

HANDBOOK OF LEGISLATIVE PROCEDURE UNDER MACAU PARLIAMENTARY LAW

PAULO CARDINAL

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FOREWORD

A statutory norm is more than a simple assemblage of words; in the same way a statutory law is more than a collection of written norms. They are the outcome of a procedure reflecting specific constitutional models for the exercise of legislative power and, thus, of how legislatures interact with other relevant constitutional bodies. Laws and norms are a product of political dynamics within a constitutional system.

The legislative procedure — a series of actions by means of which laws are discussed and adopted — confers formal legitimacy on the sovereign will of the people expressed through legislation. It entails the notion of a sequence of mandatory stages, followed in a fixed order, and in tandem with the specification of the rights and obligations of participants in each stage. It embodies a ritual towards the goal of creating new legal norms, ie binding rules of appropriate behaviour that assign a particular legal effect whenever specified conditions are fulfilled. The legislative procedure ought to reflect the model adopted at the constitutional level, but it also makes some fundamental choices conditioning further the exercise of legislative power. It is all but neutral. Thus, it is not innocuous to confer a wider or a narrower scope of legislative initiative to legislators; to allow the government to amend bills during the discussion stages; to establish a specific majority to pass a bill in parliament, the length of discussion a bill is subject to, or the scope of veto power granted to the executive branch. All this shapes the separation of powers constitutionally envisaged and the dynamics of power within a political system.

Besides conferring formal legitimacy, and hence validity, to norms contained within laws, the legislative procedure may also shape the contents of such norms and laws. The procedure is the right place to determine the scope of democratic participation in lawmaking; and embodies the representation of legitimate interests and the establishment of public consultation mechanisms. All these are instruments shaping the contents of laws and not only mere formalities within a specific sequence of actions. The enactment of written laws by legislative bodies is a constrained power and the legislative procedure determines how such constraints are implemented. Therefore, it matters how different branches of government interact when working towards the adoption of new laws and how different inputs are incorporated in the final text of the law. Moreover, it is relevant how the legislative procedure encompasses the power of the judiciary of assessing the constitutional validity of bills according to both formal and material criteria.

One might think that only a limited number of people might have an interest in grasping the intricacies of such procedures: those involved in drafting legislation, certainly; legislators and politicians in general, surely; a few academics, perhaps... This

is nothing further from the truth. The legislative procedure, as an embodiment of the fundamental values of a political community, shall appeal to political scientists and common citizens alike. This is one of the reasons why the publishing of this Handbook of Legislative Procedure under Macau Parliamentary Law is so timely. Another reason is its geographical scope. Macau's legal system has not attracted much academic attention from the outside and the number of reference works on its political system in English is limited. This Handbook fills that void by introducing Macau's legislative procedure in a broader context of local parliamentary law. Hence, it provides a valuable instrument for further research on the topic. I am certain that this book will be the authoritative source on Macau's legislative procedure, as well as on Macau's parliamentary law for the years to come.

The merits of the book belong to its author. Paulo Cardinal's expertise, rooted in solid legal knowledge and extensive experience in lawmaking, grants his work well-deserved credibility. Not only does he master the subject matter of the book, but his intellectual curiosity leads him to the right questions. Even when such questions are uncomfortable, they are pertinent. The thoroughness of Cardinal's research — that of a sound and respected legal expert on Macau's legal and constitutional systems, as well as a curious mind — would alone justify the quality of this Handbook. An additional reason, however, is the interesting comparative analysis between the written rules and the diverging practices that often creatively craft new rules. Paulo Cardinal combines these theoretical and practical approaches due to his long professional experience as a law-draftsman in Macau, which I had the privilege to witness personally during the two decades we worked together at the Macau Legislative Assembly.

The Handbook of Legislative Procedure under Macau Parliamentary Law offers useful information and materials for better understanding the characteristics of Macau's legal and political systems and for foreseeing some possible paths of evolution. After all, as Nobel Prize winner José Saramago wrote in his novel *The Gospel according to Jesus Christ* (1991), "certain things can be understood only if we take the trouble to trace them to their origins". Paulo Cardinal's Handbook helps us do so.

Pedro de Sena, Ph.D.
Lisbon, Portugal
April 2026

PREFACE

This Handbook of Legislative Procedure under Macau Parliamentary Law corresponds, in its structure and in much of their presentation, to my text *O Procedimento Legislativo no Direito Parlamentar de Macau — O procedimento legislativo no Regimento da Assembleia Legislativa*, published in the collective edition *Estudos no Âmbito da Produção Legislativa, Textos em Língua Portuguesa*.¹ It should be noted, however, that due to the degree of their differences, the present Handbook constitutes a new and distinct work, when compared to the text contained in the aforementioned *Estudos*.

In effect, this book embodies a renewed and increased effort in the study of the issue in hand with significant updates and developments, incorporating approximately one hundred new pages with new chapters and sections, while also making use of and citing a plethora of not only new bibliographical references, but also of legal opinions issued by the Legislative Assembly's Committees, along with recent decisions delivered by Macau's superior courts.

The timing for publication was determined by two main factors: the intrinsic importance of the theme herein addressed; and both the novelty and the headway attempted by this Handbook. This Handbook thus contributes further to the dissemination of specialised legal discourse and to the research into, and a better understanding of, the legislative procedure in Macau, whilst not being remiss on correlated or pre-determining matters — its evolution and prospects for progress, as well as its entrenched position within the overarching framework defined by the applicable *bloc de constitutionnalité*, particularly as laid down by the Basic Law of the Macau Special Administrative Region.

Dedicated to Macau.²

Paulo Cardinal
Macau
2019

¹ Paulo Cardinal, 'O Procedimento Legislativo no Direito Parlamentar de Macau — O procedimento legislativo no Regimento da Assembleia Legislativa', in Centro de Formação Jurídica e Judiciária (CFJJ) (eds), *Estudos no Âmbito da Produção Legislativa, Textos em Língua Portuguesa* (CFJJ 2018).

² This Preface is a translation of the one in the original edition of this Handbook written in Portuguese.

ACKNOWLEDGEMENTS

This book that is now published had a long, challenging, and complex history and procedure of several years, because of several and distinct circumstances — for instance, difficulties related to the translation (it is never easy to translate continental law concepts and terminology to English), or the pandemic with all its disruptiveness.

In truth, there was a time that I, myself, believed the project was, without appeal, six feet under. It was sentenced to be no more than that: a mere project.

However, Professor Simon Young was always there, always trying to keep it afloat, and always making it alive; despite the several above-mentioned challenges and difficulties that had to be faced and settled throughout these years. To him my first and foremost thanks are due. This is for a variety of reasons: namely for having had the original idea of putting into English my original book, for always being present, and, as underlined *supra*, for always keeping it afloat and never letting the project to be sent to the dust archives of what may have been but never came to be. Thank you, Simon.

Having acknowledged the person that, after all, made all this possible, I take the opportunity to reference here some people that, one way or the other, in one moment or another of this long procedure, contributed in different capacities, to this book in English (being mostly but not absolutely a translation of a previous one in Portuguese): Armando Isaac, Ma Yuhui, and Jonathan Ho.

Lastly, but not the least, I register here my appreciation to the Centre for Comparative and Public Law (CCPL), of the Faculty of Law, the University of Hong Kong, for giving the privilege of publishing this book.

Paulo Cardinal
Macau
27 April 2026

LIST OF ABBREVIATIONS

AHC	Ad Hoc Committee
BL	Basic Law
(C)CAC	Comissariado contra a Corrupção [Commission Against Corruption]
CCARFG	Commission for Constitutional Affairs, Rights, Freedoms and Guarantees
CE	Chief Executive
CFA	Court of Final Appeal
CFJJ	Centro de Formação Jurídica e Judiciária [Legal and Judicial Training Centre]
CRPMM	Committee on the Rules of Procedure and Members' Mandates
CSAEC	Committee for Social Affairs, Education and Culture
CSI	Court of Second Instance
FSC	First Standing Committee
FWC	First Working Committee
GFLJO	General Framework Law on the Judiciary Organisation
HKSAR	Hong Kong Special Administrative Region
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LA	Legislative Assembly of the Macau Special Administrative Region
LegCo	Legislative Council of the Hong Kong Special Administrative Region
MLA	Macau Lawyer's Association
MSAR	Macau Special Administrative Region
OG	Official Gazette of the Macau Special Administrative Region
PRC	People's Republic of China
RAEM	Região Administrativa Especial de Macau [Macau Special Administrative Region]

RAEHK	Região Administrativa Especial de Hong Kong [Hong Kong Special Administrative Region]
RoP	Rules of Procedure
SMCS	Statute of the Macau Civil Servants
SWC	Second Working Committee
SSC	Second Standing Committee
TWC	Third Working Committee
TSC	Third Standing Committee
UN	United Nations

REPORTS ISSUED BY THE LEGISLATIVE ASSEMBLY'S COMMITTEES

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legally incapacitated persons for the commission of crimes”

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Decision of the CFA in Case No. 28/2006, published in the OG, No. 37, Series II, of 12/09/2007

Decision of the CFA in Case No. 43/2006

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Decision of the CFA in Case No. 29/2012

Decision of the CFA in Case No. 33/2012

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Decision of the CSI in Case No. 733/2011

Decision of the CSI in Case No. 622/2012

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Director of Immigration v Chong Fung Yuen (2001) 4 HKCFAR 211

Leung Kwok Hung and Others v HKSAR (2005) 8 HKCFAR 229

Leung Kwok Hung v President of Legislative Council [2007] 1 HKLRD 387 (CFI)

Cheng Kar Shun v Honorable Li Fung-ying [2011] 2 HKLRD 555 (CFI)

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HANDBOOK OF LEGISLATIVE PROCEDURE UNDER MACAU PARLIAMENTARY LAW

“Good legislation is legislation that embodies a good government. If solely well made — by reducing the meaning of such expression to compliance with techniques (v.g. drafting or systematisation) — such legislation may also reflect a bad government.”

ANTÓNIO MANUEL HESPANHA³

“[T]o try to recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law. I want us to see the process of legislation - at its best - as something like the following: the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all, and they do so in a way that openly acknowledges and respects (rather than conceals) the inevitable differences of opinion and principle among them. That is the sort of understanding of legislation I would like to cultivate.”

JEREMY WALDRON⁴

“Sometimes one forgets that making laws, correcting them, adapting them, requires prior knowledge of the legislative techniques and the subject-matters over which one acts [...]. One cannot be a legislator by accident, but only when and if one is prepared for, and deserves to be in, power.”

MANUEL LEAL-HENRIQUES⁵

“In these issues, as in all others, good legislation must always be to the benefit of the population of the MSAR, whether it stems from the Government or from the Legislative Assembly’s own initiative.”

THIRD STANDING COMMITTEE OF THE MACAU LEGISLATIVE
ASSEMBLY⁶

³ António Manuel Hespanha, ‘Leis bem feitas e leis boas’ (2009) 50 *Legislação* 31.

⁴ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 2.

⁵ Manuel Leal-Henriques, ‘A revisão de 2013 – apresentação e análise crítica’ in Pedro P Sena and José Manuel Figueiredo (coords), *Estudos Comemorativos XX anos Código Penal – Código Processo penal de Macau* (Fundação Rui Cunha 2016).

⁶ TSC, Report No. 1/IV/2012, “Evaluation and study with a view to the possible enactment of a Law on Medical Malpractice”.

PART 1

INTRODUCTION

I.

INTRODUCTORY REMARKS

1. Introduction and Background

This Handbook, occasionally succinct, delve into the legislative procedure governed by the parliamentary law of the Macau Special Administrative Region (MSAR). They place a pronounced emphasis on the body of rules outlined in the Rules of Procedure of the Legislative Assembly. Their origin is rooted in the establishment of the *Lawmaking Course* — presented in Portuguese — under the banner of the Centre for Legal and Judicial Training (CFJJ) in 2015. It was during this period that I was honoured with an invitation to elucidate on this subject. The continuation of both the course and my involvement in 2016 spurred the incremental enhancement and expansion of these pages, a progression that was diligently maintained in the ensuing years.⁷

At their core, these observations were designed to support the pedagogical objectives of the course. They serve as supplementary material, yet do not purport to be a comprehensive guide to the subject or the many specific features and challenges present in the legal order and praxis of the MSAR. Therefore, the included bibliography and normative sources are not mere formalities; this Handbook was conceived as vital, though not exhaustive, tools for the academic exploration of this subject, as part of the said course facilitated by the MSAR CFJJ.

I would like to stress the educational intent behind this compilation.⁸ Its wording and structure have been crafted with this foundational purpose in mind, albeit also allowing for adaptability. As a result, some broader topics or those with wider implications might be addressed multiple times. I kindly ask the reader for their understanding in this regard.

The recognised scarcity of local legal scholarship and training of a high calibre

⁷ This Handbook began as mere notes and were markedly sparse and unbalanced in the development of various subjects and were always distributed, before the lectures, to the students of the 2015 course. Following further scholarly inquiry and reflection — both post-lectures and after the conclusion of the initial course — the notes underwent a process of evolution, expanding in scope and incorporating additional topics. As previously mentioned, they were subsequently updated and modestly augmented. To ensure their continued relevance for future courses at the CFJJ or other institutions, those notes have been periodically revised, augmented, and refined within the constraints of available time, including an update of referenced materials. The text of this Handbook as it stands represents the culmination of a layered, evolutionary process.

⁸ The reader should therefore not be surprised to encounter a more frequent use of direct quotes, either from legal scholars, either from Reports issued by the Legislative Assembly.

underscores the significant contribution that the CFJJ has made to the dissemination and knowledge of Macau law.

More specifically, within the realms of the training course for which this Handbook were crafted, the desert of knowledge is well-known and utterly dry with only a few commendable exceptions.⁹ In other related topics such as the system of government, the peculiar distribution of normative functions, the study of Law No. 13/2009, and its relationship with the sources of international law, research, though present, is either limited or not widely acknowledged.

Other reasons are equally invokable. In fact, the adequacy of the study of law-making from a procedural standpoint makes particular sense in modern democratic, pluralist and participatory States.¹⁰

Within the curriculum of the said *Lawmaking Course* — delivered in Portuguese — my Lessons formed Module V, which included these following chapters, summarised here for reference and comparison:¹¹

- I. The legislative procedure
- II. Multitude of sources versus centrality of the Legislative Assembly's Rules of Procedure
- III. Nature, Scope, and Function of the Legislative Assembly's Rules of Procedure
- IV. Legislative power in the Rules of Procedure — e.g actors, initiative,

⁹ This panorama was recently changed with the publication of the extensive collective *oeuvre*, of nearly 800 pages, Centro de Formação Jurídica e Judiciária (eds), *Estudos no Âmbito da Produção Legislativa, Textos em Língua Portuguesa* (CFJJ 2018). I was unable, for various reasons, to delve deeply into such texts; therefore, no references or quotes thereto will be made throughout this Handbook. I am convinced that this work shall become groundbreaking. The following texts can be found therein: João Albuquerque, 'Poder Normativo: O regime jurídico de enquadramento das fontes normativas internas da Região Administrativa Especial de Macau', 1 et seq; José Bento Almeida, 'Autocontrolo da Legalidade na Produção Normativa', 111 et seq; António Marques Da Silva, 'Metódica de Legislação e Processo de Consulta Pública', 143 et seq; Paulo V Henriques, 'Processo de Redacção dos Actos Normativos', 173 et seq; Chan Hin Chi, 'Bilinguismo Legislativo', 229 et seq; Lau Io Keong, 'Produção Legislativa Bilingue: Tradução de Actos Normativos e Concorrência de Documentação Jurídica Bilingue', 241 et seq; Paulo Cardinal, 'O Procedimento Legislativo no Regimento da Assembleia Legislativa', 279 et seq; Cristina Ferreira, 'Direito Internacional', 315 et seq; Choi Chi Long, 'Pesquisa Jurídica', 357 et seq; Luís Pessanha, A pesquisa jurídica no processo legislativo, 361 et seq; António Marques Da Silva, 'Análise de casos legislativos: Lei n.º 2/2007 (Regime Tutelar Educativo dos Jovens Infractores)', 409 et seq; Chan Hin Chi and José Miguel Figueiredo, 'Análise de casos legislativos: A Revisão de 2013 do Código de Processo Penal – Breves notas sobre o procedimento legislativo respectivo', 415 et seq; Paulo Cardinal, 'Análise de casos legislativos: Lei n.º 16/2008, Alteração à Lei n.º 2/93M, Direito de Reunião e Manifestação e Lei n.º 13/2012, Regime Geral de Apoio Judiciário', 433 et seq; Luciano Correia De Oliveira, 'Análise de casos legislativos: Vídeo Vigilância em Espaços Públicos e Protecção de Dados Pessoais', 439 et seq; Pedro Pereira De Sena, 'O Exercício da Função Legislativa e os Desafios na Prática da Feitura das Leis – Análise de um processo legislativo (a)típico', 469 et seq; Paulo Cardinal, 'O Procedimento Legislativo no Direito Parlamentar de Macau – O procedimento legislativo no Regimento da Assembleia Legislativa', 495 et seq. All of these chapters are published in the supra mentioned *Estudos no Âmbito da Produção Legislativa, Textos em Língua Portuguesa* (CFJJ 2018).

¹⁰ José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 233.

¹¹ As already explained, this formatting no longer corresponds, in its entirety, to the division and presentation of subjects as expounded in this Handbook.

compliance and interconnection with the Basic Law, interconnection with other legislation

- V. The common legislative process and its various stages
- VI. The urgency process
- VII. The dynamics of the ground: praxis, usages, customs, and variances

In short, this framework was the initial guide I was tasked and constrained to adopt, which over time evolved into the present *Handbook on the Legislative Procedure under Macau Parliamentary Law*.

This evolution saw the integration of minor adjustments, in tandem with the delivery of the course and the preparation of this Handbook. Consequently, the table of contents might appear somewhat restructured and expanded, but it preserves the foundational structure of the original training module; indeed, no chapter or topic from the originally conceived programme has been excluded.

Further adjustments were imperative in this Handbook, potentially resulting from the act of teaching itself. This was driven by the interests and queries articulated by participants, as well as the inherent synergy with other modules and themes of the course.

This adaptive approach became evident at the culmination of several courses. The pedagogical experience, coupled with the fruitful debate that ensued, led to several modifications and improvements, particularly in content presentation and, by extension, in the table of contents.

It is worth clarifying that the first written notes might seem to be sparse. Certain topics shall be explored in depth due to their inherent significance, the evolving dynamics in practice, or the challenges these dynamics present. Conversely, other equally vital topics might receive a more succinct treatment, occasionally limited to a quote of a given norm.

A case in point for the first situation is the issue of *legislative initiative*, encompassing the legislature's supervening initiative. In our system, as delineated by the Basic Law, the issue of *legislative initiative* is tantamount to a major focal point, overshadowing aspects like the perimeter of the areas reserved to the law. Further examples of the former scenario include the necessary and permanent nexus between majority issues in the legislative process and the Basic Law; and the nature, value and function of the Rules of Procedure, which have evolved beyond being seen as a mere compendium of gentlemanly agreements.

Today, the Rules of Procedure in the MSAR¹² possess constitutional legitimation and a normative, binding identity, thereby demarcating specific areas for subsequent normative creation. Additionally, the Rules of Procedure possess a legal stature akin to that of a law. They can be viewed as a legal instrument with legislative equivalence, or

¹² Article 77 paragraph 2 of the Basic Law: “*The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.*”

with the force of law. This is because these Rules, at their very core, epitomise the principle of the Legislative Assembly's self-organisation.

The latter situation, while still holding significant independent relevance — especially when considering the rise of independent administrative regulation as a normative source — is approached in a more ancillary manner, given the paramount importance, configuration and effectuation attributed to the legislative initiative. For this latter scenario, examples include the various deadlines and signatures in the parliamentary legislative process, which will be succinctly and largely uncritically addressed.

It should also be noted that issues of legislative drafting, especially its formal aspect, do not belong in this study.¹³

Additionally, I will abstain from challenges presented by the science of legislation, the theory of legislation, and similar topics.¹⁴ I will likewise avoid examining the contemporary feasibility of categorically defining the existence of a science, theory, or doctrine of legislation as an autonomous academic discipline.¹⁵ To this end, we shall reference the words of GOMES CANOTILHO, which, though distant in time, likely retain their validation:

“Despite the practical upheavals and the theoretical disquiet *apropos* a doctrine of legislation, one may state that no science of legislation (theory, doctrine) exists today as an autonomous scientific subject-matter.”¹⁶

¹³ On such issues, regarding Macau, see Luís Fábrica, ‘Princípios de legística material e formal’ (unpublished and archived with the Author, CFJJ 2005); Alexandre Sousa Pinheiro, ‘Algumas notas relativas a temas de Legística Formal’ in *Colectânea, Tome II* (CFJJ 2007) 405 et seq; José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016); José Miguel Figueiredo, ‘O Estado Actual da Legística Formal na Região Administrativa Especial de Macau’ (Direcção dos Serviços de Assuntos de Justiça, 2017) powerpoint slides available at <<https://ial-online.org/wp-content/uploads/2019/02/macau.pdf>>; José Miguel Figueiredo, ‘Alterações aos Códigos: Questões de Técnica Legislativa a Partir do Enquadramento Normativo da Região Administrativa Especial de Macau’ [2017] Administração 118. See also, Manuel Andrade Neves, Nuno Sardinha Da Mata, and Inês Sequeira Mendes, *Contributos para a legística de expressão portuguesa* (Fundação Rui Cunha/CRED-DM 2015). Cf Regras de legística formal a observar na elaboração dos actos normativos da Assembleia Legislativa, Assembleia Legislativa, approved by Resolution No. 16/2016/Mesa, published in the Legislative Assembly's Official Gazette, Legislature V, 3rd Legislative Session (2015–2016), II Series, No. V-34, and available at <http://www.al.gov.mo/uploads/attachment/2016-12/2790458468f335e01c.pdf>. “These rules, by directly binding the Legislative Assembly, are indirectly binding on the Government.”: José Miguel Figueiredo, above.

¹⁴ Speaking, for example, of a science of legislation, which is concerned with the basic problems of the concept, evolution and comparative analysis of laws; analytics of legislation, which analyses legislation as a source of law; tactics of legislation, which analyses legislation's “external procedure”; method of legislation, which studies the “internal procedure” of legislation and its implementation; techniques of legislation, which analyses aspects of the systematics, composition and drafting of laws, Gomes Canotilho, referring to the systematisation of Ulrich Karpen, ‘Os impulsos modernos para uma teoria da legislação’ (1991) 1 Legislação 7, 10–11.

¹⁵ José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 214.

¹⁶ Gomes Canotilho, ‘Os impulsos modernos para uma teoria da legislação’ (1991) 1 Legislação 7, 7.

2. Parliamentary Law — A Few Notes

From the title itself, it is evident that my focus will be confined to what I have designated as *parliamentary law*.

While this concept might seem novel in the context of Macau, it boasts a rich history and extensive theorisation in other jurisdictions, particularly in legal systems employing the Spanish language.

I shall refrain from an in-depth exploration of the academic debates that interrogate the ontological nature of parliamentary law, such as whether it stands as an autonomous branch of law, an intrinsic component of constitutional law,¹⁷ or as one that penetrates into the realm of administrative law.¹⁸ For the specific purposes of this Handbook, I have employed the term as an operational tool to delineate the scope of my study, a choice that will become clearer as we progress.

To navigate this terrain, it is imperative to have a clear definition of parliamentary law. I find the following definition apt:

“Parliamentary law is characterised by its object, a body of political representation¹⁹ (organisation and functioning of the Parliament), and by its functions, resulting in a normative reality — inserted into Constitutional Law — which is sheltered and heterogeneous, and formed by the Constitution, laws, regulations,²⁰ other autonomous norms (‘parliamentary acts’), usages and customs, precedents, and parliamentary case-law.”²¹

¹⁷ For one example, “the subject-matter of the initiative and the formation of laws within the broader context of the discipline known as parliamentary law, which, in turn, is a branch of the general constitutional law.”: Marta Morineau, ‘Iniciativa Y Formación De Las Leyes’ (2001) 5 Cuestiones Constitucionales 277.

¹⁸ Cf, “One can firmly support the position that parliamentary law is a part of Constitutional Law, although some areas thereof also belong to Administrative Law”: Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009).

¹⁹ While the Legislative Assembly is not wholly comprised of elected members, it nonetheless serves as a body with a significant component of political representation, given that a substantial number of its members are appointed by the executive branch. This arrangement is not anomalous, particularly within the unique framework of “One Country, Two Systems”. Although lacking sovereign authority, the Legislative Assembly functions as the representative assembly for a political organisation that transcends mere regional modalities. It wields genuine primary legislative power and maintains a relationship of interdependency — not mere dependency — with the Executive, thereby embodying the principle of separation of powers within the MSAR. For the purposes of conceptualising parliamentary law, it is also pertinent to note the irrelevance of both the political regime and the specific designation of the generic legislative body, as stated by José María and Serna De La Garza, *Derecho parlamentario* (McGraw-Hill 1997) 2, who concludes that “after all, this is an issue of terminology and convention”.

²⁰ Under MSAR law, one should understand “regulation” as encompassing the Rules of Procedure and complementary normative resolutions.

²¹ Francisco Zúñiga Urbina, ‘Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)’ (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277. See also Enrique Salazar Abaroa, *Derecho parlamentario* (Instituto Nacional de Administración Pública 1989) 51; José María and Serna De La Garza, *Derecho parlamentario* (McGraw-Hill 1997) 1. For an overview of different formal and material concepts of parliamentary law, see Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario

Historically, parliamentary law has evolved, breaking free from its traditional constraints and constitutionalised itself. It has transcended its earlier status as simple by-laws, mere internal regulations, or *interna corporis* acts and norms.

This evolutionary trajectory becomes salient when contrasted with its historical antecedents.²² Its constitutionalisation implies a diminished capacity of the Rules of Procedure and the law to be (the sole) standards of legal conformity.²³ These Rules cannot contravene the Constitution²⁴; and in the case of the MSAR, the Basic Law. This shift curtails the Parliament's exclusive internal oversight of its actions, as any breach of parliamentary law that contradicts the Constitution is now open to external judicial scrutiny just like any other norms. The constitutionalisation of parliamentary law also means that the constitutional text necessitates or pre-determines, in the words of MANUEL ARAGÓN REYES, "a certain image of parliament".²⁵

In this context, it is also worth mentioning the concept of 'law of legislation', conceived as the law governing the legislative process. It can be succinctly described as "the law that provides for the formalities to be followed by those who have the right to make laws".²⁶ While the 'law of legislation' is intrinsically related to the subject of this

(ponencia general)' in *Estudios de Derecho Constitucional* (CEPC 2009) 663 et seq. This author adopts a broad conception of parliamentary law, which includes all the norms regulating the organisation and functioning of parliaments "more concretely, the structure, powers and faculties of the parliament, the status of its members and the activity that is carried out 'for' the body and 'in' the body". He stresses that such "norms are of varied hierarchy and diverse origin, some belonging to common or general types existing in the legal order [...] and others (the written norms of internal origin) specific to this branch of Law, with singular characteristics within the normative system."

²² Manuel Aragón Reyes, 'Las fuentes del derecho parlamentario (ponencia general)' in *Estudios de Derecho Constitucional* (CEPC 2009) 672. See also, for example, on this once extremely complex issue, Alessandro Pizzorusso, 'Le deliberazioni preliminari delle assemblee parlamentari nel procedimento legislativo', (1969) 92(6) *Il Foro Italiano* 17, 17 et seq; Paloma Biglino Campos, 'Los Vicios En El Procedimiento Legislativo: La Postura del Tribunal Constitucional En La Sentencia 99/87', (1988) *Revista Española de Derecho Constitucional* 8, 24, 211 et seq; and, at length, Paloma Biglino Campos, *Los Vicios En El Procedimiento Legislativo* (UNAM IJ 2020). Note that the *interna corporis* acts approach (and the conclusions obtained) will differ significantly when one discusses common law jurisdictions, namely in regard to the parliament of the United Kingdom, and its procedures and approved laws. See summarily, 'In recent years, the South African Constitutional Court has dramatically shed the general reluctance it had shared with most courts around the world to review legislative processes as distinct from outcomes. In a series of graduated steps culminating in two 2017 cases, the Court has engaged in increasingly robust oversight of various types of legislative procedures. These processes embrace not only the law-making process itself, but also internal National Assembly rules, especially those relating to the National Assembly's other central function in a parliamentary democracy of holding the executive politically accountable [...] it has not only found existing promulgated National Assembly rules unconstitutional, as in violation of the constitutional rights of individual members of parliament.; Stephen Gardbaum, 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa' (2019) 9 *Constitutional Court Review* 1, 1–2.

²³ Manuel Aragón Reyes, 'Las fuentes del derecho parlamentario (ponencia general)' in *Estudios de Derecho Constitucional* (CEPC 2009).

²⁴ However, despite this constitutionalisation and the consequent relativisation of the Rules of Procedure's autonomy, the areas of procedural reserve continue to play an important role, as pointed out by Manuel Aragón Reyes, 'Las fuentes del derecho parlamentario (ponencia general)' in *Estudios de Derecho Constitucional* (CEPC 2009) 680.

²⁵ *ibid.*

²⁶ Enrique Salazar Abaroa, *Derecho parlamentario* (Instituto Nacional de Administración Pública 1989) 52; see also José María and Serna De La Garza, *Derecho parlamentario* (McGraw-Hill 1997) 1–2, who is critical of the concept of a law of legislation, especially for reasons arising from the legal system on which he is writing.

Handbook, I have opted not to use it as the title for this study but rather to report such a concept and to emphasise instead the overarching theme of the legislative procedure.

3. Other Issues

The reader should be cognisant that the ambit of this Handbook is confined, with few exceptions, to the legislative procedure²⁷ rather than the legislative process;²⁸ the former being a more expansive concept that encompasses additional domains of knowledge, contributions, and approaches.²⁹ As LUCIO PEGORARO defends, the examination of the legislative procedure serves as either a preliminary or parallel investigation *vis-à-vis* the study of constitutional law.³⁰

This Handbook scrutinises the legislative procedure — the *iter legis* or the lawmaking route — in its most stringent sense, eschewing other aspects of parliamentary law, and normative procedures such as those pertaining to administrative regulations.³¹ In addition, the focus will be on the legislative procedure as properly regulated and illuminating primarily the sphere of the Legislative Assembly. Exceptions to this focus will be those explicitly delineated in the Basic Law and the Rules of Procedure, eg the mandatory prior consultation with the Executive Council concerning Government bills. This Handbook deliberately circumvents any exploration of the steps previous to a bill's consultation by the said Council;³² such steps, contingent upon the circumstances and issues subject to normative attention, are extraneous to the legislative procedure in its strictest sense.

As we transition to the substantive analysis, the reader might initially perceive these pages as somewhat monochromatic, tedious, or overly descriptive and repetitive, especially when examining deadlines and identifying competent bodies and procedural protocol.

One would mitigate such potential pallor by shifting the gravitational poles of this Handbook and by interlinking it with other matters of unequivocal significance and breadth, squarely within the realm of constitutional law.

For instance, what utility is there in dissecting a formalised legislative procedure

²⁷ And I should stress, it is a strictly legal study.

²⁸ For what I believe are traditional and historical reasons, the language of the Rules of Procedure employs the expression “legislative process” and not legislative procedure. In this study, except when I really intend to distinguish between these concepts – as in the body of the text — the use of the two expressions shall entail an identity between them. On occasions, the term “process” will be specifically employed to maintain fidelity to direct quotations from the Rules of Procedure.

²⁹ See, for instance, Lucio Pegoraro, ‘Le fonti del diritto’, in Mauro Volpi and Lucio Pegoraro and Antonio Reposo and Angelo Rinella and others (eds), *Diritto Costituzionale e Pubblico* (Giapichelli 2005) 131.

³⁰ Lucio Pegoraro, ‘Le fonti del diritto’, in Mauro Volpi and Lucio Pegoraro and Antonio Reposo and Angelo Rinella and others (eds), *Diritto Costituzionale e Pubblico* (Giapichelli 2005) 131.

³¹ For example, those regarding resolutions.

³² Notwithstanding the fact that some of these steps might, in a fashion, have attained normativity through orders/decisions, guidelines, etc

if the overarching framework for normative distribution, or the constitutionally established areas of reserved legislative initiative, remains opaque or unexplored?

Or if the scope of autonomy, defined from above by the Sino-Portuguese Joint Declaration and the Basic Law, is not critically examined?

Or if one neglects the practical realities and fails to highlight any non-compliance thereof *vis-à-vis* the normative underpinnings?

Or if one fails to go even yonder, to decipher how Macau's demographic and economic landscape can be factored into making better laws — laws that are not only just and fairer but also better financially supported?³³

As one scholar declared,

“It is important to emphasise that for a legal rule to be effective, it must correspond to the values of the society that it intends to mould, and should reflect its aspirations for justice. Otherwise, the legal rule, in addition to being unjust, is also ineffective”.³⁴

Such are the themes that will be expounded upon in the ensuing chapters.

³³ Allow me to give a few examples, even though such a discussion might apparently not be totally fitting herein. Take for instance, the crafting of a law on medical malpractice. Should considerations of justice and fairness, coupled with Macau's relatively small population (in absolute terms) and its economic and financial stability, not lead to a framework that incorporates (or at least partially aligns with) comparative law solutions like strict liability and the establishment of a guarantee fund? Similarly, what of the legislative lacuna tackling the unbridled and wild increase in the real estate rental market? Or the absence of legislative measures to ameliorate the conditions of migrant workers, particularly in relation to free access to compulsory education and public healthcare services?

³⁴ JA Oliveira Rocha, ‘Processo de decisão política e feitura de leis: Aplicação a Macau’ (1992) 15 *Administração* 30.

II.

GOOD LEGISLATION AND WELL-MADE LAWS — AN OBSERVATION

1. Introduction

Legislative science, as it stands, is frequently perceived to be in a lamentable state, entrenched in clichés and overemphasised values. These values have proven to be, whether intentionally or not, reductive, and emphasises concepts such as, efficiency, economy, and formal legislative techniques.

Such a perspective often overlooks essential and *a priori* realities: the legal-political framework, a State's (in this case, the MSAR's) position within supranational frameworks, multi-composite and multi-level strands of constitutionalism, the prevailing discourse on the separation and interdependence of powers, and the catalogue of competences, among other considerations.

For these reasons, and others more specifically related to what the modern art of legislating should be, GOMES CANOTILHO, with his usual clairvoyance, warns that the current science of legislation has fallen into a precipice: a mere formal science of better legislation.³⁵

Given such a warning, it is hence worthwhile to proceed by retrace steps and consider the test to be applied to “good legislation”.³⁶

³⁵ JJ Gomes Canotilho, ‘Sobre o clube dos Nomófilos/Nomógrafos e a difícil arte de legislar no Estado Contemporâneo’ (2009) 50 Legislação 109.

³⁶ António Manuel Hespanha, ‘Leis bem feitas e leis boas’ (2009) 50 Legislação 31. Also, as someone said “we can with some confidence say that the practical point or object of the legislative process is to promote or achieve the common good”: Patrick J. Kelley, ‘Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature’ (2009) 1(I) Washington University Jurisprudence Review 123. See also “In the acts of lawmaking, one must enshrine the guiding idea of valuing the quality and not the quantity of legislation. Quality in legislation necessarily means justice, rationality and adaptability in terms of its substantive content, as well as systematisation, rationalisation and the technical expression of such legislation based on scientific criterion”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 Administração 997, 1014. Emphasising a connection between the quality of laws and the legislative procedure, see Joan Ridao Martín, ‘La influencia del procedimiento legislativo en la calidad de las leyes’, (2022) 64 Revista Catalana de Dret Públic 37.

2. Good Legislation and Legitimation

With a local touch, one might add:

“For a normative act to become good legislation, it is not enough that it is well drafted. Above all, it is necessary that the approval thereof be timely, that the solutions therein contained be socially just, and that such act be accepted into the way of life adopted by a certain society (Article 5 of the Basic Law, in the case of Macau) and in the constitutional order and under the supranational law in force.”³⁷

In the context of the MSAR, good legislation must *inter alia*, resonate with the overarching principle of "One Country, Two Systems". This principle, in turn, necessitates that such legislation conforms to and is legitimised by both the Sino-Portuguese Joint Declaration on the Question of Macau and the Basic Law.

Beyond this primary framework, good legislation should also abide by several principles constituting the second system. These include safeguarding fundamental rights, maintaining the previous way of life, adhering to the separation of powers, and upholding the principle of legality (both in terms of constitutionality and legality *stricto sensu*). It should also be in line with international law instruments, especially as stipulated in Article 40 of the Basic Law. Essentially, it should embody the basic tenets of a *Region under the Rule of Law*,³⁸ within a legally limited and defined presence of the first system, namely the "One Country" element.

None of the above excludes the adjacent driving ideas of justice, social inclusion, adequacy, necessity, solidarity, equality, and non-discrimination. These principles bolster the Joint Declaration and the Basic Law, aiding both in compliance with the other major principles and in legitimating good legislation.

Returning to generalities and in summation, as stated by JORGE MIRANDA,

³⁷ António Marques Da Silva, ‘O problema da proliferação das leis’ (*JTM*, 16 December 2014) accessed from <<https://jtm.com.mo/opiniaao/problema-da-proliferaacao-das-leis/>> 16. The author goes on: “And this is because the creation of laws does not correspond to isolated political acts, regardless of the circumstances. Therefore, the decision to legislate must be made in correlation with the values in place in a given society and the facts under analysis. Only then will the idea of justice cease to be an abstraction and become something alive and in conformity with ethical and legal values”. Furthermore, it is advisable to pay attention to the following doctrine — “Whenever it is necessary to revise or draft a law, one should, first of all, answer how and why the review or drafting is needed, as well as the theoretical foundations for such a measure, bearing in mind the worthy examples from comparative legal scholarship and comparative law, thus allowing us to find our position, through appropriate comparisons and studies. In view of the aforementioned situation, all the pronouncements related to legal reform are just an illusion, if such studies and research are not carried out; even if there is room for some reform, it will only be superficial in nature.”: Zhao Guoqiang, ‘Uma Ponderação sobre Alguns Problemas da Reforma Jurídica’ (2012) 1 *Revista de Estudos de “Um País, Dois Sistemas”* 117, 121.

³⁸ Or *Rechtsregion*, by synonymy with *Rechtsstaat*.

“In short, the *Rechtsstaat* / rule of law postulates the quality of the law.”³⁹

At this juncture, closely tied to the *Rechtsstaat* postulate, there is an imperative need to introduce, albeit succinctly, potent words that lucidly articulate the intended message in a profound manner. One may allude to LON LUVUOIS FULLER’s illustrative narrative of King Rex, a tale inspired by historical dictatorships:

“Rex’s bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster.

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis.

The other routes are:

- (2) a failure to publicise or at least to make available to the affected party, the rules he is expected to observe;
- (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change;
- (4) a failure to make rules understandable;
- (5) the enactment of contradictory rules or
- (6) rules that require conduct beyond the powers of the affected party;
- (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally,
- (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all.”⁴⁰

These above words are, indeed, food for thought on the present topic, context, and times.

³⁹ Jorge Miranda, ‘Lei, Estado de Direito e qualidade das leis. Brevíssima nota’ (2009) 50 *Legislação* 95. See also, *à propos* the Rule of Law/*Rechtsstaat* and some issues regarding legislation *vis-à-vis* the former structural principle, with interest, ‘We must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And we must rebuild a *Rechtsstaat*, a government of law that serves as well as makes possible the ideas of both justice and legal certainty. [...] a government of law is like our daily bread, like water to drink and air to breathe, and the best thing about democracy is precisely that it alone is capable of securing for us such a government’, Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26(1) *Oxford Journal of Legal Studies* 1, 11.

⁴⁰ Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 38–39. Changes to the structure of the original text have been added for clarity.

Moving on, it is worth briefly revisiting LUZIUS MADER's interpretation of *good legislation*,⁴¹ specifically its legal, procedural, and substantive requirements thereof:

- Good legislation stands as legitimate (aligning with constitutional and international principles and rules; this encompasses the principle of constitutionality, the principle of legality, and the ideas of serving the public interest, prohibiting unlawful or disproportionate restrictions on fundamental rights, and upholding respect for the division of powers);
- Good legislation is enacted in an appropriate and procedurally legal manner (ie at stake are not only the legality of the respective content, but also how such content is shaped, herein gaining particular importance the principle of constitutionality, and, naturally, the centrality of the legislative procedure — compliance therewith and correlation thereof with the legitimation of legislation);
- Good legislation demands a level of substantive quality (ie by taking into account the needs and expectations of the society it seeks to regulate, by achieving certain social objectives, by being adequate and effective, and by being coherent, both internally, and also externally, vis-à-vis other norms);
- Good legislation must also meet formal requirements on quality (ie it must be structured in a logical way, be drafted in an understandable fashion, be properly published, and also accessible to all);
- Good legislation should be drafted as a direct, to the point, text, and be limited to the necessary provisions (Montesquieu's maxim is fully applicable: one should not make unnecessary laws, among other factors);
- Good legislation is stable (ie firstly, one should avoid too many amendments; secondly, amendments should not be introduced hastily, soon after approval of a law — in other words, good legislation is characterised by consistency and durability).

In summary, these are the features of good legislation as outlined by the aforementioned author, of whose *lesson*⁴² a translated précis is attempted here. The first

⁴¹ Luzius Mader, 'From the Struggle for Law to the Nurture of Lawmaking – Recent Efforts by the Swiss Confederation to Improve the Quality of Legislation' (2009) 50 *Legislação* 295, 296 et seq.

⁴² Luzius Mader, 'From the Struggle for Law to the Nurture of Lawmaking – Recent Efforts by the Swiss Confederation to Improve the Quality of Legislation' (2009) 50 *Legislação* 295, 296 et seq. Within this scope, I would like to draw in a proposal by David C. Elliot, who advocates that "high quality legislation" is shaped by reasonable legislative policy, is well drafted and operates well, in practice, after entering into the legal order, 'Drafting legislation: High Quality legislation and How to Get It' (2012) 1(1) *International Journal of Legislative Drafting and Law Reform* 49, 51. See also, Zafar Gondal, 'Universal Responsibility to Draft Democratic, Participatory, Effective and Efficient Laws and Law Reform Projects' (2013) 1(2) *International Journal of Legislative Drafting and Law Reform* 239, et seq.

three items are especially important: good legislation ought to be legitimate, enacted in a constitutionally appropriate and procedurally legal manner, and entail a certain substantive quality.

Why is it important to have good legislation? DAVID C. ELLIOT⁴³ mentions five reasons for good legislation or, in his terminology, high quality legislation;-

- “High quality reinforces compliance with legality and confers additional credibility to legislation;
- High quality legislation shall be designed to respect the Constitution, human rights and the instruments of international law;
- From high quality legislation shall flow laws that are more efficient, clear and effective;
- High quality legislation promotes the stability of the economic and commercial environment;
- The high quality of legislation means that such legislation shall be kept permanently updated.”

I shall briefly introduce another idea that often accompanies the analysis of laws. This perspective recognises not only a wide range of criteria for assessing legislative quality but also a multiple range of criteria for the types of analyses to be performed. These indices include the quality of lawmaking, the legislative environment, normative action, technical aspects of legislation, norms, and finally, quality of laws *per se*.⁴⁴ One can derive intriguing conclusions from this matrix: for instance, legislation can be technically good *stricto sensu* yet fail to achieve its intended objectives, or it can be sociologically good but lack technical precision.⁴⁵

The need for good legislation is self-evident. It goes beyond mere eloquent drafting that adheres to formal technical criteria; well-crafted legislation alone is not sufficient.

⁴³ David C. Elliot, ‘Drafting legislation: High Quality legislation and How to Get It’ (2012) I(I) International Journal of Legislative Drafting and Law Reform 49, 51–52.

⁴⁴ Yoel Carrillo García, ‘Calidad de las leyes Algunos puntos críticos’, (2010) Legislação 52, 8.

⁴⁵ *ibid*, 26. See also the following remarks potentially carrying *additional* or *reinforcement* effects: ‘*It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. But while power may indeed serve as a basis for the ‘must’ of compulsion, it never serves as a basis for the ‘ought’ of obligation or for legal validity. Obligation and legal validity must be based, rather, on a value inherent in the statute. To be sure, one value comes with every positive-law statute without reference to its content: Any statute is always better than no statute at all, since it at least creates legal certainty. But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice.*’, Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law (1946)’ (2006) 26(1) Oxford Journal of Legal Studies 1, 6, from the starting point of (hyper, one would say) positivism shortcomings on this regard.

An excessive focus on formal legal drafting techniques should not overshadow the primary goal. This preoccupation should not evolve into a Thelxiepeia-like, full “*siren*” mode of distraction, especially if it detracts from, or undermines the objective of enacting good legislation, as previously emphasised.

For legislation to be deemed ‘good’, it must possess legitimacy.⁴⁶ This is determined by universal criteria and specific parameters relevant to the specific legal order in question. In the context of the MSAR, this refers to the adherence and efficacy of the “One Country, Two Systems” policy and compliance with both the Joint Declaration and the Basic Law.

Furthermore, good legislation should also be framed by the need to shape and promote justice, solidarity, equality, non-discrimination, suitability of solutions.⁴⁷

⁴⁶ Addressing the issue of legal and political legitimacy of the legislative act, see eg Carlos Blanco de Morais, ‘Democracia e Consenso na Decisão de Legislar’ (2004) 3 Revista Brasileira de Direito Constitucional 117, et seq. See also, addressing the connection between legitimacy and legislative procedure, with a focus on some Asian jurisdictions: Megan Elizabeth Cox, ‘Legislative Procedures and Perceptions of Legitimacy’ (unpublished and archived with the Author, Portland State University 2022).

⁴⁷ As well as, at the same time, it can be promoting the image and proving the worth of the Parliament that enacts it. This aspect, many times forgotten, has been an issue for quite some time and in several geo-political areas. See eg ‘*I believe that legislation and legislatures have a bad name in legal and political philosophy, a name sufficiently disreputable to cast doubt on their credentials as respectable sources of law. Our silence on this matter is deafening compared with our philosophical loquacity on the subject of courts. There is nothing about legislatures or legislation in modern philosophical jurisprudence remotely comparable to the discussion of judicial decision-making.*’, Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 1. Plus, legislation itself should have dignity, as emphasised by Jeremy Waldron in the above-mentioned work and other papers, such as in ‘Legislation and the Rule of Law’ (2007) 1(1) *Legisprudence* 91, and, ‘Representative Lawmaking’ (2009) 89 *Boston University Law Review* 335.

III.

THE LEGISLATIVE INTENT

1. Introduction

In closing these first pages of an introductory nature, it behoves me to address a final general question, one that holds heightened significance in Macau given the specific architecture of the current regional legislative procedure.

One of the constitutive elements of the legislative procedure is the identity of objectives concurrent in the formation of the ultimate will/intent.⁴⁸ Such “constitutive element” is directly linked to the relevant issue of “legislative intent”,⁴⁹ as expressed under Article 8 of the Macau Civil Code.⁵⁰

Indeed, as elucidated by RICHARD EKINS, jurists frequently endeavour to discern the intent of the parliamentary legislator during the enactment of a law. That is, they strive to reach conclusions on the meanings that parliament wished, or not, to express, and also on the aims or purposes intended to be pursued. He posits, “This legislative intent has traditionally been thought to be the central object of statutory interpretation.”⁵¹

Underscoring the importance of this issue, MARCIN MATCZAK says that “Legal theorists have argued about the nature of legislative intent since time

⁴⁸ See Jorge Bacelar Gouveia, *Manual de Direito Constitucional, II* (Almedina 2021) 1280.

⁴⁹ See eg Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012) 1–2.

⁵⁰ “Article 8 (Interpretation of the law) 1. The interpretation should not be limited to the letter of the law, but reconstitute the legislative intent from the texts, by taking into account, above all, the unity of the legal system, the circumstances under which the law was enacted and the specific conditions of the moment in time in which the law is applied. 2. However, the interpreter may not take into consideration a legislative intent which does not have a minimum of verbal correspondence with the letter of the law, albeit imperfectly expressed. 3. In ascertaining the meaning and scope of the law, the interpreter will assume that the legislator established the most correct solutions and was able to adequately express its intent.”

This raised an issue revolving around the choice of one, or compatibility between, the “two axes of coordinates”: ie *mens legislatoris* (intent of the legislator) and *mens legis* (intent of the law): João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador* (Almedina 2014) 177 et seq. The point is that the search for the legislative intent is relevant for either approach, although with different intensities.

⁵¹ Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2012) 1. See also, for an overview of the various notions of legislative intent, and referring that “*The nature of legislative intent remains a subject of vigorous debate in legal theory.*”: Marcin Matczak, ‘Three types of intention in lawmaking’ (unpublished, 2015) and available at SSRN: <<https://ssrn.com/abstract=2553833>> or <<http://dx.doi.org/10.2139/ssrn.2553833>>.

immemorial.”⁵²

However, as PATRICK J. KELLEY points out, the legislature “is an aggregate of different people, scholars point out. How can one discover a single intent behind a statute when those voting for it may have had many different purposes or no purpose at all as to a particular application?”⁵³

Needless is also to underscore the practical relevance that legislative intent gains when courts are adjudicating cases.⁵⁴

2. Legislative Intent vis-à-vis the Lawmaking Procedure — A Note on a Few Obstacles

As we delve deeper into the intricacies of this Handbook, a preliminary quandary emerges: How might one discern the “legislative intent”? This challenge is compounded when considering the intricate *cocktail* of factors: the mainstream praxis of external legislative impetus by the Chief Executive/Government, the non-opposition to bills introduced by the Government (external impetus again), the Members’ general avoidance of amendment proposals⁵⁵ (external impulse once more) like modification, substitution, addition/riders, and elimination/suppression. Further complicating matters are modifications introduced during the legislative procedure. These are often confined to technical aspects and mere details, outside the scope of legislative policy options. Yet, they are consistently and formally introduced by the original proponent of legislative initiative,⁵⁶ as evidenced in the so-called second versions of bills, which again reflect external influence.

⁵² Marcin Matczak, ‘Three types of intention in lawmaking’ (unpublished, 2015) and available at SSRN: <<https://ssrn.com/abstract=2553833>> or <<http://dx.doi.org/10.2139/ssrn.2553833>>. The author adds: “*legal theory perceives the legislative intent in such a diversified way: in the course of lawmaking three types of intention occur, not one. The first, called here the locutionary intention, is a semantic intention, ie an intention to use words and sentences with a specific meaning (sense and reference). The second type of intention is an illocutionary intention, ie intention to enact rules, whatever their content. Finally, a perlocutionary intention is the intention to make changes in social and economic reality by means of a legal text that has been made law.*” The said author warns of the possibility of “*dissonance between the three intentions*”.

⁵³ Patrick J. Kelley, ‘Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature’ (2009) 1(I) Washington University Jurisprudence Review 97, 131.

⁵⁴ On this issue, see, with great detail, “This is made even more difficult by another feature of the recurrent judicial explanation: the legislative intent judges say they seek to discover and implement is an intent at two levels: the intended meaning of the statutory language, and the intended application of that meaning to the case at hand. [...] The way this question is formulated embeds the insoluble riddle of legislative intent into the very question itself, for it assumes only a single possible meaning for the term “legislative intent.” But any sensible discussion of the recurrent judicial invocation of “legislative intent” must begin with the question, “what meaning can the judges possibly give to the word ‘intent’ in that phrase?”: Patrick J. Kelley, ‘Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature’ (2009) 1(I) Washington University Jurisprudence Review 97, 131–132.

⁵⁵ Not forgetting the relatively small — and in recent years, decreasing — number of bills introduced by Members.

⁵⁶ Even though, in reality, such amendment proposals substantively arise from Member’s or Committees’ suggestions.

Does the *legislative intent* pertain to the approving body or to the proponent?⁵⁷ Can we genuinely speak of a true “*identity of objectives concurrent in the formation of the ultimate will/intent*”? This question becomes particularly pertinent when observing the current practice of casting votes in favour, followed by critical declarations typically reserved for dissenting votes. The conundrum deepens when Members outwardly express dissent in their votes, yet their actual voting pattern suggests otherwise. Further complexity arises when Committee Legal Opinion contains statements akin to, “*the Committee intended to modify solution A to solution B, but the proponent did not accept such a switch*”?

Given these multifaceted dynamics, how does the *legislative intent* really unfold? How to reveal the *identity of objectives concurrent in the formation of the ultimate will/intent*? Can it be ascertained solely from the formal vote count in a Plenary meeting? This seems to be insufficient, insofar, especially when there is a proven information deficit regarding material options taken during the past fifteen years of the Legislative Assembly’s functioning within the framework of the MSAR.

Clearly, we face a major legal problem,⁵⁸ the solution to which will largely involve aspects of a more political than legal nature. Nevertheless, the legal relevance and normative contours remain pertinent, warranting this short reference thereto in this Handbook.

More questions or problems could be mentioned at this juncture. Echoing a previously mentioned author and matrix, I do believe, with a particular spotlight on local legislative processes, that “the [draftsman] is not the person authorised to perform an act of lawmaking, so the fact that she formulates a locutionary intention is not relevant.”⁵⁹

As this Handbook progresses, I will propose certain measures that might ameliorate this issue. These include: mandating the Government to supplement bills introduced to the Legislative Assembly with their respective *travaux préparatoires*; the effective exercise of the right to propose amendments; and paramountly, sequencing the general approval stage after the examination phase, that is, post the delivery of the competent Committee’s Report.

Other points, namely of an organisational-functional nature, may assist in this endeavour to understand or to define what legislative intent is. For instance, the quality and dimension of reports (which should transcend mere factual recounting akin to meeting minutes) should accurately reflect points of disagreements, provide the necessary

⁵⁷ Matters are made murkier when the *travaux préparatoires* made available to the public are generally scarce, or when, pursuant to legitimate public consultations, either the bill, or the approved law, adopts solutions that differ from the results of such consultations, often without any explanations being provided for the modifications undergone.

⁵⁸ In fact, the MSAR courts apparently often request materials of the legislative process, which are deposited in the Legislative Assembly’s archives.

⁵⁹ Marcin Matczak, ‘Three types of intention in lawmaking’ (unpublished, 2015) and available at SSRN: <<https://ssrn.com/abstract=2553833>> or <<http://dx.doi.org/10.2139/ssrn.2553833>>.

technical and political framework, and indicate or attach preparatory elements, such as comparative law studies, external opinions, and reports, and contain a prior assessment.

Enhancing the Legislative Assembly's publication of legislative handbooks, compendia, and compilations, inclusive of reports and debate transcripts, would further illuminate the possible legislative intent of a given law for the broader society.

Additionally, it is imperative that subsequent versions of Government bills be supplemented with updated explanatory notes, particularly concerning the modified aspects of the texts.⁶⁰

Be that as it may, none of these measures shall be capable of overcoming the great problem of uncovering the legislative intent. This remains true as long as the legislative process persists in its current form, where the Government's role of prime mover is evident.⁶¹ This imbalance is further highlighted by certain implicit no-go boundaries, such as the established reluctance of Members to propose formal amendments to the Government's bills. The parliamentary body's excessive side-lining and its failure thereof to commit to and engage with prevailing disagreements on issues and solutions further exacerbate the issue.

While this might seem a tangential observation, its significance and implications, even as a side note, cannot be understated.

Let us now pivot to the heart of this book.

⁶⁰ Often the original explanatory note alludes to solutions that diverge from, or even oppose, the new version! This is, therefore, neither adequate nor respectful of the idea of *legislative procedure* and the functions thereof.

⁶¹ I shall not discuss the Government's pre-eminence as the proponent of legislative initiatives (a general and frequent phenomenon in comparative law). In fact, it is common for most legislative initiatives to come from *without*, and not from *within*, parliament. What is uncommon in the MSAR is such a disparity, especially with respect to the laws effectively approved.

PART 2

SOURCES OF PARLIAMENTARY PROCEDURE

IV.

STATUTORY LAWS AND THE LEGISLATIVE PROCEDURE

1. Introductory Issues: The Statutory Laws (Legislative Acts)

The reader should be made immediately cognisant of the “law as an act of the legislative function — or, frequently in connection with it, as Law decreed by the State”.⁶² In the case of Macau, this refers to the Law decreed by the politically organised community endowed with extensive autonomy, known as the MSAR.

To succinctly emphasise, a legislative act “expresses a will or intent, obeys a form, encloses a content, and aims at a goal. It therefore has four defining elements that guarantee its own physiognomy — will, form, content, and end.”⁶³

Statutory laws,⁶⁴ or legislative normative acts, represent an end-result, not an instantaneous act⁶⁵. They come into effect only after their publication in the official newspaper, specifically, the MSAR Official Gazette (hereinafter OG). Here, I exclusively

⁶² Jorge Miranda, ‘Algumas considerações sobre a Lei’ (1998) 40 *Administração* 369, 371. Cf also the following distinction: in a formal sense, ‘Law’ can be any act or document that — regardless of its normative content — is produced by a legislative body, and because of that, enjoys or is endowed with a peculiar juridical regimen (particularly an erga omnes efficacy. In a ‘material’ sense, one calls ‘Law’ to any act or document that, regardless of the body that approved it and regardless of the juridical regimen that characterises it, contains or expresses general and abstract norms’, Riccardo Guastini, ‘Ley’, in *Estudios de teoría constitucional* (FONTAMARA 2007) 107. Hence, in the Macau case, in a formal sense, domestically, the Law (legislative act) emanated from the Legislative Assembly is Law proper, whereas the administrative regulations are not formal Laws — they can only be laws in a material sense.

⁶³ Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 50.

⁶⁴ This is not the place for discussing the shaping, concept, history and function of (statutory) law; due to its obvious importance, however, we invite the reader to be acquainted with Jorge Miranda, ‘Lei, Estado de Direito e qualidade das leis. Brevíssima nota’ (2009) 50 *Legislação* 91 et seq; *ibid*, ‘Algumas considerações sobre a Lei’ (1998) 40 *Administração* 371, 371 et seq. See also, José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 213 et seq.

⁶⁵ Jorge Bacelar Gouveia writes, “What immediately occurs to us is to emphasise that lawmaking is anything but instantaneous; on the contrary, it must correspond to a sequence of partial acts, which are interconnected with a view to a final result, which is the enactment of the legislative act: the formation of legislative acts can only be correctly explained through the idea of legislative procedure.”: *Manual de Direito Constitucional*, II (Almedina 2021) 1279. See also, emphasising the formal procedural aspect ‘One can ascertain, without the need of much justification, that ‘to legislate’ is something different from the mere ‘formulation of norms’. To formulate a norm is a ‘brute’ act, whereas to legislate — introduce the formulated norms in the legal system — is an ‘institutional act’, or better said, a sequence of institutional acts, governed by constitutive norms (juridical ones)’’, and, ‘The norms on lawmaking confer to the ‘brute’ act of establishing [...] the institutional label of legislation’, Riccardo Guastini, ‘En torno a las normas sobre la producción jurídica’, in *Estudios de teoría constitucional* (FONTAMARA 2007) 79.

address laws in the formal sense, referring to statutes approved by the legislative body⁶⁶ of the Macau Special Administrative Region, namely the Legislative Assembly.⁶⁷

In other words, when discussing laws in the MSAR, we refer to the normative enactments as such approved by the Legislative Assembly.⁶⁸ This is the concept of law *formally established*⁶⁹ in the legal order of the Macau Special Administrative Region.

The way there — to this end-result — is provided by the set of rules that build, scope, and shape such trajectory, ie the legislative procedure.⁷⁰

Though seemingly reductive, these two succinct statements indeed encapsulate the essence of this study, set within the purview of a *Lawmaking Course*.

However, it is high time to open a few doors and to contextualise, lay down pre-requisites, and cross our immediate object with other relevant issues and topics.

Such an effort will be undertaken shortly, following a consolidation of several more notions⁷¹ and an exploration of theoretical and conceptual implications surrounding the legislative procedure.⁷² This will be prefaced by a few observations on the meaning and the problems raised by the concept of the law in general.

On the law in general, JORGE MIRANDA mentions that, historically,

⁶⁶ See eg Joint Declaration, Annex I, Part III, "The legislative power of the Macau Special Administrative Region will be vested in the legislative body of the Macau Special Administrative Region." and "The legislative body of the Macau Special Administrative Region may, on its own, enact laws in accordance with the provisions of the Basic Law and the legal procedures.": Basic Law, Articles 8, 18 (the laws enacted by the legislative body of the Macau Special Administrative Region), 50, paragraph (3), 67, 71, paragraph (1), and the part of the Civil Code that correspond to a law on laws, in particular Article 1, in addition to Law No. 3/1999 and, of course, Law No. 13/2009, for example, Article 4.

⁶⁷ "Legislative power is an important issue regarding the enjoyment of the Macau Special Administrative Region's high degree autonomy. As provided for in this Article, the Legislative Assembly is the legislative organ of the Macau Special Administrative Region, exercising the legislative power in the Region.": Ieong Wan Chong, *Anotações à Lei Básica (Associação de Divulgação da Lei Básica de Macau 2005)* 137.

⁶⁸ In other words, in the MSAR, it is proper to speak of a parliamentary legislative procedure, ie the legal procedure aimed at the adoption of a law of parliamentary origin; or rather, to a parliamentary deliberation over a legislative proposal, be such decision positive (approval) or negative (non-approval), as emphasised by Gustavo Gramaxo Rozeira, 'A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar' (European University Institute 2009) 237 et seq. and 248 et seq; Gustavo Gramaxo Rozeira, 'Procedimento Legislativo Parlamentar' in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *Enciclopédia da Constituição Portuguesa* (Quid Juris 2013) 296–97.

⁶⁹ Cf in this sense, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos: esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 561.

⁷⁰ As taught by Jorge Miranda, "Whichever the competent enacting body is, the law results necessarily from a process or procedure; it results from a succession of relatively autonomous acts, with different structures, all chained in a link towards an end; the law corresponds to the concluding moment of such process or procedure": *Manual de Direito Constitucional*, V (Coimbra Editora 2011) 258.

⁷¹ "Like any activity the purpose of which is to produce a final act, the legislative process is made up of several interconnected preliminary acts, each of which is intended to clearly signal compliance with the various steps that the law requires for the validity of the end-result. Each of these steps or phases of the procedure constitutes a necessary pre-requisite for the next one, insofar as it is not possible to omit any of them, without otherwise affecting the conclusion of the final act." Marina Altamirano, *Manual de Procedimientos Legislativos*, (Editorial Juricentro 2008) 15.

⁷² Although they bear some similarities, the *legislative procedure* does differ from the administrative procedure.

“Since classical antiquity, its essence, its foundation and limits, its relationship with the common good or the principle of political unity and the authority from which it must emanate have been constantly questioned. The most significant conceptions about the State and the Law are necessarily projected in different understandings of what the law is (or should be). Let us thus recall, in the last centuries:

- The law, as the ordering of reason (St. Thomas Aquinas and, in a way, Suárez);
- The law, as the will of the sovereign (Hobbes);
- The law, as the guarantor of civil freedom and property (Locke);
- The law, as the fountainhead for the division of power and the balance between institutions (Montesquieu);
- The law, as an expression of the general will (Rousseau);
- The law, as an expression of rational will (Kant);
- The law, an instrument for utility and general happiness (Bentham);
- The law, as an immediate manifestation of sovereign power (Austin);
- The law, as an instrument of class domination (Marx, Engels);
- The law, as the tier of norms immediately beneath the Constitution (Kelsen);
- The law, as a political concept (Schmitt).⁷³

Subsequently, in the 20th century, the law became integral to the vision of a homogeneous society, made of free and equal individuals, operating based on reason and well-structured in the face of power. The law became normative prescription for the addressees, as general and abstract. The law became an indispensable neutral instrument for permanent and universal purposes, guided by the principle of certainty as a basic means for its preservation, while achieving in codification its greatest triumph. When enacted from Parliament, it takes on a unitary shape.⁷⁴

More recently, the same Author taught the following:

“The expansion of domains, the specialisation through and by different objectives and procedures, and the pulverisation of decision-making — conducive to what has been labelled as legislative inflation — do not

⁷³ Jorge Miranda, ‘Algumas considerações sobre a Lei’ (1998) 40 *Administração* 369, 371. He adds: “Each historical type of State corresponds to a certain configuration of the law within the scope of positive legal orders (in interaction with the prevailing legal theories). And in each of the major stages of development of each historical type, the law also presents unavoidable characteristics”: 372.

⁷⁴ *ibid* 374.

reinforce the authority of the law. Quite to the contrary: the guarantees conferred by, and under, the law, are transferred to the Constitution — henceforth the direct source or repository of the fundamental values of the community, with immediately applicable and binding norms. Instead of the sovereignty of the law *per se*, the principle of constitutionality is summoned, and constitutional judicial review systems are created. At the same time, the intense communication between peoples leads to the subordination of the law to the norms of both conventional international Law and the Law of international organisations.”⁷⁵

Reflecting on the insights of these legal scholars offers a fitting summation to this introductory overview.

We now delve into the legislative procedure⁷⁶ in detail.

2. The Legislative Procedure: Concept and Importance⁷⁷

We can define legislative procedure as the succession of acts or phases considered to be legally necessary for the creation and manifestation of a legal norm, as performed/enacted by a competent body to such end. It is, in truth, the itinerary for the creation of a law endowed with a specific form, stemming from the competence of this body. Each legal form entails, as such, its own procedure of a general nature.⁷⁸

⁷⁵ *ibid* 375.

⁷⁶ For a comparative, and in depth, approach of the legislative procedure, covering, eg Italy, France, Spain, Germany, see Paolo Caretti, Massimo Morisi and Giovanni Tarli Barbieri (eds), *Il procedimento legislativo ordinario in prospettiva comparata* (Università di Firenze, Associazione Per Gli Studi e le Ricerche Parlamentari 2018) <https://iris.uniroma1.it/retrieve/e3835321-f236-15e8-e053-a505fe0a3de9/Fiorentino_Procedimento-legislativo.pdf> accessed 31 January 2025. See also, an already *old*, but still useful, book Alessandro Pizzorusso (ed), *Law in the Making: A Comparative Survey* (Springer-Verlag 1988).

⁷⁷ “A parliament’s procedural efficiency in legislation [...] is a matter of considerable importance”: Rolf Becker and Thomas Saalfeld, ‘The Life and Times of Bills’ in Herbert Döring and Mark Hallerberg (eds), *Patterns of Parliamentary Behavior. Passage of Legislation Across Western Europe* (Ashgate 2004) 57.

⁷⁸ Carlos Blanco Morais, *Curso de Direito Constitucional*, I (Coimbra Editora 2012) 438. See eg José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 233: “The legislative procedure can be defined as an orderly succession of acts - capable of being integrated in phases - necessary to produce a legislative act; even in procedural terms, one should not lose sight of the fact that the law is the main or culminating act of this procedure, its final unitary result.”. A warning, “The legislative procedure presents multiple specificities that come from both political elements and interaction with civil society”: José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 249. See Gustavo Gramaxo Rozeira, ‘A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) as to the precision of the result, which can substantiate the approval of a new legislative act or that procedure would, after all, result in a negative legal act for failure to approve the legislative project in question. For further developments, Gustavo Gramaxo Rozeira, ‘Reflexão em torno do instituto da “toma em consideração” do direito parlamentar espanhol’ (2016) 7 *Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto* 101, et seq. See also, a classical definition of legislative procedure as a ‘chained combination of acts, which, rather than being legally possible, presents itself, with different intensities, as legally necessary’, Serio Galeotti, *Contributo alla teoria del procedimento legislativo* (Giuffrè, 1957) 55.

As external legislative acts fall out of scope for my purposes herein,⁷⁹ I have license to adapt the above concept of legislative procedure into the following paraphrase: an interconnected succession of acts or phases deemed legally necessary for the creation and manifestation of a law by the Legislative Assembly.⁸⁰ It is, in fact, the itinerary for the creation of a normative act endowed with the specific form of Law, grounded on, and legitimised by, the competence of this body. Such single legal form⁸¹ requires, as such, a proper procedure,⁸² of a general nature.

JORGE BACELAR GOUVEIA propounds that the general concept of procedure unfolds into constituent elements, such as the plurality of legal acts successively enacted over time, the establishment of an ordered sequence between such acts and, finally, the identity of objectives concurrent to the formation of the ultimate will/intent.⁸³

One may ask: why is this proceduralisation so important?⁸⁴

Furthermore, might one advance a set of reasons to eliminate — or perhaps to limit, dissect, or dilute — the legislative procedure, and, ultimately, to forsake its performance or subject it to the whims of fleeting expediencies? Is this a mere rhetorical flourish? Are such assertions merely hypothetical scenarios, posited as caricatured academic exemplars due to their absurdity and evident disdain for law? No! The brutal

⁷⁹ I shall not be dealing here with the process of extension/incorporation of legislative acts originating in Beijing, ie with national laws which do not, in principle, apply in the MSAR (in obedience to the latter's high degree of autonomy). However, as known, some of them do, or may, apply, either through Annex III of the Basic Law, or "*by publication or legislative act of the Macau Special Administrative Region*". These laws shall be limited to matters of national defence and external relations, as well as to other matters not within the scope of the Region's autonomy, under the terms of the Basic Law. See, in addition to the aforementioned Annex III, Article 18 of the Basic Law, paragraphs (2) and (3); also, exceptionally, due to a sufficient impetus, external to the MSAR, paragraph (4). See, for instance, Chief Executive Notice No. 10/2006, which is clearly not a legislative act of the MSAR, and therefore an order for "publication": pursuant to Article 6 of the Law on forms and templates of legal enactments, (Law No. 3/1999). Does this mechanism entail that the second option — "*by means of a legislative act of the MSAR*" — is no longer available? I do not believe the answer to be in the affirmative. Yash Ghai, in *Hong Kong's New Constitutional Order*, points out that the two envisaged modalities are not defined in the Basic Law and deems as advantageous the adoption of regional legislative acts, in order to facilitate an adequate incorporation of national normative acts in the regional legal order, pages 364 and 365. See, for Macau, Jorge Costa Oliveira, 'A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial' (1993) 19 *Administração* 20, 27 et seq.

⁸⁰ Once again, Basic Law and Law No. 13/2009, which establishes, for example, "Law of the Legislative Assembly", that is, Law enacted by the Legislative Assembly - in Article 4, paragraph 1, subparagraph (1).

⁸¹ A different situation occurs with administrative regulation, which possesses two different legal forms: independent and complementary (along with different regimen namely regarding their distinct scope and effects).

⁸² Which may be common or special.

⁸³ Jorge Bacelar Gouveia, *Manual de Direito Constitucional, II* (Almedina 2021) 1280.

⁸⁴ See the following words, focusing on a specific legal system but easily applicable in general: 'The legislative power is, [...], the first and most important of the functions [and] the most characteristic of the Parliaments. The exercise of the function of drafting and approving the laws is based on the legislative procedure, which is the succession of legal acts whose purpose is the approval of a law. The relevance of the legislative procedure derives from the aforementioned pre-eminence of the legislative function, which also implies the need for its regulation to be complete and sufficient and that its exercise be carried out in a fully rigorous manner, since it emerges as a fundamental guarantee for the Rule of Law and for citizens, insofar as it is the formal apparatus to ensure the correct formation of the will of the representatives of the Nation', JM Codes Calatrava, 'El Procedimiento Legislativo En El Siglo XXI: Problemática Y Retos Con Especial Referencia Al Senado', (2018) 104 *Revista de las Cortes Generales* 135, 136.

reality is that we have, regrettably, observed attempts of this kind. One can cite the elevation of speediness as a paramount virtue, capable of instantaneously nullifying standards, not only within the Legislative Assembly's Rules of Procedures but also within the Basic Law. After all, administrative regulations can be approved with "much greater speed".⁸⁵

And what about the much-vaunted supremacy of the Executive? Could it be succeeded by a realisation of a palpable erosion of the doctrine of separation of powers, or, if one prefers, horizontal division of powers? Such a scenario could give rise to ramifications that might mutate the legislative procedure into a quasi-*default* mechanism, invoked only when alternative methods and shortcuts were either unavailable or not chosen. This might simplify the process to an extent manifest in an *ad absurdum* provision of a piece of legislation that proclaims: "*Whenever the Government decides not to adopt an administrative regulation, it shall introduce a bill to the Legislative Assembly for the latter's approval*". Perhaps a second Article could be added, indicating a deadline for said approval. Fortunately, such harsh tendencies have receded after an ecstatic period of great fervour and pro-activity.

The proceduralisation of Public Law acts of a political nature, as is the case of a Law, "far from being useless, can instead play important roles that must be remembered";⁸⁶ a role of political legitimisation (through co-involvement of, and co-accountability by, the constitutional actors), a role of decision-making rationality (precisely by removing temptations of immediacy from decision-making) and a role pertaining to technical adequacy (namely in the examination in committee stage).⁸⁷

Regarding lawmaking, procedure gains even greater importance, since formal requirements are essential for the creation of a law.⁸⁸ There are legal experts who go even further and suggest — exaggeratedly, perhaps — that "the process is more important than the outcome."⁸⁹

⁸⁵ This is not necessarily always true and, on the other hand, the role of the urgency process, within the scope of the Legislative Assembly's Rule of Procedure, is ignored.

⁸⁶ Jorge Bacelar Gouveia, *Manual de Direito Constitucional*, II (Almedina 2021) 1281. As referred to "if any component integral to the lawmaking chain – from the introduction of a bill until publication and entry into force – fails or malfunctions, the launch or the completion of the respective legislative processes shall be directly called into question along with the efficiency and quality of the legislation.": Liu Dexue, 'Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio "um país, dois sistemas"' (2014) 102 *Administração* 997, 1016.

⁸⁷ *ibid.* On this issue, for a broader perspective, see also "One need look to the law in every state in the United States, every province in the Dominion of Canada, and indeed in every other democratic nation on earth to see that the law is infused with procedural safeguards [...] The purpose of meeting procedures is to allow members to reach informed business decisions in an effective, efficient, orderly, courteous, and fair manner": American Institute of Parliamentarians, *Standard Code of Parliamentary Procedure* 1–2.

⁸⁸ Albeit referring to a particular legal order, the following is applicable, in essence, to all legal orders: "The norm that is not enacted in accordance with procedures laid down by the Constitution and parliamentary Rules of Procedure, does not have the nature nor the rank of law.": Marina Altamirano, *Manual de Procedimientos Legislativos*, (Editorial Juricentro 2008) 15.

⁸⁹ Zafar Gondal, 'Universal Responsibility to Draft Democratic, Participatory, Effective and Efficient Laws and Law Reforms Projects' (2013) 1 *International Journal of Legislative Drafting and Law Reform* 239, 246.

In a gist, there *is* a legislative procedure⁹⁰ in Macau, the importance of which, under different approaches, is beyond any shred of doubt.

Finally, I would again borrow a few words to stress another positive role to be potentially exercised within the scope of the legislative procedure:

“Even before its application, the legal norm may, or may not, have the potential to perform its stabilising function. This depends on whether, in the enactment process, good practices have been observed [...] ie practices aimed at promoting the consensual acceptance of such norm by the various systems/areas of the life to be stabilised, in order to reach an agreement on the general solution established for the conflicts to which the norm’s factual provision (*Tatbestand*) refers to.”⁹¹

3. Context and Correlation with the Framework of the Internal Sources of Legal Norms

The moment has come to delve into, contextualise and promptly associate with the issue of the framework of the internal sources of legal norms in the MSAR.⁹²

How is the MSAR’s *super-structuring* architecture, with respect to the creation of legal norms and, in particular, lawmaking, established? How does this system operate, how is it divided and how do normative competences interplay?

It is universally acknowledged that the Constitution typically serves as the foundational legal setting for such systems, delineating the fundamental nucleus of these matters. For instance, it determines which types of normative acts are permissible (or, at the very least, the principal ones); their formal designation and origin, such as Law, Decree-Law, Administrative Regulation, Resolution, Ordinance, Legislative Order, etc; the domains reserved for legislative or, less commonly, administrative norms; the general hierarchy of norms, illustrated by the principle of constitutional supremacy and the primacy and prevalence of the law; the mutual (binary) hierarchical or modulating relationships (or, in certain instances, a complete absence of hierarchy between two or more types of normative acts), exemplified by Laws governing general legal frameworks versus the entailing Development Decree-Law(s), or the Budgetary Framework Law versus Budget Law; and ultimately, the issue of prior enabling laws, like those authorising complementary or executory normative acts (regulations) to be issued by the Executive.

⁹⁰ Containing rules that require effective compliance therewith.

⁹¹ António Manuel Hespanha, ‘Ideias sobre a interpretação’ available at <<https://archivos.juridicas.unam.mx/www/bjv/libros/7/3015/4.pdf>> accessed January 2025, also available at <http://www.estig.ipbeja.pt/~ac_direito/amh_MA_11691.pdf>.

⁹² The next few pages mostly adhere to what I have written previously, see Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade - Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 349 et seq.

Furthermore, it is also quite a commonly observable phenomenon that wherever there is a structuring, definition, and drawing of boundaries concerning normative competences among various sovereign⁹³ power-endowed or competent bodies, oversight mechanisms over the creation of legal norms are simultaneously established — overwhelmingly through the judicial pathway in comparative law. This is especially pertinent for controlling potential conflicts between different sources of legal norms, exemplified by processes such as the judicial review of constitutional conformity and of legal conformity, among others.

In Macau — at the risk of oversimplification — due to the Organic Statute of Macau, the preceding constitutional text, the model of sources of legal norms was articulated in the local constitution, together with a system of judicial review in various aspects and under several modalities. This comprehensive system was, however, coupled with or subjected to a system of normative sources externalised or exported from the country then administering the territory of Macau.

Under the Basic Law, termed the “Constitution in a broad sense”⁹⁴, *lato sensu*, (which is not equivalent to the constitutional order of the MSAR, as I regard such order to be multi-composed and multi-levelled, comprising, at the very least, the Basic Law, portions of the Constitution of the PRC, and the Joint Declaration) or the MSAR’s “functional Constitution”, as characterised by JOSÉ MELO ALEXANDRINO,⁹⁵ among

⁹³ Or of a *similar* nature, in the case of the MSAR and for the purposes hereunder.

⁹⁴ For a discussion of this issue, see Paulo Cardinal, ‘Fragmentos em torno da constituição processual penal de Macau — do princípio da continuidade ao princípio da dignidade humana’ in Manuel da Costa Andrade and Susana Aires de Sousa and Maria João Antunes (eds), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, vol III (Coimbra Editora, 2010) 759 et seq. On this same issue, see *inter alia*, Fernando Alves Correia, ‘Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional’ (1997) IV Revista Jurídica de Macau 24, stating “*The first note is that the Basic Law constitutes the true ‘Constitution’ of the Macau Special Administrative Region and, therefore, it acts as a parameter for the validity of all norms*”. See also, on others areas, such as interpretation, with possible differences from my position, “*However, it is quite difficult to interpret the Basic Law in a precise and appropriate way, since “no law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region may contravene this Law”: although it is only a basic law at the national level, in comparison with the Constitution and the law of China. In this sense, in relation to the Macau Special Administrative Region, the Basic Law is interpreted as if it were the National Constitution.*”: ‘A Lei Básica da Região Administrativa Especial de Macau: Contributo para uma compreensão de Direito Constitucional’, in Jorge Bacelar Gouveia, *Direito Constitucional de Macau* (IDILP 2012) 22 et seq; Jorge Bacelar Gouveia, ‘Fontes do Direito e Direitos Fundamentais em Macau’ in *Direito Constitucional de Macau* (IDILP 2012) 49 et seq; Zheng Wei, ‘Sobre o Sistema de Interpretação da Lei Básica de Macau’ (2012) I Revista de Estudos de ‘Um País, Dois Sistemas’ 171; “*The Basic Law is the constitutional law of the MSAR, so one can only better understand the meaning of these norms when they are analysed under the perspective of constitutionalism.*”: Sun Tongpeng, ‘A alocação de competências orçamentais em Macau – Algumas considerações jurídicas’ (2014) 27 Administração 103.

For case-law in Hong Kong Special Administrative Region, see *Ng Ka Ling and Another v The Director of Immigration* (No 1) (1999) 2 HKCFAR 4, where it is stated that the Basic Law “*became the constitution of the Hong Kong Special Administrative Region upon its establishment*”: in *Leung Kwok Hung and Others v HKSAR* (2005) 8 HKCFAR 229, Mr Justice Bokhary claims “*Our constitution the Basic Law*”. The above is not consensual; for a critique grounded on legal scholarship, see, *inter alia*, Francisco Leandro, *A RAE de Macau e a União Europeia, dois sujeitos de direito internacional?* (Fundação Rui Cunha/CRED-DM 2016) 375 et seq.

⁹⁵ José Melo Alexandrino, O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau (CFJJ 2013).

other similar or proximate qualifications,⁹⁶ relatively few of these issues remain in constitutional *loci*, at least in a direct, express, and unambiguous manner.

Specifically, within the current constitutional text, that is the Basic Law, we discern the following: the identification of the Law, emanating from the Legislative Assembly; the establishment of the type(s) of Administrative Regulation; the provisions on Resolutions, also enacted by the Legislative Assembly;⁹⁷ acknowledgment of the Decree-Law; elevation of the Basic Law to a rank of a domestic superior normative act, with which all other internal normative acts must comply; and the principle of official publication of normative acts.

Additionally, albeit in a somewhat disorganised and sparing manner, several areas reserved to the law, including but not limited to fundamental rights, definition of crimes, and budgetary, taxation, judicial, and electoral subject-matters, also make an appearance.

4. Law No. 13/2009: Origin and Driving Forces

Regrettably, there exists no cut-and-dried framework of competences expressly established in the Basic Law, namely with respect to the division between the legislative and executive powers. What is the legal solution regarding the normative acts inherited from the past, such as Decree-Laws? What nature and hierarchical position does the new executive order have *vis-à-vis* (administrative) orders and administrative regulations?

A multitude of uncertainties have surfaced within legal scholarship, case-law, and political practice — viz, regarding the existence of a general substantive area reserved to the law; the presence of an area of matters earmarked for administrative regulations;

⁹⁶ For an overview of labels attributed to the Basic Law, all resting upon the idea of constitution and constitutionality, see Cândida Antunes Pires, ‘A organização judiciária da Região Administrativa Especial de Macau’ in *Direito de Macau — Reflexões e estudos* (Fundação Rui Cunha/CRED-DM 2014) 330, namely proposing the following ones: “mini constitution”, “crypto-constitutional diploma”, “para-constitutional law”, “law with constitutional nature”, and, “monitoring law”.

⁹⁷ Although no specific norm exists in the Basic Law similar to that of article 71, paragraph (1), concerning the laws! One can find several references in the Macau constitutional law to resolutions (eg articles 74, 75 and 77), but there is no express provision on the competence for the approval — of repeal, etc — of resolutions. A different situation arises in relation to the Rules of Procedure -- thus underlining, once again, the special nature of such Rules — as they do receive from the Basic Law an express norm of competence: “*It falls on the Legislative Assembly to define, on its own, its rules [...]*”. It may even be questioned whether the form of approval of the Rules of Procedure should be a normal or regular type of resolution, or, rather, a more demanding type of procedural/rule-making resolution. The Law on forms and templates of legal enactments seems to attempt, albeit unsuccessfully, to close the gap by providing a general formal template in Article 17. A few comments: first, this is a rule on form and not on competence; second, this rule has to undergo a corrective interpretation of constitutional conformity, at least with respect to the resolutions that approve and amend the Rules of Procedure; and, perhaps, to the regulatory resolutions that develop or supplement said Rules (eg extension of the normal period of functioning of the body, the process for questioning the Government and the regulation of hearings); and, third, it is inappropriate to fuse into a law a competence that is so distinct, so unique and immune to the intervention of third parties, as is the competence to pass resolutions. One could add a fourth reason: Article 71 of the Basic Law’s scope is limited, whereas many of the Legislative Assembly resolutions are not normative in nature, but consist of decisions on individual and concrete situations.

the requirement for prior enabling laws, authorising administrative regulations of a complementary nature; the legitimacy of promulgating administrative regulations — absent a prior enabling law — directly grounded on the Basic Law; the typology and nature of administrative regulations; the feasibility of de-legalising (demoting regulated subject matters from the level of the law); the nature of decree-laws; and the availability of mechanisms for overseeing constitutional and legal conformity, such as constitutional review, among others.

As XU CHANG declared, with respect to Law No. 13/2009,

“the Basic Law does not expressly define the full legislative power of the Legislative Assembly, although a relative or broad implication may be deduced through the legislative intent of the Basic Law and numerous relevant (legal) documents; this law, however, expressly defines such power for the first time. [...]

The present law defines a series of important norms, which function as a framework of the Macau Special Administrative Region’s legal order”.⁹⁸

It was thus necessary to create the normative yardstick that would regulate this framework or basic issue as far as possible and within the upper echelon of the Basic Law. This necessitation gave rise to the legislative initiative,⁹⁹ culminating in the enactment of Law No. 13/2009.

The object of Law No. 13/2009 is indeed crystal clear and revealing:

“Article 1 (Object)

The present law develops the legal framework governing the internal sources of legal norms, under the terms of the Basic Law of the Macau Special Administrative Region [...]

Quoting QIAO XIAOYANG,¹⁰⁰ “After the transfer of power over Macau, and

⁹⁸ Xu Chang, ‘Litígio e Respectiva Resolução sobre a Competência Regulamentar dos Regulamentos Administrativos da Região Administrativa Especial de Macau’ [2012] Revista de Estudos de ‘Um País, Dois Sistemas’ 97. See also Court of Final Appeal (CFA) Decision No. 28/2006 and Court of Second Instance (CSI) in Case No. 434/2009, 440/2009, 28/2011; in a divergent sense, CSI in Case No. 280/2005, 223/2005.

⁹⁹ Luís Pessanha, ‘Breves Reflexões em Torno da Reserva de Lei da Assembleia Legislativa da RAEM’, (Segundas Jornadas de Direito e Cidadania da Assembleia Legislativa de Macau - Direitos Fundamentais – Consolidação e Perspectivas de Evolução, Assembleia Legislativa, Macau, 2016) 196, wrote: “*this is a legislative initiative of great interest and relevance, which seeks to precisely trace what the regional constitutional legislator did not intend to undertake: to the draw exact dividing line between the normative intervention fields of the Legislative Assembly and the Macau SAR Government.*”: then stating, on the very restrained original version of the draft law, “*It remains to be seen whether the boundary between the primary normative powers of the Legislative and the Executive should be this one.*”

¹⁰⁰ Qiao Xiaoyang, *Aprofundar o estudo e o debate sobre a Lei Básica e empenhar esforços na elevação do nível de qualidade dos trabalhadores da Administração Pública* (unpublished and archived with the Author 2010). See, in this regard, the following considerations: “continue to improve administrative regulations in order to guarantee their legality, reasonableness and applicability, constitutes an important work to improve the level

due to the habits from the past, the executive body took a somewhat excessive power, with respect to regulating through administrative regulations.” This explains why the Legislative Assembly, last year, for example, defined the legal framework of the internal sources of legal norms, thus resolving — and satisfactorily — said issue.¹⁰¹

The principle of the prevalence of laws over regulations and other administrative enactments already resulted directly and immediately from the MSAR Basic Law itself, inasmuch as the prevalence of the Basic Law over the other internal normative acts was therein settled, under Article 11 — “*No law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region may contravene this Law.*”

The law governing the legal framework of the internal sources of legal norms (Law No. 13/2009) was limited to developing the solution provided for in the Basic Law. Or, as the MSAR Court of Second Instance (CSI), in Case No. 438/2009, expressed, “Law 13/2009 does not innovate, but confirms and clarifies that which has already stemmed from a *generous interpretation* of the Basic Law.”¹⁰²

The Court of Final Appeal (CFA), in a decision delivered in Case No. 28/2006, plainly asserted that:

“Another issue is related to the principle of the prevalence of the law, relative to the regulation, ie the principle that the latter may not contravene the Basic Law nor the laws in general. Such principle emerges in the 2nd paragraph of Article 11 — regarding the Basic Law (“*No law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region may contravene this Law*”), and from Article 65, with respect to the laws in general (“*The Government of the Macau Special Administrative Region must abide by the law ...*”). The applicability of this principle has not raised doubts”.

The CFA, in the same decision, added:

of administration in accordance with the law, and to increase the capacity of effective governance to achieve good administration (improved government). It is also an important aspect to promote the creation of institutions and the legal system.”: Chio Heong Ieong, ‘Um estudo preliminar sobre as normas administrativas’ (2011) 93 *Administração* 737.

¹⁰¹ Cf for example, “immediately after the handover of Macau’s sovereignty, the regional Government decided to raise the functional value that administrative regulations traditionally enjoyed, substituting the scope of administrative regulations enacted by the Chief Executive, for that of the abolished typology of the decree-laws. At present, these regulations are widely and abundantly used to “legislate.”: Luís Pessanha, ‘Breves Reflexões em Torno da Reserva de Lei da Assembleia Legislativa da RAEM’, (Segundas Jornadas de Direito e Cidadania da Assembleia Legislativa de Macau - Direitos Fundamentais – Consolidação e Perspectivas de Evolução, Assembleia Legislativa, Macau, 2016) 181.

¹⁰² Boldface added. See also, Decisions No. 733/2011 and No. 622/2012 of the CSI. “This Law defines, in a deeper way, some important contents of the Region’s legislative system: the division of applicability of competences and the hierarchy between laws and administrative regulations, thus playing an obvious role and being sensible towards the improvement of the respective systems and to the consolidation of the basis of the rule of law, through administration/governance in accordance with the law.”: Xu Chang, ‘Resumo da Constituição do Estado de Direito da Região Administrativa Especial de Macau durante os Passados Dez Anos’ [2012] *Revista de Estudos de “Um País, Dois Sistemas”* 187.

“We conclude, therefore, that the Chief Executive may approve regulations only on the basis of the Basic Law, outside the areas reserved by the Basic Law to the perimeter of the law, and without prejudice to the principle of the prevalence of the law (the regulation may not contradict normative acts of a superior hierarchical standing, namely, the Basic Law and the laws)”.

After the entry into force of Law No. 13/2009, the CFA ruled the following:

“Perhaps it might be worthwhile to reflect a little on the Law governing the legal framework of the internal sources of legal norms (Law No. 13/2009, of 27/07). It is a matter of assessing whether this legislative act presents major modifications to be highlighted in favour of any of the positions under discussion. Undoubtedly, it shed the missing light on doubts warranting clarification, such as the allocation of powers between the Legislative Assembly and the Chief Executive — legislative and regulatory in nature, respectively — and, in this sense, therefore, contributed to a firmer and more precise understanding of the substantive phenomenon the of area reserved to the law. Such is our opinion. In effect, this law has now defined the limits of the law and of the regulation (Article 3), the competence of the Legislative Assembly and the substantive scope of its laws (Articles 5 and 6), as well the areas that may be subject to complementary and independent regulation (Article 7). This law has cleared up the issues, with certainty and in an explicit manner.” (Decision in Case No. 438/2009).

Law No. 13/2009 bears a constitutional quality, albeit *borrowed*, as I have defended elsewhere.¹⁰³ This quality is borrowed from the Basic Law, which, imbued with hierarchical superiority and the core of constitutional subject-matters, anchors this Law 13/2009. The law aims to structure the legal framework of internal sources of legal norms, thus further detailing the legal framework stipulated under the Basic Law. Law No. 13/2009 addresses a constitutional issue, establishing a standard for conforming subsequent laws and administrative regulations enacted post its entry into force.

5. Nature, Function, and Parametric Feature of Law No. 13/2009

As to the nature, function, and parametric characteristics of Law No. 13/2009 (regulating constitutional subject-matters), the competent Legislative Assembly Committee’s Report¹⁰⁴ states the following:

“the impact this bill’s approval will be deeply and horizontally and felt, permeating the rest of the legal fabric, with a density that normally does not occur with other laws. The function, nature and importance of the future law

¹⁰³ Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 349 et seq, especially 355.

¹⁰⁴ Report No. 3/III/2009, dated 29 June 2009, delivered by the FSC.

thus entails.”, and, later on, the “law will be useful in establishing and clarifying, as accurately as possible, rules on the creation of norms, performing, in this scope, the role of an (ordinary) law of reference for subsequent normative acts.”

This law possesses an ordering function of the norm-making process, setting a standard that other laws must adhere to, whilst addressing constitutional subject-matters. It stands as a benchmark for the other subsequent internal normative acts.

Indeed, even if the principle of hierarchical superiority is disputed or negated, one might still argue, as GOMES CANOTILHO¹⁰⁵ teaches:

“In our perspective, Macau’s legal order does not furnish statutory support for the genesis of such reinforced laws. Initially, the law in question is subject to amendment or repeal by the legislator, who, in accordance with the Basic Law, can formulate new legal and regulatory typologies. Nonetheless, **this law assumes a central legal position — it isn’t a formally superior law relative to others, but it does establish conditions, during its validity, for the legitimacy of internal sources; its derogation is impermissible during norm-making, whether concerning laws of the Legislative Assembly or regulations by the Chief Executive and Government.**”

It is entirely appropriate to state — Law No. 13/2009 should not be deemed an isolated case in the MSAR.

In fact, one other law with parametric features is Law No. 3/1999, on “*Publication, forms and templates of legal enactments*”, which governs the standard forms and templates for normative acts, *inter alia*. One cannot imagine the legal admissibility of a particular normative act could be considered concluded and able to take effect *contra legem*, for instance, by not being officially published in the Official Gazette, or without abiding by all the formal prerequisites laid down under such structuring law.

Under Articles 78 and 50, paragraph (3) of the Basic Law, the publication of laws is mandatory. However, no official bulletin is identified, nor is the existence thereof mentioned. What happens if a given law stipulates its own publication in two Chinese-language newspapers and two Portuguese-language newspapers, dispensing with publication in the OG? There is no direct violation of the letter of the Basic Law, but there is a situation of non-compliance with the *bloc de constitutionnalité* structured, in this specific forum, by the Basic Law and the aforementioned Law No. 3/1999.

The principle of publicity is expressly established in the Basic Law and is further elaborated and detailed in Law No. 3/1999, on “Publication, Forms, and Templates of Legal Enactments”, which holds substantive constitutional significance, setting

¹⁰⁵ *Unpublished*, (archived with the Author) 2008 (boldface added).

parameters that take precedence over other laws. Accordingly, laws must be solemnly and formally published in the OG.

Another example is Law No. 1/1999, ie the Reunification Law. This law was also enacted under the general terms of Article 71, paragraph (1), of the Basic Law. Hence, it may not formally purport to have a constitutional or a supra-legal value or force. In any event, the Reunification Law does serve — and is so recognised — as a substantive parameter to subsequent legislative acts, which should accordingly conform with the former law.

The above transcribed Report by the Legislative Assembly Committee emphasised,

“On the other hand, the law to be drafted is not, and could not be, a law that modifies the Basic Law. It is an ordinary law and, as such, subject to the principle of conformity with the Basic Law. Consequently, the implementation to be performed in the draft must comply with the parameters set out in that higher law. This is an indisputable point: the fundamental requirement for the material legitimation of this law is its conformity with the superior law, the Basic Law, **without prejudice to erecting itself as a reference law in the subject-matters under its scope, ie in any event, it is a law that serves as a parameter for subsequent normative acts and, as such, must be respected by the latter, otherwise the former shall be unable to perform any useful function.**”¹⁰⁶

¹⁰⁶ The issue is not an absolute novelty in a comparative constitutional context. Perhaps the closest example that comes to mind is the Italian law on the normative power of the Government. In that European legal order, such law is accepted as a law regulating normative procedure, to which obedience is due. The study of, and a reference to, said law, are unavoidable: Law No. 400/1988, entitled *Disciplina dell’attività di Governo e Ordinamento della Presidenza del Consiglio dei Ministri*, of 23 August 1988 (with subsequent amendments).

On the aforementioned Law No. 400/1988, *Disciplina dell’attività di Governo e ordinamento della Presidenza del Consiglio dei Ministri*, see eg with comparative interest but also utility for shedding some light onto the Macau system, namely with respect to some issues addressed later, Enzo Cheli, ‘La produzione normativa: sviluppo del modello costituzionale e linee di tendenza attuali’ (2003) 197 *Atti Dei Convegni Lincei-academia Nazionale Dei Lincei* 127; Enzo Cheli, ‘Ruolo dell’esecutivo e sviluppi recenti del potere regolamentare’ (1990) 1 *Quaderni costituzionali* 53, et seq; Lorenza Carlassare, ‘Prime impressioni sulla nuova disciplina del potere regolamentare prevista dalla l. n. 400 del 1988 a confronto col principio di legalità’ (1998) 1 *Giurisprudenza costituzionale* 1476, et seq; and, for a perspective in hindsight, with the benefits of interpretation, application and implementation after a few decades, Giovanni Tarli Barbieri, ‘La Disciplina Del Ruolo Normativo Del Governo Nella Legge N. 400 Del 1988, Ventinove Anni Dopo’ (2018) 1 *Osservatorio Sulle Fonti* 1, et seq; Nicola Lupo, ‘La normazione secondaria e il fenomeno della fuga dalla legge n. 400 del 1988 al vaglio del Comitato per la legislazione’ (*federalismi.It*, 9 February 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35731&content=&content_author=>; Beniamino Caravita, ‘La débâcle istituzionale della potestà normativa secondaria del Governo. Riflessioni in ordine al mutamento del sistema delle fonti’ (*federalismi.It*, 27 November 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=35216&content=&content_author=>. Also in Italy, but on a separate subject-matter impacting on these issues of legality, principle of completeness, boundaries between law and regulation, simplification and de-legalisation, Nicola Lupo, “‘Dal regolamento alla legge’: Semplificazione e delegificazione: uno strumento ancora utile?” in Maria Alessandra Sandulli and Luigi Carbone (coords), *Codificazione, semplificazione e qualità delle regole* (Giuffrè 2005) 113 et seq; Paolo

Relying now on case-law from the superior Courts,

“Anyway, regardless of all the discussions that may take place concerning the innovative or clarifying ramifications of this law, what matters most is the strength of its provisions, the mandatory nature of its norms.”¹⁰⁷

6. The Principle of Completeness of Laws: A Few References

Turning now to the misunderstood and, in certain circles, derided **principle of completeness of laws**, also known as the principle of **sufficiency of laws**, or the principle of **determinability and “fullness” of laws**¹⁰⁸.

The law — notwithstanding contrary tendencies in the history of legislative procedures — must have a determinate, precise and sufficient content, and include a clear set of prescriptive commands intended to create legal norms of conduct for the addressees, rules of action for the administration and standards of control for judicial decisions on disputes. The principle of the sufficiency of the law — or of the completeness of the law — is compulsory, leaving no rule-making room or latitude, whatsoever, for completion by (complementary) administrative regulations.

The law can no longer be satiated by simply having a reasonably or moderately determined and precise content, establishing only the essential core of a legal framework *apropos* the subject-matter under regulatory focus; the law cannot, in an even worse scenario, solely establish the meaning, the object and the fundamental dimensions of the supplementary or implementing frameworks to be later devised through complementary administrative regulations.

Whether one likes it or not, such a principle has the full force of law, as clearly stated in Article 4, paragraph (2) of Law No. 13/2009:

“The law shall have a determinate, precise and sufficient content that includes a clear prescription of the commands intended to create legal norms of conduct for the addressees, rules of action for the administration and standards of control for judicial decisions on disputes.”

In the MSAR, this **principle of completeness of laws** — or of the “density” and determinability of legislative acts — was first introduced by the Distinguished Professor

Carnevale, ‘Semplificazione mediante riassetto e sistema delle fonti nella legge di semplificazione per il 2001 (n. 229/2003). Prime considerazioni’ in Maria Alessandra Sandulli and Luigi Carbone (coords), *Codificazione, semplificazione e qualità delle regole* (Giuffrè 2005) 127 et seq; Erminio Ferrari, ‘Contro la banalità della semplificazione normativa’ in Maria Alessandra Sandulli and Luigi Carbone (coords), *Codificazione, semplificazione e qualità delle regole* (Giuffrè 2005) 141 et seq, and Giovanni Serges, ‘Riassetto normativo mediante delega legislativa e determinazione dei principi fondamentali nelle materie di legislazione concorrente’ in Maria Alessandra Sandulli and Luigi Carbone (coords), *Codificazione, semplificazione e qualità delle regole* (Giuffrè 2005) 161 et seq.

¹⁰⁷ CSI, Decision in Case No. 438/2009.

¹⁰⁸ There are perhaps a few *nuances* underlying these several expressions; however, the essential substance remains the same on all those above-mentioned expressions.

GOMES CANOTILHO. It serves as a cornerstone in the architecture of the current normative system.¹⁰⁹

While this principle initially emerged during the legislative process for Law No. 13/2009 within a context envisaging the existence of other types of laws, such as those governing general legal frameworks, both the legislator and the proponent (the Government) ultimately chose not to accept different typologies of laws. Such a diversity could have potentially contributed to a more harmonious and less conflicting dual normative structure. Instead, they opted for a singular approach: to enact laws with determinate, precise, and sufficient content, which include a clear prescription of the commands, as per Article 4, paragraph (2), of Law No. 13/2009.

A different scenario was considered in the formal version of the Government's bill, dated 29/03/2009.¹¹⁰ However, this option was decidedly squashed on political grounds, resulting in a significantly more confined space for norm-making available to complementary administrative regulations compared to what would have been permitted under such a version of the bill.

Such would remain the case, as well, for laws governing general legal frameworks:

“with the entry into force of Law No. 13/2009 — Legal framework governing the internal sources of norms, the situation has changed. This is because paragraph (2) of Article 4 of this law clearly states that “[the] law shall have a determinate, precise and sufficient content that includes a clear prescription of the commands that are intended to create legal norms of conduct for the addresses, rules of action for the administration and standards of control for judicial decisions on disputes.”¹¹¹

According to the requirements contained in such norm, a Government's bill should not be defined in a broad and vague manner. Even if a law adopts the designation of “general legal framework law”, one must safeguard that its contents are “determinate, precise and sufficient”. Therefore, what is required is that a bill not only contains a complete structure, but also be substantively more detailed and concrete, with a view to

¹⁰⁹ See also José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013) 136–137, and, in comparative law, taking the case of Portugal, Jorge Miranda, ‘Em vez do Código Civil, uma lei sobre leis’ (2007) 47 *Legislação* 21, speaking to us of normative sufficiency and explaining that the laws published within the areas reserved to the law must have “a sufficiently determinate content, with specification of the normative meaning that they establish”: otherwise such laws become undermined by vagueness, imprecision, excessive broadness, as blank cheques, frustrating the spirit of the constitutional norm that enshrines the very competence of lawmaking under such reserve, leading thus to “a real misuse of legislative power.”

¹¹⁰ Let us not forget that the Government's bill had five formal draft versions; the final approved version of the text differs greatly from the poorly drafted original version, both substantively and in length. The several versions were: initial bill introduced on 08/03/2007; version tendered on 30/04/2009, version tendered on 19/05/2009; version tendered on 26/05/2009; and version tendered on 08/06/2009, which was subject to voting and approval, on the specifics, on 14/07/2009.

¹¹¹ SSC, Report No. 5/V/2017 on the Government Bill entitled “Budgetary Framework Law”.

its completeness and legal operability.”¹¹²

In accordance with the *Tordesillas Treaty-style standards* negotiated between the Legislative Assembly and the Government, Article 4, paragraph (2), which remains in force today, was officially imprinted onto the OG. Without adherence thereto nor application thereof, the system chosen by both the Government and Legislative Assembly, approved by the Legislative Assembly, and welcomed by Beijing (namely by means of the requirement of reporting laws for record), would falter and be irretrievably disfigured.

Those who disagree with this matrix should propose and initiate a review of the law, instead of promoting or continuing a semblance of *terrorism*, ie by attacking, violating and undermining an imperative norm, which is effectively and bindingly in force, and to which parametric status is conferred.

This is really an:

“absolutely essential point in the design of Law No. 13/2009, which at times seems overlooked or, at times, seems to invite the temptation to revive an idea of the needlessness of the law to have a determinate, precise and sufficient content; such a drive could engender ideas such as the sufficiency that the law be limited to establishing, in general terms, the meaning, object and fundamental dimensions of a given framework. No. This is plainly wrong and was not, ultimately, the option decided upon by the dual partnership, consisting of the bill’s proponent (Government) and the approving body (Legislative Assembly).”¹¹³

¹¹² *ibid.* For further reading, in an introduction to the problem, “Government representatives explained that they wished to introduce a bill that would establish provisions on budgetary principles, leaving the specific matters to be regulated in detail through the respective complementary regulations. The Committee understood the proponent’s idea. In reality, the past is rife regarding the use of general legal framework laws, see eg Law No. 2/91/M — “General Framework Law on the Environment”; Law No. 6/94/M — General Framework Law on Family Policy”; Law No. 9/2000 — “General Framework Law on Sciences and Technology”; and Law 9/2002 — “General Framework Law on Internal Security”. The main characteristic of these laws is that they are of a political nature, of direction and orientation, and are developed and complemented through the use of executory legal enactments; in fact, this method is already generalised.” However, as the body of the text above argues, the above Report says, “with the entry into force of Law No. 13/2009 - Legal framework for internal regulatory sources...”.

¹¹³ Paulo Cardinal and Zheng Wei, ‘A Questão das Infracções Administrativas no âmbito do Sistema das Fontes Normativas internas estatuído pela Lei Básica e desenvolvido pela Lei n.º 13/2009’ (2012) 25 Administração 98. Below is a short account of several Legislative Assembly Committees’ Reports that invoke, affirm or confirm the principle of completeness of laws: SSC, Report No. 2/IV/2013, Government Bill “Law on urban planning”; TSC, Opinion No. 4/IV/2013, Government Bill “Law on Safeguarding Cultural Heritage”; FSC, Opinion No. 3/I/2012, Government Bill “Law on the Activity of Real Estate Brokerage”; SSC, Report No. 6/IV/2012, Government Bill “General framework on legal aid”; TSC, Report No. 6/IV/2012, Government Bill “Individual pension accounts”; SSC, Report No. 1/IV/2013, Government Bill “Law on food security”; FSC, Report No. 4/V/2014, on the “Framework on the qualifications in the fields of construction and urban development”; and TSC, Report No. 1/VI/2019, Government Bill “Legal framework for the transportation of passengers in light rental automobiles”. This does not mean that, in some cases, this affirmation of the sufficiency of laws by the Standing Committees of the Legislative Assembly has, in the end, always been duly and fully implemented in the respective laws, nor in the subsequent complementary administrative regulations.

The truth is that we can encounter several examples of non-compliance with this norm; at times, during the legislative procedure, energies are drained, and meetings are wasted in discussions on such legally settled and stabilised issues, instead of channelling efforts to find and fine-tune better substantive solutions.

In short, where warranted and justified, *change the law*, but *do not break the law*. Specifically, if the aim is to expand the normative reach of the complementary administrative regulation while constricting the normative boundaries of the law — as was proposed in one version of the Government's bill — the appropriate course of action would be to amend Law No. 13/2009, in accordance with the framework of the Basic Law, aiming to ensure the adequate balance of powers in the MSAR legal system.

Amendments to Law No. 13/2009 must not be introduced in a unidirectional or unbalanced manner. When modifying the substantively constitutional framework now in place, it shall be necessary to consider the system as a whole: the Legislative Assembly must not be deprived of its primary lawmaking function, as configured in the Basic Law; the law must not be reduced to playing the role of a mere short repository of vague general principles; no areas should be designated solely for enactment by administrative regulation; areas reserved for legislative initiative must be upheld, particularly those concerning the Legislative Assembly; and the appropriateness of creating a mechanism for judicial review of the compliance — both of regulations with the Basic Law, and of laws with the Basic Law — is of paramount importance, and shall become increasingly so should the scope for legitimate norm-making by administrative regulations expand.¹¹⁴

However, the very relevant issue of judicial review of the constitutional conformity of laws¹¹⁵ and regulations, and of the legal conformity of regulations,¹¹⁶

There are several examples: the Law on Urban Planning and Administrative Regulation No. 3/2014; Urban Planning Council and Administrative Regulation No. 5/2014 - Regulation of the Urban Planning Law; the Law on Safeguarding Cultural Heritage and Administrative Regulation No. 4/2014 - Cultural Heritage Council; Law No. 16/2012 - Law on the activity of real estate brokerage; and Administrative Regulation No. 4/2013 - Regulation of the Law on real estate brokerage. Among other cases, more than non-compliance with the mandatory rules of Law No. 13/2009 in this context. As stated in Report No. 5/VI/2019 of the SSC on the "*Framework for the professional accreditation and registration of social workers*", after signalling the consequences that the legislative option would entail for the principle of completeness of laws, as enshrined in Law No. 13/2009: "*The Members, when approving the present Government bill, are unaware of the specific conduct they are sanctioning, which leads to the establishment of disciplinary responsibility for violation of duties that are not yet enshrined*".

¹¹⁴ Paulo Cardinal, 'Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009', in *Direito, Transição e Continuidade - Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 361 et seq; Paulo Cardinal and Zheng Wei, 'A Questão das Infracções Administrativas no âmbito do Sistema das Fontes Normativas internas estatuído pela Lei Básica e desenvolvido pela Lei n.º 13/2009' (2012) 25 *Administração* 98.

¹¹⁵ Underlining the importance of these mechanisms and affirming the "direct access" to the Basic Law by the Macau courts Fernando Alves Correia, 'A Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional' (1997) 4(3) *Revista Jurídica de Macau* 26.

¹¹⁶ Without prejudice to the mechanism for challenging norms, under Articles 88 et seq. of the Administrative Litigation Proceedings Code, which allows for the judicial review of the legal conformity of administrative regulations, thus safeguarding the primacy of the law and offering a way for the resolution of conflicts between these internal sources of norms.

remain, alas, an open-ended topic.

7. Judicial Review of the Constitutional Conformity of Laws and Regulations: Brief Notes

According to XU CHANG,

"The executive branch can never replace or absorb the legislative or judicial branch." and the "political system of the Region is also based [...] on the distribution of powers, more specifically, a system with the predominance of the executive does not imply a concentration of powers by the executive, nor the dictatorship of the Chief Executive."¹¹⁷

As GOMES CANOTILHO alerts,

"The way in which the Basic Law regulates the normative competence of the Assembly and the normative competence of the Executive, in addition to requiring new contours to the relationship between law and regulation, demands renewed systems of control. [...]"

In addition to the powers already conferred by law, it is essential to consider (1) the primary and direct judicial review of administrative regulations issued by the Executive of the Macau Special Administrative Region [...]; (2) the secondary or indirect judicial review thereof (when raised as a procedural incidental issue. [...])

Its explicit provision in a law on judiciary organisation does not contradict, in our view, the Basic Law; it is essential to revise the current procedural mechanisms for controlling legality. [...] It is nonetheless clear that it shall be the task of the courts, by way of application of the law, to exercise oversight over the delegated regulations (to verify if they obey the legal framework laid down in the authorising laws), and over the independent regulations (to verify if they are in conformity with the principles and rules on competences and functions, as provided for in the Basic Law."¹¹⁸

The above are indeed prescient and reasoned words to be heeded. This represents a genuine issue in the architecture of the system of normative sources and, particularly, in the established political system and division of powers of the MSAR's legal order. Numerous warnings have been issued, and several suggestions have been embraced by our legislator.

For example, as JOÃO ALBUQUERQUE affirms,

¹¹⁷ Xu Chang, 'Litígio e Respectiva Resolução sobre a Competência Regulamentar dos Regulamentos Administrativos da Região Administrativa Especial de Macau' [2012] *Revista de Estudos de 'Um País, Dois Sistemas'* 97.

¹¹⁸ Gomes Canotilho, *Parecer* (archived with the Author, 2008).

“A catalogue of subject-matters reserved to the Legislative Assembly is of little use — however vast or extensive it may be — if the mechanisms of judicial review, allowing for the control of independent (and delegated) regulatory activity by the Chief Executive, are not set up.”¹¹⁹

The simple truth is that, there currently exists no specific judicial procedure for such control or oversight, contrasting with the situation prior to the handover.¹²⁰

It is true that, before 1999, a preliminary draft of a special procedure for judicial review of normative acts under the Basic Law was made public. This explains the present administrative litigation proceedings’ reserved approach, only addressing the issue of legal — rather than constitutional — conformity with the Basic Law of administrative regulations. The latter term is employed herein broadly, encompassing executive orders and other normative enactments. The envisioned system of judicial review would have neither conflicted with the existing administrative procedural mechanism nor resembled a shallowed, strictly diffuse European continental-type system; it was well thought through, articulated and published (in terms of *travaux préparatoires*) in 1999 amidst concerns of a potential ‘black hole’ in Macau’s legal and judicial system in the absence of a concentrated/primary/direct judicial review mechanism.¹²¹

In other words, the mechanism currently set up for the control of the legality of

¹¹⁹ João Albuquerque, ‘Regime geral das leis e regulamentos administrativos’, (2009) 27 Boletim da Faculdade de Direito da Universidade de Macau 77, 123.

¹²⁰ Vast legal scholarship, in addition to the aforementioned, has been defending the creation of these mechanisms, especially after the approval of Law No. 13/2009. For example, Paulo Cardinal, ‘Região de Direito — alguns tópicos sobre fiscalização da constitucionalidade e jurisdição da liberdade num Direito (também) em Língua Portuguesa’ in Jorge Bacelar Gouveia (org), *Congresso do Direito de Língua Portuguesa* (Almedina 2010); Zhao Guoqiang, ‘O meio de tutela do processo executivo da Lei Básica’, (2002) 15(57) Administração 909; Jorge Godinho and Paulo Cardinal, ‘The Macau Court of Final Appeal – The First Decade’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 621 et seq; Guo Tianwu, ‘As sugestões das Leis Básicas de Hong Kong e de Macau para o alargamento do regime jurídico da China’ (2001) 14(51) Administração 219, et. seq; Guo Tianwu and Chen Xuezheng, ‘O problema da fiscalização da legislação dos regulamentos administrativos da RAEM’ (2011) 24(93) Administração 753; Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade – Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 361; António Malheiro Magalhães, ‘O princípio da separação dos poderes na Lei Básica da futura Região Administrativa Especial de Macau’ (1998) 11(41) Administração 709, 721; Wang Ai Min, ‘Aperfeiçoamento do sistema de fiscalização da Lei Básica de Macau’ (2007) 15 Perspectivas do Direito 77; Paulo Cardinal and Zheng Wei, ‘A Questão das Infracções Administrativas no âmbito do Sistema das Fontes Normativas internas estatuído pela Lei Básica e desenvolvido pela Lei n.º 13/2009’ (2012) 25 Administração 98; Xu Chang, ‘Litígio e Respectiva Resolução sobre a Competência Regulamentar dos Regulamentos Administrativos da Região Administrativa Especial de Macau’ [2012] Revista de Estudos de ‘Um País, Dois Sistemas’ 97; Chong Chan Chan, ‘Algumas Considerações sobre a Fiscalização da Violação da Lei Básica’ (2013) 3 Revista de Estudos de ‘Um País, Dois Sistemas’ 123, et seq.

¹²¹ *Projectos Relativos à Organização Judiciária de Macau* (Governo de Macau 1999). See also Viriato Lima and Álvaro Dantas, *Código de Processo Administrativo Contencioso Anotado* (CFJJ 2015) 282, explaining that the prohibition contained in Article 88, paragraph (2) of the Administrative Litigation Proceedings Code was justified only because, at the time, the enactment of a law, providing for a special procedure for the judicial review of legality of legislative norms, was genuinely expected.

administrative regulations was designed piecemeal,¹²² as solely part of a whole judicial review complex, to be completed with a special procedure to ensure effective oversight over the conformity of all normative acts with the Basic Law.

The non-adoption of this mechanism has left an important and persisting *lacuna* in our legal system, which is more profound than merely a gap, omission, or loophole. The necessity lies in either enacting a law on the judicial review of the conformity of normative acts with the Basic Law or empowering the Courts to, *sua sponte*, forgo applying illegal normative acts (or illegal norms contained therein) in their decisions — beyond issuing *declaratory* rulings on the illegality of such acts for non-compliance with the Basic Law. This non-application would strictly have a horizontal *inter partes* effect and would not compromise the normative act's validity or effectiveness within the MSAR's legal order.

The courts of the neighbouring Hong Kong Special Administrative Region (hereinafter HKSAR) have adopted a divergent approach¹²³ when confronted with an analogous dilemma and a Basic Law of great similarity.¹²⁴

Needless to say, the foregoing does not exclude the political “oversight” by the Standing Committee of the National People's Congress, by means of the reporting of laws for record therewith, as established in Article 17 of the Basic Law and via the official interpretation under Article 143 of said fundamental law. The Basic Law does not extend such requirement to other normative acts, ie administrative regulations, even if such are independent in nature and directly grounded on the Basic Law.¹²⁵ Nor should it make one lose sight of the limits inherent to the existing, insufficient system, namely the restrictive scope and avenues made available by our administrative litigation system, which do does not contemplate the declaration of illegality of administrative regulations that directly contravene norms or principles of the Basic Law. This issue is exacerbated given that the enactment of independent administrative regulations, directly based on the Basic Law, is

¹²² See eg José Cândido de Pinho, *Manual de formação de direito processual administrativo contencioso* (CFJJ 2013) 190 et seq. See, however, José Cândido de Pinho, *Notas e Comentários ao Código de Processo Administrativo Contencioso*, vol I (CFJJ 2018) 612; and Viriato Lima and Álvaro Dantas, *Código de Processo Administrativo Contencioso Anotado* (CFJJ 2015) 282–83, arguing that Article 88, paragraph (2) of the Administrative Litigation Proceedings Code should be considered repealed; therefore, nothing should prevent an *erga omnes* judicial ruling of illegality of norms contained in administrative regulations when such norms do not conform with hierarchically superior normative sources, such as, *inter alia*, the Basic Law and international conventions.

¹²³ Radically different, if one looks at the first three years of the MSAR as a basis for comparison, for example, CFA Decision No. 4/2000, or, CFA Decision No. 8/2000. Gradually, though, the superior courts of the MSAR have become more attentive to the role that the judicial system has to play when faced with acts which do not conform with the local constitution. This trend will require a long evolutionary process.

¹²⁴ See, *inter alia*, Simon Young and Yash Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press 2014), and the Special Issue Commemorating the 10th Anniversary of The Hong Kong Special Administrative Region, (2007) 37(2) Hong Kong Law Journal. One wishes to draw your attention, once again, to the landmark cases *Ng Ka Ling and Another v The Director of Immigration (No 1)* (1999) 2 HKCFAR 4, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211, and *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82.

¹²⁵ One might be tempted to say that there is a “presumption of confidence” by the sovereign regarding the normative acts enacted by the regional Government.

permitted.

This scenario is potentially problematic, irrespective of the almost unlimited supremacy of the executive power or the existence of blind and unwavering confidence in a specific holder of the highest regional office. In fact, these recitals contain little or nothing from the domain of legal science or jurisprudence. Alas, at times, public law issues in Macau, or at least some of them, are approached not from a legal angle, both technically and scientifically, but rather through the lens of more political (or politicised) sciences, or, if I may be so bold, of non-science.

The current level of academic discomfort is encapsulated in the following cautious and unsuspected words:

“Any political Constitution must establish its own mechanism for the purposes of controlling legality, this being an internal requirement and an essential manifestation of modern democratic politics. This law created, for the first time in the history of Macau’s political system, the power of enacting independent administrative regulations by the Chief Executive. However, in the event that an efficient oversight mechanism is not established, in the event of failures, there shall be difficulties with a view to their timely correction, to the detriment of the party unable to resolve them; this is a serious problem, not easily solved under our current legal system. [...] In this legal context, we boldly assume that whatever the reasons underpinning the Chief Executive’s use, on a large scale, of independent administrative regulations to regulate subject matters that have not yet been subject to enactment under the form of a law — and were not subject to a legislative initiative by the Legislative Assembly itself — whatever the defect and even the error that might exist in the theory or practice of the independent administrative regulations enacted by the Chief Executive, unless this organ corrects or improves such normative act(s), it shall be difficult for other authorities to interfere or to introduce corrective measures. Even if the courts exercise the power of judicial review, they will be thwarted, due to the lack of legal grounding. All of this reflects an extremely abnormal organisation of power. The laws approved by collegial deliberation in the Legislative Assembly of the Region must be submitted to the Standing Committee of the National People’s Assembly for the purposes of record, in accordance with the Basic Law, and it is possible that such laws be returned for legal reasons and reappraisal, in order to be deemed ineffective, while the administrative regulations enacted by the Chief Executive, through an individual’s decision, do not have to be reported to any authority for the purposes of record are immune from restrictions. One can imagine the risk worthy of our attention and

vigilance.”¹²⁶

Thus, I conclude this set of reflective remarks, which I hope proved to be useful as an introductory guide, and also fruitful in providing background and connections with several issues.

Moving along.

¹²⁶ Xu Chang, ‘Litígio e Respectiva Resolução sobre a Competência Regulamentar dos Regulamentos Administrativos da Região Administrativa Especial de Macau’ [2012] *Revista de Estudos de ‘Um País, Dois Sistemas’* 97.

V.

MULTITUDE OF SOURCES VERSUS CENTRALITY OF THE RULES OF PROCEDURE OF THE LEGISLATIVE ASSEMBLY

1. Introduction

This chapter is also intended, up to a certain point, to encompass an introductory nature — of streamlining preliminary notions regarding the object of the present text.

One of the key ideas, sometimes left out of studies on legislative procedures, is this: while the norms concerning the legislative procedure find their centrality in the Rules of Procedure of the Legislative Assembly,¹²⁷ the latter do not embody the totality of such procedural norms. There is, in fact, a gamut of other normative acts that converge in the regulation of the legislative procedure, as indeed occurs in other legal orders, especially when the legislative procedure is seen as the set comprising all the norms which, in turn, regulate all the acts and all the moments or stages leading up to the normative act designated as Law.

Accordingly, the MSAR's legislative procedure spreads out from several sources, including, but not limited to, the constitutional order. The major sources are the Basic Law, the Joint Declaration, Law No. 3/1999, Law No. 13/2009, the Rules of Procedure of the Legislative Assembly, and in a few cases, *special* legislation, for example, the one regulating the Legal Status of Lawyers, which establishes prior consultation duties regarding certain subject-matters.

One must necessarily ponder the issue of other possibly legitimate sources: whether they indeed exist, and to what extent they would or conform the legislative procedure. Here, I am thinking of in-house usages and customs.

A distinction can also be drawn between internal and external sources of the legislative procedure: the former comprises the Rules of Procedure, Committees' rules of procedure, parliamentary customs, parliamentary usages, intra-parliamentary case-law; the Constitution, ie the Basic Law, international law — and, particularly in the MSAR,

¹²⁷ In other legal orders, in the respective parliamentary Rules of Procedure and other types of Rules, such as, in Portugal, the Rules of Procedure of the Council of Ministers, with respect to the governmental legislative procedure. On this issue, see eg Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 259, et seq.

the Joint Declaration — along with individual/piecemeal laws, constitute the latter grouping.¹²⁸

The Rules of Procedure are the centralising vortex — laying down the chain of acts and events, developing the constitutional norms, governing new subject matters, and anchoring the procedural sequence. The Rules are the roadmap of formal lawmaking.

One forewarns that the scope of the Rules of Procedure goes beyond strict lawmaking and establishing the legislative procedure.

Indeed, it plunges into a multitude of issues, encompassing Members' functional powers and duties—not only in legislative matters but also in others, such as political scrutiny. They address the various singular and plural bodies of the Legislative Assembly and their respective competencies and powers, including the President, Board, and Committees. General rules regarding the functioning of the Legislative Assembly, such as seat allocation, normal functioning periods, official languages, functioning of the Plenary meetings, acts of the Legislative Assembly, and rules on publicity, *inter alia*, are also covered. The Rules further govern the process of passing resolutions, and scrutiny processes—including questioning Government action, debates on matters of public interest, hearings and petitions processes, the debate on the Government Annual Policy Action Address, and examining the Report on the execution of the MSAR Budget.

Based on these initial ideas, a brief look at other sources of the legislative procedure, other than the Legislative Assembly's Rules of Procedure, might prove insightful.

Let us begin at the top, from the constitutional level.¹²⁹ The Basic Law conditions and molds the legislative procedure *ex ante*, *intra*, and *ex post*. This interaction is acknowledged and thus, received/integrated into the Rules of Procedure. Such a situation is perfect common one under comparative law and manifests the umbilical cord that exists between parliamentary rules of procedure and the constitutional order concerning these issues. When all is said and done, lawmaking is a Public Law mission of the utmost political relevance, reflecting the traditional essentiality of a *State*.¹³⁰

¹²⁸ For more developments, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014) *passim*.

¹²⁹ As stated by Gustavo Gramaxo Rozeira, 'A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar' (European University Institute 2009) 238, "the regulation of the parliamentary legislative procedure is therefore inextricably linked to the need to trace, within the legal-constitutional framework, the precise contours of the sphere of intervention of each of the subjects and political-constitutional actors, with different titles and different degrees of intervention, to participate in the formation of the legislative will/intent". And, ahead, clearly and with several scholarly references, "The Constitution is, however, undoubtedly the primary regulatory source of the legislative procedure [...] It is in the constitution that we find the main determining norms, the maximum guidelines": pp, 250–251.

¹³⁰ Despite the growing pressure coming from supra-national organisations and from regulatory phenomena of a private nature.

2. The Constitution of the Legislative Process under the MSAR Basic Law¹³¹

In a not too taxing effort, one may attempt to find more than a veneer of a *constitution of the legislative process*, under the Basic Law.¹³² Such an endeavour is far from useless. It facilitates the identification of norms that, while incorporated into the Rules of Procedure, fundamentally emanate from constitutional origins rather than being merely procedural. Furthermore, this examination broadens the horizon into a better understanding of the relevant co-ordinates governing the subject-matter in hand.

The said *constitution* is structured into two levels: a first one, relative to the norms directly and immediately governing aspects of the legislative procedure and, in a second level, containing norms that shape — indirectly or in a reflexive effect — the legislative procedure.

The following examples stem from the *first level*:

Article 8 underscores the principle that there exist “legal procedures” for the “amendments” to normative acts and necessitates their adherence. Essentially, it enshrines the concept of a legislative procedure.

Article 11 mandates the principle of constitutionality (or constitutional conformity), meaning no law or any other normative act may contravene the Basic Law. This principle integrates the safeguarding of the Basic Law into the legislative procedure itself.

Article 17 affirms that the Macau Special Administrative Region is vested with legislative power. It further establishes that reporting to the Standing Committee of the National People’s Congress does not impede a law’s entry into force. Strictly speaking, there is a political-administrative procedure for overseeing the compliance of laws with *segments* of the Basic Law, conjoined *ex post* the legislative procedure *per se*.

Article 18, by reference to Article 8, mentions the laws enacted by the legislative body of the Macau Special Administrative Region. In the former provision, the Basic Law enshrines, in general terms, the legislative power of the MSAR, whereas the latter provision develops such constitutionally granted power, which is materialised through laws enacted by the legislative body.

Article 50, paragraph (3) established that the Chief Executive of the Macau Special Administrative Region is the competent entity to sign the bills — be they introduced by the Government or by Members — that are approved by the Legislative

¹³¹ I refer only to the Basic Law. Being a Constitution *in a broad sense*, the Basic Law does not correspond to the constitutional order of the MSAR since I deem such order to be multi-composed and multileveled, comprising, at least, the Basic Law, parts of the Constitution of the PRC and the Joint Declaration.

¹³² Similarly, one may identify a constitution on criminal justice issues, a fiscal constitution, etc

Assembly, and to order their respective publication.

Article 51 establishes the right of the Chief Executive of the MSAR to veto bills: when the holder of such office considers that a bill approved by the Legislative Assembly is not compatible with the overall interests of the Region, he or she may return it to the Legislative Assembly within 90 days,¹³³ for reconsideration, together with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the original bill by not less than a two-thirds majority of all the Members, the Chief Executive must sign and order publication thereof within 30 days or dissolve the Legislative Assembly in accordance with Article 52 of the Basic Law.

Article 58, by requiring that the Chief Executive consult the Executive Council before introducing Government bills to the Legislative Assembly: only such prior formal consultation is mandatory, not any substantive assent, nor authorisation of any kind for introduction of such bills. These must contain an express indication that said Council was consulted. One may conclude that this consultation is a necessary element in shaping and completing a Government bill, ie by alluding to the formal act of original legislative impetus coming from the executive branch of power, corresponding to the constitutionally provided for type of act designated as “Government bill”. The Basic Law is silent on supervening and Government legislative initiatives — ie bills to amend bills or, rather, amendment proposals to bills...

Article 64 confers on the Government of the Macau Special Administrative Region the competence to introduce the aforementioned bills.

Article 67 establishes that the Legislative Assembly of the Macau Special Administrative Region is the legislative body of the Macau Special Administrative Region.

Article 71 establishes that the Legislative Assembly of the Macau Special Administrative Region has the competence, under paragraph (1), to enact, amend, suspend, and repeal laws, under the terms of the Basic Law¹³⁴ and, with particular emphasis on the subject matter under scope, also “*in accordance with legal procedures*”,

¹³³ What would be the legal solution if, during this period, the bill can only be returned to a new Legislative Assembly due to the beginning of a new legislature? A thought experiment: a Member’s bill approved in the last Plenary meeting of the legislature; in the course of such 90 days, there will be a new legislature in place (or a “new Assembly” as is sometimes said in Macau, and technically a misnomer, for there is only one Legislative Assembly as an institution — the composition of which is periodically renewed, under constitutionally and legally defined procedures and deadlines.) Will the Chief Executive necessarily have to shorten the period of 90 days and send it to the Legislative Assembly, with a view to holding a meeting thereof after the term of the legislative session? If the bill is confirmed, does it make sense to dissolve a Legislative Assembly, which, in any event, will very soon cease to function? On the other hand, if the *new* Legislative Assembly confirms the bill approved by the *previous* one, could the body be dissolved in its early days? Would such a scenario make constitutional and political sense?

¹³⁴ And also: “2) Examine and approve the budget bill introduced by the Government and assess the report on the execution of the budget submitted by the Government; 3) Define, based on a bill introduced by the Government, the essential elements of the taxation legal framework, and authorise the Government to incur debts”.

ie appealing, yet again, for the general idea of legislative proceduralisation.

Article 74 specifies that the President of the Legislative Assembly of the Macau Special Administrative Region has the power to decide on the agenda and to give priority to Government bills for inclusion therein, if so requested of the Chief Executive.

Article 75 enshrines a core rule with respect to the important issue of legislative initiative:¹³⁵ Members of the Legislative Assembly of the Macau Special Administrative Region may introduce bills under the terms of the Basic Law and in accordance with legal procedures (again the idea of legislative proceduralisation).

Bills which do not relate to public revenue and expenditure, the political structure or the operation of the Government may be introduced, individually or jointly, by Members. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.

Article 77 establishes the quorum for the meeting of the Legislative Assembly of the Macau Special Administrative Region shall be not less than one-half of all its Members. And, unless otherwise expressly provided for under in the Basic Law, the Members' bills¹³⁶ are approved with the votes of more than half of the total number of Members — imposing a demanding absolute majority, thus potentially blocking the approval of bills that may not have gained a widespread consensus; such a state of affairs is indeed uncommon in comparative law and marks a discontinuity *vis-à-vis* the legal-constitutional framework previously in force. In addition, one should take heed that, in the name of the separation of powers, the Legislative Assembly is exclusively competent to define its Rules of Procedure, in a manner not contradictory to the Basic Law.

Article 78, by reaffirming that bills approved by the Legislative Assembly of the Macau Special Administrative Region may only enter into force after being signed and published by the Chief Executive. This mechanism is akin to a promulgation.

The next examples are taken from the *second level*, as explained above:

Article 9 establishes that in addition to the Chinese language, the Portuguese language may also be used as an official language by the executive, legislative and judicial bodies of the Macau Special Administrative Region. Portuguese is also an official language, thus entrenching the MSAR's official bilingualism.

¹³⁵ See also, in the context of areas reserved legislative initiative, Annex II of the Basic Law, "2. the specific method for electing Members shall be specified by an electoral law **introduced by the Government** of the Macau Special Administrative Region and approved by the Legislative Assembly"; and, under Article 71, "(2) Examine and approve the budget bill **introduced by the Government**, and assess the report on the execution of the budget submitted by the Government; (3) Define, based on a **bill introduced by the Government**, the essential elements of the taxation legal framework, and authorise the Government to incur debts". (boldface added)

¹³⁶ The Portuguese language version of the Basic Law omits Government bills and only mentions Members' bills in Article 77, unlike the *letter*, for example, of Article 78 of said official version. According to what I have been told, the *spirit* of the Chinese language version of Article 77 seems to suggest the intention of covering both types of bills; such an interpretation is not, however, clear-cut nor undisputable.

Several norms on fundamental rights, both *within* (eg Articles 26, 29, 32, 40) and *without* Chapter III (for example, Articles 6, 7, 103, 128), when expressly linked to the principle of the existence of areas reserved to the law.¹³⁷

Article 74, paragraph (6) confers to the President of the Legislative Assembly of the Macau Special Administrative Region the exercise of other powers and functions, as prescribed in the Legislative Assembly's Rules of Procedure.

Article 84 establishes that the subject-matters relative to the organisation, competences and functioning of the courts of the Macau Special Administrative Region shall be reserved to the law.

Article 90 states that the organisation, competences and functioning of the Public Prosecution Service of the Macau Special Administrative Region shall be regulated by law.

Article 96 provides that the competences and functions of municipal bodies shall be regulated by law.

Article 107 prescribes that the monetary and financial systems of the Macau Special Administrative Region shall be defined by law.

This short and incomplete list illustrates how the Basic Law commands many facets of the legislative procedure. The constitutional norms are *ipso facto* mandatory, radiating towards — and illuminating — all other norms pertaining to the legislative procedure. Many of the latter norms, as contained in the Rules of Procedure, are verbatim transcriptions of the former ones.

3. “In accordance with legal procedures” as a Constitutional Pole

A fine-tuning exercise is warranted, whereby one might seek to axially buttress — or stabilise the seemingly tilting poles of — Macau's relatively *immature* system of norm-making. The Basic Law's frequent reference to the terms “*according to legal procedures*” and its equivalent “*in accordance with legal procedures*”, especially in Articles 8, 71, and 75, highlights the concept of the legislative procedure.¹³⁸ Moreover, it alludes to the fact that certain laws, and normative acts like the Rules of Procedure, must adhere to other laws,¹³⁹ precisely when the legislative procedure *in a broad sense* is considered. Specifically, this refers to Law No. 13/2009 concerning the framework of the internal

¹³⁷ See, for example, José Melo Alexandrino, O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau (CFJJ 2013)135 et seq.

¹³⁸ And legislative procedure primarily, but not exclusively, understood as what is determined in the Rules of Procedure. On the same provision applicable in Hong Kong, P Y Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 446.

¹³⁹ See, under comparative law, the explicit formulation of this principle, for example, in Article 112, paragraph (3) of the Portuguese Constitution.

sources of legal norms¹⁴⁰ and Law No. 3/1999 on the forms and templates of legal enactments.¹⁴¹ These laws are substantively conforming laws, of a parametric nature. Although not specifically mentioned, nor placed, under the formulation “*in accordance with legal procedures*” (or equivalent¹⁴² ones), such laws do have a *residuary or remanent* application and effectiveness.¹⁴³

The constitutional backdrop secures these laws as buoys in parametric waters — certain norms contained in such legislation do play the role of conforming other laws, namely in the drafting process.

Within this residuary mesh of conforming laws — in local legalese, of making laws *in accordance with legal procedures* — I have also included other norms. For instances, those impose consultations and/or hearings during the legislative procedure, for example,¹⁴⁴ Article 30, paragraph (3) of the Legal Status of Lawyers:¹⁴⁵ “*The Association shall be heard, on a mandatory basis, on legislative drafts concerning the judiciary organisation, the practise of law, civil procedure and criminal procedure.*” Similarly, Article 95, paragraph (15) of Law No. 10/1999, on the Legal Status of Magistrates: “*The Council of Judicial Magistrates has the competence to issue an opinion on legislative projects concerning the General Framework Law on the Judiciary Organisation and the Legal Status of Magistrates.*”

Other cases of this general typology do exist, as I shall demonstrate below. One should be careful in noting that a legal obligation to consult *per se* is distinct from the issue of *when* and *who* shall carry out such consultation. Each subject-matter is governed differently — for instance, the role of the Macau Lawyers’ Association (MLA), as a co-participant in lawmaking, may not be confused with the Government bodies whose function is to support, and provide consultation, *solely* to the Chief Executive, with the exclusion of the Legislative Assembly and the Members thereof, eg the Executive Council and the Permanent Council for Social Dialogue.

4. The Sino-Portuguese Joint Declaration on the Question of Macau

A quick glance at the — so often overlooked, yet fundamentally structuring, pre-

¹⁴⁰ This law is substantively parametric in nature, for the reasons explained above, namely because it develops and implements the framing of the internal sources of norms in accordance with the pre-requisites laid down in the Basic Law.

¹⁴¹ On the comparable Portuguese law, with clear substantive and formal similarities with the MSAR statute, see eg Alexandre Sousa Pinheiro, ‘Artigo 112.º’ (2008) 3 *Comentário à Constituição Portuguesa* 153, who alerts that the law contains provisions of a different nature, the contravention of which entails, in some cases, no more than an irregularity, while, in others, the resulting penalty is illegality.

¹⁴² With points of convergence, and hence the relevance within the scope of the MSAR’s legal order, Alexandre Sousa Pinheiro, ‘Artigo 112.º’ (2008) 3 *Comentário à Constituição Portuguesa* 153.

¹⁴³ With points of convergence, and hence the relevance within the scope of the MSAR’s legal order, Alexandre Sousa Pinheiro, ‘Artigo 112.º’ (2008) 3 *Comentário à Constituição Portuguesa* 153.

¹⁴⁴ On this issue, for example, Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 192.

¹⁴⁵ Approved by Decree-Law No. 31/91/M, of 6 May 1991.

determining and mooring — Joint Declaration allows one to extract from this international treaty,¹⁴⁶ either directly or reflexively (as norms on the legislative power), the following rules with relevance to the legislative procedure:

The Macau Special Administrative Region shall be vested with legislative power — paragraph (2), subparagraph (2), and Annex I,¹⁴⁷ point I.

The legislative power of the Macau Special Administrative Region shall be granted to the legislative body of the Macau Special Administrative Region, — Annex I, point III.

The legislative body of the Macau Special Administrative Region may, on its own, enact laws according with the provisions of the Basic Law and legal procedures. The Joint Declaration, in anticipation of the Basic Law, lays the groundwork for the idea of legislative procedure: “according with ... the legal procedures”: Annex I, point III.

The principle that fundamental rights are areas reserved to the law: paragraph (2), subparagraph (4), and Annex I, point V.

The principle of the two official languages within the scope of the legislative body: paragraph (2), subparagraph (5).

In a gist, the Joint Declaration contains normative references, directly related or closely associated, to the legislative procedure, which are from negligible.

5. The Legislative Assembly’s Rules of Procedure: Referral

It goes without saying that the primary source for understanding the legislative procedure is the Rules of Procedure. A comprehensive examination of these rules is set for a subsequent discussion.

¹⁴⁶ There is absolutely no doubt — legally or for any other reason — that the Joint Declaration of the Government of the People’s Republic of China and of the Government of the Portuguese Republic on the Question of Macau, signed by Zhao Ziyang and Cavaco Silva, published in the Macau OG, No. 23, 3rd Supplement, on 7 June 1988, is a true international treaty, for the purposes of the Vienna Convention on the Law of Treaties, As an international treaty, valid and in full effect, having been duly deposited by both signatory parties at the UN, in the exercise of their sovereign powers in the international sphere. Although said treaty is multi-composed (eg body and annexes) and is formally designated as a “declaration”: such circumstances in no way affect the nature of such instrument, in its entirety, under international law. In fact, point 7 of the body thereof establishes: “*The present Joint Declaration and its Annexes shall have equal binding force.*” This international treaty will cease to be effective under the terms therein provided for, ie with the lapsing of the period of 50 years: “*12. The fundamental policies mentioned above and the respective clarifications in Annex I to the present Joint Declaration shall be established in a Basic Law of the Macau Special Administrative Region of the People’s Republic of China by the National People’s Congress of the People’s Republic of China and shall remain unchanged for fifty years.*” See also Appendix I, I of the Joint Declaration.

¹⁴⁷ Entitled Clarification by the Government of the People’s Republic of China on the Fundamental Policies Regarding Macau.

6. Law No. 13/2009, Legal Framework Governing the Internal Sources of Norms

I have briefly described above the historical motivation, nature, and function of this law, which is, indeed, also a law about/on laws.¹⁴⁸

This law, under Article 1, “develops the legal framework governing the internal sources of legal norms, under the terms of the Basic Law of the Macau Special Administrative Region [...]”. Naturally, said law also affects the legislative procedure in several aspects.

Under Article 2, the purposes of Law No. 13/2009 are, namely: to establish the fundamental principles of the legal framework governing laws and administrative regulations; and to enunciate the subject-matters that fall within the scope of formal laws. This is performed either by means of a general norm — simultaneously agglutinative and self-excluding, “*The Legislative Assembly exercises the competences provided for in the Basic Law of the MSAR, for enacting, amending, suspending and repealing laws on any and all matters within the scope of the autonomy of the MSAR.*”¹⁴⁹, or in menu-type norms, including, for instance, the legal framework of fundamental rights and freedoms or the status of Macau residents.¹⁵⁰

The general rule of competence articulated in Article 5 demonstrates an inclusive approach since the Legislative Assembly may enact laws on all matters, beyond those provided for under Article 6 — nothing is excluded from the lawmaking power of the Legislative Assembly, with the natural exception of matters residing outside the limits of the MSAR’s autonomy (which explains the self-exclusionary feature).

This point is very cogent at several levels and decisively interferes in the moulding and conformation of the legislative procedure.

The Rules of Procedure are silent on the fate of bills that contravene the Basic Law. For instance, when a bill intends to regulate matters that are outside the perimeter of the MSAR’s autonomy, which clearly would be violating the options solemnly enshrined in the Basic Law itself.¹⁵¹

¹⁴⁸ Such law is infused with “*borrowed constitutionality*”: as analysed above, Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade - Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 355.

¹⁴⁹ Article 5 of Law No. 13/2009.

¹⁵⁰ Article 6 of Law No. 13/2009.

¹⁵¹ In this regard, it is worth recalling Draft Resolution No. R1/I/1999-1, which recommended the following most appropriate wording (albeit with an alternative version) to Article 110 of the Rules of Procedure of the Legislative Assembly:

“(Organic and material limits) — The President of the Legislative Assembly, shall summarily reject Members’ bills, Government’s bills, and proposals containing amendments thereto, which:

The segment “*on any and all matters within the scope of the autonomy of the MSAR*”¹⁵² enables, in my view, the President of the Legislative Assembly to issue a decision of preliminary immediate rejection, similarly to that which is provided for under Articles 107 and 108 of the Rules of Procedure.

Article 4 establishes the main types of normative acts, including, naturally, the law. A single type and form of law exists, unlike the duality of administrative regulations.¹⁵³

Paragraph (2) of this same Article 4 establishes the legal principles to which it is worth returning:

“The law shall have a determinate, precise and sufficient content that includes a clear prescription of the commands intended to create legal norms of conduct for the addresses, rules of action for the administration and standards of control for judicial decisions on disputes.”

In essence, we revisit the bottom-line of the principle of sufficiency or completeness¹⁵⁴ of laws.

I would like to put forth an additional, different, yet non-contradictory perspective, vis-à-vis the ones expounded in the previous chapter.

This time, the objective is to seek a deeper interconnection between the principle of the completeness of laws and the idea — a noble and necessary one in a Region under the Rule of Law (*Rechtsregion*) — of a substantive area reserved to the law in matters pertaining to fundamental rights.

- a) Contravene the principles or the norms provided for in the Basic Law;
- b) Contravene the principles or the norms provided for in conventions, treaties, pacts, agreements and other instruments of International Law in force in the MSAR’s legal order;
- c) Contravene the general principles of law in force in the MSAR’s legal order;
- d) Contravene the provisions of Articles 107 and 108;
- e) Omit the specific definition of the meaning or direction underlying the modifications to be introduced into the legal order.”

This draft text — a much more clarifying and adequate solution for the substantive normative limits to which the Legislative Assembly is bound — was not approved and thus not included in the Rules of Procedure.

¹⁵² Article 5 of Law No. 13/2009.

¹⁵³ “There are now two types of administrative regulations: independent administrative regulation by the Chief Executive and complementary administrative regulation by the Chief Executive.”: FSC, Report No. 3/III/2009, “Administrative regulations include two types: independent administrative regulation of the Chief Executive; complementary administrative regulation of the Chief Executive”: Guo Tianwu and Chen Xuezheng, ‘O problema da fiscalização da legislação dos regulamentos administrativos da RAEM’ (2011) 24(93) Administração 753, 753 (especially 757). These authors apparently entertain the idea that the primacy of the law over administrative regulations, stemming from the hierarchical relationship between these two types of internal sources of norms, as having been being weakened, due to both strata needing to be in conformity with the Basic Law. The fact agreed upon that both laws and administrative regulations must obey the Basic Law, as the superior fundamental text, does not, within the current constitutional framework, rule out the principle of the primacy or prevalence of the law, which entails the squashing of conflicting administrative regulations.

¹⁵⁴ The point is not to tediously undermine administrative regulations. My sole intent is to draw attention to the fact that this principle and legislative provision are often forgotten. In the future, in the event of a possible reform of Law No. 13/2009, this issue may naturally be subject to reconsideration and careful reconfiguration. Likewise, others contained in said law, provided that the modifications are not unidirectional and unbalanced.

Quoting the learned JOSÉ MELO ALEXANDRINO, writing about the MSAR's legal order:

“It is commonly said, in this matter of fundamental rights and freedoms, that a principle of a substantive (and not just a formal) zone reserved to the law applies; the substantive perspective means, quite simply put, that norm-making, with respect to fundamental rights and freedoms, is governed exclusively by the law, with two main dimensions: (i) a negative one, signifying that the matters reserved to the law may not be governed by other sources; (ii) a positive one, entailing that the law must define, with a sufficient degree of certainty, precision and fullness, all that which might be related to the restriction, configuration or regulation of fundamental rights.”¹⁵⁵

The same illustrious Author immediately settles the issue within the legal order of the MSAR, and with particular incisiveness to my discussion:

“Interestingly, this second dimension [...], which is the most difficult, is provided for in Macau's legal order, in the interesting Article 4, paragraph (2), of Law 13/2009, of 27 July — practically summing up what I just said.¹⁵⁶ [...]

This substantive zone reserved to the law is absolutely required in laws that are restrictive of fundamental rights and freedoms. [...]

Beyond these cases, the Legislative Assembly has self-limited itself,¹⁵⁷ being bound by such substantive requirement in relation to other hypotheses: it is, in my opinion, a useful norm, which has a guiding and pedagogical function [...] clarifying that, whenever the law contains rules of conduct for individuals (but also rules of action for the Administration and control standards for the judge), it must have a determinate, precise and sufficient content (ie the law must not be limited to defining the minimum rules, nor may it leave essential aspects unregulated, much less may it adopt vague, empty expressions or defer regulation to other sources). The law must have sufficient density and determinability in its content, otherwise the Administration's margin for intervention in the sphere of individual freedom shall expand unduly.”¹⁵⁸

The principle of completeness of laws is already ingrained in the legal order of MSAR and performs useful functions, particularly when it comes to issues as valued and deserving of protection as fundamental rights.

¹⁵⁵ José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013) 136–137.

¹⁵⁶ *ibid* 137; a transcription of said norm follows.

¹⁵⁷ “Even though it might repeal such norm contained in a subsequent law.”

¹⁵⁸ José Melo Alexandrino, *ibid*, 137–138.

Article 6 provides for as open-ended catalogue¹⁵⁹ of matters on which norm-making is reserved to the law. This encompasses those that explicitly or easily result from the Basic Law, such as fundamental rights (and the legal framework governing fundamental rights, freedoms, and respective guarantees, as provided for in the Basic Law and in other legislative acts),¹⁶⁰ crimes, criminal procedure, forms and templates of normative acts, budget, legal framework on taxation, environment, expropriation, along with others. While many of these issues unambiguously stem from the Basic Law, some, such as the Commercial Code,¹⁶¹ civil procedure and arbitration proceedings, registration and notary codes, legal framework on urban development, Legal Status of the Members of the Legislative Assembly, legal framework on the structure, functioning and staff of the Legislative Assembly's support services, and, last but not least, the Civil Code,¹⁶² might be seen as less directly derived.

7. Law No. 3/1999, Publication, Forms, and Templates of Legal Enactments

If one changes direction to another law on laws, an inevitable point of arrival is the law on forms and templates of legal enactments.

The said law contains several norms that intersect with the legislative procedure.

Article 1 establishes that the official journal or bulletin of the MSAR is the OG, wherein the legal enactments under the purview of such law shall be published. Laws, specifically, are published in Series I of the O. G, as per Article 3, paragraph (1).

Article 3 sanctions the “*legal ineffectiveness*” of laws when they are not

¹⁵⁹ See paragraph (19), “*Other matters conferred by the Basic Law to the Legislative Assembly*”. For example, one might revisit the areas reserved to the law, relating to the organisation, competences and functioning of the Courts, the Public Prosecution Service and the municipal bodies. See, in more detail, FSC, Report No. 3/III/2009, “*And, prudently – given that it would be very difficult to complete the set or list of matters reserved to the law – it ends with the following rule: “(19) Other matters conferred by the Basic Law to the Legislative Assembly.” In these other matters, we can mention, for example, the organisation, competence and functioning of the Courts and the Public Prosecution Service, the competence and constitution of municipal bodies, compulsory education, the protection of scientific and technological research, patents, discoveries and inventions, the protection of the results achieved by authors in literary, artistic and other creations, as well as their legitimate rights and interests.*”

¹⁶⁰ To which one should add the rights and freedoms provided under instruments of international law. In this sense, FSC, Report 3/III/2009, “*In addition, naturally, under the terms of Article 40 of the Basic Law, the instruments of international law, which may thus be, and indeed are, sources of fundamental rights.*”

¹⁶¹ A very similar option is found in the Argentinian Constitution, Article 75, paragraph (12): “*The Congress shall:[...] Enact the Civil, Commercial, Criminal, Mining, and Labour and Social Security codes [...].*” See also Article 85 (1) of the Uruguayan Constitution and Article 202 (2) of the Paraguayan Constitution.

¹⁶² In fact, there was no shortage of suggestions that the Civil Code could be revised by simple administrative regulation... Taking aside the plain truth that the Civil Code contains matters reserved to the law and flow into the category of fundamental rights — legal personality, capacity, rights of personality, marital status, affiliation, norms on norms that open the Civil Code, as well as property rights, *inter alia* — what would happen to the dignity of the Civil Code, the backbone of our legal order, under the form of an administrative regulation? In general, the dignity and structural function of Codes in a legal system require that they be approved by law of the Legislative Assembly. Such clamour might have been only the result of a passing anti-parliamentary crucible.

published in Series I of the OG, despite the requirement of mandatory publication.

Article 6 confers unto the Chief Executive the competence to order the publication of the laws.

Article 7 refers — timidly and without properly completing the general formulation of the Basic Law — to the publication in the official languages, including that of the laws.¹⁶³

Article 9 alludes to, and regulates, the issue of rectifications/corrections. Although not directly related to the legislative procedure *per se*, it's pertinent as it allows for clarifications regarding whether: there is a need for rectification or correction; which specific text is subject thereto; and, finally, which is the rectifying or corrective text.

Article 11 deals with the titles of legal enactments, having introduced, without any improvements whatsoever, modifications to the previous legal framework on this issue. While the removal of “/M/” may be reasonable, the omission of the publication date (which formerly included day, month, and year) seems less so, especially when considering the significance of this information in discerning the succession of laws.

Finally, Article 12 lays down the formal template of laws, as transcribed below:

“1. The laws, as a rule, shall adopt, in their initial segment, the following template:

“The Legislative Assembly decrees, to be valid as law, under the terms of Article 71, paragraph....of the Basic Law, the following:”.

2. In the case of a law regulating a general legal framework contained in the Basic Law or in laws, the following template shall be applied:

“In the development of the fundamental legal framework established by Article..... of the Basic Law (or of Law No..... /.... of the Macau Special Administrative Region), the Legislative Assembly decrees, to be valid as law, under the terms of article 71, paragraph.... of the Basic Law, the following:”.

3. The laws approved by the Legislative Assembly shall contain, after the body of the text and in the following sequential order:

- 1) The date of approval;
- 2) The signature of the President of the Legislative Assembly;
- 3) The date of signature of the Chief Executive;
- 4) The order for publication;

¹⁶³ The idea of bilingual publication is naturally a consequence of a bilingual formal *legislative procedure*.

5) The signature of the Chief Executive.”

Paragraphs (1) and (3) of this Article are commonly adhered to in the practice of lawmaking in the MSAR; paragraph (2) has been rarely complied with, thereby generally omitting the development, by ordinary laws, of laws governing general legal frameworks.¹⁶⁴

8. Piecemeal Statutory Laws Establishing Rights to Consultation

Within the legislative landscape, certain laws bestow certain entities with special consultation rights, or conversely, impose duties to consult, during legislative procedures. This occurs when subject-matters directly related to those entities are under discussion or the law considers such issues to be especially relevant.

A first example appears in the hitherto untouched provision of Article 30, paragraph (3) of the Legal Status of Lawyers,¹⁶⁵ approved by Decree-Law No. 31/91/M, of 6 May:¹⁶⁶ the MLA shall be heard on bills pertaining to the judiciary organisation, the practise of law, civil procedure, and criminal procedure.

A second example is Law No. 10/1999, on the Legal Status of Magistrates, under which the Council of Judicial Magistrates has the right to issue an advisory opinion on legislative bills relating to the General Framework of the Judiciary Organisation and on the Legal Status of Magistrates.¹⁶⁷ The Council of Magistrates of the Public Prosecution Service has been granted the same competence.¹⁶⁸

¹⁶⁴ Five non-exclusive and rare examples of laws that correctly applied paragraph (2): Law No. 8/2005, on the Protection of Personal Data, “*In the development of the fundamental legal frameworks established by Articles 30, 32 and 43 of the Basic Law of the Macau Special Administrative Region, the Legislative Assembly decrees, to be valid as law, under the terms of Article 71, paragraph (1) of said Basic Law, the following:*”; Law No. 13/2012, on the General framework on legal aid, “*In the development of the fundamental legal framework established by Article 36 of the Basic Law of the Macau Special Administrative Region, the Legislative Assembly decrees, to be valid as law, under the terms of Article 71, paragraph (1) of the Basic Law of the Macau Special Administrative Region, the following:*”; Law No. 3/2002, on the Procedure for notification of requests within the scope of judicial cooperation: “*The Legislative Assembly decrees, to be valid as law, under the terms of Article 71, paragraph 1), and Article 94 of the Basic Law of the Macau Special Administrative Region, the following:*”; Law No. 8/2014, on the Prevention and control of environmental noise: “*The Legislative Assembly decrees, to be valid as law, under the terms of Article 71, paragraph (1), and of Article 119 of the Basic Law of the Macau Special Administrative Region, relative to the protection of the environment, the following:*”; Law No. 12/2018, on the Legal framework for guaranteeing the rights and interests of the elderly, “*In the development of the fundamental legal framework established by Article 38, paragraph (3) of the Basic Law of the Macau Special Administrative Region, the Legislative Assembly decrees, to be valid as law, under the terms of article 71, paragraph (1) of the Basic Law, the following:*”.

¹⁶⁵ As amended by Decree-Laws No. 26/92/M, of 4 May 1992, and No. 42/95/M, of 21 August 1995.

¹⁶⁶ As amended by Decree-Laws No. 26/92/M, of 4 May 1992, and No. 42/95/M, of 21 August 1995.

¹⁶⁷ Article 95, subparagraph (15) of Law No. 10/1999.

¹⁶⁸ Article 107, subparagraph (9) of Law No. 10/1999.

9. Rules of Procedure of the Legislative Assembly's Committees

Another possible source of the parliamentary legislative procedure¹⁶⁹ is comprised by rules of procedure adopted by each of the Legislative Assembly's Committees, regulating their functioning during the legislative process, especially in the examination in detail stage.¹⁷⁰

Indeed, Article 77 of the Rules of Procedure of the Legislative Assembly provides — precisely under the title *Committees' rules of procedure* — that each committee may draw up its own rules. In the absence of Committee rules, or in the event of omissions contained therein, the Rules of Procedure of the Legislative Assembly shall apply by means of analogy. This general norm is germane to all committees of the local parliament.

The Rules of Procedure, under Article 22, categorise committees into different types: the Legislative Assembly functions through the CRPMM and other committees. The latter encompasses Standing Committees, monitoring committees, with the added provision for the formation of ad hoc or specialised committees for specific issues.

The overwhelming majority of the legislative work is shouldered by the standing committees, of which three currently operate.

If effect, the monitoring committees seem to be excluded from the functions provided for in Articles 29 and 30, ie intervention in the legislative procedure.¹⁷¹ They were not designed, nor created, to replicate the functions of the standing committees.¹⁷²

In the rare instances when the ad hoc committees are created, they may sometimes have competences for the purposes of the legislative process,¹⁷³ as was the

¹⁶⁹ On these “minor rules of procedure”: see Chiara Di Seri, ‘I regolamenti “minori”’ (*Federalismi.It*, –Focus Fonti|n. 1/20182018) downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36851&content=&content_author=>>, therein elucidating “*With the expression “minor”: it is customary to allude to all acts – with the legal nomenclature of rules – that are different from the major and general parliamentary Rules of Procedure.*”

¹⁷⁰ Or in the case of voting, in committee, on the specifics of bill, which is permitted by the Rules of Procedure, albeit not currently practiced.

¹⁷¹ Nor would their *raison d'être* entail require or permit the exercise of such functions — the fact that the composition of each of these committees, at this moment, exactly mirrors the composition of each of the standing committees (only changing the President and Vice-President of each one), does not allow for the idea of duplication or competition between committees in the legislative process. In truth, a tendency towards a subject-matter specialisation would a priori be potentially fruitful.

¹⁷² Nonetheless, it may make sense, in theory, for monitoring committees to be allowed, within the scope of each standing committee's purview, to assist and follow-up on matters contained in bills, as assigned thereto by the latter committee, thereby taking advantage of a possible specialisation in analysis or work already undertaken by the monitoring committees, to be continued in the context of a legislative initiative. Such a solution, if adopted in a possible reform of the Rules of Procedure, could clarify the issue and be regarded as a step geared towards substantive specialisation of the committees in the legislative process itself. I must stress, once again, that the current composition and the parliamentary practice do not favour this evolutionary step, which does seem to be looked upon askance.

¹⁷³ Article 32 of the Rules of Procedure establishes that the ad hoc committees shall assess the matters that

case of the AHC for the Consideration of the Government Bill on the Legal Framework for the Operation of Games of Chance, the object of which was the bill entitled “*Legal framework for the operation of games of chance*”, giving rise to Law No. 16/2001.

The Committee on the Rules of Procedure and Members’ Mandates does not, in principle, intervene in the legislative processes, although there have been exceptions.¹⁷⁴

However, said Committee may indirectly influence the course of events, for instance, when asked to interpret the Rules of Procedure, address normative *lacunae* therein, or settle conflicts of competences between committees. Furthermore, it is the competent authority concerning the *legislative* procedure governing the Rules of Procedure *per se*, under the terms of Article 26(e) of such Rules.

Having performed this little introduction, an obvious question rears its head: what *committee(s) rules of procedure*, particularly pertaining to standing committees, are currently in existence? The answer is none, following a decades-long tradition and a general feeling that the practices on the ground have not required their enactment.

Nevertheless, procedural rules exist for the monitoring committees.¹⁷⁵ As aforementioned, these do not play a role in the lawmaking process. Such rules are not even formally designated as rules of procedure — which does not preclude such nature, considering Article 77, paragraph (1), of the Rules of Procedure of the Legislative Assembly, explicitly establishing that each committee may adopt up its own rules of procedure.¹⁷⁶

Although legally available, this legal source for the legislative procedure does not yet exist, because no rules of procedure have been approved by the standing committees, nor by the CRPMM. It would indeed be beneficial if a few foundational rules on legislative initiatives were in place...

Should these committee rules of procedure materialise, several issues shall have to be addressed.

The foremost query revolves around their normative essence. What type of norms shall they be? Will they have an external, or only an internal, binding effect? Will

justified their creation. In other cases, for example, the AHC for the Analysis and Improvement of Legislation for the Protection of Minors did not intervene in a specific legislative process, seeking instead to perform a diagnosis of the subject-matter in question.

¹⁷⁴ Cf CRPMM, Report No. 2/III/2009, Law No. 12/2009 “Amendment to Law No. 3/2000 - On the Legislature and on the Legal Status of the Members of the Legislative Assembly”: CRPMM, Report No. 2/III 2008, Law No. 14/2008 - “Amendment to the Organic Law of the Legislative Assembly of the Macau Special Administrative Region”.

¹⁷⁵ Eg the Monitoring Committee on Land Affairs and Public Concessions, the rules approved by Deliberation No. 1/2009. Subsequently, in the next legislature, we have rules of procedure, under the name of *Operating Rules*, for the Monitoring Committee on Public Finance Affairs, of the Monitoring Committee on Public Administration Affairs and, again, for the Monitoring Committee for Land Affairs and Public Concessions. These rules of procedure are substantively identical, with only minor variations.

¹⁷⁶ One can intuitively perceive the problem at hand, which is solely one of formal designation. For example, in the Rules of Procedure of the Assembly of the Republic, in Portugal, a different terminology is used: “*The standing parliamentary committees are competent: [...] j) To draft and approve their rules;*” Article 35.

they be regarded as purely *administrative*, ie as *regulations of parliamentary administrative law*, or merit another qualification?¹⁷⁷ Such rules possess singularities: they do not directly derive from the principle of constitutional legitimacy;¹⁷⁸ they are approved by the committees, and not by the Legislative Assembly as a whole, sitting in a Plenary meeting; and they do not benefit from the existence of areas or matters reserved to the committee's rules of procedure.

The second contemplation hinges on the alignment with the Rules of Procedure of the Legislative Assembly. These rules must inherently uphold a hierarchical link over committee rules rather than asserting a substantive uniqueness, meaning the committee's procedural rules shouldn't contradict the overarching Rules of Procedure of the Legislative Assembly¹⁷⁹ due to their subordinate stature. The primary Rules of Procedure inherently shape and influence the committee rules. Hence, the general principle of application of the law — according to which special norms derogate or imply the non-application of general norms — does not apply here. Committee rules should echo, elaborate, and potentially fill gaps within the overarching rules, without undermining the Legislative Assembly's foundational procedures.¹⁸⁰

A third dimension to consider is how these committee rules might engage with the areas reserved to the Rules of Procedure, which will be developed in a later chapter. Assuming such reserved domains, as hinted by the Basic Law and deeply rooted in Macau's constitutional traditions and practices, do exist, how will committee rules

¹⁷⁷ Cf addressing these and other important issues, Chiara Di Seri, 'I regolamenti "minori"' (*federalismi.it*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36851&content=&content_author=>>.

¹⁷⁸ There is a single, incidental reference in the Basic Law to the committees of the Legislative Assembly, in Article 50, regarding the powers of the Chief Executive, who is competent "to decide whether members of the Government or other personnel in charge of government affairs should testify or give evidence before the Legislative Assembly or its committees." The Organic Statute of Macau contained several norms directly related to parliamentary committees, for example, "The Assembly may be organised in permanent committees and ad hoc committees may be created for specific purposes." Or "The President, on his or her own initiative or at the request of any Member, may request attendance of Assembly sessions or committee meetings": paragraphs (2) of Articles 35 and 37 respectively, also referring to "organisation of the committees deemed necessary"; "Article 42 (b). In other words, although Macau's previous constitutional law was silent on the rules of procedure of the parliamentary committees, the truth is that it gave such committees a reasonably significant formal importance. In comparative constitutional law, there are many examples that go even further in the constitutional framework for the intervention of parliamentary committees at relevant moments — for example, cf. Article 178 of the Constitution of the Portuguese Republic.

¹⁷⁹ As Jorge Miranda teaches, "In addition to the 'general' Rules of Procedure of the Assembly, each parliamentary committee draws up its own rules of procedure [...] necessarily subordinate thereto": Manual Direito Constitucional V (Coimbra Editora 2011) 261. See also, in agreement, Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 301.

¹⁸⁰ The emergence of this problem and a solution thereto can be found in the aforementioned rules of procedure of the monitoring committees. For example, Article 10, paragraph (2) of the Rules of Operation of the Monitoring Committee on Land Affairs and Public Concessions, approved by Deliberation No. 1/2009: "In the event of a contradiction between the provisions of the Rules of Operation of the Monitoring Committee for Land Affairs and Public Concessions and the Rules of Procedure of the Legislative Assembly, the latter shall prevail."

interact with them?¹⁸¹

One possible hypothesis is to consider that the Rules of Procedure of the Legislative Assembly, together with all committee rules of procedure (and, eg resolutions relating to the hearings process, the Government questioning process), would constitute a whole, a “single normative complex”,¹⁸² as Italian scholarship has defended.¹⁸³

Although this path could prove useful in assessing the issue, I remain sceptical. It would necessitate the coexistence of various instruments and norms from distinct source hierarchies within this proposed complex. If one adds to this argument both the existence of norms with parametric and conforming measures for others — which, in itself, would not be totally exclusionary of the above thesis¹⁸⁴ — and the fact that the Rules of Procedure *per se* do have constitutional legitimacy and a formal identity, I cannot fathom how the idea of a true single normative complex may be duly entertained. Moreover, some norms integral to committees’ rules of procedure could be approved by the whole Legislative Assembly, sitting in a Plenary meeting, whilst others may be approved *only* by the respective committee.¹⁸⁵

A second approach, arguably more compelling, is to embrace the core notion that there are indeed areas or matters reserved to the Rules of Procedure. This viewpoint derives directly from the principle of the “self-organization of politico-legislative bodies.”¹⁸⁶ The Rules of Procedure of the Legislative Assembly, in this sense, are envisioned as “reservoir-type source of norms, exclusively dedicated to regulate the organisation and functioning of the Assembly.”¹⁸⁷ Within this framework, one can discern two components of reserved areas: one being more intense or *absolutely* reserved, the second less intense or *relatively* reserved.

That first component of an absolute nature, shall always be directly grounded on the Rules of Procedure, being defined, from the outset, by the matters that the local constitution expressly establishes. For instance, the *additional powers of the President of the Legislative Assembly*, and rules on the legislative procedure, which stems from the competence to *enact, amend, suspend, and repeal laws, under the terms of this Law and*

¹⁸¹ The above, on committee rules of procedure is, with adaptations, applicable to the rules of procedure governing hearings, which, under Article 143 of the Rules of Procedure, shall be contained in a regulation approved by the Plenary in the form of a Resolution; the same applies to the complementary rules of the questioning process, contained in Resolution No. 2/2004, regulating the Process of Questioning Governmental Action, which was explicitly based on the “*development of Articles 134 and 135 of the Rules of Procedure*.”

¹⁸² Excluding, of course, the resolutions of a non-normative nature.

¹⁸³ According to Pedro Alfaro Velez, ‘O Regimento da Assembleia da República como fonte de Direito’ in *Estudos de Direito Público* (Âncora 2006) 740.

¹⁸⁴ As in the parametric relationships between laws governing general legal frameworks and the respective development laws.

¹⁸⁵ With respect to the latter norms, one might call into question their nature and external binding effectiveness, as they are out of the scope of the imperative protection provided by the Basic Law.

¹⁸⁶ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 856.

¹⁸⁷ Pedro Alfaro Velez, ‘O Regimento da Assembleia da República como fonte de Direito’ in *Estudos de Direito Público* (Âncora 2006) 741.

in accordance with legal procedures.¹⁸⁸ This component is further intertwined with Article 77 of the Basic Law, concerning matters such as the quorum for the functioning of the Legislative Assembly, and the required majorities for the approval of bills (in the first paragraph). Together, these provisions bestow the Rules of Procedure of the Legislative Assembly with a constitutional identity.

At least in the above cases, there may not be any room for *minor or lesser* rules of procedure,¹⁸⁹ as the matters in question shall, *per constitutionem*, be regulated in the Legislative Assembly's Rules of Procedure.

The second component, with a *less intense perimeter of reserved matters*, contains areas which are not inalienable: the Rules of Procedure may grant authorisations,¹⁹⁰ in a parallel fashion with the now extinct legal typology of legislative authorisations.¹⁹¹

In other words, the *modus operandi* would be similar to a normative delegation, from the Rules of Procedure to other normative acts of the Legislative Assembly; the latter would be distinct from, but subordinate to, the former.¹⁹² Such is my proposal.

An approximation — with due caution — of this understanding may be perceived in the concept of “*de-location from the Rules of Procedure*” to legislative acts¹⁹³ in this case (ie in effect, an *upgrading* of the source of norm-making). The distinction is that the Rules of Procedure are not merely delegating competences but also narrowing their primary regulatory intervention by expelling matters into the sphere of lawmaking.

¹⁸⁸ Article 71 of the Basic Law.

¹⁸⁹ Are there other matters subject to the Rules of Procedure, which are foreseen under the Basic Law, for example, in view of Article 65 (and, conversely, Article 76), which establishes the Government's duty to respond to questions from Members of the Assembly Legislative? If such norm, in addition to expressing an express duty, may also be added to the area of matters reserved to the Rules of Procedure, the consequence would be thus: the entire regulatory framework of the political scrutiny process would have to be therein included; such matters could not be subject to delegation to other minor resolutions within the scope of Macau's parliamentary law. On this issue of matters reserved to parliament, although not expressly established in the constitutional text, see eg Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 676–77, of a reserve of bylaws broader than that which is made up of the constitutional remissions expressed.

¹⁹⁰ Addressing a possibility in a similar sense, see Pedro Alfaro Velez, ‘O Regimento da Assembleia da República como fonte de Direito’ in *Estudios de Derecho Público* (Áncora 2006) 741.

¹⁹¹ An emblematic example: “The rules on hearings shall be contained in a regulation approved by the Plenary in the form of a resolution.”: the sole pre-requisite being “When the clarification of issues of public interest so requires, any standing or ad hoc committee, within the strict scope of such committee's material competence, may summon any persons to testify or give evidence, under the terms of Article 71, paragraph (8) of the Basic Law.”: Article 142 of the Rules of Procedure. See also Article 136. “The rules for the questioning process are set out in a resolution approved by the Plenary.” A different direction was taken with the debates on issues of public interest, which are directly regulated under Articles 137 to 141 of the Rules of Procedure.

¹⁹² This concept of authorisation reinforces the principle of prevalence (of the Rules of Procedure of the Legislative Assembly over the committees' rules of procedure).

¹⁹³ See article 85, paragraph (2) of the Rules of Procedure (“The rules on the identification, forms and templates, publication, rectification/correction and entry into force of laws and resolutions are governed by law.”), and Article 192 of the former Macau Legislative Assembly's Rules of Procedure, dating from 1977. Cf, Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 677 et seq wherein the author asks if parliamentary rules of procedure may renounce to matters reserved thereto.

Although laws in the MSAR are enacted by the very same body, the Legislative Assembly, the respective procedure co-involves third parties. Throughout this text we shall provide examples of this phenomenon.

10. Rules of Procedure of the Executive Council

A few words on the Rules of Procedure of the Executive Council, approved by Administrative Regulation No. 2/1999, are warranted.¹⁹⁴

As discussed above, Article 58 of the Basic Law requires the Chief Executive to consult the Executive Council before introducing bills to the Legislative Assembly.

Such requirement entails not only the prior consultation of the Executive Council by the Chief Executive, but also the reference thereto in the bill to be introduced, as a mandatory element of the creation thereof.¹⁹⁵ The said consultation is a necessary element in shaping and completing bills.

This process alludes to the formal legislative impetus proceeding by the Executive branch, translated into the constitutionally designated “Government bill”.¹⁹⁶ Essentially, this pertains to an original legislative initiative. The Basic Law remains silent on the so-called supervening initiatives, which should take the form of an amendment proposal.¹⁹⁷ Regardless of whether the Chief Executive chooses to consult the Executive Council at its discretion, it can be deduced from the Basic Law and in the context of an ongoing legislative process that the Executive Council’s involvement in the legislative process is confined to a single, *ex ante* moment, as to the introduction of a bill to the Legislative Assembly.

Therefore, there is no obligation to consult the Executive Council in the event of amendment proposals introduced to the original version of Government bills, given that the latter will have already transited from the Executive power into the sphere of the legislative body, with the Chief Executive acting, before the Legislative Assembly, as the proponent and sole actor.

Taking a closer look at the Rules of Procedure of the Executive Council, Article 2, entitled “competence”, which declares: “The Chief Executive shall consult the Executive Council before: [...] 2) Introducing Government bills to the Legislative Assembly.”

Nothing of note here, as it replicates the Basic Law and, as such, is endowed with a higher value than that of a mere ordinary norm inserted in an administrative

¹⁹⁴ As amended by Administrative Regulation No. 2/2005 and Administrative Regulation No. 25/2011.

¹⁹⁵ Article 103, paragraph (2), subparagraph (b) of the Rules of Procedure.

¹⁹⁶ In identical terms, with the very similar Consultative Council, the Organic Statute of Macau provided for, under Article 48, the following: “2. *The Council shall be heard on the following subjects: a) Bills that the Governor introduces to the Legislative Assembly;*”. No one has ever suggested that the Consultative Council would have to be heard at any stage after the introduction of bills to the Legislative Assembly.

¹⁹⁷ In view of these different concepts, see Article 102 of the Rules of Procedure.

regulation.

Notably, few aspects within these Rules of Procedure are pertinent to the legislative procedure. There is Article 13 that sheds light on the quorum, and Article 21, further on the non-binding advisory opinion of the majority of the members: “*If the Chief Executive does not accept the opinion of the majority of the Members of the Executive Council, the specific justifying reasons for the refusal must be recorded.*” In this case, a special duty of stating the reasons by the Chief Executive is created, for his or her refusal of and disagreement with the recommendation given by the Council.¹⁹⁸

Article 1 transcribes the Basic Law: “The Executive Council of the Macau Special Administrative Region is the body for assisting the Chief Executive in decision-making.”, including those regarding Government bills (whether he or she introduces them or not, irrespective of content). Clearly, decision-making within the legislative procedure¹⁹⁹ rests solely with the Chief Executive, given that the Council functions strictly as an advisory entity.

There is a procedural rule in force, which apparently limits the material scope of the consultation: “*The Executive Council does not discuss in detail, unless otherwise directed by the Chief Executive.*”²⁰⁰ The said rule, although typical for such bodies, seems incongruent with a holistic understanding of the legislative procedure, which demands comprehensive analysis and assessment of bill provisions and their implications.

In conclusion, the Executive Council does not have any intervention in the legislative procedure, other than the one established by the Basic Law — and only when the constitutional law so requires — as the Chief Executive’s consultative body. It is not an autonomous source of norms relating to the legislative procedure.

11. Customs, Usages, Practices, Conventions, Precedents, and Intra-Parliamentary Case-Law

11.1 Introduction

I venture now into what is, generally speaking, a shifting quicksand or quagmire: the analysis of whether customs, usages and practices are legitimate sources of the legislative

¹⁹⁸ It is unclear what the consequences are in the event of non-compliance with this duty to state reasons, as, moreover, it is not even less clear what happens when a given bill is rejected by the Council. Although the legal effect of a lack of reference to consultation by the Executive Council could perhaps be deemed a minor irregularity, not jeopardising the legislative process, the absence of such consultation has a much graver dimension, as it contravenes a requirement contained in the current constitutional framework. The correct solution would be to consider such a bill invalid — and, by extension, any law the approval of which resulted thereof — on the grounds of violation of Article 58 of the Basic Law.

¹⁹⁹ Given that “the Executive Council itself is not a decision-making body, but rather a body that assists the Chief Executive in making decisions, in order to assert the former’s collective advisory functions, while the latter is responsible for decision-making.”: as claimed by Jiang Hua, ‘Mútuo controlo e articulação entre o Executivo e o Legislativo na RAEM’ (2001) 99 Administração 163.

²⁰⁰ Article 19, paragraph (2) of Administrative Regulation 2/1999.

procedure,²⁰¹ possibly including other potential *sources*²⁰² in this discourse.

In the subsequent chapter on the dynamics on the ground, I shall apply the observations made herein to specific examples.

Quoting JORGE MIRANDA,

“In addition to the written legal norms, there are or may be customary norms of greater or lesser importance, and the terrain has always proved to be the most conducive to the rooting of practices and conventions. It would be reductive not to pay attention to these.”²⁰³

While this observation holds merit, it was arguably *truer* in the past.

The proliferation of normative sources of parliamentary law, in general, and of the legislative procedure, in particular — namely through its constitutionalisation — means that “This enlargement of normative sources reduces, as such, the role of customs in parliamentary law, thereby strongly limiting its flexibility in terms of application and, naturally, its very ‘availability’ to parliament.”²⁰⁴

Given varying degrees of significance, this area has often served as a fertile foundation for the emergence of these sources, be they genuine, quasi, or merely illusory. Sometimes, they stand as true sources of the legislative procedure; at other times, they appear as misleading bases for parliamentary law, tainted by their lack of legitimacy. Given that such sources are invoked in Macau, it is essential to address these ambiguous typologies in our examination of the sources of the legislative procedure.

It is crucial to consider, when addressing these non-formal and unwritten

²⁰¹ A relevant and revealing work on these issues is Diogo Freitas do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004), a compilation of studies (legal opinions, *Pareceres*). The core question was conferring flexibility to the *legislative procedure* by using one of these non-formal (or informal) routes. The aim was to clarify which source would be admissible, for example, customs (and, if so, whether *praeter* or *contra constitutionem*), conventions and practices. See also, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014) *passim*, in particular, 77 et seq.

²⁰² In this regard, there are some authors who speak of an “*informal parliamentary law*”: with several classifications, Renato Ibrido, ‘Prima “legge” del diritto parlamentare: l’adattamento. A proposito delle modalità di coesistenza fra Regolamenti delle Camere e fonti non scritte’ (*federalismi.it*, 23 July 2018), downloaded on <<https://flore.unifi.it/retrieve/e398c37d-e893-179a-e053-3705fe0a4cff/Prima-“legge”-del-diritto-parlamentare-l’adattamento.-A-proposito-delle-modalità-di-coesistenza-fra-Regolamenti-delle-Camere-e-fonti-non-scritte.pdf>>.

²⁰³ Jorge Miranda, *Direito Constitucional*, vol V (Coimbra Editora, 2009) 261.

²⁰⁴ Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 668.

sources,²⁰⁵ whether they go *beyond* the formal written norms or conflict with them.²⁰⁶

Naturally, their value and admissibility shall vary on a case-by-case basis.

11.2 Customs

Customary law in general, regardless of its modalities and admissibility, is recognised as having little real importance as a source of law in Macau: “In the case of Macau, one is at a loss to provide a single example of an area of the law where the custom is currently of any degree of importance.” says JORGE GODINHO.²⁰⁷

Custom has been understood, in the theory of the sources of law, as comprising two elements.²⁰⁸ Firstly, the substantive component corresponds to repetitive usage of certain behaviours or practices within a certain circle of subjects. In this case, this pertains to the actions of the bodies and Members of the Legislative Assembly and, perhaps, third parties that relate therewith due to their functional roles. Secondly, there’s a referential, subjective, or psychological element, encapsulated as the entrenched conviction that such behaviours are mandatory and need to be respected by the community, ie the so-called *opinio juris vel necessitates*. As HANS Kelsen taught, “is an essential element of a

²⁰⁵ Customs, usages, and practices will always be unwritten, whereas conventions, precedents, and *intra-parliamentary case-law* may or may not, be subject to written form. Evidently, it is much more difficult to interpret and find precise definitions and meanings in less formal or unwritten sources: “Therefore, in most institutionalized settings such as parliaments the truly important rules are usually formalized. Formal rules governing the conduct of parliamentary work are typically contained in the constitution and standing orders or rules of procedure of parliaments.”: Wolfgang Muller and Ulrich Sieberer, *Procedure and Rules in Legislatures*, in Martin Shane and Thomas Saalfeld and Kaare Strøm (eds.), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 314.

²⁰⁶ There are those who, just by appealing the principle of legality, summarily dismiss the validity of this type of sources, when such are not in conformity with the formal written sources. In other words, these sources do exist, provided that they are subordinated to the *legal norms*; see eg Susana Pedroza De La Llave, ‘Las fuentes formales del derecho parlamentario y su normatividad constitucional en México’ (2012) 26 *Cuestiones Constitucionales* 204.

²⁰⁷ Jorge A. F. Godinho *Macau Business Law and Legal System* (LexisNexis 2007) 13. Jorge Bacelar Gouveia states, “The written and legislated character is evident in the fact that the functioning of Macau’s legal system is based on legislative acts, other sources of a customary nature being inoperative.”: Jorge Bacelar Gouveia, ‘Macau no Direito Constitucional de Língua Portuguesa’ in *Direito Constitucional de Macau* (IDILP 2012) 195. See in general João Baptista Machado, *Introdução ao Direito e ao Discurso Legitimador* (Almedina 2014) 161: “In a modern, strongly dynamic and differentiated society, there is little possibility of the formation of law through a customary route”, notwithstanding the existence of derogating custom (disuse). See however Sun Tongpeng, ‘Uma Reflexão Sobre a Localização Jurídica de Macau’ (1998) 42 *Administração* 1005, 1008–09, who attaches particular value and importance to custom as “living law” in the regulation of Macau’s society.

²⁰⁸ See, for example, Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) who exclude a range of requirements from custom, stating that “Custom only requires two elements. the usage and the conviction of the mandatory nature thereof.”: 150–151. To which, sometimes, a third component is added: duration, ie the period necessary for the custom to consolidate itself as a source of law, considering that the requirement that “custom, to be a source of law, has to last since time immemorial – ie that living men at a given moment do not recollect when the usual practice began — ensuring that everyone remembers that it has always been as thus”: Diogo Freitas Do Amaral and Ravi Afonso Pereira, *Manual de Introdução ao Direito I* (Almedina 2014) 373. Although the notion of time in our contemporary society seems to point to a greater speed, as everything moves faster, for these purposes, the idea of a reasonable duration remains relevant, ie although a very long duration or a firm or deep-seated remoteness in time may not be required, it is clear that a custom cannot be constituted rapidly, from *yesterday*’s practice, as such immediacy would perhaps be unsteady and contentious.

customary fact. In other words: the constitutive acts of a custom are performed with the conviction that such acts must be performed.”²⁰⁹ However, he immediately highlights a proviso: “This conviction presupposes, however, an act of individual or collective will, the subjective meaning of which is that we must conduct ourselves in accordance with the custom.”²¹⁰

A word now in particular to constitutional customs: ‘One says that are constitutional those customs that are established by virtue of the constitutional bodies interactions with each other’²¹¹, hence a specific delimitation regarding its origins (constitutional bodies) is needed in order to label a certain customary rule as a constitutional customary one.

Regardless of whether the express acceptance of custom, as a source of law, by written laws is deemed unnecessary, the Civil Code indeed omits any reference thereto, when establishing the sources of law in Macau.²¹²

In the Basic Law, there is but a single reference to custom²¹³ and it emerges out of place *vis-à-vis* the constitutional framework on the sources of Law (Article 8 of the Basic Law).²¹⁴

In contrast, the HKSAR Basic Law establishes: “The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation

²⁰⁹ Hans Kelsen, *Teoria Pura do Direito* (Arménio Amado Editora 1984) 314.

²¹⁰ *ibid.*

²¹¹ Riccardo Guastini, ‘Costumbre Y Convenciones Constitucionales’, in *Estudios de teoría constitucional* (FONTAMARA 2007) 241.

²¹² João Gil de Oliveira and José Cândido de Pinho, *Código Civil de Macau — Anotado e Comentado*, Livro I, vol I (CFJJ 2018) 84 et seq.

²¹³ Article 42: “The interests of residents of Portuguese descent in Macau are protected, under the terms of the law, by the Macau Special Administrative Region. Their customs and cultural traditions must be respected.”: following a similar provision in the Joint Declaration. Underlining this fact, Jorge Bacelar Gouveia, ‘Macau no Direito Constitucional de Língua Portuguesa’ in *Direito Constitucional de Macau* (IDILP 2012) 95–96, the author states that the treatment of custom by the Basic Law is “enigmatic” in multiple aspects. Affirming that this constitutional norm may be faced with “The possibility of limiting the law by custom”: João Gil de Oliveira and José Cândido de Pinho, *Código Civil de Macau — Anotado e Comentado*, Livro I, vol I (CFJJ 2018) 86. One should recall that in other legal orders, including some from the same legal family, it is possible to find examples of references to custom in the specific subject-matter of the sources of law, for example, in the Constitution of East-Timor, Article 2, paragraph (4): “The State recognises and values the norms and customary usages of East-Timor that do not contravene the Constitution and the special legislation on customary law.”; see Jorge Bacelar Gouveia, ‘Macau no Direito Constitucional de Língua Portuguesa’ in *Direito Constitucional de Macau* (IDILP 2012) 501 et seq.

²¹⁴ “Laws, decree-laws, administrative regulations and other normative acts previously in force in Macau are maintained, except to the extent that any contravene this Law or are subject to amendments in accordance with legal procedures, by the legislative body or by other competent bodies of the Macau Special Administrative Region.” In the residuary category “other normative acts”: I believe one should include other formal written sources or types of enactments, first of all due to the wording used. Examples: (normative) resolutions, the (former) Legislative Diploma, the (former) (Provincial Decree), etc See also Article 11 of the Basic Law: “No law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region shall contravene this Law.”

and **customary law**²¹⁵ shall be maintained”.²¹⁶ (boldface added). This situation is entirely to be expected, as the neighbouring region’s legal system belongs to the Common Law family, wherein custom has a totally different relevance as a source of law.

Moving along, deeper, into the discussion.

In relation to the *default* source²¹⁷ of our legal system (law in a substantive sense), customs may be positioned, in their intent, as either *secundum legem*, *praeter legem* or *contra legem* norms. These three types of customs have different outcomes.

The *secundum legem* (ie in accordance with written law) customs, even though they may in fact exist (or have existed), namely by having arisen prior to the written norm or law into which they were replicated, shall not be relevant to my study. Such customs do not modify, create, nor derogate any written norm *already* in existence, whichever the latter may be and whatever its antiquity.

As to the *praeter legem* (ie outside of written law) customs, I accept their possible existence and validity. Specifically, they could serve as a possible source of rules that emerged for the interpretation of, and the filling of *lacunae* detected in written norms of the Basic Law and of the Rules of Procedure. These customs might act as instruments for the “clarification, development and adaptation to the needs of social evolution.”²¹⁸ In a later chapter I shall extol a few examples, like the formal subsequent versions (second, third, fourth, and so forth) of Government bills, a reality not foreseen under the Rules of Procedure. This discussion may highlight the functionality of customs in the broader context of the Basic Law as integral elements of constitutional law application.²¹⁹

Turning to the *contra legem* (ie against written law) customs,²²⁰ one must, among other steps, to *calibrate* the custom in question. In theory, if one does not reject the constitutionality of *contra legem* customs, the result would be the supremacy of the customary rule over the Rules of Procedure. The resulting validity and normative force of such a scenario seems suspect, especially when considering the Basic Law’s status as a formal constitutional text.

As the sentiment goes, “The legal force of the formal Constitution repels it in

²¹⁵ On the meaning of custom as a source of law and its application in Hong Kong: Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong University Press 1999) 347 et seq.

²¹⁶ Article 8 of the HKSAR Basic Law. See also, with some similarity with the aforementioned Article 42 of the Basic Law of Macau, Article 40: “The lawful traditional rights and interests of the indigenous inhabitants of the “New Territories” shall be protected by the Hong Kong Special Administrative Region.”

²¹⁷ Note that this abundantly used tripartite classification of customs, as a source of law, rests on the relationship *vis-à-vis* written law; as if loosening, or such classification thus conveying, the idea of custom as a fully autonomous source.

²¹⁸ Jorge Miranda, *Manual Direito Constitucional II* (Coimbra Editora 2007) 149.

²¹⁹ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 862. According to this scholar, a custom *contra constitutionem* shall not cease to be an unconstitutional custom; the constitutionalisation thereof shall require an amendment to the Constitution.

²²⁰ This may be a positive phenomenon, ie both in the creation of norms, and in the derogation of written norms — be these constitutional, legal or procedural — which shall thus fall into disuse.

principle,”²²¹ and it’s worth noting that the Rules of Procedure predominantly effectuate the fundamental framework contained in the Basic Law. This powerful argument is not, however, absolute; certain scenarios might allow *contra legem* customs to take root, such as if there are norms in the Basic Law that yield more than one meaning. In a graver scenario, due to the lack of a veritable system of judicial review for constitutional conformity, deviations from the Basic Law’s constitutional framework might persist over time, potentially morphing into customs.²²² Still, even if a *contra legem* customary rule were to emerge, an outstanding issue would remain: assessing the admissibility thereof in light of our formal constitution called Basic Law.

I continue to lean towards the refusal of said admissibility, ie to a departure from the concept of customs as a source of law endowed with normative-constitutional force. Instead, I prefer to reduce their legitimacy to that of usages, the validity of which would depend on conformity with the fundamental law. As GOMES CANOTILHO rightly declares, “the existence of unwritten rules derogating constitutional procedural norms is peremptorily excluded even if the intent is to confer unto such rule the degree and strength of constitutional custom.”²²³ On usages in non-compliance with the parliamentary rules of procedure, he adds: “with the consensus of the entire Assembly, there is the possibility of single derogations of a few procedural rules, excepting those codified in the Constitution itself.”²²⁴

In other words, even if there might possibly come into being a parliamentary custom contrary to a norm or principle of the Basic Law — for example, an alleged custom (which I shall later deny herein) that there is no supervening legislative initiative by Members with respect to any and all Government bills — such custom would be unconstitutional. The constitutionalisation and full effectiveness of said custom could only be carried out by means of an amendment to the Basic Law itself, irrespective of modifications to other sources of legal norms.

The constitutionalisation of parliamentary law creates a space of normative unavailability to parliaments themselves, pertaining to the constitutionally enshrined parliamentary norms, thus entailing the eradication “of normative or customary mutations. The contravening procedural norm²²⁵ or usage may not prevail over the letter of the

²²¹ Jorge Miranda, *Manual Direito Constitucional II* (Coimbra Editora 2007) 149, and Jorge Miranda, ‘Caducidade de normas constitucionais’ (2014) 146 *O Direito* 285.

²²² Miranda, *Manual Direito Constitucional II*, 150.

²²³ Gomes Canotilho, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 85.

²²⁴ Gomes Canotilho, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 85. See also Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 673.

²²⁵ In the sense of procedural rule.

constitutional norms.”²²⁶

The extreme rigidity of the Basic Law, characterised by its inherent statism, might theoretically pave the way for the emergence of customs. However, when anchored to the Joint Declaration and Article 31 of the Chinese Constitution,²²⁷ this rigidity seems to indicate a prohibition against *other alternative means* of constitutional norm-making, that was ponder and considered by the lawmakers.

Finally, we shall address the issue of the duration²²⁸ of a practice. Notwithstanding modern dynamics have somewhat relaxed this criterion, making it less stringent and less rooted in ancient traditions, its significance remains intact. Given the MSAR’s brief history, meeting this criterion, especially concerning the Basic Law and the Rules of Procedure of the Legislative Assembly, seems more daunting.

If an alleged custom *contra constitutionem* is at issue, it may not *ever* be admissible as such, if there is a discrepancy *vis-à-vis* not only an isolated constitutional norm, but also a series of constitutional norms, or if said purported custom involves subverting the Legal Status of the Members of the Legislative Assembly and the constitutional structuring principles of the MSAR’s legal-constitutional order.²²⁹

However, within a limited type of situations, there may occur a possible opening for the admissibility of a custom *contra constitutionem vis-à-vis* the Basic Law. As already alluded to, my position is that the constitutional order of Macau is multi-composed and multileveled.²³⁰ While the Basic Law serves as the cornerstone of the

²²⁶ Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 673.

²²⁷ These three elements, taken together, constitute the constitutional order of the MSAR.

²²⁸ Cf Jorge Miranda, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 99; Diogo Freitas Do Amaral and Ravi Afonso Pereira, *Manual de Introdução ao Direito I* (Almedina 2014) 373.

²²⁹ Jorge Miranda, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 100. Such would be the case in Macau, I believe, for example, in the event of a total and absolute restriction to the Members’ power to introduce amendment proposals to any Government bills. In effect, Article 75 of the Basic Law would come into play, in all its breadth, along with Articles 1, subparagraph (b), 102, paragraph (2), 106, 107 and 124, paragraph (2) of the Rules of Procedure, which, as a whole, implement the Basic Law in this matter.

²³⁰ As I have already written, “Macau’s bloc de constitutionnalité is multi-composed because it is based on norms resting on differentiated legal instruments. On the other hand, I must warn, at the outset, that my position is subject to profound criticism, in particular (or almost solely) regarding the Joint Declaration as a constitutive and constituent element of the Macau Constitution. The multi-origin of norms with a constitutional value and function also results from an (almost necessary) multilevelled constitution. Ie the *bloc de constitutionnalité* emerges in a differentiated order and does not have a homogeneous legal force. Finally — also accustomed to dissent — the normative document called Basic Law corresponds, at least to some extent, to the formalised Constitution of Macau. The Basic Law is the main constitution of Macau, rather than the supreme one: it is the main normative source or supplier — in terms of quantity and scope, as well as the structuring, articulation and stabilisation of values and principles — of Macau’s constitutional order. The other sources of this higher order are either sparse (Constitution of the PRC), or have a guiding function or contain (rich) principles, although scarce in normative development (Joint Declaration).”: Paulo Cardinal, ‘Fragmentos em torno da constituição

MSAR's constitutional fabric, it isn't the sole or primary source. Within the set of sources of constitutional order, the Basic Law isn't preeminent. Instead, it's subordinate to both the Constitution of the People's Republic of China and the Sino-Portuguese Joint Declaration.

If one were to contemplate, for instance, the formation of a *praeter legem* custom by reference to the Joint Declaration,²³¹ with respect to the development or implementation of the principles “*the current social and economic systems in Macau will remain unchanged, as well as the respective way of life*”,²³² and such custom were to be revealed, incidentally, *contrary to the Basic Law*, I would be persuaded to accept such custom, based on the principle of hierarchy within the multi-composed constitutional order of the MSAR.²³³

For the purposes of studying the legislative procedure, one needs to investigate customs which contravene procedural norms:²³⁴ ie a parliamentary custom “*that is a custom related to the Rules of Procedure*”.²³⁵ I shall only address the issue of *contra legem* customs, applying hereto that which I mentioned above regarding the other two modalities of customs.²³⁶

First, recalling that there are norms in the Rules of Procedure that replicate constitutional norms, one may immediately, in this case, exclude the creation of true

processual penal de Macau — do princípio da continuidade ao princípio da dignidade humana’ in Manuel da Costa Andrade and Susana Aires de Sousa and Maria João Antunes (eds), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, vol III (Coimbra Editora, 2010) 759–60.

See also, in navigating this idea of multi-composition of the constitutional order (although not including the Joint Declaration), Lok Wai Kin, ‘A Constituição e a Lei Básica são base constitucional da Região Administrativa Especial’ (2010) 88 *Administração* 393, “Therefore, the Basic Law is also one of the constitutional bases of the Special Administrative Region.”; and “The fundamental position on which we must insist is: the Constitution and the Law Basic constitute the constitutional basis of the Special Administrative Region. In principle, in the context of “a country” regulated by the Constitution, we must apply the rules of the Constitution and the Basic Law; only within the scope of the “two systems”: not regulated by the Constitution, do the rules of the Basic Law apply.”: 394–395.

²³¹ Given that “the Joint Declaration is the Grundnorm of the Basic Law”, as I defended in ‘Fragmentos em torno da constituição processual penal de Macau — do princípio da continuidade ao princípio da dignidade humana’ in Manuel da Costa Andrade and Susana Aires de Sousa and Maria João Antunes (eds), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, vol III (Coimbra Editora, 2010), 763; for further on this, Armando Isaac, ‘The Constitutional Framework for Legal Co-operation between the “Two Systems” of the “One Country”: the Case of Macau’ (Conference on Mutual Legal Assistance under ‘One Country, Two Systems’, Hong Kong, 1999).

²³² Or other principles enshrined in the twelve fundamental policies for Macau and reaffirmed in the clarification of the Government of the People's Republic of China on the Fundamental Policies Regarding Macau, eg on the principle of a high degree of autonomy, the continuity of fundamental rights or the regional legislative power based on a regional legislative body.

²³³ Perhaps in this case the custom would not exactly become a source of law *per se* but would rather be an expression of the constitutional framework in force, as understood in the fullness of its dimensions and fundamental underlying impetuses.

²³⁴ One could also refer here to the issue of *contra legem* custom in the strict sense, within the scope of the *legislative procedure*, by taking into account, for example, the norms contained in the law on forms and templates of legal enactments.

²³⁵ Miguel Galvão Teles, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 148.

²³⁶ The issue of admissibility of *secundum* and *praeter legem* customs.

customs. A usage, if at all exercised, shall not be transformed into a custom. Second, when examining norms within these Rules intended to develop or implement the Basic Law, a custom in contravention of such procedural norms may be admissible, provided that it does not antagonise the developed or implemented constitutional norm. In other words, it shall not distort, disfigure, nor reduce the function of the latter norm. Third, with respect to other norms of the Rules of Procedure, customs in contravention thereof may also be admissible, provided that the twin elements of a custom are verified: the substantive one and the *opinio juris vel necessitatis*.²³⁷

This discourse inherently underlines the basic principle of the hierarchy of the sources of norms. While a customary norm at the legal or procedural level (as outlined in the Rules of Procedure) may supplant a written norm of the same nature, it cannot derogate a norm with a higher legal value or located at a superior level.

A closing remark to say is that customs, as sources that may reveal norms, are justiciable, in the same way as legal and procedural norms, namely as to their constitutional conformity. The judiciary system's role is of cardinal importance, with special emphasis on the CFA, and without omitting the work that the CSI has performed in such matters, albeit in view of written norms. It remains to be seen how the law, and case-law, will evolve — whether we might, in the future, see *erga omnes* declarations of non-conformity with the Basic Law, with such unconstitutional norms being nullified and voided.

11.3 Usages

Parliamentary usages, similar to customs, rest upon or constitute a repetition or reiteration of determinate behaviours or practices within a certain circle of subjects — specifically, within the bodies and Members of the Legislative Assembly, and perhaps, extending to third parties correlating thereto, within the scope of their functions. Such behaviors predominantly exhibit mere internal or in-house effectiveness,²³⁸ without exerting any

²³⁷ It is appropriate to pose the following question: if there is a usage, and if a conviction of bindingness is created therefrom, yet based on an error about the respective pre-requisites, can such be equated as an error in the formation of the subjective will? Is the *opinio juris vel necessitatis* requires a prior conviction that the written norms — of the Basic Law, of the Rules of Procedure — had already created a certain norm with a definite meaning. In these cases, the custom arises from an erroneous perception of a previously written norm, absent an autonomous conviction of its mandatory nature. For example, Article 75 of the Basic Law, on bills, establishes an area of reserved legislative initiative in favour of the Executive, only mentioning, the latter, the original legislative initiative. What if, erroneously, there is a usage prohibiting the introduction of supervening initiatives in these matters since said norm of the Basic Law also refers to amendment proposals and not solely to the Government's bills? Can a custom be created *contra* the Rules of Procedure in this instance? I believe not. I refuse to countenance such an outlook, as it would truly represent a custom against the constitution and, on the other hand, one should not forget that the alleged custom would have been defectively created in its subjective element, tainted with an error in the *opinio juris vel necessitatis*, particularly in what concerns the conviction on the lawfulness of this behaviour and the root of the mandatory conduct. There may be a mere appearance of a custom here, corresponding to a purported compliance with a norm, which is misinterpreted, thus misleading the relevant actors.

²³⁸ Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 166.

extramural influence. An essential point is the absence of any conviction of a mandatory or compulsory adherence to such behaviours. In opposition to custom, there is a “weakened manifestation of the current trend to attach legal significance to facts”.²³⁹

In other words, “Usages are mainly behavioural habits that acquire relevance as routines adopted in the processing of functional communication between parliamentary operators.”²⁴⁰

“Therefore, because it lacks its own legal quality, the usage does not constitute an autonomous way of creating the Law. It only applies insofar as the law accepts it and to the exact extent of such acceptance.”²⁴¹

Usages may constitute a step in the creation of customs. Until such an event is verifiable, that is, as long as they remain as mere usages, they may be observed or disregarded without any legal sanction or penalty, barring instances when the law mandates compliance therewith. The non-compliance with a usage shall not affect a given legislative procedure, nor may it be justiciable. In any case, as VIEIRA DE ANDRADE opined, “a current procedural praxis contrary to the constitutional text [...] cannot be legitimate if it involves disfiguring or mischaracterising the procedure, such as it has been conceived.”²⁴²

The motivating force for adherence to a usage is rooted “in a certain ‘psychic coercion’ that tradition, and the foreseeable adoption thereof as an exemplary pattern of conduct, exercise”²⁴³ *vis-à-vis* a Member of the Legislative Assembly.

In this regard, the Committee on the Rules of Procedure and Members’ Mandates is competent to “*suggest to the Plenary the modifications [to the Rules of Procedure] that the practice may advise*”, as per Article 26 (e) of said Rules. This norm instils the idea that, until they are inserted into the Rules, by sovereign decision of the Plenary, the usages are devoid of binding effect — even internally. Such a conclusion would reinforce my understanding on the value of usages: these are not mandatory; yet they may be *converted* into *normal* norms, to be contained in the Rules of Procedure.

Conclusively, an exemplification of usage in action during the legislative procedure is as follows: should a Member opt not to introduce a proposal to amend a Government bill, the rationale behind such behaviour may be traced to the unusual or politically sensitive nature of such an intervention, and not due to any purported recognition of the (non-existent) illegality of such introduction, nor to any alleged

²³⁹ Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 166.

²⁴⁰ César Delgado-Guembes, *Teoría de las Fuentes del Derecho Parlamentario* (PERU 2009) 118.

²⁴¹ Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 155.

²⁴² Vieira de Andrade, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 211.

²⁴³ Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 166.

conviction of a (non-existent) prohibition in doing so. Several reports of the Legislative Assembly's committees precisely highlight this aspect.

Moreover, some distinguished Members have, in fact, introduced amendment proposals to Government bills. Such amendments have not seen the light of day, either because the respective proposals were not approved or, worse still, were thwarted by the President of the Legislative Assembly, through the issuance of orders of rejection. This non-admission of amendment proposals by the President is in breach of Article 75 of the Basic Law and of several procedural rules, as I shall detail below.

11.4 Practices

Practices are basically usages: “The parliamentary practices, in short, are usages detached from any conviction of mandatory behaviour.”²⁴⁴ In the field of parliamentary law, it has perhaps become commonplace to speak of usages as practices. I have made this autonomous reference to practices, not because one should see them under different guises, but precisely to point out that they are often confused or belong to a single typology.²⁴⁵ There are, however, scholars who distinguish between parliamentary practices from the usages, under a “logic that, in each period, befits the processes and the organisation according to the vision of the parliamentary alliances or majorities”, ie based on a limited period and on the political chessboard.²⁴⁶

I would like to remind the reader of the competence of the CRPMM to “*suggest to the Plenary the changes [to the Rules of Procedure] that the practice may advise*”, as per Article 26, subparagraph (e) of said Rules. This norm instils the idea that, until they are inserted into the Rules, the practices are devoid of binding effect. Such a conclusion would reinforce my understanding of practices as mere usages.²⁴⁷

11.5 Conventions

Defining conventions proves elusive, as their implications fluctuate dependent upon the

²⁴⁴ Diogo Freitas Do Amaral, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 41. See also Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 864, referring to constitutional practices “*mere usages*”.

²⁴⁵ See, for example, Jorge Miranda, *Manual Direito Constitucional II* (Coimbra Editora 2007) 156, and, in a joint assessment, Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 166, et seq.

²⁴⁶ César Delgado-Guembes, *Teoría de las Fuentes del Derecho Parlamentario* (PERU 2009), 117.

²⁴⁷ Cf the case of the modification of Article 110, paragraph (1), regarding the timing of the cancellation of a legislative initiative, ie determining the moment up until which a legislative initiative may be withdrawn. Some practices, shall we say, have allowed the withdrawal of Government bills after the end of the general debate — even after its approval on the whole and after the conclusion of the committee's work, in clear violation of the solution in force until 2017. At present, the regulatory procedural norms have followed that practice, henceforth legitimising cases of cancellation after approval of a bill on the whole.

matrix of the legal system into which they are inserted.²⁴⁸

In any event, inherent to the idea of a convention is precisely an agreement involving two parties²⁴⁹. These bilateral agreements do not create legal obligations, but only political ties that may be expressed or implied. They may serve to implement vacuous spaces left by legal regulation, to overcome difficulties in the specific application of a given constitutional, legal, or procedural norm, or even to seek to replace the application of constitutional, legal, or procedural norms with a new, alternative, *political regulation*,²⁵⁰ if such is possible. I do not recognise any legal value stemming from conventions; with respect to the last example, the principle of constitutionality and the principle of legality would be jeopardised.

On the legislative procedure,

“It is important to start by emphasising a firm point — the flexibility of the parliamentary legislative procedure, whether by written rules of procedure or by unwritten parliamentary conventions, encounters a first and insurmountable limit in the norms and principles of the Constitution”.²⁵¹

In Macau, it will not be impossible to uncover conventions of the first type, namely concerning the manner in which the presence of the Chief Executive in Plenary unfolds. Within the scope of the legislative procedure, it may be possible to detect conventions relating to the timing of introduction, the pace, and the priority for appraisal/examination, regarding a given Government bill. Or conventions on the simultaneous introduction and debate of several Government bills related to each other, for the proponent’s convenience. Perhaps, finally, in the event of *late or untimely withdrawals* of Government bills — essentially, a misnomer for the cancellation of the respective legislative initiative.²⁵²

11.6 Precedents

Precedents, inherently non-judicial in this discourse, can be characterised as “practices

²⁴⁸ Cf, Jorge Miranda, *Manual Direito Constitucional II* (Coimbra Editora 2007) 156, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 863, et seq; Diogo Freitas Do Amaral, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 40, Riccardo Guastini, ‘Costumbre Y Convenciones Constitucionales’, in *Estudios de teoría constitucional* (FONTAMARA 2007) 244 et seq.

²⁴⁹ Either an express one or a tacit agreement, many times these last ones being, in practice, more common, as said by Riccardo Guastini, ‘Costumbre Y Convenciones Constitucionales’, in *Estudios de teoría constitucional* (FONTAMARA 2007) 244.

²⁵⁰ See Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 167 et seq.

²⁵¹ Diogo Freitas Do Amaral, ‘Parecer’, in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 23.

²⁵² Precisely what happened with the Government bill entitled “Framework for guarantees applicable to the holders of the office of Chief Executive and the principal officials, before assuming office, while in office and after leaving office.”: as I shall show below.

relative to specific questions of the jurisdictional-political procedure, legislative procedure”²⁵³, ie they originate from the solution decided upon a given case to become the basis for deciding similar situations. It is unnecessary to have a reiterated practice, which may or may not exist, “because a simple episodic fact,²⁵⁴ a single conduct, may give rise to an enabling or legitimising precedent for a future similar behaviour in view of a similar factual scenario.”²⁵⁵

A precedent is a self-binding behaviour practiced by a body or the holder of an office. I consider that the nature of a precedent is political, rather than legal.²⁵⁶ Therefore, a precedent shall not be positioned to contradict written norms, be they constitutional, legal, or procedural. There are, consequently, wide areas, vast matters, which are forbidden to conventions.²⁵⁷

In this category one may include the acceptance of bills — with delayed distribution thereof, until they are rendered fully bilingual, in the event of introduction by the proponent in only one of the official languages of the MSAR — and, possibly, in between this typology and that of the usages, the submission of bills for *prior assessment* by the Legislative Assembly’s Legal Advisory Staff, in order to determine their conformity with the applicable parametric normative levels.

11.7 Intra-Parliamentary Case-Law

This concept may somehow be seen as an upshot from the previous notion of precedent, especially when viewed as an isolated episode, being embodied in “the sum of precedents that establish unitary decisions [...] arising in parliamentary life”.²⁵⁸ Decisions live in parliament and its constituent bodies.

Another angle of approach would be to grant true jurisdictional — in the sense of decision-making on cases — competence, mainly as a way of filling *lacunae* or establishing stable interpretations of norms in certain circumstances. Differently from the precedents, in these cases one would see the allocation of specific competences to clarify any doubts and solve conflicts.

The decisions thus made would constitute *intra-parliamentary case-law*, with

²⁵³ Francisco Zúñiga Urbina, ‘Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)’ (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 279. See also Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014) 79, et seq.

²⁵⁴ Hence it is not to be confused with a custom.

²⁵⁵ Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 170.

²⁵⁶ Admitting cases of legal bindingness, Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 170.

²⁵⁷ Cf although with a categorisation that may not be entirely coincidental, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014) 87, et seq.

²⁵⁸ Cf Francisco Zúñiga Urbina, ‘Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)’ (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 279–280.

the proviso that such are in-house decisions, taken in parliaments and their bodies, in the Legislative Assembly.

The second perspective has a normative basis in the Legislative Assembly's Rules of Procedure, in several aspects and with different actors.

In effect, Article 159²⁵⁹ of the Rules of Procedure establishes:

“(Interpretation and solving of omitted cases)

1. The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members' Mandates.

2. The deliberations of the Board taken under the previous paragraph, when written, are published in the Series II of the Legislative Assembly's Official Bulletin”.

This is the main seat of intra-parliamentary case-law in the MSAR, and the Board of the Legislative Assembly is the competent body. The express admissibility of unwritten intra-parliamentary case-law is in the letter of the norm — “deliberations, when written” — allowing, therefore, for non-formalised decisions.

There are a few known cases of the exercise of this competence in the Legislative Assembly's procedural practice. The immediate limit of this *intra-parliamentary case-law* is provided by the norm, constricted in its scope to matters relative to the application of the Rules of Procedure: interpretation shall follow the normal rules, eg one may not interpret a norm without a minimum support in the respective text;²⁶⁰ and the solving of omitted cases shall require the real existence of lacunae that need to be filled.

Another lane of *intra-parliamentary case-law* should be pointed out, with a different protagonist, and which may, laterally, impact the legislative procedure: Article 26, subparagraph (f) of the Rules of Procedure: the Committee on the Rules of Procedure and Members' Mandates is competent “*To decide, at the request of the President of the Legislative Assembly, the Board, or the President of any committee, on conflicts of competences between committees.*”

²⁵⁹ See also Article 18, subparagraph (b) of the Rules of Procedure.

²⁶⁰ For example, in the former wording of Article 110 of the Rules of Procedure, “*Once any bill has been accepted, [...], its authors or authors may withdraw it until the end of the general debate [...]*”. Under this norm, which was replaced under Resolution No. 2/2017 — bringing profound changes to the Rules of Procedure — the proponent could not have withdrawn — or should not have been authorised to do so by the Legislative Assembly — the Government bill entitled “*Framework for guarantees applicable to the holders of the office of Chief Executive and the principal officials, before assuming office, while in office and after leaving office.*”: since such bill had already been subject to general debate and been approved on the whole. Precisely with the modifications made in 2017, the aforementioned norm, paragraph (1) of Article 110 (paragraph [2] was unfortunately repealed) has a new wording: “*The authors of a bill may withdraw it until the debate on the specifics thereof commences*”: thus enshrining into the body of the Rules of Procedure a previous practice, which was devoid of any legal or procedural grounding — there was neither a *lacuna*, nor did the text then in force allow for the solutions that were practised.

At the level of these informal sources, one could, perhaps, also draw two additional spheres into this reflection: **legislative ethics**²⁶¹ and **rules of courtesy**.²⁶²

12. Final Remark

At the end of this chapter, one of my key ideas shall have been ingrained: the regulation of the MSAR's legislative procedure does find its centrality and fulfilment in the Rules of Procedure of the Legislative Assembly, but not exclusively therein.

There is, as I have tried to show, a constellation of other normative acts that converge in the governing of the legislative procedure, especially when the legislative procedure is seen as the set of all the norms that regulate all the parliamentary acts²⁶³ and all the moments that result, ultimately, in the normative act designated as Law, as a *complete* and effective legislative act.

²⁶¹ In addition to the legal rules established in Law No. 3/2000 (On the Legislature and the Legal Status of the Members of the Legislative Assembly), especially Articles 34 et seq and Article 38, which establish ethic-based rules. See, for an overview, although seemingly suggesting that the rules of parliamentary ethics must all be contained in written norms, namely laws, Efrén Chávez Hernández, 'Ética En El Poder Legislativo' *"Parliamentary ethics shall not be but ethics applied to the representative institution, which one may designate as parliament, congress [...] assembly, inter alia."* (2006) 115 Boletín Mexicano de Derecho Comparado 109.

²⁶² Cf Jorge Miranda, *Manual Direito Constitucional II* (Coimbra Editora 2007) 157, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014) 103, et seq. I refer here to norms of social conduct, of civility, of correction that, prima facie, have very little impact within the scope of the legislative procedure, but should not be absolutely excluded therefrom. For example, in the name of courtesy, the Committee Reports are sent to the Government as soon as signed, ie before the general procedural deadline of five days. It could also be under a rule of courtesy that, in addition to Members, everyone who takes the floor in a Plenary meeting should do so standing; it is a behaviour that does not occur, perhaps because, under the terms of Article 70, paragraph (2) of the Rules of Procedure, *"When addressing, Members may speak standing or seated."*

²⁶³ On this notion of *parliamentary act*, ie an act that manifests itself within the scope of the constitutionally established parliamentary faculties, functions and powers, including acts by third parties, within the scope of the parliament (eg external legislative initiative, and speaking of procedurally recognised subjects in parliamentary processes), César Delgado-Guembes, 'Teoría del Acto Parlamentario' in *Derecho Parlamentario* (USMP 2009) 352 et seq. The author also refers to acts in Parliament and acts before Parliament, which, according to his notion, would no longer be parliamentary acts.

PART 3

LEGISLATIVE POWER UNDER THE RULES OF PROCEDURE OF THE LEGISLATIVE ASSEMBLY

VI.

THE CENTRALITY OF THE RULES OF PROCEDURE OF THE LEGISLATIVE ASSEMBLY IN THE LEGISLATIVE PROCEDURE

1. The Centrality of the Rules of Procedure and the Intersection and/or Pre-Determination of Other Norms: An Introduction

Sidestepping the core issues often constitutionality pre-defined in the legislative procedure — such as the area of norm-making by the law; legislative initiative; signature; publication — the Rules of Procedure of the Legislative Assembly serve as the bedrock²⁶⁴ sustaining the filigree of lawmaking, the steps to be taken, the timing of such steps and the allocation of tasks to the different bodies of the Legislative Assembly.

In other words, there is a centrality²⁶⁵ to the Rules of Procedure with respect to the legislative procedure since the overwhelming majority of procedural steps and stages are established, developed, or implemented therein. Such centrality is rendered completely arrant by the reality of a single legislative body existing in the MSAR — there is, simply put, no other local body able to enact legislative acts.²⁶⁶

The complex and lengthy path traialed by a bill — from its introduction until its transformation into a formal legislative act of the Legislative Assembly — is, by and large, set out in the Rules of Procedure of the Legislative Assembly: be it *ex novo*, as is the general case; be it by replicating and reaffirming constitutional provisions of the Basic Law; or be it by *intermediating* — ie developing, implementing and extending constitutionally pre-established norms.

From the previously discussed norms contained in the Basic Law and other normative acts, a few conclusions can be clearly drawn. Primarily, matters pertaining to fundamental rights are reserved to the Law and solely to the Law. The legislative initiative

²⁶⁴ This is a common solution in comparative law; cf, for instance, ‘Given the normative scarcity of the Constitution regarding the legislative procedure, its basic source is found on the rules of Procedure’ of the parliaments, Piedad García-Escudero Márquez, ‘El Procedimiento Legislativo en las Cortes Generales: Regulación, Fases y Tipos’ (2005) UNED Teoría y Realidad Constitucional 16, 217.

²⁶⁵ Centrality does not necessarily entail a qualitative or a founding or primary importance in the strict sense of these terms; see eg Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 665.

²⁶⁶ A different issue to address altogether is whether other regional legislative acts should exist and if, pre-conditionally, some higher norms could point thereto.

in such matters is of a shared nature, involving both Members and the Government/Chief Executive. Every bill requires the approval of the Legislative Assembly in a Plenary session through a given majority. Additionally, the signature of the Chief Executive and the order for publication are indispensable, with such publication transpiring in Series I of the OG.

Another conclusion or example has already been reached thus far: the essential elements of the taxation framework may only be subject to regulation by law of the Legislative Assembly, the respective legislative initiative being reserved to the Government/Chief Executive. Nevertheless, as above, the Government's bill requires approval by the Legislative Assembly in a Plenary session, followed by the Chief Executive's signature and subsequent publication in Series I of the OG.

Do the aforementioned information and conclusions allow one to know everything about the legislative procedure, ie everything that is required for a bill to be transformed into law?

The answer is a resounding “no.”

Several procedural details remain opaque. How, for instance, is a bill formally accepted? What are the conditions for introducing bills? What are the deadlines to be observed for their appraisal? How are the bills made public? How are they voted upon? Is there a single voting mechanism or more than one? What is the form of voting? Which bodies of the Legislative Assembly are involved in such a process? Are there reports on the bills? Do such reports precede the first voting, or are they issued subsequently? What are the deadlines for submitting amendment proposals? And for the reports? May bills be withdrawn? Until when? What are the procedures to be followed, and who is competent for the final drafting of the laws? May a specific bill be processed urgently? If so, under which terms and on what grounds? How are these various acts sequenced and linked together?

Such questions are answered in the procedural norms of the Legislative Assembly. They are not answered — at least immediately and sufficiently — neither by the Basic Law nor by the other normative acts previously referred to.

Without prejudice to the intersection with, and/or pre-determination of, other norms, the Rules of Procedure of the Legislative Assembly do codify, develop, and implement the legislative procedure of the MSAR.

2. Resolution No. 1/1999 and the Amending Resolutions: Brief Remarks

The Rules of Procedure were approved by Resolution No. 1/1999 and subsequently

amended by Resolutions No. 1/2004,²⁶⁷ No. 2/2009,²⁶⁸ No. 1/2013,²⁶⁹ No. 1/2015,²⁷⁰ and No. 2/2017.²⁷¹ The legal form for the enactment of the approval of, and of amendments to, the Rules of Procedure of the Legislative Assembly has been the resolution of the Plenary, although, as alluded to above, another specific legal form could be conceivable. The approval of the Rules of Procedure results from the exercise of an absolute competence expressly granted by the Basic Law to the Legislative Assembly — without a scintilla of hesitation, there is, as such, a substantive area of absolute original and supervening procedural norm-making initiative in favour of the Legislative Assembly and its Members.²⁷² Nor could it be otherwise, even if the Rules of Procedure were silent on such issue, as this normative territory belongs to the domain of the internal self-organisation of the legislative body.

Although more relevant to the subject-matter to be addressed in the next chapter (eg the nature of the Rules), I would like to take this opportunity to discuss the various amending resolutions, from the point of view of their normative procedure, particularly with respect to the enabling constitutional norms and the correctness of the invocation thereof.

Resolution No. 1/1999, which approves the Rules of Procedure of the Legislative Assembly,²⁷³ begins with these introductory words: “*The Legislative Assembly resolves, under paragraph (2) of Article 77 of the Basic Law of the Macau Special Administrative Region, the following:*”. In other words, it bases its authority correctly on Article 77 of the Basic Law.

Resolution No. 1/2004 rightly invokes the enabling norm of the Basic Law, adding the regulatory norm regarding the form, publication, and entry into force of the Rules: “*The Legislative Assembly resolves, under Article 77 of the Basic Law and Article 161 of its Rules of Procedure*”.

²⁶⁷ Among other amendments, the text of Articles 6, 16, 22, 25, 26, 28, 30, 36, 37, 83, 84, 85, 86, 89, 90, 98, 102, 107, 113, 114, 119, 120, 137, 138, 139, 153, 157, 160 and 161 was modified. Pursuant to Article 4 of this resolution, the Rules of Procedure were republished in its entirety, with the amendments inserted in their proper place, and, in view of the deletion of a few provisions, the text of the amended Rules was renumbered.

²⁶⁸ Among other amendments, Articles 9, 35, 50, 64, 127, 129, 147 and 151 were modified, and Subsection II-A, on monitoring committees, was added to Chapter IV. When this amendment was made, the Rules were republished in its entirety and a consolidated version, pursuant to Article 4 of the Resolution: “*The Rules of Procedure of the Legislative Assembly, approved by Resolution No. 1/1999, as amended by Resolution No. 1/2004 and by the present resolution, are republished and renumbered in accordance, in the annex hereto*”.

²⁶⁹ Only a minor modification to Article 27 was introduced.

²⁷⁰ Resolution No. 1/2015, which *Amends the Rules of Procedure of the Legislative Assembly*, modifying the text of Articles 2, 53, 60, 72, 109 and 142, and repealing article 54 said Rules.

²⁷¹ Resolution No. 2/2017, which amends Articles 11, 17, 31, 34, 42, 49, 52, 58, 59, 81, 98, 110, 111, 112, 135, 136, 139, 141, 146, 149, 154 and 161 of the Rules of Procedure of the Legislative Assembly, and repeals subparagraph (d) of Article 11 and paragraph (2) of Article 110, thus introducing changes with a major impact, namely within the legislative procedure, effective from October 2017 — for example the excision of the possibility of adopting an initiative; the relevant procedure of acceptance and rejection of the legislative projects, especially with regard to Governments bills and to the challenges (on appeal) to such decision thereon.

²⁷² See Article 160 of the Rules of Procedure.

²⁷³ Which is annexed thereto, forming an integral part thereof, pursuant to Article 1 of said resolution.

Resolution No. 2/2009, on the other hand, wrongly invokes Article 71²⁷⁴ as the enabling constitutional norm, insofar as the competence to approve and to amend the Rules of Procedure ends up in confusing two distinct functions. However, it correctly invokes the procedural norm: “*The Legislative Assembly resolves, under Article 71 of the Basic Law and Article 159 of its Rules of Procedure, the following:*”.²⁷⁵

Resolution No. 1/2013 rightly restores the effectively enabling constitutional norm²⁷⁶ and specifies the procedural norm on the form, publication, and entry into force contained in the Rules of Procedure: “*The Legislative Assembly resolves, under paragraph (2) of Article 77 of the Basic Law of the Macau Special Administrative Region and paragraph (1) of Article 161 of its Rules of Procedure, the following:*”.

Resolution No. 1/2015 is likewise correct: “The Legislative Assembly resolves, under paragraph (2) of Article 77 of the Basic Law of the Macau Special Administrative Region and Article 161 of its Rules of Procedure, the following:”.

The same applies to Resolution No. 2/2017, with a nuance in the procedural enabling form: “The Legislative Assembly resolves, under paragraph (2) of Article 77 of the Basic Law of the Macau Special Administrative Region, the following:” — thus omitting the appropriate reference to the regulatory procedural norm.

²⁷⁴ I must make the supposition that the reference is to subparagraph (1). There is no other subparagraph in Article 71 that could be brought forth in this normative process.

²⁷⁵ This resolution is still tainted by a formal error, because it confuses the Rules of Procedure, approved by Resolution No. 1/1999 and contained in the Annex thereto, with the resolution *per se*: “(Amendments to Resolution No. 1/1999) Articles 9, 35, 50, 64, 127, 129, 147 and 151 of Resolution No. 1/1999, which approved the Rules of Procedure of the Legislative Assembly, shall have the following text:”. However, it is not Resolution No. 1/1999 that is being amended, but rather, of course, the “Rules of Procedure of the Legislative Assembly of the Macau Special Administrative Region, which are attached thereto and form an integral part of the present resolution.” This error was not repeated in the other resolutions. For example, in Resolution No. 1/2004, “Articles [...] of the Rules of Procedure of the Legislative Assembly, approved by Resolution No. 1/1999, shall have the following text:”. Similarly, in Resolutions No. 1/2013, No. 1/2015 and No. 2/2017.

²⁷⁶ Paragraph (2) of Article 77: “The Legislative Assembly shall make, on its own, its rules of procedure, which may not contravene this Law.” It is true that, in this matter, as in others, the Basic Law opts for regulatory modesty or maybe for a somewhat radical or distorted view of the then-current thesis of “*normative simplification*”. For example, compare the equivalent rules of the Organic Statute of Macau — Article 30, paragraph (1), (j): The Legislative Assembly is competent to make its internal rules of procedures, in addition to the development pursuant to Article 42, which established: “The Rules of Procedure of the Legislative Assembly shall contain: a) The composition and competences of the Board; b) The organisation of the committees considered necessary; c) The form of voting; [...] e) The conditions for the introduction of bills for territorial laws [...] f) The procedural protocols to be followed for the final drafting of laws [...] h) The regulation of the powers, rights, immunities and privileges of the Members of the Assembly; i) Other rules contained in this Statute and also those considered necessary for the functioning of the Assembly.” This norm, naturally no longer in force, shall not fail to have a potentially relevant role to play as regards the interpretation and development of the corresponding article of the Basic Law, in obedience to the principle of continuity. In truth, there is nothing in the Basic Law implying or suggesting that the Rules of Procedure, to which said Law refers, is (or has to be) radically different from the Rules of Procedure of the Legislative Assembly in effect prior to the establishment of the MSAR. An inattentive look at the current Rules of Procedure confirms that the Legislative Assembly created such Rules in a way that is, structurally and fundamentally, a continuation of the previous ones, excepting, of course, the differences directly derived from the Basic Law and the different options in terms of legislative policy (eg the approval of a bill on the whole before the report of the examining committee, and not in the reverse order, as was the case previously).

I shall now continue with the journey, after this short *sojourn*.

3. Overview of the Rules of Procedure with respect to the Legislative Procedure

Allow me to present a birds-eye view of the legislative procedure,²⁷⁷ within the regulatory scope of the Rules of Procedure of the Legislative Assembly.

Emphatically, the Rules of Procedure open with the following Article, entitled “*Powers in the legislative sphere*”:

“The Members have the power, in exercising the legislative competence of the Legislative Assembly, to:

a) Introduce bills and draft resolutions;

b) Introduce proposals to amend the bills and drafts referred to in the preceding paragraph, as well as to Government bills;

c) Apply for the urgent processing of any of the bills, drafts and proposals provided for in the preceding paragraphs.”

In other words, the Members’ powers in legislative matters are draped as a noble function,²⁷⁸ with a primary role, at least symbolically.²⁷⁹ Moreover, from this first provision, several important norms immediately irradiate, namely: the power of original legislative initiative, through the introduction of bills; the power of supervening initiative, affirmed, in principle, *vis-à-vis* both Members’ bills and Government legislative initiatives (*as well as to Government bills*); and the power to request urgency processes of any and all types of bills.

Some questions do arise as to the inclusion of the draft resolutions,²⁸⁰ as framed under the heading “*Powers in the legislative sphere*” and “*in exercising the legislative competence of the Legislative Assembly*”. Is it the intent that normative resolutions also adopt the form of law, even though using another procedural designation — or, better still, a different form of law? Or is such inclusion explained by criteria of formal drafting techniques and/or to a perceived convenience of insertion and systematic reference? Or,

²⁷⁷ For an overview, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 480, et seq.

²⁷⁸ Recall Article 75 of the Basic Law and see also, “Article 39 (Referral) The functional powers of the Members, in legislative and supervisory matters, including other powers and duties that are instrumental thereto, are regulated in the Rules of Procedure of the Legislative Assembly, Law No. 3/2000, as amended by Law No. 13/2008 and Law No. 12/2009, “On the Legislature and the Legal Status of Members of the Legislative Assembly”.

²⁷⁹ The Rules of Procedure of the Assembly of the Portuguese Republic contain, in Article 1, *the start date and term of the mandate*. The same was true regarding the Rules Procedure of the Legislative Assembly, in force until 19 December 1999.

²⁸⁰ It should be noted that, inconsistently with the provisions of Article 1, the power to propose amendments to the Rules of Procedure, which follows the form of a resolution, seems to be classified as an instrumental power, pursuant to Article 3 of said Rules.

moving in another direction, what is at stake is not an assimilation by, or an equivalence to, the *form of law*, but the extolling of a *value/force of law or equivalent*?

Article 9 lays down the following bundle of powers that the President of the Legislative Assembly is competent to exercise, in the context of the legislative procedure:²⁸¹

- “To summarily accept or reject bills, draft resolutions and draft simple deliberations by the Plenary, challenges and applications, after verifying the procedural regularity thereof, without prejudice of his or her decision, in the event of a total or partial rejection, being subject to appeal to the Board and subsequently to the Plenary;”
- “Submit to the competent specialised committees for the purposes of examination and reporting, the texts of the bills, draft resolutions, and draft simple deliberations by the Plenary;”

And still on topic:

- “To promote, in tandem with the Board, the creation of committees and to ensure compliance with the deadlines established in the Rules of Procedure or by the Plenary;”
- “In general, to ensure compliance with the Rules of Procedure.”

Article 10 makes it incumbent upon the President of the Legislative Assembly to put all bills, drafts, and proposals to debate and to voting by the Plenary, and to inform the latter of those that have been summarily rejected.²⁸²

Article 12 confers several other competences upon the President of the Legislative Assembly: to give notice to the Chief Executive of the refusal to approve the Government bills referred to in Article 52, subparagraph (2) of the Basic Law; to give notice to the Chief Executive of the confirmation of a Member’s (or Members’) bill, in the event provided for under Article 51 of the Basic Law; to give notice to the Chief Executive of a new refusal to approve the Government bills provided for in subparagraph (a), pursuant to Article 54 subparagraph (3) of the Basic Law; to send the approved bills to the Chief Executive, for signature and publication, pursuant to Article 50, subparagraph (3) of the Basic Law; to exercise, on his or her own initiative, or at the request of any Member, the right to invite third parties to participate in plenary meetings, without prejudice to Article 50, subparagraph (15), and of Article 64, subparagraph (6), of the Basic Law.

²⁸¹ Article 74 of the Basic Law, in particular its paragraph (6), which provides that the President of the Legislative Assembly of the MSAR is competent to “*Exercise other powers and functions, as conferred by Rules of Procedure of the Legislative Assembly.*”

²⁸² See also Article 51, on the *duty to inform*.

Under Article 18,²⁸³ the Board of the Legislative Assembly is competent to decide on all issues of interpretation²⁸⁴ and solving omitted cases or *lacunae* in the Rules.²⁸⁵ Article 26 complements this norm, to some extent, by establishing that the Committee on the Rules of Procedure and Members' Mandates shall issue an advisory opinion on such issues, upon submission thereto by the President, the Board, or the Plenary. The said Committee shall also opine on draft resolutions to amend the Rules of Procedure, as well as to suggest to the Plenary "*the modifications that the practice may advise*".

Article 28 lays down the competence of the standing committees to examine and to report on bills, and the amendment proposals thereof, introduced to the Legislative Assembly. Exceptionally, such committees may also vote on the specifics of a bill *after* its approval in general by the Plenary, if the latter decides on such a course.

Article 56 deals with the agenda of the plenary meetings, establishing a set of priorities. In accordance with the Basic Law, the initial items are Government bills, as requested by the Chief Executive. Subsequent bills are ordered based on the significance of the subject matters, with topics such as elections, the budget, fundamental rights, and the taxation framework taking precedence.

Article 60 specifies that when addressing the Plenary for the introduction of bills or proposals, speakers are restricted to a brief indication of the object.²⁸⁶

Article 66 governs the *cherished* and often employed²⁸⁷ instrument of the voting explanation.²⁸⁸

Article 73 provides that Members who authored the bill under scrutiny may participate, without the right to vote, in the competent committee's meetings.²⁸⁹ The said Members may address the committee in question without the authorisation of the respective President.

²⁸³ See also article 159, paragraph (1), of the Rules of Procedure, which provides that "The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members' Mandates."

²⁸⁴ It is not unreasonable to remind the reader that this task of legal interpretation should be guided, as occurs in other legal orders, by a certain idea of *in dubio pro parlamentum*, ie in favour of the Legislative Assembly and what bodies of a parliamentary nature represent. See, for example, "*The interpretation, in particular, must be performed in such a way that the representative and participatory character of Parliament is reinforced and not limited*": Marina Altamirano, *Manual de Procedimientos Legislativos* (Editorial Juricentro 2008) 295.

²⁸⁵ In other words, two different powers are at stake: interpretation of the Rules of Procedure and, on a different plane, solving gaps, loopholes and omitted cases and filling *lacunae*, depending on whether Article 18 (and 159) or Article 26 of the Rules are being read.

²⁸⁶ A rule that was, at times, clearly ignored.

²⁸⁷ Indeed, one often witnesses silence during the debate, followed by a long litany of explanations of vote.

²⁸⁸ To clarify the meaning of the vote, ie whichever way the vote was cast, be it favourable or dissenting (even including abstentions).

²⁸⁹ I believe that the correct understanding is that only the Member(s) who, having introduced the bill — ie being the proponent(s) — do not belong to that committee, shall not be entitled to vote. In other words, a proponent who is also a Member of the committee does not lose his or her right to vote.

Article 81²⁹⁰ contains the necessary majority rules for approval, stating that “Deliberations aimed at approving the matters provided for in subparagraphs (b), (c) (d) and (e) of Article 56 shall be passed by a qualified majority of two-thirds of the total number of Members.” This refers to confirmations outlined in Article 54, paragraph (2), and Article 5 of the Basic Law. Additionally, it pertains to the Government bill for amending the Electoral Law of the Legislative Assembly, pursuant to paragraph (3) of Annex II to the Basic Law, and to bills and proposals for the purposes of paragraph (7) of Annex I to the Basic Law.

Paragraph (2) declares that “Deliberations aimed at approving the matters provided for in the remaining paragraphs of Article 56, with the exception of paragraph (r),²⁹¹ shall be passed by more than one half of the total number of Members.” In other words, this norm replicates the general rule of the absolute majority, as provided for in Article 77 of the Basic Law.²⁹²

The above are clear examples of procedural rules that merely incorporate, into the Rules of Procedure, the higher-level and *ex ante* defined norms of the Basic Law, thus bestowing undoubted *constitutional force* upon such rules.

Article 85, as mentioned earlier, seems to “*de-locate from the Rules of Procedure*” to legislative acts, by means of an *upgrading* of the source of norm-making in this case. This is evident when it specifies in paragraph (2) that “*The rules on the identification, forms and template, publication, rectification/correction and entry into force of laws and resolutions are governed by law.*”

Recalling the originally proposed text of the Rules of Procedure of the Legislative Assembly, a similar norm for “*de-location*” or normative *upgrading* was, in fact, introduced in Article 1, involving matters under the purview of, or to be included into, the law, namely the Legal Status of the Members. The said norm, however, was not greeted with approval and disappeared in the final text of the Rules.²⁹³

In effect, Draft Resolution No. R1/I/1999-1, drawn up by the CRPMM,

²⁹⁰ This Article has undergone modifications introduced by Resolution No. 2/2017, namely a new paragraph (4) explicitly explaining that “*approval by simple majority means that the deliberations have more votes cast in favour than against.*”: in an exercise of futility and normative inappropriateness.

²⁹¹ This is a matter for draft simple deliberations of the Plenary.

²⁹² Therefore, repealing the general rule that the deliberations of the Legislative Assembly are passed by a simple majority of the votes of the Members present in the Plenary meeting (with exceptions, *inter alia*, cases of a two-thirds majority of the Members fully exercising their functions within their mandate (a.k.a., in office). Naturally, this possibility of approving laws by a simple majority would make it less difficult to pass Members’ bills. As a matter of fact, there have been bills which have mustered more votes in favour than against; by virtue of the absolute majority rule (the criterion being the total number of Members), such bills were not approved. One should also note that the “*total number of Members*” will not always and absolutely be equivalent to “*Members fully exercising their functions within their mandate*”.

²⁹³ This would not be a unique nor innovative example. In fact, Article 192 of the Rules of Procedure of the Legislative Assembly of 1977, established that the law would regulate its Support Services, under the significant heading “*Referral to the law*”. Such is confirmed by the preamble of Law No. 3/77/M, of 28 May 1977, “*Services of the Legislative Assembly*”: “*Article 192 of the Rules of Procedure of the Legislative Assembly provides that a special law shall regulate the Services thereof.*”

contained the following wording:

“Article 1 (Perimeter of matters governed by the Legal Status of the Members)

The Legal Status of the Members shall regulate the following matters:

- a) The scope and the initial date and the term of the legislature, the legislative session, the normal period of functioning of the Legislative Assembly and the mandate;
- b) The pre-requisites, conditions, procedures and effects of Members’ resignation, suspension of mandate and disqualification;
- c) The Members’ immunities and other conditions for exercising their mandate;
- d) The Members’ general rights and duties, which do not have a direct connection with the exercise, in particular, of the political, legislative and supervisory powers of the Legislative Assembly of the Macau Special Administrative Region;
- e) The procedure for the verification of credentials.”²⁹⁴

²⁹⁴ Cf the address delivered by Member Leonel Alves: “I begin by pointing out the first reason: in the first plenary meeting of this Assembly, much was said about what should be included in the Rules of Procedure and what should be contained in the “Legal Status of the Members”. In fact, this issue has been discussed at length, as we will have a Basic Law in force from the 20th of this month, different from the Organic Statute of Macau. Thus, we find that the effort made, in order to clearly delimit the boundary between these two legal enactments, was enormous: on the one hand, the Rules of Procedure and, on the other, the “Legal Status”. What we have here, in Article 1, is the result of said effort. From Article 2 onwards, the matters therein should belong to the Rules of Procedure, while the “Legal Status of the Members” should be the proper place for that established in Article 1. Such is the result of the reflection we promised to undergo when, in this Chamber, we met for the first time. The second reason, which led to the inclusion of this Article in the draft, has to do with my belief that it is not “a transitory or temporary rule”: but rather one “of transition”. We will have new Rules of Procedure — ie “new” when compared to the previous ones! — the first of the Macau Special Administrative Region, regulating the activity of this legislative body. No harm would come, it seems to me — or, at least, there would be no formal deficiencies — if we included this Article in the Rules, the purpose of which is, as I have said, solely and exclusively, to adapt, during this period of transition, to a new law that will sovereignly regulate local issues — the Basic Law. Perhaps, after this period, and in two or three years, it will prove unnecessary. For this very reason, I call this law “the law of transition” — in two, three, four or five years, it may become totally unnecessary and useless. Therefore, the purpose of its inclusion has the objective, I repeat, of showing that there are issues to be dealt with, in the Legal Status of the Members: through a law. As an example, I would like to say that, in one of the meetings we held, an Esteemed Colleague warned of the need to specify, in the Rules of Procedure, the normal period for the Assembly to function, or better still, when each legislative session begins and ends, and when the extraordinary period of functioning begins. The truth is that he found no answer in the Rules. At the time, it was said that we may not deal with this type of issue in the Rules of Procedure, as it must be contained in a law, as referred to in Article 1: “The scope and the initial date and the term of the legislature, the legislative session, the normal period of functioning of the Legislative Assembly shall be regulated by law.” It was through a specific and paradigmatic example that the usefulness of the Article was demonstrated. We might ask: Is/Was it in error? No, it is because Article 1 establishes that there has to be a law. The third reason for its insertion is for my Esteemed Colleagues to ascertain if any of these matters, a), b), c) or d) — which we believe merit inclusion in a law — should, on the contrary, be included in the Rules of Procedure. Therefore,

In an inverted direction, the Legal Status of the Members²⁹⁵ apparently “de-locates” these matters through a *downgrading* of the source of norm-making, the loci of which are the Rules of Procedure. One might call this phenomenon “delegalising pro Rules of Procedure (Regimento)”. Article 39 of said law stipulates the following: “*The functional powers of the Members, in legislative and supervisory matters, including other powers and duties that are instrumental thereto, are regulated in the Rules of Procedure of the Legislative Assembly*”; Article 5, paragraph (2) establishes: “*The anticipation or extension of the normal period of functioning are regulated in the Rules of Procedure of the Legislative Assembly.*” As such, matters reserved to parliamentary procedural norms are declared or clarified in a formal law.

In Articles 92 *et seq.*, one finds a set of norms on the publicity/transparency of the work carried out by the Legislative Assembly, including rules on the Legislative Assembly’s Bulletin and its several Series. Such transparency entails, *inter alia*, the publication of the verbatim account of the plenary meetings, of the texts pertaining to bills, reports of the competent committees, and final drafts of approved bills.²⁹⁶ Among them, Article 97 deserves special emphasis.²⁹⁷

Naturally, what follows are the strictly procedural rules on the legislative

this has to do with what I underlined at the start of my speech: pursuant to the debate at the first plenary session, we promised to make an effort to know what should be in a law and what should be in the Rules. This was the result of our conclusions. I don’t know if I have been sufficiently clear as to the reasoning behind this preliminary draft. I reiterate that the objective is to elucidate the Esteemed Colleagues about the work that we performed and the separation of the subject-matters that we intend to pursue.” The recommended norm was, however, deleted.

²⁹⁵ Law No. 3/2000.

²⁹⁶ These rules, plus the existence and content of the Legislative Assembly’s website, allow us apply the following words to the MSAR: “*The parliamentary legislative procedure is an open, transparent procedure, in which all documents received are available on the website of the Assembly of the Republic and in the 2nd series of the Journal of the Assembly of the Republic*”: João Caupers and Marta Tavares de Almeida and Pierre Guibentif, *Feitura das Leis: Portugal e a Europa* (Fundação Francisco Manuel dos Santos 2014) 119. In this regard, Osvaldo Castro affirms, in essentially parallel legal order, that the parliamentary legislative procedure is public, from the introduction of the legislative initiative until the signature of the President of the parliament; transparent because it is conducted in public meetings (in the case of the Legislative Assembly, in principle, only the plenary meetings); subject to public scrutiny, during and afterwards (see, in the case of Macau, the website of the Assembly Legislative); participated, as all citizens/residents may comment on the proposed solutions (there is a general invitation on the website of the Legislative Assembly to such end); subject to political opposition (although, in the case of Macau, as is well known, there are no political parties); and is the end-product of the will of an assembly that represents all voters. No element of the parliamentary legislative procedure may be concealed, further stressing that it is due to the successive parliamentary scrutiny and the successive technical reviews of the initiatives that many problems are detected and corrected — an assertion that is fully applicable to Macau, if one compares the original versions of the bills and the laws published in ‘Legislação no Século XXI. Uma perspectiva parlamentar’ (2009) 50 *Legislação* 163.

²⁹⁷ “Series II of the Legislative Assembly Bulletin comprises: a) The texts of the bills and of the draft resolutions, motions and simple deliberations of the Plenary; b) The final texts of the approved bills, resolutions and simple deliberations of the Plenary; c) The texts of petitions submitted to the Legislative Assembly; e) The reports of the committees on bills and draft resolutions, accompanied by the texts with amendments thereto, if such exist, as well as the remaining opinions, reports and memoranda requested from the committees; f) The Board’s deliberations and the President’s decisions with respect to the matters provided for in Articles 1, 2 and 3.” — a true principle of publicity is enshrined, not only with respect to the law — the procedural end-result, but also to the legislative procedure *per se*.

process.²⁹⁸

In the Rules of Procedure, references are made to legislative processes, opening with the so-called *common legislative process*, in my view a term to be viewed as a mere remnant from History.²⁹⁹

Herein are regulated, developed, and implemented the rules on the **legislative initiative** (power, form, exercise, areas/matters reserved thereto), the respective limits (organic, substantive, and formal), the procedure immediately following the stage of acceptance or rejection and the requirement of prior cognisance of the texts submitted to the Plenary.

Next, the Rules of Procedure deal with the **presentation and general debate**,³⁰⁰ the phases through which it unfolds and how it ends.

The subsequent step is that of **voting on the bill in general**, determining the object³⁰¹ and effects of such deliberation.

One then enters the crucial phase³⁰² of the **examination on the specifics of a bill in committee**, determining the object³⁰³ and the deadlines for such purpose.

Moving on to the **debate and voting on the specifics** of a bill, the object³⁰⁴ thereof is identified and established, eg special rules for the functioning of committees and on the order of voting.

In the event that no voting on the specifics nor the consequent final overall

²⁹⁸ Cf for an overview, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 480.

²⁹⁹ Assuming that special legislative processes exist, which is not the current situation the MSAR. In the Rules of Procedure of the Legislative Assembly of the territory of Macau, in the pre-handover period, several special processes co-existed with the common legislative process, namely, Organic Statute, Legislative Authorisations, and Ratifications of Decree-Laws. The urgency process was available for any bill. In other words, this process is not special *vis-à-vis* the common process: it is but an acceleration of a legislative process, be it a common process or a special one. In addition, its systematic insertion is not the most apt (after all the legislative and supervisory processes), as was the case in the previous Rules.

³⁰⁰ The general debate concerns *the principles and the system* of each bill, as well as its *opportunity* from a political, social and economic point of view.

³⁰¹ It is said that voting on the whole *refers to each bill*, it is said. This alone does not clarify anything. We believe that the reference to the principles and the system of each bill must also be included here, inasmuch as said features shall be the object of the voting process, along with the bill's political, social and economic opportunity.

³⁰² Both in terms of lawmaking and in the praxis, which has been demonstrating how such procedural stage is crucial for the effective discussion of options and solutions, in addition to issues of true lawmaking in the technical-legal sense, ie draftsmanship, filling of *lacunae*, harmonisation of concepts, linkage with the legal order, under the principle of the unity of legal system, etc

³⁰³ The examination in committee consists of an assessment of the specific solutions contained in each bill, focusing, *inter alia*, on: a) The adequacy of such solutions with the principles and system of the bill approved on the whole; b) The search for the most appropriate legislative means for the proper execution of the bill; c) The repercussions of the bill on the principles and the legal order; d) The technical-legal perfection of the bill's provisions.

³⁰⁴ The debate and voting on the specifics of a bill *concerns each Article*. The President may decide to group more than one Article or, due to the complexity of the matter, the proposed amendments, or at the request of any Member, to conduct the debate on — and put to the vote — provisions by paragraphs or subparagraphs, thus allowing the taking of a political position on the options therein reflected.

voting³⁰⁵ in committee takes place, and in the absence of a new appraisal of a bill's text by a committee, one proceeds to the **final drafting** phase. The competence for that definitive drafting and confirmation of such final text is thus established: the committee drafts, and the President of the Legislative Assembly applies the confirmatory imprimatur.

Finally, under the Rules of Procedure, the *common and normal* legislative procedure closes with the **signature of the Chief Executive**. However, in exceptional situations as delineated in the Basic Law, an additional phase may transpire, namely, the **confirmation of a Member's (or Members') bill(s)**,³⁰⁶ in case the Chief Executive refuses to sign.

The above paragraphs outlined, very briefly, the complex and vast — and singular — common legislative procedure as regulated in the Rules of Procedure.

The urgency process, which may be adopted or applied to any bill or draft resolution under Article 155, does *not* constitute a *special* legislative procedure, considering what such procedures entail.³⁰⁷

4. In Conclusion: Centrality versus Completeness

Similar to the reality of most legal orders, the centrality — not synonymous with completeness, nor with primacy — of the Rules of Procedure of the Legislative Assembly is manifested in the legislative procedure, as seen above.

The emphasis on **centrality** is merited, primarily because this idea draws in and re-establishes the major principles and norms stemming from the constitutional order. Furthermore, such a notion allows for the development, implementation and completion of those fundamental principles and norms. It has proved to be a reliable tool for innovation, especially in establishing successive stages, actors, competences, deadlines, and deviations from the normal path. The journey commences with the superstructure of the legislative process, navigating towards the details and the filigree of the legislative procedure.

However, centrality should not be confused with completeness.

The Rules of Procedure do not aspire to a holistic, sealed-off or absolute completeness within the scope of the legislative procedure.

For instance, yet again, the Rules do not regulate the publication of the laws in the OG, nor do they determine that such publication is made in Series I (such matter is entrusted to the Law on the forms and templates of legal enactments), much less do said

³⁰⁵ It is an eventuality, because such will only happen if and when the option of voting on the specifics in committee is effectuated.

³⁰⁶ What about Government bills? I shall return to this subject later.

³⁰⁷ This urgency process does not constitute a special legislative process, as opposed to the common process — I reiterate that it is merely a means to accelerate a legislative process, be it a common process or, if such is available, a special one.

Rules establish that the Chief Executive is competent to send the laws for publication (a matter governed by the Basic Law).³⁰⁸ The Rules are also silent on the requirement of substantive and organic conformity with the Basic Law of bills and draft resolutions and deliberations, beyond the strict sphere of the legislative initiative (such matters are present in the Basic Law and in Law No. 13/2009).

Likewise, the Rules of Procedure do not contain an express rule regarding the limits to the legislative power of the MSAR's autonomy, within the People's Republic of China (Law No. 13/2009 directly establishes such limitation, when referring to the autonomy of the MSAR),³⁰⁹ nor do they refer to consultative mechanisms during the legislative process, in addition to the consultation of the Executive Council (such matters are governed in piecemeal legislation, such as the Legal Status of Lawyers, approved by Decree-Law No. 31/91/M, of 6 May 1991).

³⁰⁸ It is under this corrective lens that the general rule set out in Article 100, paragraph (1) of the Rules of Procedure should be read: "*The acts of the Legislative Assembly which, under the terms of the law, shall be published in the Official Gazette of the Macau Special Administrative Region, are sent to the Official Press by the President as soon as possible.*" In other words, the laws are necessarily outside the scope of such "acts": as per the provision Articles 50, paragraph (3), and 78 of the Basic Law — the competence for the publication of laws rests exclusively with the Chief Executive (see also Article 6 of the Law on forms and templates of legal enactments). In fact, a wording more in line with the Basic Law is Article 9, subparagraph (g) of the Rules of Procedure, which confers on the President of the Legislative Assembly the competence "*To order the publication, in the Official Gazette of the Macau Special Administrative Region, of resolutions, motions, simple deliberations by the Plenary and deliberations of the Board*": while wisely not mentioning the laws. Finally, one might again call out the "de-location" from the Rules, as set out in Article 85, paragraph (2).

³⁰⁹ See Article 5 of Law No. 13/2009.

VII.

NATURE, SCOPE, FUNCTION AND FEATURES OF THE RULES OF PROCEDURE OF THE LEGISLATIVE ASSEMBLY

1. Introduction: The Five Pillars

Within the autonomous legal order of the MSAR, the Rules of Procedure of the Legislative Assembly are affirmed through several defining features, underpinned by five pillars, which I shall seek to identify in this chapter.

The said Rules have substantive constitutional legitimacy and also a constitutionally endorsed formal identity,³¹⁰ they epitomise:

1. The principle of self-organisation and self-regulation of the regional parliament, to the fullest possible extent;
2. The principle of a procedurally reserved set of matters, either expressly conferred or inferred, in relation to which the Legislative Assembly enjoys exclusivity in norm-making;
3. The principle of its legal substantive force equivalent to a law, ie by being a normative act, other than a law in a formal sense, it has the value of law.³¹¹ This is because it is externalised and binding, not only on the Legislative Assembly, its organs, and Members, but also on all those who interact therewith, inside the scope of the functions regulated by the Rules of Procedure, namely the legislative procedure.

The Rules are, therefore, “*a statute law*”, in the words of GOMES

³¹⁰ The references made to the Rules in Article 77 and Article 74 of the Basic Law, not going as far as other constitutional texts, still give such Rules a formal identity. The Rules may not be confused with the laws; they do not need the signature of the Chief Executive, nor are they confused with the resolutions. Cf Pedro Alfaro Velez, ‘O Regimento da Assembleia da República como fonte de Direito’ in *Estudos de Direito Público* (Âncora 2006) 677.

³¹¹ One may speak of the force of law or value of law. See Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 697–98: “The theoretical/jurisprudential category of force of law appeals to three fundamental ideas: (1) primary and first position of the law, in the sense of having a normative standard immediately below that of the Constitution; (2) the power of legal innovation within the legal order (active force); (3) resistance to repeal or derogation by other hierarchically inferior norms (passive force).”

CANOTILHO.³¹²

Besides these five pillars, other features may be added or derived therefrom: freedom of the Rules, conditioned to its constitutionality³¹³ and also limited by law; the Rules as the standard for lawmaking; and the Rules as an inescapable norm for a *norm-creation-process*.

The following pages shall address these issues. However, references will be made in more than a single instance or in a *crisscrossed* fashion, in relation to several topics mentioned in the title of this chapter. Inevitably, not all such topics shall merit their own respective sections.

2. Constitutional Legitimation and Formal Identity

Although distinct, I shall approach these two pillars under a common section, as warranted by the umbilical cord that links such concepts.

A first reminder: the Rules of Procedure of the Legislative Assembly have constitutional legitimacy. It is from a norm of the Basic Law, as the constitution *in a broad sense* of the MSAR, that the Rules of Procedure are directly and immediately grounded on and sourced from. Parliamentary rules of procedure “are directly incarnated in the Constitution, and their content is the regulation of their own organisation and functioning, as determined by the Constitution itself.”³¹⁴

The Rules are not a trivial creation within the legal order of Macau. Much less may they be described as a cyst or a foreign body, perversely or surreptitiously attached “to the normal tissues” of the legal order.³¹⁵

It is worth recalling the normative narrative of the Basic Law on the Rules of Procedure of the Legislative Assembly: “The Legislative Assembly shall make, on its own, its rules of procedure, which may not contravene this Law.”³¹⁶

Such is the key norm, from which flows, into the legal order of the MSAR, the irrepressible founding source of the normative act designated as Rules of Procedure of

³¹² Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855.

³¹³ And consequent justiciability in assessing its constitutional conformity. See, for instance, Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 673.

³¹⁴ José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 128, citing parts of a Decision from the Spanish Constitutional Court. See also, stressing the express constitutional provision, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 33.

³¹⁵ It is not unimportant to point out, even if off-handedly, that the only committee the existence of which is pre-determined, either in the Rules of Procedure, or in Law No. 3/2000 (On the Legislature and on the Legal Status of the Members of the Legislative Assembly), is the Committee on the Rules of Procedure and Members’ Mandates.

³¹⁶ Cf a similar norm in Article 75 of the HKSAR Basic Law.

the Legislative Assembly.

Simultaneously, said constitutional norm contains two explicit corollaries:

- The independence and self-regulation of the Legislative Assembly in the making of the Rules³¹⁷ (*make, on its own, its rules of procedure*); and
- The express limitation to the autonomy of the Rules, in view of the principle of constitutionality³¹⁸ (*which may not contravene this Law*).

A third — implicit and consequent — corollary might be perceived: the principle of autonomy of the Rules, ie in the substantive conformation of the Rules, insofar as no solution shall be prohibited thereto, as long as it is a matter to be regulated under such Rules and provided that it does infringe upon the Basic Law.

Finally, I would like to add a further corollary: the Basic Law establishes the Rules as a *must* — an act of inescapable and mandatory norm-making.³¹⁹ The Basic Law does not concede a privilege, a right or a faculty to the Legislative Assembly: it demands that the Legislative Assembly effectively adopts its own Rules of Procedure, not only to accomplish its self-organisation but also as a necessary norm to develop and implement other provisions of the Basic Law, namely in the scope of the legislative procedure and in the allocation of other powers and functions to the President of the Legislative Assembly.

The constitutional reference to the Rules of Procedure in the Basic Law also extends to Article 74:

“The President of the Legislative Assembly of the Macau Special Administrative Region has the following competences: [...] Exercise other powers and functions, as conferred by Rules of Procedure of the Legislative Assembly.”

It is imperative to note that various articles within the Basic Law either explicitly

³¹⁷ Underlining or creating a space of independent norm-making reflecting the principle of self-regulation by the legislative body.

³¹⁸ This was an issue discussed in several legal orders. The Basic Law straightforwardly resolves the potential doubt: the norms of the Rules of Procedure may not contravene the Basic Law, due to the principle already established in Article 11, “*No law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region may contravene this Law.*”; since the Rules of Procedure can easily be inserted into the residuary category of normative act of the Region, the truth is that Article 77 is rightly guided, in this area, by clarity and directness. Contrary to other legal orders, in the MSAR the Rules must necessarily obey the commands of constitutional law. From here, one may also extract the principle of interpretation of the procedural rules in accordance with the norms and principles of the Basic Law and, naturally, the scrutiny/control — eg through judicial review — of their constitutional conformity with the Basic Law, under the same terms which might be applicable to laws *vis-à-vis* the Basic Law.

³¹⁹ Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 666. The author further states that there is parliamentary autonomy to make the rules of procedure, but there is no autonomy not to do so.

reference or implicitly allude to³²⁰ procedural rules.³²¹ For instance, terms in Article 71 “enact, amend, suspend and repeal laws, under the terms of this Law and in accordance with legal procedures.” Similarly, Article 75 mentions “in accordance with legal procedures” with respect to the initiative of the law. Article 8 highlights the need for “amendments” to legislation to be done “in conformity with legal procedures.” In Article 145, the framework regime for the modification or termination of laws is discussed.³²² Other matters are, *inter alia*, those contained in Article 77 paragraph (1), and those rooted in the constitutionally conferred functions exercised by the Legislative Assembly.³²³

In other words, the legitimacy of the Rules of Procedure is unquestionable, being solemnly proclaimed in Article 77 of the Basic Law, with a standing that is equalled by the constitutionally recognised and inescapable formal identity of said Rules.

XIAO WEIYUN describes the reasoning behind Article 77 of the Basic Law: “In addition to the working procedures provided for in the Macau Basic Law, there are also procedural rules on deliberations, so that the former procedures may become more specific and standardised.”³²⁴ Therefore, the Basic Law further stipulates the following transcribed words of IEONG WAN CHONG: “the procedures relating to the meetings must be specified by the Legislative Assembly on its own, in the rules of procedure, to be drafted.”³²⁵

This legal-constitutional option of the MSAR (and of the HKSAR) is far from being innovative or isolated. On the contrary, it not only respects the local constitutional memory, but also embraces the general or universal trend of legal orders, guided by values and principles (albeit with naturally different hues and foci), such as democracy, separation of powers, parliamentary self-organisation, the existence of an effective *house/chamber(s) of laws*, and legitimisation of public normative acts, namely laws, etc

There is, in a gist, an unyielding constant in modern comparative constitutional

³²⁰ In parallel with the Spanish case, where the Constitution apparently dedicates a single provision to parliamentary rules of procedure, says Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 667: “*The appearance is deceiving*” and, “*The Constitution defines in detail the parliamentary matters, circumscribing in this way the scope*” of the Rules.

³²¹ And other legal norms that affect the *legislative procedure*, such as the Law on forms and templates of legal enactments, for example, as previously seen.

³²² As well as in other Articles that refer to matters other than the legislative procedure, for example, “Article 76. Members of the Legislative Assembly of the Macau Special Administrative Region have the right to question the actions of the Government, in accordance with legal procedures.”

³²³ Not constituting matters reserved to the law. As stated by José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 127: “*There are a series of matters, included in the Constitution, which are characterised as being specific to the parliamentary organisation*”.

³²⁴ Xiao Weiyun, *Conferência sobre a Lei Básica de Macau* (Associação Promotora da Lei Básica de Macau, Macau, undated) 189.

³²⁵ Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 150.

law: the expression of the principle of parliamentary self-organisation.³²⁶

A *very quick tour* of a few examples seems worth the effort.

3. The Constitutional History of Macau

First, a curt nod to Macau's constitutional history.

The Organic Statute of Macau corresponded, *mutatis mutandis* — but without the charter of fundamental rights — to our Basic Law.

Such Statute established that “The Legislative Assembly is competent: [...] to make its own rules of procedure”: Article 30, paragraph (1).

This guiding norm-principle was further developed, as follows, in Article 42:³²⁷

“The Rules of Procedure of the Legislative Assembly shall contain:

- a) The composition and competences of the Board;*
- b) The organisation of the committees considered necessary;*
- c) The form of voting;*
- d) The advance subject to which the matters to be addressed in the period before the agenda shall be announced;*
- e) The conditions for the introduction of bills for territorial laws and the deadline to be observed for appraisal thereof;*
- f) The procedural protocols to be followed for the final drafting of laws approved by the Assembly;*
- g) The deadlines for submission of proposals and reports;*
- h) The regulation of the powers, rights, immunities and privileges of the Members of the Assembly;*
- i) Other rules contained in this Statute and also those considered necessary for the functioning of the Assembly.”*

4. Comparative Law

In this section, I shall gather lessons from comparative law on the aforementioned

³²⁶ Cf *inter alia*, the following studies in comparative law: Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 408 et seq; Héctor Fix-Zamudio and Salvador Valencia Carmona, *Derecho Constitucional Mexicano e Comparado* (Porrúa 2005) 690 et seq; Giuseppe Morbidelli and Lucio Pegoraro and Antonio Reposo and others, *Diritto Pubblico Comparato* (Giappichelli 2009) 384 et seq.

³²⁷ In addition to other norms that mentioned the Rules of Procedure, for example, Article 39 of the Organic Statute of Macau, which provided that “*The legislative initiative belongs, without distinction, to the Governor and, in the form regulated in the Rules of Procedure of the Assembly, to the Members thereof.*”

constant.

Beginning in **Hong Kong**, Article 75, paragraph (2), of the Hong Kong Basic Law states that “The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.”

In this regard, it was ruled that “Article 75 (2) enables the Legislative Council to regulate as it sees fit, its role in the enacting process, including motions for amendment. Subject to conflict with the Basic Law, as interpreted and enforced by the courts, The Legislative Council, in exercising Article 75 (2), is answerable to no outside authority.”³²⁸

In **Portugal**, Article 175(a)³²⁹ of the Constitution establishes: “The Assembly of the Republic is competent to [make] and approve its own Rules of Procedure, under the terms of the Constitution.”

Article 232, paragraph (3) further provides that “The Legislative Assembly of the autonomous region is competent to make and approve its own rules of procedure, under the terms of the Constitution and the respective politico-administrative Statute.” See, accordingly, Article 42, paragraph 3 of the Politico-Administrative Statute of the Autonomous Region of the Azores and Article 49, subparagraph (a) of the Politico-Administrative Statute of the Autonomous Region of Madeira.

In **Mozambique**, the Assembly of the Republic is competent to “*approve the Rules of Procedure of the Assembly of the Republic*”, under the terms stipulated in Article 179, paragraph (4) of the Constitution.

In the Constitution of **Cape Verde**, “In relation to its own organisation and functioning, the [...] National Assembly is competent to: a) Make and approve its own Rules of Procedure; [...] c) Exercise the other powers that are conferred thereon by its Rules of Procedure.”

In **Brazil**, it is constitutionally guaranteed that “The Chamber of Representatives has exclusive competence: to make its internal rules of procedure” and, “The Federal Senate has competence: to make its internal rules of procedure”, Articles 51 and 52. Furthermore, “The Legislative Assemblies (of the federal States) are competent to

³²⁸ *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) 399–400 (Hartmann J). Reaffirming these principles of independence and constitutional conformity, the court in *Cheng Kar Shun v Honorable Li Fung-ying* [2011] 2 HKLRD 555 (CFI) held that, “It therefore requires a particularly strong case to justify interpreting the Basic Law in such a way as to impose a straitjacket on the Legislative Council as to how it may go about its business.” See also, Albert Chen, ‘Constitutional Developments in Autumn’ (2009) 39 Hong Kong Law Journal 751, Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn, Sweet and Maxwell 2015) 287. Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 308 et seq. It should also be noted that, in Hong Kong, resolutions approving or amending the Rules of Procedure are considered *Resolutions with legislative effect passed by LegCo*.

³²⁹ In addition to several other provisions that expressly refer to the Rules of Procedure of the Assembly of the Republic, such as the principle of publication in the official journal bulletin (*Diário da República*), the principle of the establishment of the powers of the Members and the pre-definition of the parliamentary committees.

regulate on their internal rules of procedure.”, Article 25.

In **Italy**, Article 64 of the Constitution establishes that “Each House adopts its own rules of procedure by an absolute majority of its Members.”

In **Spain**, the Constitution establishes, in Article 72, “1. The Houses establish their own Rules of Procedure, autonomously approve their budgets and, by common agreement, regulate the Legal Status of the Staff of the Cortes Generales (Parliament). The Rules of Procedure and their amendments shall be subject to a final overall voting, which requires an absolute majority.”

In **South Korea**, Article 64 provides for the following: “(1) The National Assembly may establish the rules of its proceedings and internal regulations, provided that they are not in conflict with law.”

In **Japan**, Article 58 of the Constitution states: “Each House shall establish its rules pertaining to meetings, proceedings and internal discipline”.

In **Singapore**, Article 52 of the Constitution declares: “Subject to the provisions of this Constitution, Parliament may, from time to time, make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business.”

In **Costa Rica**, Article 121 of the Constitution: “It is the exclusive competence of the Legislative Assembly [...] to enact its internal rules of procedure, which, once adopted, may not be modified except by a vote of not less than two-thirds of the total number of its Members.”

In **Argentina**, under the terms of Article 66 of the national Constitution, “*Each House shall make its own rules of procedure.*” For example, in the Constitution of the Province of San Juan: “*The House of Representatives decides on its own Rules of Procedure.*”

In **Paraguay**, Article 190 of the Constitution: “On the Rules of Procedure — Each House shall make its own Rules of Procedure.”

In **Peru**, Article 94 of the Constitution: “The Congress makes and approves its Rules of Procedure, which have the force of law.”

In **Bolivia**, Article 159 of the Constitution: “The powers of the Legislative Assembly are [...] 1. To make and approve its Rules of Procedure. 2. To elect the Board, determine its internal organisation and functioning.”

In **The Philippines**, Article VI of the Constitution, Section 16, 3: “*Each House may determine the rules of its proceedings.*”

After this short, hopscotched view (in truth, an almost random³³⁰ one) of comparative law and of local constitutional history, one may gain a more solid and compelling understanding of the constant in question, which occurs everywhere — in Constitutions of unitary States, Federations, and in the Statutes governing non-sovereign autonomous regions. This constancy may, naturally, encounter occasional exceptions.³³¹

Now, it is time to dive into the issue of *why* the MSAR constitution attaches such an express and explicit importance to the Rules of Procedure and to these structuring principles.

5. Expression of Parliamentary Self-Organisation

The Rules of Procedure are the expression of parliamentary self-organisation and the Legislative Assembly's internal normative autonomy.³³² They constitute the genuine representation of parliamentary autonomy³³³ and are the best guarantee for defending parliament's own functionality from interference by other powers.³³⁴ The procedural norms “depend on the freedom of action of the Members [...], on the effectuation of the principle of representation (publicity of meetings and deliberations, for example), and on the possibility of Parliament manifesting/expressing its power in relation to others organs [...]. Complete autonomy in the making of the rules of procedure is therefore essential.”³³⁵

In other words,

“the rules of procedure are believed to be an expression of parliamentary autonomy — either constitutionally foreseen or implicitly deriving therefrom [...] — an autonomy which inevitably entails a wide margin of

³³⁰ Not wholly random, given the presence of legal orders *close* to that of the MSAR, either because they belong to the same Continental/Roman-Germanic family, or due to geographical proximity.

³³¹ In the legal order of Mainland China, such power is exercised through laws.

³³² “For the MSAR Legislative Assembly, its Rules of Procedure, Legal Status of the Members and Organic Law constitute the impermeable and irreducible core of said body's autonomy, being necessary for the performance of its superiorly established functions.”: as was written in the explanatory note of the Bill “Amendment to the Organic Law of the Legislative Assembly of the Macau Special Administrative Region”: dated 2008.

³³³ Which represents “*a proper or self-referential constant*”: incorporating a very large internal parliamentary organisational power, in the words of Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010) 762–763. For developments on this autonomy, namely normative and functional, *ibid*, 773 et seq. See also, with interest, J. Alonso Antonio and A. Alonso Antonio, *Derecho Constitucional Español* (Editorial Universitas, S.A. 2015) 528 et seq. Referring to parliamentary autonomy as comprising “*regulatory/procedural*”: “*budgetary*”: administrative and pertaining to staff/personnel.

³³⁴ J. Alonso Antonio and A. Alonso Antonio, *Introducción al Derecho Parlamentario* (Editorial Dykinson 2002) 25–26, adding a function of defending the procedural rights of parliamentary minorities, in the face of “*a wrong interpretation of the game of majorities and parliamentary minorities*.” Also, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 33, speaking of a *condition of parliamentary guarantee*.

³³⁵ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 595.

discretionary power in deciding parliament's own internal organisation.”³³⁶

And JAVIER PEREZ ROYO also tells us,

“The autonomous regulatory competence of the houses of parliament is recognised in Article 72, paragraph (1) [of the Constitution]. [...]”

The Rules of Procedure are norms enacted autonomously by each House without [...] the intervention of any other constitutional organ, neither in their drafting, nor in their approval [because they] are norms that execute the Constitution.”³³⁷

As such, “parliamentary self-organisation is expressed, above all, through the competence to adopt regulatory norms.”³³⁸

The historical origin of this principle is well known and is traceable to the traditional independence maintained by parliaments *vis-à-vis* the Executives in certain legal orders during the era of Absolutism in Europe. After the French Revolution, it has, in the words of GIUSEPPE DE VERGOTTINI, “been linked to the preferential position taken up by Parliament”.³³⁹ Within the Common Law family,³⁴⁰ one may say that “Parliament's privileges are historically unique and egocentric but essential to its functions and authority.”³⁴¹

In summation, the express establishment in the Basic Law, granting the Legislative Assembly the competence to establish its Rules of Procedure, not only empowers this body to enact such rules but also bestows upon them a definite constitutional identity.³⁴² The constitutional intent is the fulfilment of the principle of self-organisation and internal self-regulation, a common principle in the panorama of modern constitutional law.

³³⁶ Giuseppe De Vergottini, *Diritto Costituzionale* (10th edn, Cedam 2023) 241. See also, *inter alia*, Mauro Volpi, ‘L’organizzazione costituzionale dello Stato’ in L Pegoraro and A Reposo (eds) *Diritto Costituzionale and Pubblico* (Giapichelli 2005) 311.

³³⁷ Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 666 et seq. For example, see Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 19 et seq.

³³⁸ Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 409. For example, as stated by J.P. Schneider, the Bundestag “within the framework of this faculty (organisational autonomy) endows itself with Rules of Procedure, which are entrenched in the tradition of German parliamentary Law.”: ‘El régimen parlamentario’ in Benda and Maihofer and Vogel and others, *Manual de Derecho Constitucional* (Marcial Pons 2001) 353.

³³⁹ Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 409.

³⁴⁰ A tradition that even today, due to the very characteristics of the British strain — based on the Westminster model — of constitutionalism *made in common law*, does not recognise or resist the application of a principle of constitutionality, or of constitutional conformity, with submission of such rules of procedure to judicial control/review.

³⁴¹ Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers 2001) 386. See also in this context, John Alder, *Constitutional and Administrative Law* (Palgrave 2007) 198 et seq; O Hood Phillips and Paul Jackson, *O Hood Phillips Constitutional and Administrative Law* (Sweet & Maxwell 1987) 243 et seq; Robert Blackburn and Andrew Kennon and Michael Wheeler-booth, *Griffith & Ryle on Parliament — Functions, Practice and Procedure* (Sweet & Maxwell 2003) 3 et seq.

³⁴² Unlike the Executive Council's Rules of Procedure.

This principle of self-regulation carries a significant consequence in this context: the Rules of Procedure are enacted in the form of a Resolution,³⁴³ and not of a law, thus precluding the intervention of the Chief Executive, whose responsibilities, as seen above, include the signing and vetoing of laws, as well as ordering their publication. As the normative acts regulating the internal affairs of the Legislative Assembly adopt the formal legal typology of resolutions, they are immune from the post-approval procedures that the laws undergo, with the participation of the Chief Executive. Furthermore, under the Basic Law, such normative acts are not subject to reporting, for record, to the Standing Committee of the National People's Congress.

My discourse is obviously laid upon an idea of respect for the Legislative Assembly and its functions,³⁴⁴ within a system of separation of the legislative body from the executive and judicial powers.

From such conclusion one can jump to the issue of the matters reserved to the Rules of Procedure.

6. Rules of Procedure (Regimento) Reserved Matters

In the MSAR, as in comparative constitutional law, there is a substantive zone or area of matters reserved to the parliamentary rules of procedure.³⁴⁵

A matter immediately reserved by the Basic Law is found in Article 74, which

³⁴³ One could envisage an act bearing a distinctive formal enactment or a qualified external sign, ie the form of the act of approval of the Rules of Procedure (and possibly other matters closely related thereto), as an act of normative content and as an expression of the separation of powers and of the Legislative Assembly's power of self-regulation, might take a different form relative to the acts that serve purely political purposes, without any normative content. In any case, it would always be an act not subject to signature, nor possible veto by the Chief Executive. It would be sent for publication by the President of the Legislative Assembly and would not be subject to reporting for record in Beijing. It would still be an act with the force of law but not a law.

³⁴⁴ As for Hong Kong, for example, in case law, *Rediffusion (Hong Kong) Limited v Attorney General* [1970] AC 1136 (PC); *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J); *Cheng Kar Shun v Honorable Li Fung-ying* [2011] 2 HKLRD 555 (CFI); *Cheung Tak Wing v Director of Administration* [2018] 5 HKLRD 740, [2018] HKCFI 2557; *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906, [2020] HKCA 124; among others. For a more complete listing of court decisions addressing this issue in Hong Kong, Lo Pui Yin (PY Lo), *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997* (HKUP 2014) 272. See also in the legal scholarship, Albert Chen, 'Constitutional Developments in Autumn' (2009) 39 HKLJ 751, "The judge's view that the court will only in exceptional circumstances interfere with the internal working of the legislature was based on case law on the court's disinclination to intervene in the legislative process.": p 762. See also PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 451, "The Basic Law of the HKSAR, in giving full legislative powers to the Legislative Council of the HKSAR, has in clear terms given it the power to regulate as it (and it alone) deems best, the manner in which it discharges the process of enacting laws".

³⁴⁵ Cf *inter alia*, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855, Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 668, Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 45; Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), passim, especially 33 et seq; Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)' (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 285, who speaks of a "regulatory monopoly". The matters reserved to parliamentary rules of procedure, alongside the matters reserved to law, together constitute the core of the area reserved to parliament. About such concept, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 245 et seq.

establishes the conferral, by the Rules of Procedure, of other powers and functions to the President of the Legislative Assembly. This idea of reserved matters is implicit in Article 77 and other norms, such as references to legislative procedures,³⁴⁶ under the formula “*in accordance with legal procedures*”. The history of constitutional law, in general, and of parliamentary law, in particular, allows one to consolidate the areas of norm-making under the Rules of Procedure of the MSAR regional parliament.

I do assert the existence of pre-determined procedurally reserved matters, as set out above, by the Basic Law.³⁴⁷

The opposite scenario would not make the least sense. What effectiveness would the principle of self-regulation and self-organisation have? What would be the purpose of allowing the President of the Legislative Assembly to exercise powers and functions conferred to him or her by the Rules of Procedure? What would be the normative utility of conjoining the establishment of the principle of the Rules of Procedure’s legitimacy with the creation of rules for the legislative procedure, if, in practice, the ultimate conclusion was to be cognate to: “such may be done in accordance with — or via — the Rules of Procedure, but may also be performed by some other means”?

7. Rules of Procedure versus Law: Division of Powers, Not Hierarchy

“Just as there are matters reserved to the Constitution, to international convention or to law, there are also matters reserved to parliamentary rules of procedure.”³⁴⁸ I should emphasise that, consequently, regulatory matters reserved to parliamentary procedural rules are excluded from the normative spheres of laws and administrative regulations. An invasion of the parliamentary area of reserves matters, as guaranteed by the Basic Law, shall taint the alien and intruding normative act with unconstitutionality.

The inverse situation and its consequences, namely, by the Rules of Procedure into an area of matters reserved to the law, holds true as well. Examples: a norm in an administrative regulation establishes the deletion of Explanatory Notes from Government bills, or a norm in a law that eradicates voting on the specifics of a bill and imposes a single vote on the whole bill, shall both be in non-conformity with the Basic Law. From

³⁴⁶ Regarding the importance of this area reserved for parliamentary *legislative procedure*, and its relationship with the area reserved to the law, as traditionally understood, and with the idea of representation and pluralism, one can summon the following words: “*This is, above all, the reserved area for a certain type of procedure for normative enactment (the parliamentary legislative procedure), endowed with the characteristics of opposition, publicity and free deliberation that is unique to such body, substantially differentiating it from the governmental normative procedure.*”: Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 593.

³⁴⁷ There is also a reserved area of procedural initiative *vis-à-vis* the Rules, in favour of the Members and the Committee on the Rules of Procedure and Members’ Mandates. It would not make sense, from any angle, for a solution other than the absolute reserve of initiative regarding the Rules of Procedure.

³⁴⁸ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 597. See also Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), *passim*.

a different perspective, a norm in the Rules of Procedure establishing a crime, a tax or a restriction on a given fundamental right, shall also be in non-compliance with the Basic Law, as such issues fall under the domain of matters reserved to the law.

If one thus realises that the Rules may not invade the space reserved to the law, nor vice versa, one may correctly conclude that the relationship between both legal acts is one of demarcated neighbourhoods, ie an *allocation of normative competences*, rather than a hierarchy between Law and the Rules.³⁴⁹

Thus, for this purpose it is unproductive to discuss which type of legal enactment has primacy in the normative pyramid of the sources of norms, viewed as multileveled and distinct vertical strata, with the superior norms flowing from the apex. In other words, this is not a case of solving normative conflicts based on hierarchy (a criterion sometimes used in potential positive normative conflicts),³⁵⁰ nor other criteria such as the chronological one.³⁵¹

8. Rules of Procedure as a Proper Juridical Norm

It has been amply established that the Rules of Procedure have constitutional protection and are, furthermore, enabled and required by the Basic Law. However, it is also true that said Rules are not Law, in the strict and formal sense determined by the Basic Law.

In effect, the Rules and the Laws are enacted by the same body, subject to the same general requirements for majority approval, and go through a normative procedure with many similarities,³⁵² although with specific differences³⁵³ (which are indeed relevant,

³⁴⁹ “The relationship between the law and the rules of procedure is less transparent, since, in principle, there must be a boundary between legislative and procedural matters. The relationships between them are, in principle, a relationship of sharing or allocating competences and not of hierarchy. In case of conflict, the law must make way when it has invaded the procedural space, or the latter must cede to the law when it has gone into the scope of the latter.” Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 383. See also Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 749.

³⁵⁰ Neither of a negative nature, due to an absence of a norm, ie a *lacuna*.

³⁵¹ On this topic, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 298 et seq.

³⁵² On the deliberative process of the resolutions in the Rules: “Article 134 (Applicable framework) “To the resolutions shall apply, with the necessary adaptations, the provisions of the preceding Section, with the exception of Subsection VIII.”

³⁵³ Article 160: “(Amendments to the Rules of Procedure) 1. The present Rules of Procedure may be amended at the initiative of the Committee on the Rules of Procedure and Members’ Mandates, or of at least nine Members. 2. The proposed amendments to the Rules of Procedure follow the deliberative process of resolutions, with the specialties set out in the following paragraphs. 3. After accepting a proposal for an amendment introduced by Members, the President sends the text to the Committee on the Rules of Procedure and Members’ Mandates for appraisal and issuance of an advisory report. 4. After such report is received by the President, he or she shall schedule, for a plenary meeting to be held within the period of twenty days, the debate and voting, on the whole and the specific, on the proposed amendment.”; Article 161: “(Form, publication and entry into force) 1. The approved amendments take the form of a resolution. 2. Whenever justified, the Rules of Procedure may, by decision of the President, be subject to a new publication, with the modifications inserted into the proper place. 3. The publication of the amending resolution and, in the case provided for in the preceding paragraph,

as in the context of initiative).³⁵⁴

Leaving aside those particular features, I must underscore, yet again, that the Rules of Procedure are not subject to the signature of the Chief Executive³⁵⁵ and are sent for publication in the OG by the President of the Legislative Assembly.³⁵⁶

As GOMES CANOTILHO says,

“Only the weight of a tradition that relegated the so-called administrative regulations [...] to the purely internal sphere and did not recognise the legal nature of organisational norms can justify that, even today, the statute of a sovereign body be classified as an internal regulation.”³⁵⁷

Or, in the words of JORGE MIRANDA and RUI MEDEIROS, “The procedural norms are true legal norms, mandatory and sanctioning in nature.”³⁵⁸

Although the Rules do not fit the formal definition of “law” as established by the Basic Law, the legal reality dictates that they do indeed constitute a norm: a veritable normative act.³⁵⁹ Regardless of their distinction from laws, it is undeniable that the Rules has — decidedly and irreducibly, *de minimis* in vast segments, maybe in its entirety — the force of law.³⁶⁰

of the new text of the amended Rules of Procedure, is made in the Official Gazette of the Macau Special Administrative Region. 4. Amendments to the Rules of Procedure shall enter into force on the day following publication.”; Article 26, subparagraph e): the Committee on the Rules of Procedure and Members’ Mandates is competent to suggest to the Plenary the modifications to the Rules of Procedure “that the practice may advise”.

³⁵⁴ For example, per the Basic Law, and a natural implementation of the Rules, the initiative to approve and to amend said Rules is exclusively reserved to the Legislative Assembly and its Members, under the terms, respectively, of Articles 77 of the constitutional law and 160, paragraph (1) of the Rules of Procedure.

³⁵⁵ Again, the Rules of Procedure of the Legislative Assembly: “Article 134 (Applicable framework) “*The provisions of the previous Section shall apply, with the necessary adaptations, with the exception of Subsection VIII.*” This subsection focusses precisely on the signature of the Chief Executive. Also, bear in mind a correct interpretation of Article 50, paragraph (3). Emphasising this aspect, with respect to the Rules of Procedure of the Assembly of the Republic, in Portugal, and with clear points of contact and even identity, Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 382.

³⁵⁶ Article 100 “(Publication in the Official Gazette) 1. The acts of the Legislative Assembly which, under the terms of the law, shall be published in the Official Gazette of the Macau Special Administrative Region, are sent by the President, as soon as possible, to the Official Press,”: in conjunction with Article 161, paragraph (3), both of the Rules. See also Article 6, paragraph (2), of the Law on the forms and templates of legal enactments.

³⁵⁷ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855. For a historical-comparative glimpse, and an identification of the achieved evolution, see, Francisco Zúñiga Urbina, ‘Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)’ (1997) 18 *Revista de Derecho de la Universidad Católica de Valparaíso* 277, 285 281 et seq; Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (*federalismi.it*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>. This Author contends the following: “Once the internalist theory was overcome, the problems that arose with respect to parliamentary regulations and rules of procedure became refocussed on reconstructing their position in the system of sources, their scope of competence and the qualification of the acts possessing the force of law.”

³⁵⁸ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006).

³⁵⁹ As such, it necessarily shall respect the Basic Law — Article 77 — as discussed above.

³⁶⁰ Or, in another expression, *legislative value*. In fact, it should be noted that the Rules of Procedure is not

The next section shall develop this issue.

9. Value or Force of Law³⁶¹

The Rules of Procedure shall have the force of law,³⁶² as derived, *prima facie*, from their constitutional enabling and legitimation. It is not a typology of normative act “*invented*” in the Rules, ie by itself. On the contrary: it receives legitimation from the Basic Law.³⁶³

“With respect to legal effectiveness, it is difficult to exclude an external scope thereof from the Rules of Procedure [...].”³⁶⁴ The point is to determine the extent and scope of this external effect, not to discuss whether such an effect exists. Or, as another Author teaches, “Parliamentary rules of procedure may be classified as acts equivalent to — but not fungible with — ordinary law, which belongs to the primary level of the sources of legal norms.”³⁶⁵

One of the essential functions of the rules is to regulate the legislative procedure — see, for example, the insertion of the norm in the second paragraph of Article 77,

the only case of an internal normative act with the force of law or equivalent legislative value: in addition to other normative resolutions of the Legislative Assembly, especially those that complement the Rules (for example, Resolution No. 3/2000 and, with interest in this point, Report No. 1/2001, by the CRPMM, *Process of questioning Government action*, therein alluding to the connection between this resolution and certain Articles of the Rules of Procedure), within the strict scope of the MSAR’s legal order, another act with a normative nature, endowed with the necessary legislative value (or equivalent) is the act (an executive order?) that decrees measures to restrict the exercise of rights, freedoms and guarantees — considered reasonable, adequate and proportional to the maintenance of public order and tranquillity — in the event of an emergency due to a serious threat of disruption to internal public security, as provided for in Article 8 of Law No. 9/2002, *General Framework Law on Internal Security of the Macau Special Administrative Region*. In effect, there are capabilities that derogate laws, from the outset those enshrining fundamental rights. See, on these issues, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 635 et seq. In order to better grasp said Article 8, see Report No. 4/II/2002 of the SSC, on “General Framework Law on Internal Security of the Macau Special Administrative Region”.

³⁶¹ A gentle reminder on the aforementioned discussion *apropos* the force of law and the value of law; cf. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 697.

³⁶² Thus, for example, signalling that “they are subordinated only to the norms of constitutional rank and endowed with a substantive sphere of exclusive competence”: Vezio Crisafulli, *Lezioni di diritto costituzionale*, vol II (Padova 1984) 160; Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (federalismi.It, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 635 et seq; and Gomes Canotilho defends the existence of a reinforced law value of the Regimento, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857.

³⁶³ Being distinguished from the generic references that the Basic Law makes to resolutions.

³⁶⁴ Miguel Galvão Teles, ‘Parecer’ in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 147.

³⁶⁵ Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (federalismi.It, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>.

specifying rules on the quorum and the necessary majority for the approval of laws — to which one should add that said Rules, in general, reveal, in the most privileged manner, the untouchable internal normative autonomy of the Legislative Assembly.

Its scope of action is self-demarcated and developed, but not in a foreign fashion, nor without parameters. Such scope results directly — and reflexively — from the Basic Law, the historical constitutional background, and the principle of continuity, projected in several norms of the Basic Law,³⁶⁶ besides Article 77. My argument may also find succour in comparative law.³⁶⁷

It is believed, moreover, that there have been virtually no criticisms or denials of the matters regulated in the Rules, primarily with respect to the legislative procedure — one could argue that such a substantive demarcation is widely accepted. To reiterate for clarity, the existence of matters reserved to regulation by the Rules results from the Basic Law.³⁶⁸

One could say that the Rules may traditionally have been looked upon simply as *interna corporis* or in-house rules, similar to by-laws, effective and binding inwardly, dealing with aspects of purely internal arrangements or management.³⁶⁹ Nevertheless, the truth is that the Rules are also naturally externalised and do “*project external legal effects*”,³⁷⁰ *vis-à-vis* all bodies that formally participate in the legislative process³⁷¹ both before and within the Legislative Assembly. From the outset, we may name the Government/Chief Executive, and their representatives, but also other bodies and entities.³⁷² At least in these cases, we have *externa corporis* norms, or norms which have legal effects beyond the Legislative Assembly.

These public bodies,³⁷³ as parliamentary agents within the scope of the

³⁶⁶ Albeit with the springiness that is a feature thereof.

³⁶⁷ Starting off with the parallel and close case of Hong Kong. The Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended to 31 October 2014), embrace, with great similarity, the following matters: Members and Officers of the Council, Sessions, Meetings and Adjournments of the Council, Arrangement of Business, Petitions and Papers, Questions to the Government, Statements and Personal Explanations, Motions, Rules of Speaking, Rules of Order, Procedures for Particular Motions, Reports of House Committee on Subsidiary Legislation and Other Instruments and Related Motions, Procedure on Bills, Financial Procedure, Committees, Miscellaneous Matters.

³⁶⁸ An area of reserved matters that is not expressly determined and identified — but is determinable and identifiable in the Basic Law and, also, by applying the principle of continuity.

³⁶⁹ Of a substantively administrative nature, one might say; I would clarify that such is only true in matters that do not constitute either replications of higher norms, nor developments or implementations of constitutional rules.

³⁷⁰ Carlos Blanco Morais, *Curso de Direito Constitucional, I* (Coimbra Editora 2012) 96–97.

³⁷¹ Jorge Miranda and Rui Medeiros guarantee that: “The procedural norms are addressed, first of all, to Parliament and parliamentarians. However, they also address — and, in this sense, obligate — other bodies insofar as these may, under the Constitution, be in a relationship with Parliament.”: Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 596.

³⁷² Such as the Commission against Corruption or the Monetary Authority. In addition, for example, when individuals are heard in committee.

³⁷³ Persons or organs.

legislative process,³⁷⁴ are, to that extent, legally bound by the Rules of Procedure.

It is also true that, even in classical legal scholarship, the traditional internal nature of parliamentary rules of procedure was lamented:

“This is regrettable, because these are important norms relative to the legislative procedure, ie constitutional determinations that are only partially contained in constitutional laws, as the Constitution regulates the basic principles of organisation and of parliamentary procedure.”³⁷⁵

Such conception has nowadays been surpassed.³⁷⁶

To prove that said conception is truly outdated, one only needs to peek at the Rules and verify that many of the norms therein replicate constitutional norms (for example, at the level of the legislative initiative, respective limits, and the rules on the required majority for approval, or even when they develop and implement norms of the Basic Law).

Or when the Rules of Procedure impose the indication that the Executive Council has been consulted before the introduction of a Government bill, or the requirement of an explanatory note, or that bills shall be introduced in writing and drafted by articles, or when it establishes a double vote, in general and on the specifics, or when it decides to entrust a Committee with the task of reporting during the stage of examination in committee on the specifics of a bill, etc

The totality of the regulatory norms of the legislative procedure may easily be understood as immediate or mediating developments or implementations of the Basic Law, all encapsulated under the preordained umbrella idea of the legislative procedure contained in the Basic Law, which, naturally, cannot delve into specifics.³⁷⁷

The external effects of the Rules have a greater reach. For instance, the *policing* powers, given that the President is also competent to “*Maintain order and discipline, as well as the security of the Legislative Assembly, taking the measures deemed convenient, including ordering the vacating of the plenary room of persons who cause*

³⁷⁴ Also in other areas, for example, in supervisory processes. Article 65 of the Basic Law “The Government of the Macao Special Administrative Region must abide by the law and be accountable to the Legislative Assembly of the Region, by: enforcing the laws approved by the Legislative Assembly and already in force, periodically submit reports to the Legislative Assembly regarding the execution of Government policy action and shall answer questions raised by Members of the Legislative Assembly.” Or, for example, Article 50, subparagraph (15), Article 71, subparagraphs (4), (5), (6) and (7) and, paradigmatically, paragraph (8) “To summon, as required when exercising the powers mentioned above and functions, persons concerned to testify or give evidence.” Note that several of such functions are directly regulated in the Rules of Procedure.

³⁷⁵ Hans Kelsen, *Teoría General del Estado* (Ed Nacional 1965) 446.

³⁷⁶ Inter alia, Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (*federalismi.It*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>.

³⁷⁷ Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 150.

disturbance;³⁷⁸ or when dealing with the procedural protocols of aspects pertaining to the exercise of the right of petition.

The Rules of Procedure are subject to mandatory official publication³⁷⁹ in the OG, with a formal means of publicity identical to that of the laws and other *erga omnes* binding legal norms.

The reader may wonder if the Rules, taken as a set — bringing together the norms replicating those of the Basic Law, the norms that develop and implement the Basic Law, with the remaining norms, the *new* norms, including those of mere internal arrangements, of an administrative and organisational nature — is endowed with *erga omnes* effectiveness and bindingness?

In other words, should all its norms — and not just those resulting from the Basic Law, namely anyone regulating the legislative procedure — be externally binding?³⁸⁰

It is indeed an interesting and complex question, which shall not be answered herein in absolute terms.

Be it as it may, as a partial conclusion, for the intents of this course, one need only conclude that (at least) the Rules' norms governing the legislative procedure have external effectiveness and a binding nature. They do possess "*legislative value (equivalent thereto)*".³⁸¹

In summary, the Rules of Procedure, typologically, contain a triad of norms.³⁸²

- a) Norms that replicate the Basic Law;
- b) Norms that develop, implement and interpret principles and norms of the Basic Law;
- c) *New* norms.³⁸³

³⁷⁸ Article 9, subparagraph (h) of the Rules.

³⁷⁹ Which "indicates its external relevance": Miguel Galvão Teles, 'Parecer' in O Presidente da República e o Parlamento: *O procedimento legislativo* (Lisboa 2004) 148. Underscoring this point, see also, Elisabetta Frontoni, 'Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell'evoluzione della giurisprudenza costituzionale' (*federalismi.It*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>.

³⁸⁰ Cf *inter alia*, Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 381 et seq; Pedro Alfaro Velez, 'O Regimento da Assembleia da República como fonte de Direito' in *Estudos de Direito Público* (Âncora 2006), Giuseppe de Vergottini, *Diritto Costituzionale* (Cedam 2022) 242 et seq. With a divergent standpoint, see Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 596.

³⁸¹ Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 749.

³⁸² Cf Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)' (1997) 18 *Revista de Derecho de la Universidad Católica de Valparaíso* 277 285, Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 47.

³⁸³ *Ie* norms in the Rules of Procedure that "regulate legal concepts or categories not contained in the Constitution": Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento

For the first and second categories, there is no doubt as to their legality, *legal value equivalent to a legislative act* or force of law, with consequent external effectiveness, namely *vis-à-vis* the entities and people who interact with the Legislative Assembly in the exercise of the latter's functions. The question remains regarding the third type of norms.

In reality, all of these norms are, coherently, sheltered under the same normative act. As such, if some norms have a normative character with the features described above, it follows that this normative mantle shall cover the totality of the norms contained in the Rules. In other words, normative implications extend to all procedural norms:³⁸⁴

“This implies that its normativity affects its own totality, the totality of its norms [...] and, therefore, the relationship between law and parliamentary rules of procedure is not one of hierarchy, but rather one of differentiation of areas of competences, within the same normative level, the law.”³⁸⁵

The Rules of Procedure, in their entirety, in their completeness or fullness, constitute a norm with the value of law. Such is my opinion. A different issue, as seen below, is the legal consequence for the non-compliance with certain procedural norms, which may result in mere non-invalidating irregularities.

It should be noted that the allocation or division of areas of normative competence between the law and the Rules of Procedure does not mean, nor is it equivalent, to admitting that lawmaking is not subject to the Rules. The laws, to be enacted, go through a compulsory legislative procedure, which basically rests on procedural norms contained in said Rules. The procedural norms pertaining to the legislative procedure are norms for norm-making³⁸⁶ (and, if only for this reason alone, necessary norms). They are, therefore, standard norms governing an ordered lawmaking process. They establish and regulate the *assembly line* of laws.

These norms, relative to the *proper sequential* ordering of the legislative procedure, are applied to all processes of enacting future laws.³⁸⁷ They are, at that moment,

Parlamentario’ (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 285. See also, Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010), who introduces the following typology of norms: “*applicative of the Constitution*”: “*in addition to the Constitution*” and “*extracted from the Constitution*”: 775.

³⁸⁴ Inter alia, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129, and the constitutional case-law therein referred to.

³⁸⁵ José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129. Cf *inter alia*, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 35 et seq; who employs the term “rank of law”.

³⁸⁶ In other words, the application of such norms is precisely intended to create other norms or, as Hans Kelsen conceived: “*A norm regulating the creation of another norm is, per se, applied in said creation.*”: Hans Kelsen, *Teoria Pura do Direito* (Arménio Amado Editora 1984) 325.

³⁸⁷ The principle that the rules of procedure may not be derogated is present here, ie they may not be “*unapplied to a specific case*”: Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 50. Jorge Miranda and Rui Medeiros submit that the Rules of Procedure are self-binding: “*Enacted by parliament,*

endowed with a parametric value that derive from their function, and the area of matters reserved to the Rules. They do not depend on the existence of a typical rule for the stratification of sources based on a general hierarchy of normative acts.³⁸⁸

In this regard, it has been said that

“The Rules Procedure of Congress are a type of unique norm in the legal order. It is not a norm like any other. The Rules are procedural parameters for the very legality of the laws [...] the laws are procedurally subordinated [...] to the normative hierarchy of the Rules [...] Faced with this normative hierarchy, from the point of view of its content, the laws that Congress approves, or the norms that the government approves by delegation from Congress, are at least passively subordinated to the Rules, as these are parameters or measures of legality [...] In any case, all legislation is procedurally subject to the norm under which such legislation is created.”³⁸⁹

What is the legal solution or outcome if there is a violation of a given norm of the Rules, during a legislative procedure? I am addressing specific non-compliance with provisions of the Rules of Procedure in the lawmaking process, and not with the invasion of the area of matters reserved to the Rules of Procedure by a pre-existing legal norm. In brief, what happens with acts committed in contravention of the legislative procedure, as regulated in the Rules?

In breach with the theory of *interna corporis* irregularities, which goes back to English parliamentary law, one may contend that

“Taken to the extreme, this thesis would exclude the possibility of controlling the defects relative to the formation of the legitimate will/intent, which determines the very existence of the law. This is the reason why, today, the trend is to admit that, after the unconstitutionality of a law, due to a violation of the parliamentary rules of procedure, has been judicially invoked, the body responsible for control can verify the regularity of the process of formation of the legislative will/intent, in accordance with the rules of procedure, in order to, simultaneously, be able to certify the existence, or not, of a violation of the Constitution itself.”³⁹⁰

this body must observe all of its rules while in force, and may only modify them for the future, and not under the guise of a given debate or a separate/piecemeal vote.”: Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 595.

³⁸⁸ When the Basic Law refers to lawmaking norms — “*based on/in accordance with legal procedures*” — is it not, in a way, pointing towards this direction? I believe that the intention of the Basic Law is to subordinate lawmaking to such procedures, based on the specific nature and function of the Rules of Procedure (and other legal procedural norms) and not in view of a general principle of hierarchy. The practical consequences of opting for either thesis would be, I concede, fundamentally identical.

³⁸⁹ César Delgado-Guembes, *Teoría de las Fuentes del Derecho Parlamentario* (PERU 2009), 68–69.

³⁹⁰ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857. See also, for a lengthy discussion, Paloma Biglino Campos, *Los Vicios En El Procedimiento Legislativo* (UNAM IJ 2020).

If the violated norm is a rule directly executing or replicating a norm or principle of the Basic Law,³⁹¹ for example, at the level of the rules of the legislative initiative, I submit that the President of the Legislative Assembly shall issue a decision of rejection. Failing to do so would contaminate the entire process, and ultimately, the law in question would be deemed unconstitutional,³⁹² resembling a scenario akin to fruit from a poisoned tree.

There are some scholars who consider that, in the event of a contravened procedural norm merely replicating a constitutional norm, the violation of the procedural one shall not even merit any autonomy.³⁹³ Instead, sole relevance should be given to the direct violation of the constitutional norm. In the MSAR, Article 11 of the Basic Law would be applied, allowing for the exclusion of the non-conforming legal norm.

What if the case is a violation of a procedural norm, which, while grounded on the Basic Law, proceeds to develop, implement, or extend its provisions? I believe that, as a rule, such a violation should have the same fate as the previous situation. There still persists a nexus with the norms of the Basic Law, therefore the procedural norms' autonomy is always limited, rather than being the result of genuine norm-making discretionary powers to freely adopt normative solutions.

What if the situation is an infringement of an *original* procedural norm without any constitutional basis? I admit that, in such a case, a mere irregularity may occur: for example, a deficient counting of a given procedural deadline,³⁹⁴ which is the solution

³⁹¹ On procedural norms rules directly executing constitutional norms, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857, debates whether, for this purpose, and in the Portuguese context, the Rules of Procedure should not be given the status of a “reinforced law”.

³⁹² Taken together with other possible unconstitutionality of any and all laws (substantive, formal or organic in nature), the conclusion in the body of the text seems to be self-evident. Therefore, I cannot fathom what motivated the opinion given in Report No. 1/VI/2019 of the CRPMM, which stated once “*the legislative procedure has been concluded*”: it is impossible to produce legal effects upon such approved law. It is known that any law is always subject to the possible scrutiny of its constitutional conformity — in the MSAR, with the Basic Law, as demanded by its Article 11 — in the context of “*successive or a posteriori judicial control or review*” and, on the other hand, the opinion by the Committee completely ignores the balancing of the possible deficiencies detected, pointing to undifferentiated handling between a mere “irregularity”: and an evident breach of a procedural or constitutional norm, be it substantive or formal in nature. Invalidating and non-invalidating deficiencies are not distinguished. Perhaps the wording of the opinion did not reflect the true intent of the Committee; otherwise, such understanding intolerably undermines the Rules, its function and legal value, and may possibly represent an attempt towards an illegitimate functional interpretation to meet a pre-ordained result. Cf Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857, on the “*control of deficiencies relative to the formation of the lawmaking body's will/intent, which determine the very existence of the law*.” See also Decision of the CFA in Case No. 61/2018, pointing to the need for a weighting of values. In short, one might even pose the question of whether said opinion, as expressed, does not generate some sort of “invitation” to contravene the Rules.

³⁹³ Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 383.

³⁹⁴ Which has been occurring with some frequency; the issue does not attain gravity, provided that Members are not prevented from having effective knowledge of the bills, as warns Alexandre Sousa Pinheiro, ‘Artigo 112.º’ in Alexandre Sousa Pinheiro and Pedro Lomba (eds), *Comentário à constituição portuguesa III volume - 1.º tomo* (Centro de Investigação da Faculdade de Direito da Universidade de Lisboa 2008) 155.

given in administrative procedure³⁹⁵ (similar, in many aspects, to the legislative procedure), wherein the rule is that not every act found to be in non-compliance with the law is invalidated, ie there are deficiencies or imperfections that only generate a non-invalidating irregularity.³⁹⁶ “This is what happens with the non-essential formalities, ie formalities required by law, the non-performance of which does not entail the invalidity of the act.”³⁹⁷

As VIEIRA DE ANDRADE teaches, after giving us an account of “Invalidating deficiencies (‘illegalities’ that potentially affect the effectiveness of the act) and non-invalidating deficiencies (‘irregularities’),” he explains that, within the category of deficiencies relative to norm-making, there are formal defects, in which are included

“procedural defects: in general, they are the cause of annulment, but they may generate nullity (violation of fundamental rights of a procedural nature, for example) or constitute mere irregularities — not to be confused with the defects in the acts of the procedure that may influence the decision, projecting thereon and thereby causing defects in the content.”³⁹⁸

³⁹⁵ The legislative procedure is analogous, in important aspects, to the administrative procedure, *inter alia*: Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010) 791.

³⁹⁶ Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. See, regarding a different issue, but within the parliamentary procedure, the Decision of the CFA in Case No. 61/2018 alludes to a principle of proof of resistance when the vote is not essential to the existence of the necessary majority, but also refers to the undue exclusion of a person in the voting process or the lack of summoning of a Member to the meeting — the majority of scholarship and case-law are inclined towards the invalidity of the deliberation, even if the vote in question did not change the outcome of the voting. The Decision reads, “*If there is an evident public interest in the preservation of deliberations that were passed, in many cases constituting the approval of laws, it seems that a principle of proportionality shall have to be asserted, which entails a weighting of values between the importance of the (possible) deficiency and the importance of preserving the deliberation, in terms of protecting said interest. [...] given that the appellant’s vote would not have been decisive in any deliberation taken by the Legislative Assembly during the mentioned period, it seems to us that the possible deficiency — if it exists — must be considered to have been remedied.*” Evidently, this path is more reasonable and balanced than Report No. 1/VI/2019, of the CRPMM, which dealt with a proximate issue. This debate does not end here, in my view. In fact, the mere unlawful absence of a Member, although necessarily limited to 1 vote (his or her own), still leaves ample space to question if his or her presence — peppered with addresses, interventions, arguments — could, perhaps, sway other Members when it came time to voting. A case in point is the processes of disqualification from office and suspension of the mandate: the affording of means for the Member’s adequate defence — not disguised as mere answers to questions addressed to him or her — maybe a very relevant factor in the formation of the outcome of the voting by the peers.

³⁹⁷ Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. Exemplifying with, among other cases, formalities the omission of which does not prevent the achievement of the objective envisaged by the law requiring such formalities, and also merely bureaucratic formalities, 599.

³⁹⁸ Vieira De Andrade, ‘As Formas Principais da Actividade Administrativa: Regulamento, Acto e Contrato Administrativo’ in *Sumários das Lições de Direito Administrativo II, Academic Year 2009/2010* (Coimbra 2010), archived with the Author, 53, 59. “The traditional judicial stance of “degradation of essential formalities into non-essential ones”: when they do not affect the substantial validity of the act (for reasons of legal certainty and, above all, of the procedural economy), and the critical response by segments of academia, based on the revaluation of the “law of forms”. One should, however, accept, when handling cases of annulment: i) the irrelevance of the procedural or formal deficiency, in the event that such deficiency has not resulted in effective harm to the values and interests protected by the violated norm, if such values or interests have been sufficiently

Allow me to add that, if one is faced with a non-compliance with a norm that incorporates an essential element in the legitimisation of the legislative procedure, which, realistically, may refer to procedural norms only *apparently* devoid of constitutional linkage but, in reality, reflect essential elements or principles of the legislative framework described above, then one is dealing with a consequence that would entail more than a mere irregularity.

In short, the fact that non-performance or violation of a particular type of procedural norm may be regarded as a mere irregularity, without projecting consequences onto the validity of the normative act approved with such a deficiency or a lesser one, does not diminish the normative and parametric value of the Rules of Procedure in the context of lawmaking.

10. Other Issues

Upon reaching the end of this long chapter, I propose to jot down short remarks on a few other points regarding the characterisation of the Rules of Procedure of the Legislative Assembly.

10.1 The Formal Typology of Resolution

The Rules of Procedure are created under a formal legal enactment: a Resolution of the Legislative Assembly. The same applies to the amendments to said Rules.

One could ponder if the Rules of Procedure, namely in view of their formal identity, should not be approved, and amended, by means of a legal form other than the *general* resolution.³⁹⁹ It is conceivable that a special modality of resolution could be adopted for this purpose.

Revising or amending the Rules of Procedure follows the common process, but with some specific differences — for instance, the competence for such initiative is granted to the Committee on the Rules of Procedure and Members' Mandates, under the terms of Article 160 of the Rules, without prejudice to an original initiative by a minimum

protected via another route; ii) the conservation of the act, ie its non-annulment by the judge, despite its invalidity, when the content of the act cannot be any different, and there is no relevant interest in the annulment (thusly the Italian Law expressly provides for today – L. 241 / 1990, article 21 – octies). I would also tend to admit the irrelevance of the deficiency or the conservation of the act when it is evidenced, beyond any doubt, that a formal deficiency had no influence on the decision (namely, in electoral acts but, in general, §46 of the German procedural law — VwVfG [*Verwaltungsverfahrensgesetz*]). It should be noted that formal deficiencies are less relevant in the context of subjectivist-based administrative litigation, namely of actions containing requests or applications brought against public bodies – insofar as the infringed formal norms aim to ensure public interests and not the rights and interests of individuals.”: *ibid*, 59–60.

³⁹⁹ Regarding this issue, in light of the Portuguese legal-constitutional order, wherein the groundwork for differentiated Rules of Procedure-Resolution panorama is stronger, when compared with the text of the Basic Law, for example, Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 548–49.

of nine Members.⁴⁰⁰

The majority required for approval, as in most cases, is the absolute majority (votes in favour cast by more than half of the total number of Members).⁴⁰¹

10.2 Official Publication

The Rules of Procedure are, under its own terms, subject to official publication: “The publication of the resolution of amendments and, in the case provided for in the previous paragraph, of the new text of the amended Rules of Procedure, are made in the Official Gazette of the Macau Special Administrative Region.”⁴⁰² Nor could it otherwise, given that the Rules contain true legal norms.

The order for publication — unlike what happens with the laws — is a competence exercised by the President of the Legislative Assembly, thus aligning one more element in reinforcing the idea of parliamentary self-regulation.

Regrettably, the Law on forms and templates of legal enactments overlooks and undervalues the Rules of Procedure.⁴⁰³ This law fails to mention the Rules *per se* explicitly, despite the formal-constitutional identity bestowed upon them by the Basic Law.

On the other hand, the same law does mention the typology of resolutions — and the resolution is the Legislative Assembly’s self-chosen legal form through which the Rules of Procedure are enacted — and thus the idea that, *malgré tout*, the Rules end up being, indirectly, provided for in said law. The truth, however, is that one can barely understand, or not understand at all, the ordering that is made therein with respect to the templates of the various normative acts, with the resolutions placed in the lowest and last position (Article 17 of Law No. 3/1999), after the laws, administrative regulations, executive orders, decisions by the Chief Executive and even decisions from the principal officials! This apparent arrangement is therefore useless.

10.3 The Suggestion of Modifications Based on Praxis

Note the rule set out in Article 26, subparagraph (e) of the Rules of Procedure (in parallel with that Article 160?), on the competence of the Committee on the Rules of Procedure

⁴⁰⁰ A very high number indeed, even after the increase in the total number of Members. Perhaps it is intended to provide a special stability to the procedural-normative fabric.

⁴⁰¹ Cf Article 77 of the Basic Law, as the Rules of Procedure are approved by the formal legal enactment designated Resolution.

⁴⁰² Article 161, paragraph (3) of the Rules.

⁴⁰³ For a mere example, on another level, “However, Law No. 3/1999 suffers from some handicaps, especially the absence of a formal enabling act for the publication of international agreements and respective notifications.”: Cristina Ferreira, ‘A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 212–13.

and Members' Mandates to suggest to the Plenary the amendments to the Rules of Procedure that the practice may advise. Does this mean that the idea of procedural custom is being rejected?

For a practice to be considered effectively binding, should it be documented and formally integrated into the Rules of Procedure? ⁴⁰⁴ In any event, one has to investigate whether a given practice, or custom, in a broad sense, is revealed to be in accordance with the Rules, notwithstanding whether *praeter* the Rules, or conversely, contradicts them. I submit that such practices — and maybe possible customs, which I doubt really exist⁴⁰⁵ — may never prevail over an express contrary procedural norm, *de minimis* if such norm replicates a constitutional norm or stems from the constitutional order. The consequence for such procedural misconduct would be to illegitimately disqualify the Rules from its function and its nature as a set of legal parameters.⁴⁰⁶

10.4 Interpretation and Filling of *Lacunae*

What about the interpretation, solving of omitted cases and filling of *lacunae* under the Rules of Procedure? Article 159 of the Rules of Procedure provides that

"1. The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members' Mandates.

2. The Board's decisions taken under the terms of the previous paragraph, when written, are published in Series II of the Legislative Assembly's Bulletin."

On the other hand, under the terms of Article 26, the Committee on the Rules of Procedure and Members' Mandates is competent *"To issue an advisory opinion on questions of interpretation and filling of lacunae of the Rules of Procedure, submitted thereto by the President, the Board or the Plenary"*.⁴⁰⁷

In the letter of the norms, beyond the specific and strict question of the interpretation — which will follow the normal canons of the interpretation of legal norms, eg contained in the Civil Code — at times, the language points to solving omitted cases and, at others, of filling of *lacunae*. Regardless of this lack of identity in the wording, it seems clear to me that this power may only be exercised if and when there is an effective legal *lacuna* (thus excluding minor gaps, loopholes and difficulties in interpretation or

⁴⁰⁴ For instance, the current practice or usage of resorting to second or third versions of the Government bills, which are not covered by the Rules, or, as the previously mentioned amendment of 2017 left unsolved, the deadline for cancellation of the legislative initiative.

⁴⁰⁵ Such customs duly meeting all the requirements to come into existence.

⁴⁰⁶ Furthermore, in a legal order belonging to the Continental/Roman-Germanic family.

⁴⁰⁷ One should not forget that this interpretation — and filling of *lacunae* — must be performed in accordance with the Major Law of Macau, respecting the core options contained in the Basic Law. It is an interpretation moulded by constitutional conformity, in accordance with the Basic Law, to which I add a principle *in dubio pro Parliament/Legislative Assembly*.

application).

In other words, the door is not opened for the derogation of existing norms, nor for the creation of new norms, unless such norms emerge to fill a real *lacuna* that has actually been duly verified — and insofar as needed to fill such carefully checked *lacuna*.

If there is no *lacuna*, ie if there already is a procedural norm, applicable to a given case provided for therein, the Board may not create a different norm, nor give a different meaning to an existing one, by way of a merely apparent filling of a *lacuna*. In such an event, the issue shall have to be raised in the context of amending the Rules, if the currently effective norm is considered inadequate, but always in accordance with the norms and principles of the Basic Law.

VIII.

THE LEGISLATIVE INITIATIVE, IN PARTICULAR

1. Introduction: Legislative Power and Competence

This issue is closely connected to the Basic Law — eg the legislative powers of the Members, the legislative initiative, the majorities required for deliberations, the area of matters reserved to the law and the primacy of law. It further interacts with other sources, besides the Basic Law, such as Law No. 13/2009, the law on forms and templates of legal enactments.

The Legislative Assembly of the MSAR is the *legislative body* of the MSAR, as stated in Article 67 of the Basic Law, thus the Legislative Assembly is competent to enact, amend, suspend, and repeal laws, pursuant to the Basic Law and in accordance with the established legal procedures, as provided for, in general terms, under Article 71, paragraph (1) of the Basic Law.

As stipulated in Article 5 of Law No. 13/2009, which establishes the legal framework of the internal sources of norms, under the terms of the Basic Law, the Legislative Assembly exercises the powers *provided for* in the Basic Law of the MSAR, being competent to enact, amend, suspend, and repeal laws, on any and all subject-matters falling within the scope of the MSAR's autonomy.

The above words curtly outline the legislative competence of the Legislative Assembly.

2. Legislative Competence *versus* Competence of Legislative Initiative

A different — but intimately intertwined — issue from the legislative competence, is that which concerns the legislative initiative,⁴⁰⁸ ie the legal-procedural aspects relative to the regulatory framework, the competence, and the limits to, the legislative impetus: who has the power to initiate the formal legislative procedure.

⁴⁰⁸ Manuel Aragón Reyes explains, “There are times when both capacities are exercised by the same organ and there are times when they do not. In short, these are different functions [...] it must be said that legislative initiative is distinct from legislative power.”: Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 640–41.

As JORGE MIRANDA affirms,

“The legislative initiative — depending on the adopted perspectives, the first stage of the procedure or the ability to kick-start one — is not to be confused with legislative competence. These are, evidently, different concepts: legislative initiative means proposing laws; competence means enacting/approving laws.”⁴⁰⁹

A preliminary observation to be made: the legislative initiative, which is the power to trigger the procedure, is not to be confused with legislative competence, which is the power to enact/approve laws.⁴¹⁰ As GUSTAVO GRAMAXO ROZEIRA warns, “It is therefore absolutely clear: entitling any entity or person with the right of parliamentary legislative initiative does not imply that such entity or person is called upon to participate... in the exercise of the legislative function.”⁴¹¹

In reality, the issues are so distinct⁴¹² that, from the outset, the respective protagonists are different. Legislative competence rests exclusively on the collegiate parliamentary body *Legislative Assembly*, whereas legislative initiative, under the system established by the Basic Law, is double-headed.⁴¹³

In pursuance of the foregoing:

- Legislative initiative is granted — and externalised — to the Chief Executive/Government adopting the form of a Government bill;⁴¹⁴ and
- Such power of initiative is internally de-concentrated, being distributed among the Members on an individual basis: any and all Members of the Legislative Assembly may introduce bills;⁴¹⁵ the initiative of lawmaking belongs to the Members.⁴¹⁶ Such power may be exercised as an exclusively individual initiative, or as a joint sponsorship of a bill by several Members individually considered,

⁴⁰⁹ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 264. He adduces that “The current trend, everywhere, is towards an increasingly clear separation between bodies with legislative competence and bodies and subjects with initiative; and, therefore, to substantially expand the number of entities with the power or right to trigger a procedure.”: *ibid*, 266.

⁴¹⁰ José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAF DL EDITORA 2015) 250.

⁴¹¹ Gustavo Gramaxo Rozeira, ‘A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 98.

⁴¹² Illustrating the radical difference between legislative competence and competence of legislative initiative, the former Organic Statute of Macau, after establishing large areas of matters absolutely and relatively reserved legislative competence in favour of the Legislative Assembly, established in Article 39 that “*The legislative initiative belongs, without distinction, to the Governor and, in the form regulated in the Rules of Procedure of the Assembly, to the Members thereof.*”

⁴¹³ As in most constitutional systems, speaking, for instance, of a “*pluralistic approach to the legislative initiative*”: Valerio di Porto and Luigi Gianniti, ‘L’iniziativa legislativa parlamentare’ (*federalismi.it*, 14 July 2017) <<https://www.federalismi.it/nv14/articolo-documento.cfm?artid=34383>>.

⁴¹⁴ Article 64, subparagraph 5) of the Basic Law, Article 101 of the Rules of Procedure; Article 102, paragraph 1 of said Rules.

⁴¹⁵ Article 75 of the Basic Law.

⁴¹⁶ Articles 1, subparagraph a, and 101 of the Rules of Procedure.

up to a maximum of nine Members.⁴¹⁷ Legislative initiatives by Members adopt the form of Members' bills.⁴¹⁸

There are different actors, ie holders, of this differentiated public power; there also exist a number of differences in the specific frameworks, as well as in the limitations, applicable to each of these two distinct avenues of the original legislative impetus, in addition to the mandatory areas containing matters reserved to the law.

3. Legislative Initiative: A Few Classifications

Legislative initiatives may be summarised into the following categories.⁴¹⁹

A first large divide, as previewed above, distinguishes between internal legislative initiative and external legislative initiative.⁴²⁰ It is internal, if the holders of the legislative initiative belong to the body endowed with the legislative competence in question — for example, a bill introduced by Members of the parliamentary body competent to enact such bill into law. It is external, if the holder of the legislative initiative does not belong to the body with legislative competence — for example, a Government bill before parliament; a citizens' legislative initiative (if accepted); or an initiative coming from other non-state bodies, eg regional ones.

A second classification of great relevance is based “*on the moment of intervention in the legislative procedure*”,⁴²¹ thereby distinguishing between original legislative initiative and supervening legislative initiative, the criterion being whether the legislative procedure is an *ab initio* or *ex novo* one, or whether the initiative takes place *during the course* of a duly initiated and ongoing legislative process. The applicable specific frameworks are — by the very nature of such initiatives and in alignment with consensual comparative law — quite different. I shall return to such distinction later.

A third classification, meriting further elaboration, is based on the existence of either areas of reserved matters, or unrestricted legislative initiative. Normally, in this context, legislative initiative may be of the first type — depending on the matters, exclusive to one organ or another — or may be shared, in which case the legislative initiative may be triggered by more than one entity, without any limitation or legal pre-

⁴¹⁷ Article 103, paragraph 1 of the Rules.

⁴¹⁸ Article 102, paragraph 1 of the Rules.

⁴¹⁹ Cf *inter alia*, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251.

⁴²⁰ See *inter alia*, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251, Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 99. Both, mindful of the subject to which they are addressed, are initiatives that qualify as parliamentary legislative initiatives, that is, by reference to the addressee, that is, the body with the legislative power to which they are addressed (in the case of Macau, the Legislative Assembly, always), as explained by Gustavo Gramaxo Roseira, ‘Iniciativa Legislativa Parlamentar’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *Enciclopédia da Constituição Portuguesa* (Quid Juris 2013) 208 et seq.

⁴²¹ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 100, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251.

condition. In the MSAR, there is a third modality: the conditioned legislative initiative.

In terms of parliamentary legislative initiatives, one can also distinguish between individual initiatives — those introduced by a single Member,⁴²² and collective initiatives, when introduced by a plurality of Members,⁴²³ (and, in a few legal orders, legislative initiatives introduced by committees.)⁴²⁴

Another distinction, to be developed further below, relates to the difference between legislative initiative and lawmaking impetus, rooted in their respective legal effects. The legislative initiative creates the typical, necessary, and constitutive legal effect of opening⁴²⁵ a legislative procedure,⁴²⁶ whereas in a lawmaking impetus, either all

⁴²² As the manifestation of an individually entitled and unfettered power exercisable by any member of parliament, see Article 1 of the Legislative Assembly's Rules of Procedure. For example, a requirement that the introduction of bills depends on the sponsorship of a given minimum number of proponents would be illegal. See, moreover, with clarity, the provision of Article 75 of the Basic Law, which establishes bills introduced, individually or jointly, by Members of the Legislative Assembly.

⁴²³ In the case of Macau, up to a maximum of nine (9) Members, pursuant to Article 103, paragraph (1) of the Rules of Procedure.

⁴²⁴ See Article 124, paragraph (2), subparagraph a) of the Rules of Procedure.

⁴²⁵ Other than enacting the intended law. The legislative procedure shall be compulsorily open, but there is no requirement that it be concluded positively through the approval of a law. Or, as stated by Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004), “*The legislative initiative conditions [...] the exercise of the powers of the body with legislative competence, forcing it to act, even if the final result may be limited to the rejection of the bill.*”: page 97. As stated by Gustavo Gramaxo Rozeira, “*The question is to know what are the legally binding relations, if any, which condition the reaction of the parliamentary assembly to the legislative projects that are presented thereto. It is true that the exercise of the right of parliamentary legislative initiative, by of any of its holders, does not become an “obligation to legislate” by the parliamentary institution. That right is exercised in order to adopt a legislative act, in effect; but this aim, as pursued by the author or authors of a legislative project, is not to be confused with a lawmaking imposition upon the parliamentary assembly to which the project is addressed.*”: Gustavo Gramaxo Rozeira, ‘Reflexão em torno do instituto da “toma en consideración” do direito parlamentar espanhol’ (2016) 7 Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto 101, 102.

⁴²⁶ Cf *inter alia*, Manuel Aragón Reyes mentioning that “to understand the legislative initiative as the act by means of which the legislative procedure is obligatorily launched, more specifically, as the act by which the constitutive phase of that procedure is opened. [...] As Carré de Malberg said, once the initiative is introduced, Parliament is obliged, constrained, to enter into the discussion of the text [...] To exercise the legislative initiative [...] is [...] to initiate it, to put it irremissibly in motion”: Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 642.

See also, with important considerations, “the empowerment, by the constitutional order, of the right of parliamentary legislative initiative to a restricted set of holders has to impart relevant consequences. This right is a very restricted one, as an attribution by the constitutional order is normally associated with a particularly reinforced politico-constitutional status, either due to the performance of certain functions, in terms of the institutional architecture of the State, or due to the number of constitutional subjects involved. We are therefore talking about political actors to whom the legal-constitutional order has reserved a prominent role *vis-à-vis* the legislative procedure: a role that encompasses the possibility, granted by the constitutional order, through the exercise of the right of legislative initiative, to trigger the exercise of the state legislative function. This circumstance leads us, from the outset, to reject the hypothesis that the exercise of the right of parliamentary legislative initiative is absolutely harmless — that its effects are reduced to such a small extent that no obligation would result from such exercise”: and, further on, “It cannot therefore be accepted that the exercise of the right of legislative initiative entails legal consequences that are largely assimilable to the legal effects arising from the exercise of the right to petition. The mere blatant disproportion between the number of holders of the right of legislative initiative and those who may avail themselves of the right to petition would, if another argument did not exist, suffice to instinctively lead to the realisation that the structural and functional differences between both is broad enough to demonstrate that the first of such rights is, in relation to the second, a substantially more

or some legal effects are not produced, nor do they occur — ie there is no obligation or need for a direct and immediate triggering of a legislative procedure.

I believe that the issue of legislative initiative assumes enormous importance in the legal-constitutional system of the MSAR, especially when analysing, in detail, the field of legislative power and its practice.

In fact, as I had the opportunity to argue quite some time ago:

“even if the Assembly assigns to itself the monopolising role as legislator, it is also necessary to analyse the issue of competence of legislative initiative, on the one hand, and we must bide our time in order to assess the normative dimension of future government regulations, on the other hand⁴²⁷ [...]”

In other words, it is at the level of the legislative initiative, and not of the legislative competence — as one might perhaps be led to expect — that the Basic Law curtails claims pertaining to the effective lawmaking of the Assembly and its Members.”⁴²⁸

The following sections shall address the principles underlying the legislative initiative.

4. The Conformity of the Legislative Initiatives with the Constitutional Order — Respective Acceptance, Rejection and Reform

The need to ensure the conformity of legislative initiatives with the constitutional order is a *fait accompli* under the Rules of Procedure, for example, in Articles 101,⁴²⁹ 104,⁴³⁰ and 105,⁴³¹ culminating expressly in Article 107, subparagraph (a): “*The President of the Legislative Assembly shall summarily reject bills and amendment proposals, which: (a) Contravene the provisions of Articles 104 and 105.*”⁴³²

qualified one.”: Gustavo Gramaxo Rozeira, ‘Reflexão em torno do instituto da “toma em consideración” do direito parlamentar espanhol’ (2016) 7 Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto 101, 109.

⁴²⁷ Paulo Cardinal, ‘O sistema político da Região Administrativa Especial de Macau: em busca do equilíbrio’ (2002) 14(6) Boletim da Faculdade de Direito da Universidade de Macau 75, 78.

⁴²⁸ *ibid* 84.

⁴²⁹ “Without prejudice to the provisions of Articles 104 and 105, the initiative of the law belongs to the Members and to the Government of the MSAR.”

⁴³⁰ “The initiative of the law is reserved exclusively for the Macao SAR Government in the following matters: a) Electoral Law of the Legislative Assembly; b) Public revenue and expenditure; c) Political structure; d) Operation of the Government.”

⁴³¹ “The written authorisation of the Chief Executive shall be required for the exercise of Members’ initiative in matters relating to Government policy.”

⁴³² An issue not explicitly clarified in the Rules of Procedure is the reserved initiative in view of the essential elements of the taxation framework. It appears that, in this case — and only in this case — as long as such

Does the need for constitutional conformity exist, even if not mentioned the Rules?

Should a Government bill be rejected if blatantly unconstitutional, outside the cases expressly provided for in the Rules?⁴³³ For instance, a bill proposing the abolition of local currency (MOP, better known as the “*Pataca*”? Or eliminating the Executive Council or the Permanent Council for Social Dialogue? Or violating a fundamental right explicitly laid down in the Basic Law?⁴³⁴ Or by going beyond the scope of the MSAR’s autonomy?

I submit that that the decision of acceptance, rejection and reform of a legislative initiative should be made immediately, in accordance with the procedural norms. However, if the Rules of Procedure are silent on certain matters — and such is at issue — a mere judgment of compliance with the Rules of Procedure may not suffice. It shall be

elements are at stake, and not any and all tax matters, Article 107, subparagraph a) of the Rules of Procedure should apply by analogy — consequently, with a rejection of such bills outright, since a reserved area of initiative already results directly, expressly and unequivocally from Article 71, paragraph 3) of Basic Law. The MSAR Budget constitutes the paradigm of the limitation in terms of “*public revenues and expenditure*” (in any case, the Rules of Procedure could have dedicated an autonomous subparagraph for these purposes). In any event, legal clarity and certainty underpinned Draft Resolution No. R1/I/1999-1, with the following text (not approved): “*Article 107 (Matters of reserved initiative) -- The initiative of the law is reserved exclusively for the Government of the MSAR in the following matters: a) Electoral Law of the Legislative Assembly; b) MSAR Budget; c) Essential elements of the taxation framework, establishing the taxed base and the rate of each tax, as well as the terms for granting tax exemptions; d) Authorisation for the Government to incur public debt; e) Public revenue and expenditure; f) Political structure; g) Operation of the Government.*”

⁴³³ “It is mandatory for the Legislative Assembly of the MSAR to verify a contravention of the Basic Law by laws, before taking the decision to suspend or repeal such laws. Upon assessing such a violation, under the terms of Articles 11 and 71 of the Basic Law, the Assembly may take the decision mentioned above. In this case, the appraisal carried out by the Assembly certainly includes an effective “judgment” regarding the compliance or non-compliance of the laws with the Basic Law. After all, it makes the necessary adaptations of the norms that have infringed upon the provisions of the Basic Law, or rather, such “judgment” itself constitutes a mechanism of controlling the conformity of the laws with the Basic Law. In my view, therefore, the Legislative Assembly of the MSAR exercises, within the limits of autonomy, the conditioned and limited power to scrutinise the violation of the Basic Law”: Chong Chan Chan, ‘Algumas Considerações sobre a Fiscalização da Violação da Lei Básica’ (2013) 3 Revista de Estudos de ‘Um País, Dois Sistemas’ 123, 126.

⁴³⁴ In order to avoid what happened, for example, in this case, which, in the end was well resolved in the Committee stage of examination on the specifics, but should not have even reached such stage altogether: “The members of the Committee understood, however, that even though they comprehended the importance of the historical arguments and the need for safeguarding the legitimate expectations of the Maritime and Fiscal Police staff, the truth is that the structuring of the base and the higher careers, into two distinct careers — the male and female ones — constituted discrimination on grounds of sex, not conforming to Article 25 of the Basic Law of the Macau Special Administrative Region [...] This constitutional provision embraces the principle of equality, assuming a structuring dimension for the entire legal order of the Region. In determining the equality of residents before the law, the Basic Law imposes legal equality (law in the sense of legal order) and prohibits the differentiation of residents into distinct legal classes according to nationality, birth, race, sex, etc. The establishment by the bill two parallel careers, male and female, in structuring and characterising the career of Customs’ staff represented a restriction to the principles and rights enshrined in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights, which precisely prohibit such discrimination; it is also not in conformity with the final part of the second paragraph of Article 40, since the rights and freedoms provided for in those instruments of international law may not be restricted.”: FSC, Report No. 1 II/2003, Government bill entitled “Framework of the careers, positions and remuneration of Customs staff.”

See also, discussing issues of constitutionality, or lack thereof, in matters of fundamental rights, TSC, Report No. 2/VI/2019, Amendment to Law No. 9/1999 — General Framework Law on the Judiciary Organisation.

necessary to *move up* in the legal order and complement such conformity directly with the Basic Law,⁴³⁵ and also with Law No. 13/2009.⁴³⁶

May bills that violate international treaties effective in the MSAR be accepted? Namely within the scope of the special protective mantle of Article 40 of the Basic Law? What about the international treaties outside the universe of the ICCPR, the ICESCR, and the ILO?

Another case arises concerning the renewal of the legislative initiative, which is a reason for rejecting a bill, under Article 109, paragraph (1) of the Rules. I shall pick up on this item later.

5. Freedom of Exercising Legislative Initiative

Legislative initiative is freely exercisable. Such is the general rule, with very few exceptions thereto.⁴³⁷ In other words, the decision to exercise a given legislative initiative, whether by the Executive or by Members, is not mandatory nor necessary within a certain timeframe.⁴³⁸

There are, nonetheless, exceptional situations in which the exercise of a given legislative initiative is mandatory. The typical example is the budget bill, which the Executive is obligated to introduce annually to the Legislative Assembly.⁴³⁹ Moreover, Law No. 15/2017, *Budgetary Framework Law*, stipulates in Article 25, paragraph (1), that the Government is obliged to introduce the budget proposal for the following year to the Legislative Assembly by 30 November each year, in the form of a Government bill. There is an obligation, binding upon a specified addressee holding legislative initiative with temporal requirements: a deadline and the frequency for exercise of such initiative.

I also consider to be mandatory legislative initiatives those which correspond to

⁴³⁵ “The Basic Law is actually the constitutional law of Macau, and thus controls the direction of legal developments”: Tong Io Cheng and Wu Yanni, ‘Legal Transplants and the On-Going Formation of Macau Legal Culture’ (2010) 2 *Isaidat Law Review*, 668.

⁴³⁶ As it is a law endowed with “borrowed” constitutionality and develops the legal framework on the internal sources of norms, under the terms of the Basic Law. For instance, Article 5 of this law: “The Legislative Assembly exercises the competences provided for in the Basic Law of the MSAR, for enacting, amending, suspending and repealing laws on any and all matters within the scope of the autonomy of the MSAR.” In other words, such a norm clarifies that only within the scope of the MSAR’s autonomy is any legislative power in the MSAR and consequent legislative competence by the Legislative Assembly. The violation of said norm, as stemming from the principles of the Basic Law, shall *per se* constitute a sufficient reason for the summary rejection of a bill.

⁴³⁷ Cf Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 277.

⁴³⁸ See, with interest, on difficult issues such as the self-binding of a legislative body to periodic laws or to laws subject to an annual cycle (other than the budget law), Francesco Rimoli, ‘Leggi a ciclo annuale e vincoli al legislatore futuro: un profilo teorico’ (*federalismi.It*, 1 February 2019), downloaded on <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38001>>, and Paolo Carnevale, ‘La parabola della legge periodica “per legge”: ascesa e tramonto di un modello?’ (*federalismi.It*, 1 February 2019), downloaded on <<https://www.federalismi.it/nv14/editoriale.cfm?eid=508>>.

⁴³⁹ See, referring precisely that the “budget proposal is annual”: João Albuquerque, ‘Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM’ (unpublished and archived with the Author, 2013).

constitutive lawmaking impetuses⁴⁴⁰ — for example, stemming from the Basic Law or from laws establishing general legal frameworks. The difference is that no *timeliness* constraints would be applicable,⁴⁴¹ nor would there be a duty to formally initiate a legislative process, except, naturally, in matters within the scope of areas reserved to legislative initiative. In the latter event, the obligation resulting from the lawmaking impetus shall only have a single and given addressee,⁴⁴² or may require prior authorisation.

6. Decisions of Acceptance, Rejection, and Reform

In the context of a legislative initiative, whoever the triggering entity may be, the President of the Legislative Assembly has the *duty*, under the Rules, *to issue decisions* of acceptance, summary rejection or reform thereof.

The decisions of acceptance, rejection, and reform⁴⁴³ are merely assessments of the organic, substantive, and formal propriety/limits⁴⁴⁴ of the bills, ie in a word, on their procedural regularity. Therefore, considerations on the opportunity, merit or political expediency of the legislative initiative shall be left out.⁴⁴⁵ Much less may such decisions be guided by a particular bias towards a given Member, in view of his or her general political position *vis-à-vis* a political standing or platform.

The President of the Legislative Assembly is the guardian of constitutionality — namely, of the Basic Law — and of the Rules. To such extent, he or she shall be totally impartial, under the beacon of the parametric norms to which he or she must obey.

The decisions of summary rejection (and the others?⁴⁴⁶) are, under Article 111

⁴⁴⁰ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 277.

⁴⁴¹ For instance, the legislation regulating Article 23 of the Basic Law, which was approved several years after such constitutional law came into force, or the legislation on fundamental labour rights (namely the rights to strike and to collective bargaining), which have still not known the light of day.

⁴⁴² For example, in matters pertaining to the essential elements of the taxation framework or electoral legislation relating to the Legislative Assembly, the Executive branch is the exclusive agent of the respective mandatory legislative initiative.

⁴⁴³ Article 108 of the Rules of Procedure, “The breach or omission of the formalities provided for in the preceding paragraph may be remedied, within the non-extendable deadline established by the President.”

⁴⁴⁴ Cf in the Italian case, for example, “The requirements are therefore minimal and easy to fulfil. In reality, the Presidents of the Houses exercise control [...] over the substance of the initiatives, especially when these may have an impact on their institutions and constitutional principles.”: Valerio di Porto and Luigi Gianniti, ‘L’iniziativa legislativa parlamentare’ (*federalismi.it*, 14 July 2017) <<https://www.federalismi.it/nv14/articolo-documento.cfm?artid=34383>>.

⁴⁴⁵ The appraisal of which falls to the Plenary of the Legislative Assembly. See, for example, “the body with the competence to adopt a legislative measure is not bound to approve it [...] but is obligated to appraise it; it may not ignore such measure nor refuse its acceptance for reasons of merit”: Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 97. See also: “This decision, however, is adopted following a control that has an exclusively legal nature, relative to the fulfilment of constitutional and procedural requirements; it is not a control on the merit or opportunity of the legislative projects, nor the normative solutions proposed therein.”: Gustavo Gramaxo Rozeira, ‘A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 161.

⁴⁴⁶ *De minimis*, one should allow for appeals against decisions of reform, in the event that the latter requires the improvement of bills in abusive and unnecessarily restrictive terms. An acceptance *per se* may also be

of the Rules of Procedure, subject to appeal to the Plenary; the latter's confirmatory deliberation of the President's decision is deemed to constitute the final, definitive rejection of the bill in question.⁴⁴⁷

Article 111 has been profoundly modified by the 2017 review of the Rules. In effect, the respective Explanatory Note laid out that:

“The wording of this Article has been profoundly changed, since the current norm is lacking in clarity, confusing the acceptance process with the rejection, in the context of appealing decisions of the President, as well as presenting little clarity regarding the procedural framework for appealing the President's decisions regarding legislative initiatives. In view of the above, the procedures for the acceptance and the rejection of bills by the President have been separately established. Appeals of the President's decisions shall be admissible only in the event of rejection of Members' bills, the scope of the appellants being confined to the respective proponents. The appeal shall, in the first instance, be brought to the Board of the Legislative Assembly; only subsequently, if such body maintains the President's decision, shall the appeal be submitted to the Plenary.”

While a measure of simplification was introduced, it is no less true that choices were made for solutions that are unclear, lack real justification and, worst of all, pose several questions.

Why is there no appellate procedure for decisions rejecting Government bills? I trust that such an omission would not imply an inability to reject bills, in cases, *inter alia*, where a Government bill blatantly violates the Basic Law. Such an interpretation, if it were to gain ascendancy, would deal a severe blow to the status and the functions of the Legislative Assembly and, certainly, represent a gross deviation from the fundamental rules and principles of a normal legislative procedure, integrated into a legal order

appealable to the Plenary, for example, if blatantly in violation of the Basic Law, although the interested party in this appellate procedure shall not be the accepted bill's proponent, but rather another Member or a group of Members.

⁴⁴⁷ Article 111 has been profoundly modified by the 2017 reform. In effect, the Explanatory Note reads: “The wording of this Article has been profoundly changed, since the current norm is lacking in clarity, confusing the acceptance process with the rejection, in the context of appealing decisions of the President, as well as presenting little clarity regarding the procedural framework for appealing the President's decisions regarding legislative initiatives. In view of the above, the procedures for the admission and the rejection of bills by the President have been established separately. Appeals of the President's decisions shall be admissible only in the event of rejection of Members' bills, the scope of the appellants being confined to the respective proponents. The appeal shall, in the first instance, be brought to the Board of the Legislative Assembly; only subsequently, if such body maintains the President's decision, shall the appeal be submitted to the Plenary.” While it is true that some simplification was achieved, it is no less true that choices were made for solutions that are unclear, lack real justification and, worst of all, pose several questions. Why is there no appellate procedure for decisions that reject Government bills? Such an omission will presumably not, I hope, induce or lead one to infer the impossibility of rejecting bills — nor could such be the case, *inter alia*, in relation to a Government bill evidently violating the Basic Law? Why is there no appellate procedure for decisions of acceptance?

aspiring to an effective *Rule of Law*.⁴⁴⁸ I must concede defeat in attempting to understand the *raison d'être* of this procedural option.

Why is there no appellate procedure for decisions that accept (any and all) bills?

I find it impossible to adhere to this policy choice by the parliamentary legislator.

In closing this interlude, I must reaffirm that a decision of acceptance is not tantamount to, nor does it presume, any concurrence with the merits of the legislative initiative in question.

7. The Original Legislative Initiative — Members' Bills and Government Bills

The Basic Law provides — and the Rules of Procedure thus confirm — that, in principle, the original legislative initiative may come from Members⁴⁴⁹ and the Government.⁴⁵⁰ Article 101 of the Rules of Procedure states, “*The initiative of the law belongs to the Members and to the Government of the MSAR.*” Thus in Article 102, the former are called Member’s bills and the latter Government bills: “*The original initiative of the law takes the form of a Member’s bill, when exercised by Members; when exercised by the Government, it takes the form of a Government bill.*”

Both types of legislative initiatives have equal dignity and are subject to the same full array of principles, with a certain degree of specialisation and a few applicable exceptions.⁴⁵¹

There is differentiation in the legal framework,⁴⁵² in some respects substantial — for example, a Government bill’s requires the prior consultation of the Executive Council, unlike Member’s legislative initiatives, which naturally do not. Similarly, this obligation does not extend to other consultative bodies exclusive to the Chief Executive, such as the Permanent Council for Social Dialogue.

Under the Basic Law, the framework provided for in Article 51 is only applicable

⁴⁴⁸ And not a dictatorial system, without any interwoven support based on legality, separation of powers, etc, wherein, perhaps, such a description would be more fitting

⁴⁴⁹ Members may exercise legislative initiative individually or jointly, Article 75, paragraph ((2) of the Basic Law; in the latter case, the number of proponents may not exceed nine, Article 103, paragraph (1) of the Rules of Procedure.

⁴⁵⁰ Not from other bodies, entities or persons: for example, the Executive Council, nor from the Courts, the Commission Against Corruption; also excluded are the popular initiatives, for instance, by means of a petition with a certain number of signatures.

⁴⁵¹ Which, however, in the case of Members’ bills, turn out to be huge. Apart from these exceptions, the initiative of the law, belonging to the Members, is full and untamed — they have the power to choose their own desired substantive solutions, therefore not being subject, or obligated, to introduce solutions and methods considered preferable, either by other Members, or by the Government, or which have been indicated in the Government Annual Policy Action Address.

⁴⁵² Another by-product of a political system based on a separation of powers (albeit with natural elements of co-operation and inter-dependence between the legislative body and the Executive).

to Members' bills and not to Government bills:

"If the Chief Executive considers that a Member's bill approved by the Legislative Assembly is not compatible with the overall interests of the Macau Special Administrative Region, he or she may return it to the Legislative Assembly within 90 days, for reconsideration, together with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the bill in question by not less than a two-thirds majority of all the Members, the Chief Executive must sign and order publication thereof within 30 days, or act in accordance with Article 52 of this Law."

As such, ANTÓNIO KATCHI explained that,

"In the case of a Member's bill, the Chief Executive may refuse signature and order of publication, returning it to the Legislative Assembly, within 90 days, with a written statement of the reasons for such refusal (Article 51, 1st part of the Basic Law). He or she thus exercises a right of veto. In the case of a Government bill, the Chief Executive may not refuse signature, nor the order of publication (Article 51, 1st part of the Basic Law, in reverse). This is understandable, given that the legislative initiative will have come from the Government itself. It is, however, important to point out that the Assembly may have approved the bill only in part, rejecting some of its provisions; in addition, if such bill deals with a matter not included in the Government's sphere of reserved matters of legislative initiative, the Assembly may have introduced amendments, regardless of any Government consent. In any of these events, the content of the approved law may no longer correspond to the Government's will/intent. Even so, it seems that the Chief Executive may not interpose his or her veto."⁴⁵³

The real differences are also made clear through the observation of the praxis. Hence the huge success rate — approval — of Government bills, contrasted to the relatively low success rate of Members' bills.

In this regard, one should proceed to demolish a myth: there are laws in the MSAR that have indeed resulted from Members' bills, ie from the Members' legislative initiative. These laws span various subject matters aside from the internal organisation of the Legislative Assembly. For example, laws on fundamental rights, such as data protection, and amendments to the law on the right of assembly and demonstration.

⁴⁵³ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483–84. The general debate (and voting in general) plays a fundamental role, deals with, and establishing/stabilising — I believe — the principles and system of each bill, as well its political, social and economic opportunity. See Articles 113 and 119, subparagraph a) of the Rules of Procedure.

8. Original Legislative Initiative versus Supervening Legislative Initiative — Amendment Proposals and Substitution Texts

It is never too much to recast the — at times forgotten and almost buried — fundamental distinction between original legislative initiatives and supervening legislative initiatives.⁴⁵⁴ Naturally, differences in nature, framework and pre-requisites are detected in each of these two modalities.

The evident dissimilitude — also seemingly overlooked — is expressed by ANTÓNIO KATCHI: “The legislative initiative may be original or supervening, depending on whether it aims to trigger a new legislative process or to intervene in an already ongoing process.”⁴⁵⁵

Or as JORGE MIRANDA and RUI MEDEIROS teaches,⁴⁵⁶ a bill embodies an original initiative or the start of a legislative process. There is also a supervening initiative, which is characterised by amendment proposals. It is not, properly speaking, a more or less extensive content that which distinguishes bills from amendment proposals. What separates them is the primary nature of the bills, which define the object of the legislative process and the secondary nature of the amendment proposals always linked to, and in light of, a previously introduced bill (or several, taken together).

Relevantly, JAIME VALLE opined that,

“The substantive division of the power of original legislative initiative may not be transported, *per se* and as a rule, to the domain of supervening legislative initiative⁴⁵⁷ [...]”

One reality is the power to choose the moment for exercising a legislative competence over a given subject-matter; another, quite different reality, is the possibility of determining the content of the act that shall result from the exercise of such legislative competence.”⁴⁵⁸

⁴⁵⁴ Also speaking of a synonymy in relation to secondary legislative initiative and derived legislative initiative, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 873.

⁴⁵⁵ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 476.

⁴⁵⁶ *ibid* 555.

⁴⁵⁷ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 111. The author further clarifies, “In fact, the foundation underlying the creation of areas reserved to original legislative initiative translates into the power [...] to determine the moment from which the Assembly of the Republic shall be able to legislate on the matters in question [...] This objective is achieved with the creation of reserved areas of original legislative initiative, which does not cover, nor extend to, the introduction of amendment proposals. A different understanding would drastically restrict the faculties of intervention in the procedure, both by the other bodies with the power of initiative and, above all, by the body with the competence to approve legislative acts, which would be constrained to simply accept or reject the introduced bills (which were subject to an external original legislative initiative).”

⁴⁵⁸ *ibid* 111–12. Adding: “The content of each of the areas of reserved initiative must be justified by a relevant interest”: which is why the *raison d’être* of an original legislative initiative may not be extended to the supervening legislative initiative, 112.

Furthermore, as observed by GUSTAVO GRAMAXO ROZEIRA,

“Our opinion, however, is that despite an indisputable affinity, both types of initiative have such a remarkable set of structural and functional differences that it does not seem possible to consider them as belonging to a conceptual unity”.⁴⁵⁹

The supervening legislative initiative has its own framework, differing from the original initiative in several aspects such as the range of protagonists, the timeliness of their submission or introduction,⁴⁶⁰ and even legal designation, as they are called “amendment proposals”. This distinction is explicitly highlighted in Articles 1, subparagraph (b) — wherein these two initiatives are distinguished in separate paragraphs — and 102, paragraph (2) of the Rules of Procedure, which expressly refer to the “supervening initiative”⁴⁶¹ adopting the form of “amendment proposals”.

Article 106 of the Rules of Procedure decodes the concept of “amendment proposals” and classifies them into four modalities:

“1. Amendment proposals may have the following nature:

*a) Modification;*⁴⁶²

*b) Substitution;*⁴⁶³

*c) Addendum;*⁴⁶⁴

*d) Suppression.”*⁴⁶⁵

These proposals are structured in a sequential order, with several prioritised concerning the text of the original legislative initiative for voting on the specifics, under the terms of Article 124, paragraph (1) of the Rules.

In addition, Article 124, paragraph (2) of the Rules sheds light on the legitimate

⁴⁵⁹ See Gustavo Gramaxo Rozeira, ‘A origem da Lei – o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) with considerable and convincing developments on the following pages, resulting in the unmistakable distinction between original and supervening initiatives (in the author’s language, *the initiating of modifications*), pointing out the different procedural moments in which they arise, the diversity of effects, the reflection of the duty to deliberate in the event of amendments (in the original initiative such duty is always present, ie parliament shall always be bound to appraise, debate and vote on an original initiative, whereas in the event of supervening initiatives these may not even be subject to consideration, if hampered by the fact of non-approval of the original initiative or by the prior approval of another, incompatible, supervening proposal), the non-coincidence of actors holding one and another type of initiative.

⁴⁶⁰ Naturally, an amendment proposal always requires a pre-existing duly accepted original *legislative initiative*, which shall be the object of such proposal.

⁴⁶¹ Underlining that the Rules refer expressly to the supervening initiative, José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 238.

⁴⁶² “Proposals to modify aim to restrict, expand or modify the meaning of the text under consideration.”

⁴⁶³ “Proposals to substitute contain provisions that are different from the ones originally introduced in the text.”

⁴⁶⁴ “Proposals to add contain the addendum of new subject-matters, while retaining the original text and the meaning thereof.”

⁴⁶⁵ “Proposals to suppress aim to delete the provision under consideration.”

actors authorised to introduce an amendment proposal, ie the Committee and the Members, and by reverse interpretation, who does not possess such legitimacy. Therefore, with respect to the supervening legislative initiative, which takes the form of amendment proposals, such initiative is not within the Government's purview, even with respect to bills whose ongoing legislative procedure was originally triggered by the Executive body.

See also Article 99, subparagraph (e), which calls upon an idea of amendment proposals, under the guise of committee reports on bills being accompanied by amendment texts. When linking this to the provisions in Article 124, paragraph (2), subparagraph (a), regarding proposed amendment proposals submitted by the committee, there seems to be an indication of a supervening initiative in the form of a substitution text,⁴⁶⁶ as a text materialising a supervening initiative by the competent committee or, under this terminology, an amending text.⁴⁶⁷ I use this terminology because it could precisely align with the concept of a substitution text, intended to entirely replace the originally introduced text of a bill.⁴⁶⁸

Article 127, paragraph (3) of the Rules clearly enunciates the following: "Any Member may introduce a proposal to amend the text, as approved on the specifics, in committee, until the period for final overall voting begins.", provided the unusual route of approval on the specifics, in committee, takes place.

The framework regulating amendment proposals is not flawed, nor does it appear to reveal any *lacunae*, much less require interpretative clarification. On the contrary, the Rules of Procedure attach great importance to it and, consequently, build a truly complete legal structure around the theme.

One is faced with two distinct legal typologies: the original legislative initiative *versus* the supervening legislative initiative; both are well demarcated and may not be confused with each other, nor be subject to any interference between them.

I would endeavour to raise an issue with the following segment of the norm in Article 107, subparagraph (a): "*the amendment proposals may not [...] contravene the provisions of Articles 104 and 105*" — the latter provisions refer to the initiatives reserved

⁴⁶⁶ In the Rules of Procedure previously in force, the substitution texts, under Article 131, had explicit legal-procedural standing.

⁴⁶⁷ Making express use of substitution texts, see TSC, Report No. 3/II/2005, "*In formal conclusion, having assessed and analysed the bill, the Committee renders its opinion that such bill, in the version contained in the text revised in substitution of the previous one, meets all the necessary requirements to be appraised and voted on (by the Plenary).*"; and FSC, Report No. 1/III/2009. See also, TSC, Report No. 2/III/2008, Committee on the Rules of Procedure and the Members' Mandates, Report No. 2/III/2009, Committee on the Rules of Procedure and the Members' Mandates, Report No. 2/III/2008. As examples of introducing sets of individual amendment proposals, without a global substitution text, see TSC, Report No. 1/2000; SSC, Report No. 3/2000; and TSC, Report No. 2/2001.

⁴⁶⁸ The similarities with the said second versions of Government bills, in current usage, but effectively without any legal-procedural standing, are several and evident.

to the Executive⁴⁶⁹ and to the conditioned initiative, the contravention of which entails summary rejection.

In other words, what the Basic Law refers to in Article 75 are the Members' bills,⁴⁷⁰ the original initiatives emerging within the scope of the Legislative Assembly.⁴⁷¹ Such is the scope and the intent of the constitutional norm. It does not cover Government bills. For example, the original initiative reserved in favour of the Executive is only revealed, not expressly but via a reversed interpretation of said norm of the Basic Law. "Our fundamental law only limits the original initiative of the Members in certain matters; it does not include the supervening legislative initiative."⁴⁷²

The Basic Law does not mention what the Rules of Procedure refer to as "*amendment proposals*", ie it is self-limited to deciding on the original legislative initiative and takes no notice of the supervening initiative. This raises a pivotal question

⁴⁶⁹ On the dubious issue of whether the initiative is formally the Government's or the Chief Executive's, see João Albuquerque, '*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*' (unpublished and archived with the Author, 2013).

⁴⁷⁰ Besides the resolutions, which shall not be discussed for now.

⁴⁷¹ On Article 74 of the HKSAR Basic Law, see *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J), Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 286, Benny Tai, 'The Chief Executive' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 236, affirming "*Proposing amendments to bills takes place after a bill has been brought to LegCo and is therefore outside the scope of article 74.*": Margaret Ng, 'The Legislature' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 294 et seq, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–145, PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 446. Moreover, in the Committee on Rules of Procedure, Legislative Council of Hong Kong, 'Procedure in dealing with the introduction of Members' Bills as provided in Article 74 of the Basic Law and the interpretation of Article 48(10) of the Basic Law' LC Paper No CB(1) 45/98-99 (22 July 1998), the following is clearly defined: "Regarding the interpretation of Article 74 to cover Committee Stage amendments, the Committee is of the view that nothing is written in the Article which suggests that the Article is meant for anything other than bills introduced by Members. The Basic Law is very specific in making reference to bills, motions and Members' amendments to Government bills, as illustrated in the voting procedures provided in Annex II of the Basic Law. If Article 74 were intended to cover Members' amendments to Government bills, there is no reason why it was not stated in the Article in the first place. The Committee considers it inappropriate for the Department of Justice to extend the coverage of Article 74, which governs only Members' bills, to Members' amendments to Government bills. The Committee is aware of the concern of the Executive, as reflected in the Solicitor-General's opinions that proposals in relation to those areas mentioned in Article 74 should come from the Executive instead of from Members of the Legislative Council. This principle has been spelt out in Article 74 and is also reflected in the Rules of Procedure of the Council. The Basic Law has not specified a detailed procedure of the legislative process. Still, it is clear that amendments to Government bills moved by Members are anticipated, as shown in the bicameral voting procedure in Annex II of the Basic Law and references to the introduction, amendment and passage of bills in various provisions. The Committee considers it important to maintain a legislative process which allows every bill or motion before the Council to be fully debated and all aspects of the bill or motion thoroughly considered. The legislative process which the Council has now put in place is a three-reading process which has worked well in Hong Kong and which the people of Hong Kong are familiar with. This process provides a stage between the second and third readings, during which the Committee of the Whole Council discusses the detailed provisions of proposed amendments to a bill. A Member (including a public officer) in charge of a bill can withdraw the bill at the beginning of the proceedings for the second or third reading of the bill. If the Government finds it difficult to accept a Government bill in its amended form, the public officer in charge may withdraw it before the third reading stage."

⁴⁷² Luís Pessanha, '*A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada*' (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

about the procedural norm⁴⁷³ at hand: is it a norm *praeter* the Basic Law? If so, would it be legitimated by merely developing, implementing, executing, or detailing a norm or a principle of the Basic Law, or illegitimate because it erects an unlawful limitation to the Members' supervening initiative?

In my view, the Basic Law establishes a self-sufficient prohibition and restriction, which is clear, precise and unequivocal, on Members' bills,⁴⁷⁴ explicitly without requiring any interpretative or applicative operation aimed at its normative developing, implementing, executing, or detailing.⁴⁷⁵ Furthermore, the procedural norm in question goes way beyond the scope of the Basic Law and establishes a very deep limitation to the normal powers of the Members.

I suggest that this restriction may not be created *ex novo* by the Rules of Procedure, a normative act subordinate to the principle of conformity with the Basic Law.⁴⁷⁶ As LUÍS PESSANHA observed,

“The legitimacy for the Legislative Assembly's Rules of Procedure to condition the supervening initiative of the Members, within the scope of Tax Law — where the Basic Law does not so do, rather recognising the free supervening initiative of the Members in any and all cases, and only conditioning the original legislative initiative in certain typified matters — can be at issue. It may be conceived as a procedural restriction in non-conformity with the Basic Law, since it goes beyond that which the Basic Law allows and provides for, by introducing broader restrictions to the political rights of the Members. Moreover, it is not a solution that is easily reconcilable with the constitutional history of the Legislative Assembly of Macau, nor with the parliamentary tradition existing in Macau, at least prior to the transition of sovereignty, least of all with the examples from

⁴⁷³ Cf the following argument based on the concept of “advancement” or “step forward”: “The Rules of Procedure of the Legislative Assembly constitutes an advance in this issue, to the extent that they reserve exclusively to the Government the original legislative initiative and the supervening legislative initiative in matters relating to public revenue and expenditure.”: Sun Tongpeng, ‘A alocação de competências orçamentais em Macau – Algumas considerações jurídicas’ (2014) 27 Administração 103, 109.

⁴⁷⁴ In this case, there is no need to enact complementary norms, unlike what is required with many other norms contained in the constitutional text, namely Article 76 or Article 71, paragraph (1) of the Basic Law, where, moreover, the expression “*in accordance with legal procedures*” is used. This Article 75, like, for example, the first part of Article 77, due to the relevance of the respective subject-matters and the relative simplicity of the normative construction of the legal frameworks in question, attain full primary execution and applicability directly from the Basic Law.

⁴⁷⁵ An interpretative effort is certainly required in the breaking down of concepts such as political structure or operation of the Government — but not in the affirmation of such prohibition.

⁴⁷⁶ See *inter alia*, Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.ª Parte do Artigo 75.ª da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 188 et seq; PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 451–46, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–45; Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press 1999) 252; and the Legislative Council Paper for the House Committee Meeting, Committee on Rules of Procedure, Procedure in Dealing with the Introduction of Members' Bills as Provided in Article 74 of the Basic Law and the Interpretation of Article 48.

comparative law, namely with the interpretation and application performed with the corresponding norm of the Hong Kong Basic Law, where it is consensually accepted that Government bills, once introduced into parliament, may undergo amendments or modifications, at the initiative of members of the parliamentary body.”⁴⁷⁷

As I have already had the opportunity to propound, it is necessary, at a bare minimum, to question the legitimacy of the Rules of Procedure in enshrining a new rule in this relevant domain, a rule that would be contrary to the rule expressed by the Basic Law, therefore in non-conformity therewith. This purported extension of an original area of reserved initiative to the entire supervening initiative does not, I believe, find support in the Basic Law; it would imply the introduction, by mere procedural fiat, of an inescapable factor in eroding the normal powers of Members, in contradiction with the constitutional history and with comparative law. In other words, even if the procedural normative intention had been to equate, in those typified matters,⁴⁷⁸ the area of supervening initiative to the constitutionally established area of original legislative initiative, it will be necessary to question whether such an equivalence passes the test of conformity with the Basic Law. I believe it does not.⁴⁷⁹

One may conclude that such procedural norms should be interpreted and applied correctively, in order to (re)conform them *vis-à-vis* the constitutionally applied norms in this matter. Those norms must be subject to an interpretation in conformity with the constitution (Basic Law), and, in the event that such norms cannot be salvaged through a corrective interpretation according to the Constitution, the solution shall have to be their disapplication.⁴⁸⁰

As I also mentioned before, a reserved area of original legislative initiative does not, *per se*, just throw its mantle of protection — and consequent exclusion of third parties — over the area of supervening initiatives. The constitutional rule in the granting of an area of reserved legislative initiative operates only for original legislative initiatives; otherwise, the constitutional legislator feels the need to expressly establish the extension of the area of reserved initiative to the supervening initiative. The Basic Law, as is well known, makes no express mention of an area of reserved supervening legislative initiative. To accept the opposite, ie to admit the existence of an absolute area of reserved initiative

⁴⁷⁷ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

⁴⁷⁸ The matters are: Electoral Law of the Legislative Assembly; public revenue and expenditure; political structure; operation of the Government; and Government policy.

⁴⁷⁹ Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.^a Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CREG-DM 2017) 192.

⁴⁸⁰ “In this context, it can be argued that the procedural norm, insofar as it does not comply with the Basic Law, may have to be disappplied, or interpreted in conformity with the Basic Law, thus functionally aiming to achieve the objective of not excessively restricting the supervening legislative initiative of the Members to the Legislative Assembly.”; Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

— original and supervening — would mean conceiving the Legislative Assembly not as the legislative body of the MSAR, with the competence to “enact” laws,⁴⁸¹ but rather as the MSAR body with the power to not approve laws. We would, hence, be facing a kind of negative power or counter-power.⁴⁸²

This additional and subsequent restriction to the normal powers of the Members is not foreseen in the Basic Law, nor does it derive any consent, authorisation, or general pre-determination from the MSAR constitution that could be deduced, induced, or inferred from this paramount law.⁴⁸³

I would supplement with another very relevant factor: the understanding that a constitutional order with a division of powers between organs, and with access *for all* to public and political positions, supports the power of members of parliament to introduce proposals to amend governmental bills. In fact, “The right to amend, recognised in all parliamentary rules of procedure, is therefore part of the *ius in officium* of the parliamentarian’s office.”⁴⁸⁴

The general principle set out by the Basic Law is that Members, in the context of legislative procedure, are fully entitled to all the powers — “*The Members of the Legislative Assembly of the Macau Special Administrative Region introduce bills*”⁴⁸⁵ — except for those on subject-matters expressly removed by the same Basic Law. Imagine, *ad absurdum*, a procedural norm adding an inhibition of supervening initiative regarding the Government bills listed in the Government Annual Policy Action Address. Naturally,

⁴⁸¹ Article 71, paragraph 1).

⁴⁸² Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.^a Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 188 et seq. with the indication and a partial verbatim transcript of the Plenary meeting debate on the Rules, adding “*There will be a political intention to leave to the Government the judgment on the convenience and opportunity of legislative initiatives in matters of greater interest or relevance. It would therefore be another element that embodies the primacy of the Executive within the scope of the political system of Macau. Furthermore, it would be devoid of any sense, be it legal or political, to prevent the Legislative Assembly from amending Government bills, such as those concerning the electoral methodology of the Members or, in an extreme interpretation, that the Assembly could not amend Government bills on matters included in the chapter on the Political Structure (IV), such as those relating to civil servants, the oath of allegiance, to the Commissions.*”

⁴⁸³ Such is so, in terms of legal science and theory, which are exempt from, and unaware of, any conjunctural political considerations or judgments of convenience or expediency, relative to the extent or degree of executive primacy, which fluctuates and at times denies, through the praxis on the ground, the effective separation of powers, dictated by events and concerns that have nothing to do whatsoever with lawmaking.

⁴⁸⁴ Ana Del Pino Carazo, ‘Del tránsito de un concepto formal a un concepto material de enmienda en el procedimiento legislativo — una cuestión zanjada?’ in Francisco Rubio Llorente and Javier Jiménez Campo and Juan José Solozábal and others (coords), *Echavarría La constitución política de España: estudios en homenaje a Manuel Aragón Reyes* (Centro de Estudios Políticos y Constitucionales 2016) 226.

⁴⁸⁵ Article 75 of the Basic Law. Also, Article 1 of the Rules of Procedure: “The Members have the following powers, within the scope of the legislative competence of the Legislative Assembly: a) To introduce bills and draft resolutions; b) To introduce proposals to amend the bills and draft resolutions referred to in the preceding paragraph, as well as the to Government bills.” Furthermore, Article 101 of the Rules is an expression of this general principle. On this matter, regarding the similar Hong Kong norm, Article 74 of its Basic Law, see Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 45 et seq. Herein is quoted a decision by the then President of LegCo (Rita Fan), who stated that Article 74 is “an enabling article which enables Members of the Legislative Council to introduce bills” and imposes, “conditions and restrictions on such introduction.”

such a norm would also be illegitimate, infringing upon the Basic Law.

Let's entertain the idea momentarily: Even if we were to accept the legitimacy of the procedural norm that prohibits the introduction of amendment proposals related to bills within the realm of the Government's reserved legislative initiative⁴⁸⁶ or those in conditioned matters⁴⁸⁷, it would nonetheless be true that such prohibition, even if not unconstitutional, could never be unconditionally extended to every bill introduced by the Government and in favor of itself, while outside the scope (depriving the scope of the conditioned area, as configured in the Basic Law),⁴⁸⁸ simply because the legislative initiative was triggered by the Executive.

The legislative procedure may not be disfigured by transforming it into an option reduced to a *yes/no alternative binomial* formality, ie either a Government bill is approved or not, but immune any amendments thereto.

Furthermore, the Rules of Procedure *per se* provide for them, outside of the alluded to cases of reserved areas: "The powers of the Members, within the scope of the legislative competence of the Legislative Assembly, are the following: To introduce amendment proposals relating to the bills and draft resolutions referred to in the preceding subparagraph, as well as to Government bills" — *as well as* Government bills, I must stress.⁴⁸⁹

As the CRPMM reported:

⁴⁸⁶ João Albuquerque, '*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*' (unpublished and archived with the Author, 2013). João Albuquerque speaks, in these cases, of absolutely reserved original and supervening initiatives.

⁴⁸⁷ João Albuquerque considers, with my agreement, that these cases are of relatively reserved legislative initiative, ie only original in nature: *ibid*.

⁴⁸⁸ See João Albuquerque, '*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*' (unpublished and archived with the Author, 2013). If I read him correctly, seems to add another layer of reserved legislative initiative in favour of the Government. His thesis starts with the idea that, in the matters falling under what the Basic Law designates as governmental policy and similar issues — "The Government defines [...] policies": in Article 64 — and provided that such matters concern fundamental rights and others subject to an area reserved to the law, it follows that, "as a rule": there would be an absolute legislative initiative reserved to the Government, thus impeding the exercise of supervening initiative by the Members. I cannot agree with this stance. Right from the start, and adopting a formal argument, if the expression "The Government defines policies" means the Government alone has the power to "decide": then a definition made by law immediately removes the formal authorship of policies. In effect, the Law, regardless of its origin, always belongs to the legislative body of the MSAR, the Legislative Assembly. Therefore, at least on a formal level, a definition may be made by a body other than the Government. In addition, the definition of policies does not always have to go through normative measures, nor do I believe that, in the relevant Articles of the Basic Law, what is at issue is primarily related to norms, but rather to typical governmental functions. If there is to be a repercussion in terms of triggering a legislative initiative, such would be translated, I believe, not in a reserved initiative, but in a conditioned initiative. Finally, if this enlargement is accepted — which the Rules of Procedure do not give assent to — the implications would be serious: a thick slice of the legislative pie would be removed from the Member's initiative, bringing the situation closer to what the same Author refers to as the "parody of the legislative power".

⁴⁸⁹ The aforementioned Article 127, paragraph 3) of the Rules of Procedure also affirms the power to introduce proposals for amending the text already approved on the specifics, while paragraph (1) refers, without distinction, to Members' and Government bills.

“The exercise of the legislative power conferred to this Legislative Assembly obviously includes the power to introduce specific amendments to both Government bills and Members’ bills; otherwise, it would be impossible to understand what constitutes the legislative power granted by the Basic Law to the Legislative Assembly, much less could one perceive, as a mere example, the *raison d’être* of Article 117⁴⁹⁰ of the Rules of Procedure of this Assembly Legislative.”⁴⁹¹

One must take due notice of the recent examples of clearly unlawful rejection of amendment proposals made by Members to Government bills, namely the following: rejections related to amendments to the bill resulting in Law No. 11/2018 — *Amendment to Law No. 2/93/M, of 17 May, on the Right of Assembly and Demonstration* — proposals thereof introduced and rejected at the Plenary meeting held on 30/07/2018; and to the bill resulting in Law No. 12/2018 — *Legal framework for guaranteeing the rights and interests of the elderly*, introduced and rejected by the Plenary meeting held on 07/08/2018.

These illegal decisions to reject amendment proposals reveal a stranger and more peculiar phenomenon, when one takes into account, in the first case, the fact that the matter in question was not within the sphere of the Government’s reserved legislative initiative, adding to which I would adduce the next argument: the previously enacted amendments to such law had resulted from a Members’ bill⁴⁹² (Law No. 16/2008) and, furthermore, such bill was subject to a set of amendment proposals initiated by the competent Committee.⁴⁹³ Neither the group of Members, as proponents of the original initiative, nor the Committee, in exercising supervening initiative, asked for or received, authorisation from the Chief Executive — it simply did not occur to anyone that the legislative subject-matter in hand could be regarded as Government policy. From 2008 to 2018, no constitutional or procedural norms on these issues were modified. Therefore, the applicable normative framework, then and now, has always been exactly the same.

In the second case, the decision by the President was unexpected and illegal, contravening not only several norms of the Basic Law and of the Rules of Procedure, but also the conclusions expressly contained in Report No. 5/VI/2018, of the FSC, entrusted with the examination stage of the legislative process:

“In effect, and very briefly, one must remember that — since this Government bill is not (nor could it be) included in the framework of limitations under Article 75 of the Basic Law and Article 107 of the Rules

⁴⁹⁰ Article 119 today.

⁴⁹¹ CRPMM, Report No. 1/III/2009.

⁴⁹² Bill dated 3 November 2008, introduced by Members Leonel Alves, Kou Hoi In, Philip Xavier, Chui Sai Cheong, Fong Chi Keong, Chan Meng Kam, Iong Weng Ian, Leong Lok Wa and Chan Chak Mo.

⁴⁹³ Cf TSC, Report No. 2 /III/2008, “To facilitate the voting, in the Plenary meeting, of the bill – with the amendments proposed by the Third Standing Committee, pursuant to Article 104, subparagraph c) of the Rules of Procedure of the Legislative Assembly — a new complete text (with the amendments duly indicated) is appended as an Annex to this Report.”

of Procedure of the Legislative Assembly, in the (dubious) enlargement of constitutional restrictions, the Committee and the Members *per se*, may introduce, as they see fit, proposals to amend the Government bill, pursuant to Article 106 of the Rules of Procedure [...]

In truth, the exercise of this power of supervening legislative initiative by the Members and/or the Committees, does effectively exist — it has historical grounding and is wholly appropriate and in full conformity with the Basic Law of Macau.”

Quoting a very relevant report by the CRPMM, to quell any possible doubts:

“Do recall that which is peremptorily affirmed in Report No. 1/III/2009 of the Committee on the Rules of Procedure and Members’ Mandates: ‘The exercise of the legislative power conferred to this Legislative Assembly obviously includes the power to introduce specific amendments to both Government bills and Members’ bills; otherwise, it would be impossible to understand what constitutes the legislative power granted by the Basic Law to the Legislative Assembly, much less could one perceive, as a mere example, the *raison d’être* of Article 117 (now 119) of the Rules of Procedure of this Assembly Legislative.’”

For all the above reasons, plus the recent positions of the holders of the office of President have differed from several committees’ advisory reports, the (non-)solution reached in Report No. 1/VI/2019, of the CRPMM, is beyond comprehension. The said report concludes by stating that the “Submitted challenge may not be considered, as such procedure could not possibly produce any useful effect.” Even though it might possibly be devoid of immediate usefulness — a mere hypothetical concession — the truth is that the utility and the relevance of the issue far exceed the specific case in hand, projecting itself undoubtedly into the future, in view of the aforementioned discrepancies over the years.

In Hong Kong, faced with an identical norm in its Basic Law, and despite governmental opposition, Members of the Legislative Council (LegCo) may introduce proposals to amend bills triggered by a Government original legislative initiative, even within the areas provided for in Article 74 of the Basic Law:⁴⁹⁴ “The Legislative Council considered it was inappropriate to extend the scope of Art 74 to include committee stage amendments introduced by members of the Legislative Council”, as PY LO refers.⁴⁹⁵ Or

⁴⁹⁴ Corresponding to our Article 75.

⁴⁹⁵ PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 451–46. “It was important to maintain a legislative process which allowed every bill or motion to be thoroughly considered”. See also, *inter alia*, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–45; and Committee on Rules of Procedure, Legislative Council of Hong Kong, ‘Procedure in dealing with the introduction of Members’ Bills as provided in Article 74 of the Basic Law and the interpretation of Article 48(10) of the Basic Law’ LC Paper No CB(1) 45/98-99 (22 July 1998).

in other no less clear terms, “Article 74 concerns the introduction of bills, rather than the enacting process, and thus does not embrace the proposal of amendments to bills by members of the Legislative Council.”⁴⁹⁶

As GU YU underlines, “Members’ power to amend government bills is of great significance, as their initiation power has been largely curbed by Article 74 of the Basic Law.”⁴⁹⁷

Such is how the *law in the books* is; and also how the *law in practice* — albeit under substantial constraints or challenges,⁴⁹⁸ contrary to the prevailing beliefs or statements. Members do introduce amendment proposals to Government bills within the realm reserved for the Government’s exclusive original legislative initiative, although a few, albeit very limited, receive approval.

Closing this sidebar on the neighbouring HKSAR and proceeding forthwith.

Finally, as GOMES CANOTILHO says, “The initiative is the impetus of the lawmaking procedure, but the legislative procedure is not limited to a simple approval or rejection, rather entailing a stage for debate and construction.”⁴⁹⁹

GUSTAVO GRAMAXO ROZEIRA clearly writes,

“In cases of reserved initiative, these naturally only cover the exercise of the right of legislative initiative in relation to the specific subject-matter of the introduced bill — but it no longer extends, naturally, to the faculty of proposing amendments. Unless an express constitutional provision establishes otherwise,⁵⁰⁰ matters withheld from the exercise of the right of parliamentary legislative initiative are not likewise removed from the exercise of the power to propose amendments. Such is so, naturally, because the parliamentary assembly, once called upon to legislate on a certain matter, may not be hampered in its freedom to conform/decide the content of the

⁴⁹⁶ Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 286. See also *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J) on this norm: “therefore circumscribes the rights of members before anything has been brought within the purview of the LegCo while proposing amendments to bills is part of the process that takes place after bills have been brought within the purview of LegCo”. Agreeing with such admissibility, Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 66 et seq, with much data provided.

⁴⁹⁷ Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 87.

⁴⁹⁸ The problem, in the praxis, as reported by Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 293, is that the Government, despite a judicial decision declaring the right of supervening initiative by Members, “took the stance of opposing all amendments introduced by members. As a result, hardly any member’s amendments were ever passed, although numerous were introduced.”

⁴⁹⁹ Adding: “After a bill is included in the agenda ... there will be a presentation thereof before the Plenary, and proposals for amendments thereto may be introduced by the Members”: Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Almedina 2003) 873.

⁵⁰⁰ Which does not exist under Article 75 of the Basic Law.

legislative act that it shall (possibly) adopt.”⁵⁰¹

One may reinforce this assessment — thus consolidating the principle that the existence of an area of reserved original legislative initiative shall not extend, necessarily and automatically, to a reserved supervening initiative in favour of the body to which the former reserved area has been granted — by alluding to the history of Macau’s constitutional law and comparative constitutional law, as tools to illustrate better the normative normalcy: an original reserved initiative does not imply a reserved supervening initiative.

9. The Issue in the History of Macau Constitutional Law

The history of Macau’s constitutional law prominently features the example of the Organic Statute of Macau, albeit with distinctive features.⁵⁰²

The competence to approve the Organic Statute of Macau and its amendments rested with the Assembly of the Portuguese Republic. In effect, Article 292, paragraph 3) of the Portuguese Constitution⁵⁰³ provided for the following: “*The Assembly of the Republic may review/amend the Statute or substitute thereof.*” This competence fell within the area of legislative matters absolutely reserved to the Portuguese parliament. However, at the level of the competence of legislative initiative, such power was exclusive to the Territory’s own governing bodies, the Legislative Assembly and the Governor: only “[u]pon a proposal of the Legislative Assembly of Macau or the Governor of Macau, in the latter case after hearing the Legislative Assembly of Macau, and in either case after an advisory opinion by the State Council”, the Assembly of the Republic could then exercise its reserved legislative competence.⁵⁰⁴

GOMES CANOTILHO and VITAL MOREIRA explain that, “Under the terms of Article 292 of the Constitution, the initiative of a review/amendment always rests with the Territory’s self-governing bodies.”⁵⁰⁵

Although dependent on a strongly limited external initiative, the Assembly of the Republic retained the authority to propose amendments once receiving the bill. In other words, the reserved original initiative was not extended into a reserved supervening

⁵⁰¹ Gustavo Gramaxo Rozeira, ‘A origem da Lei – o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 354.

⁵⁰² Due to, *inter alia*, its constitutional legal nature.

⁵⁰³ I refer to the version in force on the date of the transfer of sovereignty.

⁵⁰⁴ See also, in the Organic Statute of Macau, Article 30, paragraph 1, subparagraph (b): the Legislative Assembly is competent to “*To submit a proposal to amend this Statute or to substitute thereof, to the Assembly of the Republic; to be heard on a proposal, initiated by the Governor, to the same end; to render its opinion on the amendments that the Assembly of the Republic may introduce to the such proposal;*”; and Article 11, paragraph 1, subparagraph f): the Governor is competent “*To submit a proposal to amend this Statute or to substitute thereof, to the Assembly of the Republic, and to render his or her opinion on the amendments that the Assembly of the Republic may introduce to such proposal*”.

⁵⁰⁵ Gomes Canotilho and Vital Moreira, ‘A fiscalização da constitucionalidade das normas de Macau’ (O Direito Online 1992) <<https://odireitoonline.com/a-fiscalizacao-da-constitucionalidade-das-normas-de-macau.html>> accessed on 29 January 2025.

initiative, notwithstanding a few nuances: in the event of a bill approved with amendments, the President of the Republic could not promulgate the law passed by the Assembly of the Republic, without the concurrence, whichever applicable, of the Legislative Assembly of Macau or the Governor of Macau, pursuant to paragraph (4) of the said Article 292 of the Constitution.⁵⁰⁶

10. The Issue in Comparative Constitutional Law

In comparative constitutional law, one may commence by mentioning the cases revealed in the Portuguese legal order, wherein situations of reserved initiative granted to certain bodies “although only concerning the original initiative”⁵⁰⁷ are detected, ie the original initiative must be triggered by the Government or by the Regional Legislative Assemblies,⁵⁰⁸ while allowing Members of Parliament to introduce amendment proposals.⁵⁰⁹

“The reason why the reserved area of initiative is confined to the original initiative (except in a single case⁵¹⁰) is this: [although] the essential [content of a bill] is found in the latter, the collaboration of various bodies and subjects of parliamentary action in improving the original text can prove to be very useful; the very idea of rationality linked to parliamentary debate thus requires it to be so.”⁵¹¹

Another case of comparative law⁵¹² now located in this continent: The Philippines, where two houses of parliament operate.

Section 24, Article VI of the 1987 Philippine Constitution establishes that “All

⁵⁰⁶ Hence, the “The Organic Statute of Macau cannot therefore be conceived strictly as a “bestowed rule”: but rather as an agreed-upon structuring norm of the legal order”: Gomes Canotilho and Vital Moreira, ‘A fiscalização da constitucionalidade das normas de Macau’ (O Direito Online 1992) < <https://odireitoonline.com/a-fiscalizacao-da-constitucionalidade-das-normas-de-macau.html> > accessed on 29 January 2025.

⁵⁰⁷ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 275.

⁵⁰⁸ Portuguese Constitution: “Article 226 (Statutes and electoral laws) 1. The bills relative to politico-administrative statutes and the election of Members of the Legislative Assemblies of the autonomous regions are drafted by these organs and sent for debate and approval to the Assembly of the Republic.” and “Article 161 (Political and legislative competence) The Assembly of the Republic is competent to “b) To approve the politico-administrative Statutes and the laws relative to the election of Members of the Legislative Assemblies of the autonomous regions;”.

⁵⁰⁹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 275. Discussing the limits of the freedom of conformation, by the Assembly of the Republic, but without calling into question its competence to amend such bills, ie through amendment proposals, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 775–776.

⁵¹⁰ Proposals to amend the Budget bill involving increased expenditure or decreased revenue — the so-called brake-rule.

⁵¹¹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011), 277.

⁵¹² In addition to the aforementioned Hong Kong case. We could mention many others, for example, the Spanish case, where in matters of reserved initiative originating from the Government, the “modifications” (amendment proposals) submitted by parliamentarians are allowed, except for amendments that propose an increase in expenditure or a decrease in revenue, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 359.

appropriation, revenue or tariff bills, bills authorising increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.” As already mentioned, this only means that “the House alone can initiate the passage of a revenue bill [...] But [...] the Senate can completely overhaul it, by amendment of parts or by amendment by substitution, and come out with one completely different.”⁵¹³

The attribution of an area of absolute reserve of original legislative initiative does not preclude the exercise, by other actors, of a supervening legislative initiative.

11. The Issue under the Current Law, Scholarship and Praxis

The answer to the question of whether there may be, in the legal framework of the MSAR, supervening legislative initiatives from Members, directed at the Government’s original legislative initiatives, is a definite yes.⁵¹⁴

“It is normal — or should be so considered — that in any legislative procedure, the text of a bill is submitted for consideration/appraisal (on the whole and the specifics), including a legal-technical analysis, and subsequent voting. A simple inference leads one to conclude that, precisely as a result of such appraisal and analysis, the final text — as printed in the official journal/bulletin — shall not fully correspond to that which was originally drafted in the original bill. What may, and does, vary, is the depth and nature of the amendments made thereto. The opposite, ie the untouchability of the original text during the course of all the stages comprising the long, complex and participative legislative procedure would not be normal. Such an expectation would represent an unnatural pre-cognition of what a legislative procedure is (and of what it should be). These introductory statements, being true for legislative procedures in all democratic legal orders, based on a division or separation of powers (even if mitigated), are therefore also true and appropriate for Macau.”⁵¹⁵

There is, nonetheless, an apparent absence of supervening legislative initiatives by the Members, who prefer to let the Executive formally adopt and introduce, at its own initiative (when it agrees), amendment proposals that have either originated from or been suggested by an examining committee. It’s essential to note that this absence is only seemingly apparent, as there have been attempts to submit amendment proposals for

⁵¹³ Joaquin G Bernas, *The 1987 Philippine Constitution: A Comprehensive reviewer* (Rex Book Store 2011) 255, adding: “Textually, it is the ‘bill’ which must exclusively originate from the House; but the ‘law’ itself which is the product of the total bicameral legislative process”. See also, *inter alia*, Hector S De Leon and Hector M De Leon, *Textbook on the Philippine Constitution* (Rex Book Store 2011) 278.

⁵¹⁴ With the procedurally imposed exceptions relating to matters under Article 75 of the Basic Law and to the Legislative Assembly’s electoral law.

⁵¹⁵ Paulo Cardinal and Chan Wai Peng Bárbara, ‘Lei N.º 5/2016, Regime Jurídico do Erro Médico – da Proposta de Lei às Páginas do Boletim Oficial: Breve Crónica do Caminho das Diferenças’ (2017) 8 *Legisiuris* 11, 11–12.

voting. This situation raises the question: Is such behaviour a custom *contra* Rules of Procedure?⁵¹⁶ If so, does this custom, in contravention of a procedural norm, acceptable? Or is it a case of a mere usage?⁵¹⁷ In my opinion, the most appropriate classification is that of a simple non-binding practice.

A contribution from the MSAR's legislative memory is warranted:

“Although without an insurmountable legal content, and without constituting a precedent, it is necessary to introduce another argument, namely that the Legislative Assembly has already proceeded, through proposals submitted by Members, to amendments to the Executive's bills on matters subject to the reserved legislative initiative, such as, for example, the bill on the Commission of Audit (a matter that falls within the scope of the political structure), which was introduced in the pre-entry period prior to the establishment of the MSAR. It should be noted that during this period of functioning of the provisional Legislative Assembly, although there was a short set of rules of procedure,⁵¹⁸ differing, in several aspects, from the Rules now in force (and, in other aspects, lacunose), one should point out that the normative pyramid obeyed in lawmaking was the Basic Law — which, in this respect, remains unchanged.”⁵¹⁹

Indeed, Report No. 2/1999, of the TWC, on the bill entitled “Organic Law of the Commission of Audit” which is one of the fundamental laws issued upon the Establishment of the MSAR, says the following:

“Accordingly, the Committee has amended the bill, since the problems

⁵¹⁶ Which, as discussed above, I do not generally regard as acceptable in the constitutional domain.

⁵¹⁷ A disuse resulting from ingrained reservation or self-restraint in the exercise of procedural powers, perhaps based on judgments of opportunity or political convenience, given that the Executive has the support of an expressive majority of the Members; therefore, the Government's amendment proposals are expected to be well received by the Plenary.

⁵¹⁸ Entitled Provisional Rules of Procedure of the Legislative Assembly of the Macau Special Administrative Region; see also Article 226(1) of the Portuguese Constitution (n 508).

⁵¹⁹ Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.^a Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CREDDM 2017) 195: “Once a Government bill is accepted, it is subject to a general debate and then to voting on the whole; the general debate “deals with the principles and the system” of the bill (Article 112 of the Rules of Procedure) and the voting on the whole “deals with each... bill” (Article 115, paragraph 1), with no room, at this stage, for the consideration of amendment proposals. In other words, in the case of approval, the bill is given assented by the Legislative Assembly with respect only to its principles and system (and to its opportunity), – again Article 112 of the Rules of Procedure – without entering into the specific solutions contained in the bill (Article 118 of the Rules of Procedure), which emerge only when the bill is subject to examination and voting on its specifics. If a Government bill is approved on the whole – for example, on the political structure – it follows that its principles and system are also thereby approved, but not so in respect of the specific substantive solutions; therefore, the introduction, by Members, of proposals for amending the bill on the specifics, provided that such proposals do not interfere with the principles and system already generally defined and approved as such, should be accepted. It should be stressed that the system contains escape routes in the event that the Chief Executive deems the proposed amendments to be unsuitable or inconvenient: the approved laws only enter into force after being signed and published by the Chief Executive (Article 78 of the Basic Law). And, of course, nothing prevents informal consultations between the Legislative Assembly and the Government, in order to reach a consensus – a value/outcome so precious in Macau.”

raised have ramifications *vis-à-vis* many Articles; in order to facilitate the reading of such amendments, the Committee attaches hereto the respective proposals.”

Also, in matters falling within the scope of Article 75 of the Basic Law,

“The Working Committee considered the possibility of including Articles in the text, referring to the independence of judges and to the limits of hierarchical subordination of public prosecutors, similar to Decree-Law No. 55/92/M, of 18 August. After hearing the Executive, the Committee proposes the inclusion of a new Article, to be inserted between Articles 3 and 4, with the following wording:”⁵²⁰

See also, following the same path, albeit with some differences the TWC’s Report No. 1/1999, Regulation on the Requirements relating to the Nationality of the Residents of the Macau Special Administrative Region; and the FWC’s Report No. 1/1999, Report on the examination on the specifics of the Government bill entitled “Publication, forms and templates of legal enactments”.

Special reference is drawn to the FWC’s Report No. 2/1999, Use and protection of the National Flag, Emblem and Anthem, stating that, “The Committee gives its favourable opinion to the approval of the bill, with the amendments suggested in the annex.”

This was followed by the respective proposals mentioned by the SWC in its Report No. 2, Use and protection of the regional flag and emblem, affirming: “On the specifics thereof, the bill does not raise particular doubts for the Working Committee. However, its text may be subject to a few improvements, which is why the Working Committee submits the following proposals:”

This issue does not end here. Within the scope of the present Rules of Procedure, it is observable that the Legislative Assembly, particularly through its Standing Committees, has exercised a supervening legislative initiative independently and formally when examining Government bills. This practice is embodied in an annex to the Committee Report entitled proposals for amending the text of the Government bill, submitted by the Committee (under the terms of, and pursuant to, paragraph 2) of Article 101, Article 105 and subparagraph [a] of paragraph [2], Article 123 of the Rules of Procedure), thus introducing proposals for modifying, substituting, suppressing and addending. Report No. 5/2001 of the SSC, on the Government bill entitled “Pre-contractual agreements on the disposal of, and on the liens and encumbrances on, immovable property”, points out bluntly in its conclusions, “The Plenary is advised to approve the text in question, with the amendments formally proposed by the Committee in Annex A herewith.”

⁵²⁰ SWC, Report No. 4, on the Legal Status of Magistrates.

In several more recent Reports, the committees — without making formal use of amendment proposals — still sought to underline their legal capacity and ability to do so, by expressly alluding to such power; the choice of not introducing such proposals is explained by reasons unrelated to any possible legal impediments.

For example, the following is contained in one of such formal reports:

“Indeed, and in a gist, the Committee presented the Government with six major suggestions for amending the bill, but only one was accepted by the proponent. [...]

This does not invalidate, on a strictly legal level, the introduction in these matters, on their own, by Members or the Committee, of proposals to amend Government bills, as provided for in the procedural norms — eg that, ‘The Members have the power, within the scope of the legislative competence of the Legislative Assembly, to: [...] (b) Introduce proposals to amend the bills referred to in the preceding paragraph, as well as the Government bills’;⁵²¹ and that ‘Any Member may introduce proposals for amending the text approved, on the specifics, in committee, until the final overall voting period begins.’⁵²² Furthermore, the Committee concluded that, from a political perspective, absent the proponent’s agreement, those eventual formal amendment proposals would be destined to fail.”⁵²³

In another Report, the issue is explained as follows:

“It should be stressed or remembered that, evidently, in this matter (as in so many others), the Committee and the Members have legal powers of supervening legislative initiative, ie to amend or modify an original legislative initiative, even if the latter is a Government bill — and without the need for any previous or subsequent agreement by the proponent. However, without denying these legal powers, it was understood that, in order to achieve a better result in terms of legislative policies, a mutual undertaking of the most solid and comprehensive kind, between the Government, on the one hand, and the Legislative Assembly, its Committee and Members, on the other, would be appropriate.”⁵²⁴

In a more recent Report from a different Committee:

“On the other hand, it is very important to seek a successful negotiation with the Government and, thus, to draft a better law for the MSAR and its society. Regardless of the eventual success of such negotiations, which actually took place — something laudable and perhaps preferable, in accordance with a

⁵²¹ Article 1, subparagraph (b).

⁵²² Article 99, subparagraph (e), Article 124, paragraph (2), Article 127, paragraph (3).

⁵²³ TSC, Report No. 4/V/2016, Law No. 10/2016, “Amendment to Law No. 17/2009 – Prohibition of the illicit production, trafficking and consumption of narcotics and psychotropic substances”.

⁵²⁴ TSC, Report No. 3/V/2016, Law No. 5/2016, “*Legal framework on medical malpractice*”.

certain tradition — the truth is that the Committee and the Members still enjoy a set of powers which they may exercise in order to improve the law and, if necessary, remove non-conformities *vis-à-vis* higher-level normative acts. There is nothing extraordinary, unconstitutional, illegal or contravening the Rules of Procedure, still less of total historical emptiness. [...] the Committee and the Members, *per se*, may introduce, if they so wish, proposals to amend the bill, pursuant to Article 106 of the Rules of Procedure.”⁵²⁵

The examples referred to above and the quoted statements, allow, without hesitation, for the following definitive conclusion: there is no custom⁵²⁶ whatsoever that may be revelatory or constitutive of any possible rule — which would be *contra legem*, *contra* Rules and also *contra constitutionem* — in this domain, ie forbidding, in general, the exercise of the supervening initiative in the legislative procedure of Government bills.

12. The Non-existence of Government Supervening Legislative Initiative

A glance at the Rules indicates that the Government may not formally introduce amendment proposals.

The Rules do not confer onto the Government the power to submit proposals for amending Members’ bills, nor do they mention the introduction of proposals to amend Government bills. In effect, such power of supervening legislative initiative is excluded — even on a shared basis with the Legislative Assembly — from the very bills or matters covered by the area of reserved Government original legislative initiative.

The praxis on the ground has compensated such a “predicament” with the phenomena of second, third, etc, *versions* of the (original) Government bills.

13. Restraints on Legislative Initiative vis-à-vis the Perimeter of Untouchability, Stabilised via Approval in General

A separate issue — not to be confused with the question of the areas of reserved legislative

⁵²⁵ FSC, Report No. 5/V/2018, Government bill entitled “*Legal framework for guaranteeing the rights and interests of the elderly*”.

⁵²⁶ As a clear sign of a refusal to recognise the subjective element of a custom — the conscience of a binding behaviour (or an obligation to act in accordance therewith), I would point out the challenge/claim for redress made by a Member to the President of the Legislative Assembly, because the latter refused to accept a proposal to amend a Government bill introduced by such Member. The said request for redress is addressed in Report No. 1/VI/2019, of the Committee of the Rules of Procedure and Members’ Mandates (it is not possible to understand the underlying logic of aggregating two very different issues, both in their nature and in their relevance, in a single advisory report; was it simply because the questions were raised by the same Member?). See also Joaquin G Bernas, *The 1987 Philippine Constitution: A Comprehensive reviewer* (Rex Book Store 2011) and Hector S De Leon and Hector M De Leon, *Textbook on the Philippine Constitution* (Rex Book Store 2011).

initiative, nor with the preceding question — is that of limiting or inhibiting the introduction of amendment proposals to bills, in view of their substantive content, considered specifically, ie whether such proposals might manifestly clash with the principles and system⁵²⁷ of a bill already approved in general.

In fact, the approval of a bill in general denotes a critical point, wherein certain fundamental aspects such as the bill's principles and structural framework attain a level of protection. These foundational elements, integral to the bill, justified its comprehensive endorsement by the Plenary.⁵²⁸

As LUÍS PESSANHA⁵²⁹ defended:

“It should be noted that the approval of the initial version of bill in general, by the Plenary of the Legislative Assembly, implies that the principles and the system of the legislative initiative are fixed (cf. Article 119, subparagraph [a] of the Rules of Procedure of the Legislative Assembly). Any amendments that may be introduced subsequently, during the appraisal on the specifics of the text, must respect the substantive options that were approved in general.”

One may not draw the inference of an absolute and intangible immutability of a bill's text from the above quote,

“Remember that the approval, on the whole, of a given bill does not entail — it cannot so entail and has never so entailed in the past — that the content of such bill is immutable; it does not mean that its solutions and norms are carved in stone. An approved bill on the whole does not receive a cloak of immunisation or crystallisation, extending to the appraisal and voting on the specifics thereof. We know that it does not work in such a way.”

To clarify further,

“The approval on the whole does draw a perimeter (of some untouchability), but the general debate is on the principles⁵³⁰ and the system of each bill, as well as its opportunity from the political, social and economic points of view, pursuant to Article 113 of the Rules of Procedure.”⁵³¹

⁵²⁷ Articles 113 and 119, subparagraph a) of the Rules of Procedure.

⁵²⁸ FSC, Report No. 5/VI/2018.

⁵²⁹ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

⁵³⁰ For example, when analysing the principle that prior notice be given to a public entity or body for meetings, gatherings or demonstrations to be held using public roads, or in public places or areas open to the public, such requirement does not immutably freeze, within its normative scope, the pre-definition or stabilisation of public body or entity A or of public body or entity B.

⁵³¹ FSC, Report No. 5/VI/2018. Pointing to the areas of excellence of the supervening legislative initiative, “Whereas the examination in committee consists of the assessment of the specific solutions contained in each

More was said in a Report by the CRPMM:⁵³²

“When asserting that ‘the general debate deals with the principles and the system of each bill, as well as its political, social and economic opportunity’, it is clear that in case of approval of any bill on the whole, the ‘mandate’ of the committee to which the respective examination on the specifics has been assigned shall be based on the terms resulting from the general debate, precisely on the principles and the system of bill, as well as the evaluation of the criteria of opportunity pointed out in that norm”.

Then the Committee added, I believe with the dynamics of the praxis in mind,

“this means that the examination on the specifics is framed by the general debate, but such does not authorise the exclusion of other sources of influence in determining the course of the examination on the specifics of the bill — eg the legal-technical analysis that can hardly take place in a general debate, being reserved precisely for the stage of appraisal and debate on the specifics in committee.”⁵³³

bill, focussing, in particular, on: a) The adequacy of these solutions vis-à-vis the principles and system of the bill as approved on the whole; b) The search for the most appropriate legislative means for the proper execution of the bill; c) The repercussions of the bill on the legal principles and the legal order; d) The legal-technical perfection of the normative provisions, pursuant to Article 119 of the Rules of Procedure.”

⁵³² CRPMM, Report No. 1/III/2009.

⁵³³ The said Report by the CRPMM added: “The examination of the specifics is not solely guided by the general debate, and the latter cannot crystallise the legislative process. It is by examining the specifics that one can truly assess, in detail, the scope, as seen from various angles, of the norms contained in the bill, as well as the technical options therein conveyed; consequently, this is the timely stage allowing for an appraisal, in greater depth, of the legislative policies and the norms intended to serve them. The said stage is the appropriate one for raising issues which might lead to the adjustments and improvements deemed convenient, in order to submit the text of the Government bill to the Plenary, for debate and voting on the specifics.”

IX.

THE RESERVED AREAS OF LEGISLATIVE INITIATIVE, THE CONDITIONED LEGISLATIVE INITIATIVE, AND THE SHARED AREA OF LEGISLATIVE INITIATIVE

Looking now at the reserved areas of original legislative initiative, which gravitate—at a fundamental though not exclusive level—around Article 75 of the Basic Law.

1. The Government's Area of Reserved Initiative

Article 75 of the Basic Law requires, in a reversed interpretation, that certain matters be reserved to the general legislative initiative of the Government, limiting the possibility of being introduced by Members — ie bills not involving matters of public revenue and expenditure, nor the political structure or the operation of the Government, may be introduced, individually or jointly, by Members of the Legislative Assembly.⁵³⁴

Generally speaking, in said *matters* (public revenue and expenditure, the political structure and the operation of the Government) and, in truth, others as well — Legislative Assembly Electoral Law, Budget,⁵³⁵ essential elements of the taxation framework, via Article 104, subparagraph (a) of the Rules and Annex II of the Basic Law, together with Article 71, paragraphs (2) and (3) of such constitutional Law — legislative initiative is reserved to the Government, with varying degrees of *constriction* or porousness.

⁵³⁴ In effect, if the development, interpretation and application of this norm is not conducted in a manner appropriate to its primary function — the attribution of legislative initiative powers to Members, even if restricted — based on criteria such as the separation of powers, mechanisms of balance and control between the two poles of political power and the nature of the Members' functions, then this framework may be castrating to the point of legitimising Gu Yu's question of whether LegCo really exists to *make laws* — see Gu Yu, *Hong Kong's Legislature under China's Sovereignty 1998–2013* (Brill 2015) 6 et seq.

⁵³⁵ Luís Pessanha, 'A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada', paper presented in Macau, 2017, archived with the Author, explains that "The Basic Law entails a dynamic co-operation between the executive and the legislative bodies in the areas of Tax and Budget Law, where the Government assumes the exclusive legislative initiative to formulate its financial and taxation options, as well as to introduce legislative initiatives in the budgetary area" and later on, "The Government therefore holds the legislative initiative in budgetary and taxation issues, being able to measure the opportunity and the necessity thereof, from the political, financial and economic point of view, to make modifications in the legal-fiscal order in force, taking into account the situation of Macau's economy."

2. The Members' Area of Reserved Initiative

On the other hand, matters concerning the legal status of the Members (not limited to those inserted in such statutory law) or the organic structure of the Legislative Assembly, among other matters of a legislative or normative nature — such as the Rules, regulations on hearings, public debate, petitions to the Legislative Assembly, etc — are excluded from the Government's normative impetus. Instead, these rest under the exclusive competence of the Legislative Assembly, as a solely in-house initiative, either pursuant to the provisions of Article 77, paragraph (2) of the Law Basic and to the procedural norms herein analysed, either out of respect for structuring principles such as the internal autonomy and self-regulation of the Legislative Assembly and its separation from the Government. Notably, such has always been the undoubtedly followed praxis on the ground, representing instances of reserved legislative initiatives implicitly anchored in principles embedded within the constitutional law, although not explicitly or specifically articulated in the Basic Law.⁵³⁶

The Government recognised that matters relating to the Legal Status of the Members constitute the exclusive competence of this Legislative Assembly. This body alone is thus competent for the respective legislative initiative. The Legal Status of the Members, which is integral to the Legislative Assembly's absolutely reserved area of legislative competence, is the Members' exclusive initiative, possessing an exceptional nature *vis-à-vis* other common laws, as it enacts a set of norms that define the political status of the Members.⁵³⁷

The Executive's incapacity, due to a reserved legislative initiative in these matters in favour of Members, means that the Government is inhibited from introducing bills pertaining to the Legal Status of the Members and similar matters on the organisation and guarantees of independence of the Legislative Assembly, such as, for example, matters related to the structuring and staff of the Legislative Assembly. The issue of the legislative initiative excluded from the Executive in the aforementioned matters is unequivocal and undisputed, and has come to be repeatedly affirmed, regardless of the formal textual/systematic insertion of the norm the approval of which is sought (by the Government) and irrespective of whether the matter is expressly regulated in the law that addresses the Legal Status of the Members. Having reached this conclusion, one shall add that whatever the political view may be on the creation or extension of a legal aid

⁵³⁶ This situation of an absence of express reference, although not aiding in clarity, is not unique in terms of comparative law. See, for example, with reference to other matters in the Portuguese case, Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 134 et seq and 170.

⁵³⁷ See eg FSC, Report No. 5/III/2008. On the other hand, the Explanatory Note of bill amending Law No. 3/2000—"On the Legislature and the Legal Status of the Members of the Legislative Assembly stated, "Within the scope of the legislative process relating to the Government bill to amend Law No. 3/2001 – Electoral Law of the Legislative Assembly – the Government requested that said period, also provided for in Article 19 of such law, be extended to double the allotted deadline, for reasons related to the difficulty felt by the Electoral Administration in fulfilling the tasks of electoral organisation in a timely manner. However, in the case in hand, as regulated by the Legal Status of the Members – as it is a by-election to fill a vacancy in the composition of the Assembly – any modification on this issue is subject to the exclusive legislative initiative of the Members."

framework to Members (and, *mutatis mutandis*, to Legislative Assembly staff), such matter falls solely within the purview of Members' legislative initiative, as embodied in a possible bill.⁵³⁸

The original and supervening legislative initiative forbidden to the Executive in the above matters mentioned is unequivocal and undisputed, being recurrently affirmed, regardless of the formal textual/systematic insertion of the norm the approval of which is sought (by the Government) and irrespective of whether the matter is expressly regulated in the law that addresses the Legal Status of the Members.

These special cases of reserved initiative preclude, or at least compress — as they should be — the general Government-reserved area containing the matters of political structure and public revenue and expenditure. It's unequivocal that, for instance, when approving the Legal Status of the Members, triggered by an exclusive initiative of the Members, the resulting law shall inevitably touch on issues relating to the political structure, as well as entailing public expenditure — the important criterion to retain is that such are, nonetheless, matters reserved to the exclusive initiative of Members, because they are inherent to the self-organisation of the Legislative Assembly.⁵³⁹

3. The Conditioned Legislative Initiative

The theme or framework of the original legislative initiative is actually three-fold: there is an area, placed in the middle ground, deemed as the conditioned initiative by the Members.

Such area is what the aforementioned Article 75 of the Basic Law establishes: the introduction of bills involving Government policy shall require prior written consent from the Chief Executive. Article 105 of the Rules of Procedure further complements said

⁵³⁸ FSC, Report No. 2/IV/2010. See *inter alia*, João Albuquerque, 'Opiniões sobre a Proposta de Lei intitulada enquadramento das Leis e Regulamentos Administrativos' in *Colectânea de Legislação sobre o regime jurídico de enquadramento das fontes normativas internas* (Assembleia Legislativa 2009) 374 et seq.

⁵³⁹ It should be noted that the Government's bill that resulted in the approval of Law No. 11/2008, Amendment to Law No. 3/2001 'Electoral Law of the Legislative Assembly' — despite the fact that its initial version violated the Members' reserved legislative initiative — was accepted, the correction of the problem having been postponed to a later stage, which was effectuated via an amendment, at the legislative initiative of Members, to the *Legal Status of the Members*. See FSC, Report No. 5/III/2008, which stated: "*Changing the deadline for by-elections, in the event of vacancies in the Legislative Assembly, is the exclusive competence of this Assembly Legislative and it is for this reason that it is a matter contained in that Status and not available to the Government's legislative initiative. It is enough to understand that the determination of the period for the by-elections, in case of vacancies, affects the duration of the Mandate or term in office, and to understand that the intended modification cannot be pursued through a Government bill*" and, "*This Committee considers, therefore, advisable to suggest that when the amendments to Law No. 3/2000 – On the Legislature and the Legal Status of the Members are introduced – in view of changes to the framework on immunities, should also proceed to the adjustment of the period from ninety to one hundred and eighty days (in the case, obviously, of elected Members), in paragraph 3) of Article 8 of the Legal Status of the Members. Thus, the Committee and the Government decided to keep the amendment to Article 19, contained in the latter's bill, notwithstanding the fact that the debate and voting on the specifics of such a bill may only take place after the legislative process to amend Law No. 3/2000 – a matter of the exclusive initiative of the Members of this Legislative Assembly – is finalised.*"

norm by stating that the exercise of the Members' initiative on matters pertaining to Government policy depends on prior written authorisation from the Chief Executive.⁵⁴⁰

4. The Shared Area of Legislative Initiative

Finally, there is an immense scope of subject-matters — the majority imaginable thereof — wherein no type of legislative initiative is reserved to any proponent, nor are there conditioned initiatives — consequently, both the Government and Members have total parity of legislative initiative in this vast domain.

I shall proceed with a few conceptualisations after dividing the original legislative initiative into the above-mentioned four categories or typologies.

5. Delimiting the scope of the Areas of Reserved Initiative

I must draw the reader's attention to the extreme relevance attached to the interpretation, clarification and development of the concepts of "public revenue and expenditure", "political structure", "operation of the Government", "essential elements of the taxation framework" and "Government policy", among other relatively vague and indeterminate notions adopted in the Basic Law and in the Rules of Procedure. Certainly, such an effort falls, in practice, firstly, to the Legislative Assembly and, at a later stage, to the Chief Executive, who is competent to sign and order publication — or refuse to so do — of laws approved by the Legislative Assembly.

Independently of the Government's reserved legislative initiative, there is a marked factual quantitative importance, in the MSAR as well as in general comparative law, of legislative initiatives originating from the Government.⁵⁴¹ One might speak of a tendency towards "*laws by administrative fiat*",⁵⁴² ie of a certain idea of predominance of Administration over Legislation as a preferential instrument in the pursuit of a State's ends.⁵⁴³

⁵⁴⁰ There are a few cases of recourse to the route of conditioned legislative initiative, for example, Law No. 9/2000; "General Framework Law on Sciences and Technology".

⁵⁴¹ Speaking, for example, on "*the centrality of the Government's legislative initiative*": Valerio di Porto and Luigi Gianniti, 'L'iniziativa legislativa parlamentare' (*federalismi.it*, 14 July 2017) <<https://www.federalismi.it/nv14/articolo-documento.cfm?artid=34383>>.

⁵⁴² Luís Fábica, 'Princípios de legística material e formal' (unpublished and archived with the Author, CFJJ 2005) 3. *Apropos*, Marcelo Rebelo De Sousa, points out that "lawmaking by Governments is, increasingly, undertaken by the Public Administration. As for Parliaments, due to the scope and content of the laws they vote on and the very character and procedure of the parliamentary body, the weight, even if informal, of decision-making by the Public Administration is more circumscribed. It could be said that Government bills are the product of the Public Administration. Still, parliamentary appraisal and voting allows for the outstripping or mitigation of excessive administrative conditioning.": Marcelo Rebelo De Sousa, 'O Provedor de Justiça e o procedimento legislativo' (Provedor de Justiça – Sessão comemorativa 1996).

⁵⁴³ *ibid.* This phenomenon will also be reflected in another aspect: "the technical complexity of the norms and the speediness required in legislative procedures means that those who prepare legislative projects are, in most

The competence to interpret and to clarify the above concepts — for the purposes of determining whether a bill is within, or without, the scope of the Government’s area of reserved legislative initiative or of a conditioned legislative initiative, lies solely with the President of the Legislative Assembly,⁵⁴⁴ as it should be.⁵⁴⁵

Incidentally, I would like to illustrate this point by invoking Hong Kong LegCo’s Rules of Procedure and the Official Information Notes on these subjects:

“Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended on 22 March 2013)

51. Notice of Presentation of Bills

(3) Members may not either individually or jointly introduce a bill which, in the opinion of the President, relates to public expenditure or political structure or the operation of the Government.

(4) In the case of a bill which, in the opinion of the President, relates to Government policies, the notice shall be accompanied by the written consent of the Chief Executive in respect of the bill.”

“Information note on presentation of bills by Members of the Legislative Council:

The procedure for presentation of bills by Members pursuant to the relevant legal provisions, RoP and the established practice is outlined below:

[...]

(d) seek the President’s opinion in writing on whether the bill relates to any of the following matters:

- (i) public expenditure,
- (ii) political structure,
- (iii) the operation of the Government, or
- (iv) Government policies;

(BL 74 and Rule 51(3) and (4) of RoP)

(e) if the President is of the opinion that:

- (i) the bill relates to (d)(i) or (ii) or (iii), the Member may not

cases, members of the Administration itself, limiting members of legislative bodies to sanction, with a more or less formal approval, the solutions defined by the former.” The same text continues, “The problem is aggravated in those legal orders where normative power – whether or not it takes on a legislative form – is gradually shifting to the executive bodies, with the decreased exercise of effective legislative competence by bodies separated from the Public Administration.”, *ibid*, 3–4.

⁵⁴⁴ Cf Article 9, subparagraph c) of the Rules of Procedure.

⁵⁴⁵ PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 446–47.

introduce the bill;

(ii) the bill relates to (d)(iv) only, proceed to (f); or (iii) the bill does not relate to any of the matters in (d)”.

In general, the interpretation, clarification and development of these various concepts are not directly and explicitly performed in, or by, the Basic Law, given its nature of a higher-level normative source. One could address such issues in a structuring law, such as Law No. 13/2009, for matters of legislative initiative, or by adding these matters to said law. In the absence of more detailed and specific legal criteria, an interpreter’s effort is called for. Naturally, given that auxiliary elements do not exist, the experience gained over the past few years shall indeed be very useful.

6. On the Political Structure

As seen above, the breadth and depth of the “political structure” concept is limited when faced with legislative initiatives pertaining to the Legal Status of the Members.

Nor may said concept imply a total or absolute impediment to Members bills that — *de minimis*, in a lateral or partial fashion or as a reflexive effect — entail granting additional competences to certain organs or public services of the MSAR. Nothing prevents Members from introducing legislative initiatives touching on the array of tasks, competences, duties, etc, of public, judicial, administrative or political entities already in existence (or to be created).

In fact, such has occurred with several laws resulting from Members’ bills.

For example, this is evidenced by instances where competences have been conferred upon bodies such as the CFA, the Administrative Court, or individual judges handling cases.⁵⁴⁶ Additionally, duties of collaboration have been mandated on the Chief Executive and principal Government officials, encompassing various bodies, services, institutes, and autonomous entities.⁵⁴⁷ Furthermore, competences have been allocated to the Department of Economic Affairs concerning administrative offences,⁵⁴⁸ extensive powers have been granted to a public authority,⁵⁴⁹ obligations have been imposed on all Public Administration services and bodies, including municipal bodies and public institutes, to send three copies of all official or unofficial publications to the Legislative Assembly, for the purposes of legal deposit and inclusion into the latter’s library.⁵⁵⁰

The interpretation and application, in practice, of this legal framework, have been consensual and uneventful.

⁵⁴⁶ As seen in Law No. 8/2005, Law No. 16/2008, and Law No. 13/2008.

⁵⁴⁷ Law No. 3/2000.

⁵⁴⁸ Law No. 7/2005.

⁵⁴⁹ Law No. 8/2005.

⁵⁵⁰ Law No. 11/2000.

7. Public Revenue and Expenditure

With the exception of the Government's reserved initiative to introduce the annual Budget bill, one has to analyse this concept tactfully and prudently. Otherwise, the conclusions might reach levels of absurdity, given the obvious fact that any law may impact public revenue and expenditure.

Several laws in force, resulting from Members' own initiatives, require "public expenditure", such as laws concerning the Legal Status of the Members⁵⁵¹ and laws relating to the organic structure of the Legislative Assembly: the approval of the Legislative Assembly's budget; the remuneration of the Legislative Assembly staff; the purchase of new documentation and bibliography; the purchase of studies and the provision of services, including surveys or occasional tasks; the expenditure related to retirement and survivors' monthly pensions.⁵⁵² Clearly, these are not laws on public expenditure *per se*, but laws that — like any other — have budgetary implications, albeit only in a residuary way, as they do involve expenses.

Similarly, with respect to the "public revenues" of the Legislative Assembly, for example, the accrued balance from previous managements, the proceeds from the sale of its own assets or the interest on its own resources/investments.⁵⁵³

Note the following words by LUÍS PESSANHA:

"Less balanced, in our view, is the option contained in the Basic Law that does not allow Members of the Legislative Assembly, endowed with legislative initiative in general, to formulate bills that may be financially relevant, albeit of an ad hoc or a one-off nature, with a view to adopting specific legislative measures, without a very significant budgetary impact. This follows from the provisions of the first part of Article 75 of the Basic Law, where it is established that legislative initiatives introduced by Members may not involve "public revenue and expenditure" — deserving to be considered an excessive restriction of Members' legislative initiative."⁵⁵⁴

8. Operation of the Government

This issue seems to remain non-contentious, in the sense that the concept only includes the operation and the structuring of the Government, in a strict sense, that fundamentally

⁵⁵¹ Namely in respect of their remuneration; monthly allowance for the operating expenses of the Members' Bureaux, where constituents and the population are received and heard, and for the hiring of support staff.

⁵⁵² See Law No. 11/2000 and Law No. 14/2008.

⁵⁵³ Law No. 11/2000.

⁵⁵⁴ Luís Pessanha, 'A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada' (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017). See also, José Hermínio Paulo Rato Rainha, 'Lei Básica da Região Administrativa Especial de Macau e Sistema Fiscal' (2002) 14 BFDUM 199.

being the Chief Executive and the Offices of the Secretaries.⁵⁵⁵

Therefore, a correct purposive and functional interpretation shall not shut the door to the inclusion of addending minutiae, such as granting a new competence or imposing a new duty, etc, to any Government Department. Surely, this is not the underlying end, nor the spirit; otherwise, virtually no law could be initiated by Members. What is normal, in any law, is that duties are imposed on a certain public entity, that there is supervision or sanctions/penalties, ie a competence to enforce the application of the latter, and so on.

These matters can be seen as a reflex of the Members' reserved initiative with respect to the Legal Status of the Members and the organic structuring of the Legislative Assembly.

9. Government Policy

Regarding the clarification of the concept of Government's "policy" — or, better still, of what constitutes involvement with such "policy" — one must agree with the compelling argument that this vague concept may not be filled to the brim, thus ultimately resulting in thwarting the principle of unconditional legislative initiative by Members. Such an outcome would evidently violate the Basic Law and its twinned system of agency with respect to legislative initiative. In other words, Government policy may not be interpreted as a means to condition Members' initiative, to an extent that would signify diminishing or emptying the unconditional — and endowed with a wide margin — legislative initiative of the Members, as enshrined under the Basic Law.

Thus, not any and all intention, action, announcement, omission, declaration — even if possibly made by the Government itself — may purport to constitute or be invokable as "Government policy".

If, *ad absurdum*, the Government announces intentions in its Annual Policy Action Address, such as forming a working group to review fundamental rights, conducting public consultations on criminal law, introducing bills on property rights, or studying the Civil Code or Code of Civil Procedure reform? May this legitimise the conclusion that, from now on, as if in anticipation, all such matters are reserved for the Government's legislative initiative? Similarly, if a Secretary or Department head mentions considering a specific subject in the media, would this preclude Members from introducing bills related to fundamental rights or criminalising a given conduct? It seems to me evident that the answer is a negative one.

The above could hardly be harmonised with the relatively usual circumstance that the Government takes year upon year to study a certain subject/proposal. Would the

⁵⁵⁵ For instance, Law No. 2/1999, Framework Organic Law on the Government, or the matters covered by Administrative Regulation No. 14/1999, Approves the Legal Status of the Offices of the Chief Executive and the Secretaries.

Legislative Assembly and its Members be simply prevented from introducing a bill on a very relevant matter? The Third Permanent Committee, in Report No. 1/IV/2012, affirms,

“As an introduction, it is necessary to clarify that [...] the Members have the power of initiative on the matter of medical malpractice, ie they have the power to generate, on their own initiative and without limitations, the legislative process on that relevant matter.”

However, in such case and at that specific moment in time, “the Committee decided not to draft a bill.”⁵⁵⁶

The question is: Government policy, surely — but which Government’s? Is the concept confined to the policy of the Government currently in office or extended to previous Governments’ policies? For example, if a previous Government carried out a study on a given issue, presented certain options to the public, inserted the proposal in the legislative domain (but did not complete such work), and a subsequent Government does not comment on nor pursue, such matter, should that imply that Members would be indefinitely and eternally deprived of their legislative initiative? It is equally evident that an affirmative answer would subvert the spirit of the Basic Law.

The concept of Government policy, in terms of delimiting the legislative initiative reserved to Members, but requiring prior written consent by the Chief Executive, shall have to be grounded on the fundamental or basic choices that the Government makes in each area of intervention, thus excluding accessory, secondary or detailed aspects of Government options.⁵⁵⁷ It seems, however, clear that the concept of Government policy cannot be understood in an excessively comprehensive way, thus leading to an emptying or an almost complete exhausting of the legislative initiative of the Members of the Legislative Assembly. Those are only the fundamental government policies.⁵⁵⁸

What is at stake here would be — taking improbable examples — impeding Members’ bills wishing to cancel all social benefits for the elderly; ordering the Government to terminate the free access to health services; abolishing, without further ado, any and all subsidies and subventions to private associations; or, even more absurdly

⁵⁵⁶ *Diagnóstico e estudo com vista a eventual elaboração de uma Lei do Erro Médico*. [Evaluation and study with a view to the possible enactment of a Law on Medical Malpractice.]

⁵⁵⁷ Hence it is necessary to ask whether a bill that is merely interpretative, or clarifying, of a provision of the Land Law (Article 104, paragraph 5), should be rejected because the Government’s policy might be at stake. This situation did occur and the bill in question was rejected by the President. I cannot adhere to this solution, as such an interpretation is deeply restrictive of the Members of parliament itself, translating into an inadmissible and undesired compression — as I contend — of the Basic Law. In other words, such rejection seriously injured the Basic Law, the Rules of Procedure, plus the status and dignity of the Legislative Assembly and its Members. I do hope that this was an unfortunate and isolated case, not signalling a shift in policy. Obviously, a different issue would be the voting down of the bill by the Plenary, as it is entitled to, based on considerations of opportunity, convenience, justice, etc the bill.

⁵⁵⁸ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’, paper presented in Macau, 2017, archived with the Author. See also, in a concurring sense, Pedro Pereira De Sena, *O Exercício da Função Legislativa e os Desafios na Prática da Feitura das Leis – Análise de um processo legislativo (a)típico*, in *Estudos no Âmbito da Produção Legislativa, Textos em Língua Portuguesa* (CFJJ 2018), 473.

still, obligating the Government to terminate public transportation.

To regard the vacuous macro-concept of Government policy as absolutely untouchable would lead to an intolerable compression of the capacity of initiating legislation by the Members, contrary to the design of the Basic Law.

It would also entail two more consequences:

First, bills would necessarily have to appear to be totally neutral in social, economic, cultural and legal terms. It's quite challenging to imagine a bill that, lacking written consent from the Chief Executive, does not reflect some aspect of Government policy, orientation, or omission. Laws are not neutral, in the sense that they always instill a certain social, economic, cultural and legal idea on a given issue.

Any bill by a Member, when approved, affects the legal fabric of the MSAR and carries with it solutions that, inevitably, are projected in the Government and its policies — beginning with the principle of the primacy of laws over administrative regulations and the principle of legality to which the Government is subject.⁵⁵⁹

Henceforth, in this domain, the Government cannot go against the law, ie the law of the Legislative Assembly and approved at the initiative of the Members. This has been the case with most of the bills introduced, and also the approved ones. Several of the approved bills, over the course of the various legislatures, inexorably affect Government policies, with greater or lesser immediacy or impact. In fact, some of them carried out true transversal revolutions, with horizontal effects spanning the entire Public Administration. Consider, for example, the Law on the Protection of Personal Data, and the Law amending the Access to Law, imposing its new framework on any and all public entities. None of these laws required the prior consent of the Chief Executive before being introduced by Members — the bills were accepted by the President of the Legislative Assembly and the resulting laws approved by the Legislative Assembly, signed by the Chief Executive, published in the OG and reported for record at the Standing Committee of the National People's Congress.

Second, if such were not the case, ie if Members' bills had to be neutral and could not touch anything that could, with greater or lesser clarity and solidity, be perceived to be Government policy, then it would be necessary to conclude that many of the Members' bills accepted over the years, several of which were approved, are tainted by unconstitutionality, for violation of Article 75 of the Basic Law, ie they should never have been accepted in the first place by the President. This conclusion would not make the least sense as such bills would be incorrectly accepted.

One can be certain that, in the first instance, it is up to the Legislative Assembly to solve the issue and, at a later stage, up to the Chief Executive to decide on the

⁵⁵⁹ Article 3, paragraph (2) of Law 13/2009 and Article 65 of the Basic Law.

signature⁵⁶⁰ and order for publication, or refusal thereof, of laws approved by the Legislative Assembly, under the terms, *inter alia*, of Articles 50, paragraph (3), 51, and 52 of the Basic Law, as well as Articles 132 and 133 of the Rules of Procedure. There is a first moment of formal internal control within the Legislative Assembly, and later a moment of political control by the Chief Executive under a logic of separation and interdependence of powers duly defined under the Basic Law.

According to the data obtained, only five bills were introduced under the typology of conditioned legislative initiatives, upon obtaining written authorisation from the Chief Executive.

⁵⁶⁰ Song Xixiang, 'Sobre as Relações entre o Poder Executivo e o Legislativo e o Judicial em RAEHK e RAEM' (2012) 4 *Revista de Estudos de 'Um País, Dois Sistemas'* 119 highlights this aspect of the framework established by the Basic Law, 121.

X.

THE ACCEPTANCE OF LEGISLATIVE INITIATIVES AND THE CONSULTATION AND HEARINGS OF ADVISORY AND COLLABORATIVE ENTITIES AND BODIES

1. The Acceptance of Legislative Initiatives

The common procedure of the original legislative initiative, indistinguishably applicable to both Government bills and Members' bills, consists, in essence, of the following: substantively, all bills shall contain the specific definition of the meaning/extent of the modifications to be introduced into the legal order, and, formally, all bills shall be presented in written form, expressed in Articles, with a designation succinctly identifying its principal object and be accompanied by an explanatory note,⁵⁶¹ Articles 107 and 108 of the Rules of Procedure. Non-compliance with such requirements results in the summary rejection by the President of the Legislative Assembly.

It should be noted that, with the exception of the first case, the neglect or omission of the aforementioned formalities is remediable within a non-extendable deadline set by the President, Article 108, paragraph (2) of the Rules of Procedure.

Such framework, as currently in force, is typified and fully comprehensive, thus not allowing for other criteria to be applied, namely merit, political suitability, or even the specific legal quality based on elements other than those duly and expressly stipulated in the Rules — such is clear, for a contrary view would render the system open to total and unrestricted discretion. The President of the Legislative Assembly acts as a quasi-notary public, vested in the role of formal and administrative guardianship of said specific norms of the Basic Law and of the Rules of Procedure.

Political judgments and other legal-technical assessments are postponed to later

⁵⁶¹ Bear in mind that the indispensable — not subject to any sort of waiver — procedural requirement of presenting an Explanatory Note may not conceptualised in a strictly formal or minimal way, ie such note cannot be deemed sufficient if it merely contains one or two paragraphs, without substantiating, explaining, justifying anything in substance. For example, it is not enough to replicate one or two norms of a Government bill and turn them into an explanatory note. From this common procedural requirement certain substantiveness must be perceivable from the document in question, otherwise not only would such requirement be defrauded, but also and the underlying normative teleology — to help lawmakers immediately understand the object and the opportunity of the bill.

moments, ie to be assessed by the Plenary and in the competent Committee.

Such, I repeat, is the formal framework in effect; naturally, though, the mandatory respect for the Basic Law — see Article 11 thereof — forces one to conclude that, *malgré* the apparent silence of the Rules, the President has, at his or her disposal, the possibility to reject a bill, or to return it for the purposes of reform, if such bill is in direct, unequivocal and manifest non-conformity with the Basic Law.

There are differences depending on whether the legislative initiative originates from Members or the Government.

2. External Consultations and Hearings

I cannot leave out a few words on the intervention of consultative bodies within the legislative procedure. It is not innovative, nor is it unique to Macau. Such intervention by third parties is a longstanding idea and is materialised in different legal orders — it constitutes a mark of participatory democracy.⁵⁶²

With respect to the hearing of certain bodies and entities, as a general rule, Government bills are subject to the intervention of the Executive Council. This involves a consultation process rather than a formal hearing, and it precedes the formal introduction of such bills to the Legislative Assembly.

One has to distinguish between bodies and entities that should, *in general*, be consulted, which have a *collaborative* nature or function, on the one hand, from those bodies and entities that constitute the Government's own consultative bodies, naturally available only to the Executive branch, on the other hand.

Alongside or beyond mandatory consultations and hearings, there may be — and, in fact, the parliamentary praxis points to such reality — optional consultations and hearings,⁵⁶³ which certainly may be held, or not. The initiative may be triggered either by the Committee entrusted with a given legislative process,⁵⁶⁴ or by a *general invitation*.⁵⁶⁵

⁵⁶² For a brief explanation and a historical-evolutionary note, Carlos Blanco Morais, *Curso de Direito Constitucional, I* (Coimbra Editora 2012) 402–403. Also, with interest, “if the summing of the entities is carried out before the drafting of a bill, the participation will be useful to collect data not yet taken into account. In a later moment, its importance will be, above all, directed towards correcting or amending certain aspects of the bill.”: 2015, 11, Manuel Andrade Neves, Nuno Sardinha Da Mata, and Inês Sequeira Mendes, *Contributos para a legística de expressão portuguesa* (Fundação Rui Cunha/CRED-DM 2015) 11.

⁵⁶³ Carlos Blanco de Morais, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 401. The Author also alludes to individual and collective hearings. See, for example, regarding an individual hearing, FSC, Report No. 1/IV/2016, “Law on the prevention and correction of domestic violence”: “The Committee also received (legal) opinions (...) and University of Macau Professor Zhao Guoqiang, who was invited to personally present his views to the Committee at the meeting...”.

⁵⁶⁴ For example, see TSC, Report No. 4/ IV/2013, “Law on the Safeguarding of Cultural Heritage”: which states that the Committee, taking into account the scope of the proposal, decided to carry out a public consultation, with an appeal to media outlets.

⁵⁶⁵ See the Legislative Assembly's homepage, which maintains a permanent general invitation for submission

Bear in mind that, in external consultations and hearings, what is sought is the participation, an extension of involvement, a better knowledge — it is not possible, by such means, to effect a transfer of the right, the duty or the responsibility, either to decide, or to make a politico-legislative option, whatever such may be. An agreement or a disagreement with the outcome of a consultation or a hearing has no legal correlation with the act of decision-making or lawmaking *per se*.⁵⁶⁶

As a rule — once again, allow me to reiterate the special case of the Executive Council at an earlier stage *vis-à-vis* Government bills — consultations and hearings, for example with the MLA, should take place during the examination stage⁵⁶⁷ of the legislative procedure⁵⁶⁸ — as I shall develop further below, in the procedure that aims to enact laws in its *proper sense*, the task of examining bills essentially falls within the remit of the Legislative Assembly's committees.⁵⁶⁹

of opinions on bills; the website has a special colouring for residents (permanent and non-permanent and, in a corrective and extensive interpretation, non-resident persons, including legal persons). Later on I shall return to this theme.

⁵⁶⁶ Which does not mean that they should be, without due consideration, simply ignored, ie only serving as a means of expressing an illusory or apparent, merely formal participation, without substantive value. This is, of course, also true, in general, for all mandatory consultations. See eg, “*All these contributions were taken into due account by the Committee in the analysis of this Government bill of a structuring nature.*”: FSC, Report No. 3/III/2009, “*Legal framework governing the internal sources of legal norms*”; “*All these contributions were taken into due consideration by the Committee when analysing this complex and innovative Government bill*”: TSC, Report No. 4/III/2009, “*Prevention and Repression of Corruption in the Private Sector*”; “*It should, therefore, be mentioned that the final text is largely due to the suggestions and specific normative proposals presented by the MLA*”: SSC, Report No. 3/IV/2012, “*Amendments to the Commercial Registry Code*”; “*All opinions received were intended to contribute to the improvement of the legislative initiative and all were seriously considered by the Committee during the analysis of the Government bill*”: TSC, Report No. 3/IV/2013, “*Amendments to the Code of Criminal Procedure*”; “*It should also be noted that the Committee expressed its openness, as usual, to the contributions from civil society and the sectors involved by the future law. Thus, it is necessary to refer to a meeting held by the Committee with representatives of the various associations in the sector [...] those associations presented several opinions and suggestions, which deserved due consideration by the Committee.*”: FSC, Report No. 1/V/2014, “*Prevention and control of environmental noise*”; and “*The Committee thanks all the persons and entities who contributed with opinions and suggestions for the improvement of the Government bill, which was duly weighted.*”: FSC, Report No. 1/IV/2016, “*Law on the prevention and correction of domestic violence*”. It follows that, in principle, the written opinions received should be attached to the Committees' Reports and thus made readily available to the public. See moreover, “*The hearings may take place orally or in writing and the resulting suggestions and contributions should be the subject of an appropriate compilation and systematisation.*”: Manuel Andrade Neves, Nuno Sardinha Da Mata, and Inês Sequeira Mendes, *Contributos para a legística de expressão portuguesa* (Fundação Rui Cunha/CRED-DM 2015) 11.

⁵⁶⁷ This aspect differentiates them (or should) from the so-called public consultations prior to the legislative initiative *per se*. Such public consultations are generic and indistinct, and are only intended to assist in the planning or policy-making of a non-legislative body, which has the power to trigger legislative procedures, but not the power to adopt legislative texts.

⁵⁶⁸ Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 405, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAF DL EDITORA 2015) 252–253, declaring that “the competent parliamentary committee is especially tasked with holding hearings and with conducting consultations.”

⁵⁶⁹ Cf José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAF DL EDITORA 2015) 252. See also FSC, Report No. 1/IV/2016, “*Law on the prevention and correction of domestic violence*”: which reads: “*During the analysis of the Government bill, on the specifics, the Committee decided to collect the opinions of the various judicial operators – judicial magistrates, magistrates of the Public Prosecution Service and lawyers*

Continuing on these issues, a few observations on the Government's consultative bodies shall suffice.

3. Government Consultative Bodies

3.1 The Executive Council

In the case of legislative initiatives originating from the Government, the constitutional and procedural requirement that the Chief Executive consult the Executive Council before introducing bills to the Legislative Assembly, under Article 58 of the Basic Law, means that Government bills must be signed by the Chief Executive and contain the reference that the Executive Council has been consulted thereon, as per Article 103, paragraph (2) of the Rules of Procedure. In the event of non-compliance with the provision of said paragraph (2), the President shall return the bill to the Chief Executive, with the indication of the omitted formality, in accordance with paragraph (4) of said Article 103.

Naturally, such a requirement does not exist, nor would it logically be applicable, in view of Members' legislative initiatives, given that the Executive Council of the MSAR is the body: the end and function of which are to assist only the Chief Executive in decision-making, per Article 56 of the Basic Law.

The said Council is the sole government consultation body provided for in the Basic Law, and the only body from which prior consultation is required. This circumstance is duly reflected in the Rules, thus justifying its inclusion in the fully typified requirements for rejection of bills.

Besides this general procedural framework, there are specific cases that, under legal provisions, proceed to add requirements, namely the obligation to consult certain entities before the Government introduces bills to the Legislative Assembly, ie before formalising the legislative initiative.

— in compliance with the rules on the mandatory consultation of the Macau Lawyers Association, pursuant to paragraph 3) of Article 30 of Decree-Law No. 31/91/M, of 6 May, and the consultative powers granted to the Council of Judicial Magistrates and to the Council of Magistrates of the Public Prosecution Service, pursuant to paragraph 16) of Article 95 and paragraph 10) Article 107 of Law No. 10/1999, respectively.” Moreover, “The Macau Lawyers’ Association submitted an opinion, dated 27 February 2015, making an analysis of the bill’s text and presenting suggestions on legal drafting. The Council of Judicial Magistrates and the Council of Magistrates of the Public Prosecution Service did not formally express any opinion. However, on 17 February 17, 2015, the Chief of Staff of the Prosecutor forwarded to the Committee thirteen individual opinions of Magistrates of the Public Prosecution Service, presented without identification of authorship, the collection of which had been requested by order of the Prosecutor. On 6 November 2015, the President of the Committee received nine more personal opinions from unidentified Magistrates of the Public Prosecution Service, analysing amendments to the initial text of the bill, then under appraisal.” The novelty in the delivery of anonymous opinions, albeit from qualified persons (Magistrates of the Public Prosecution Service), is certainly noteworthy and raises doubts as to the appropriateness of their delivery and acceptance.

3.2 The Permanent Council for Social Dialogue

The Permanent Council for Social Dialogue, which fulfils the obligation to create an organisation for social dialogue of a consultative nature, comprises representatives from the Government, employers' associations and workers' associations. As referred to in Article 115 of the Basic Law,⁵⁷⁰ and under the terms of Decree-Law No. 59/97/M, of 29 December 1997,⁵⁷¹ the Permanent Council is tasked, *inter alia*, with issuing advisory opinions on bills and draft normative acts with social and labour implications.

A few clarifications are required.

Firstly, even though this Council is a constitutionally protected body, albeit in an indirect or presumed fashion,⁵⁷² — ie the Basic Law does not explicitly identify it, contrarily to the Executive Council — this tripartite and structurally consultative body may not be raised to a decision-making level, nor may it *usurp* the functions constitutionally granted to the Legislative Assembly,⁵⁷³ the Chief Executive, the Government or the Executive Council. Any attempt in this direction would result in an affront to the Basic Law in several of its principles and norms.

This Council embodies its defined role — neither more nor less. It operates as a socially supportive entity of an advisory nature in relation to a specific bundle of matters. Its consultation by the Government — not by the Legislative Assembly — is mandatory in such matters, but the opinions rendered are not binding.

Secondly, the requirement of consultation does not apply to Members' legislative initiatives. In effect, the Permanent Council for Social Dialogue is an organ for the Chief Executive's consultation on social and labour policy, as articulated in Article 1, paragraph (1) of Decree-Law No. 59/97/M. Like the Executive Council and other councils, this Permanent Council for Social Dialogue only provides consultation to the Chief Executive, and not to the Legislative Assembly, much less to individual Members.

⁵⁷⁰ “The Macau Special Administrative Region shall have an organisation for social dialogue of a consultative nature, comprising representatives of the Government, of employers' associations and of workers' associations.”: second paragraph.

⁵⁷¹ And of international labour law applicable in Macau.

⁵⁷² Some voices doubt whether this Council corresponds to the entity provided for in Article 115 of the Basic Law, “In addition, there is another problem that deserves to be taken into account – the body that has the advisory power in drafting legislation and implementing Government policies, namely, the functioning of the Permanent Council for Social Dialogue. Article 115 of the Basic Law of Macau specifically stipulates that the Macau Special Administrative Region has a consultative organisation of an advisory nature, consisting of representatives of the Government, employers' associations and workers' associations. In other words, a three-party consultative body that functions as an official advisory body. It is necessary to create this organisation in the Special Administrative Region so that it can perform its own functions, the objective of which is to make contacts, and reconcile relations between employers, workers and the Government. As to its nature, this body is advisory.”: Lok Wai Chong, ‘Lei Básica de Macau pós 1999 — sua influência na concertação social’ (1998) 39 Administração 32.

⁵⁷³ See, for example, “The Basic Law grants the competence to enact legislation exclusively to the Legislative Assembly of the future Administrative Region. Therefore, the responsibility for lawmaking in the field of labour relations lies with the Legislative Assembly of the future Administrative Region.”: Lok Wai Chong, ‘Lei Básica de Macau pós 1999 — sua influência na concertação social’ (1998) 39 Administração 32.

Consequently, and coherently, said Council may only issue opinions on its own initiative, or at the request of the Chief Executive, according to Article 2 of Decree-Law No. 59/97/M.

At no time does the Legislative Assembly, let alone Members thereof, request opinions from the Council. In other words, the issuance of an opinion on bills with social and labour implications only takes place at the request of the Chief Executive or on the Council's own initiative. No other avenue is allowed. Therefore, it is inescapable that this legal obligation to consult the Permanent Council for Social Dialogue only applies to bills initiated by the Government and not to bills initiated by Members.

In fact, the practice seems to point to the Government's regular compliance with this obligation to consult; for example, it will have occurred in the preparatory work leading to Law No. 12/2001, entitled "*Amends the legal framework for insuring work-related accidents and of occupational illnesses*". However, there appears to have been some exceptions, judging by the Explanatory Note, in which there was an omission of consultation. For example, in Law No. 9/2003, entitled "*Labour Procedure Code*", nothing is said about the prior consultation of the Permanent Council for Social Dialogue. Yet, it's important to note that in none of these cases was the lack of consultation of such Council deemed to constitute grounds for rejection of the respective Government bill.

With regard to Members' bills, naturally, there is no requirement for Members to engage in prior consultation with the Government's consultative body, the Permanent Council for Social Dialogue. As a matter of fact, the current practice conforms with such dispensation — several Members' bills on matters relating to trade unions were uncontestedly accepted for general debate in the Plenary, without the Permanent Council for Social Dialogue having been priorly heard thereupon.

Thirdly, it seems unassailable that the Legislative Assembly, although it should always attempt to remedy any possible illegality resulting from an omission to consult, does not have the power to summarily reject a legislative initiative by the Government requiring prior consultation of the Permanent Council for Social Consultation, in view of the typified framework established in Articles 107 and 108 of the Rules of Procedure — such an omission shall have the nature of a mere irregularity.

Stretching the argument further, into a bit of a non sequitur area, granted that there had to have been a prior consultation of said Council, what should be done is to proceed with the omitted consultation after the acceptance of the bill and, preferably, before the examination on the specifics thereof.

The duty to consult the Permanent Council for Social Consultation is addressed only to the Government, which is endowed with procedural and institutional mechanisms to hear and obtain advice from such — Government and not parliamentary — consultative body. In any event — mandatory initiative by the Government, or optional by the Members — it is possible to comply with this obligation to consult even *after a bill has been introduced* to the Legislative Assembly, namely during the stage of examination on

the specifics, if by simple error, or impossibility, the proponents did not comply with the legal obligation to hear/consult before introducing a legislative initiative.

3.3 Other Government Advisory Bodies

In addition to the previously identified councils, there is a wide range of other Government consultative and advisory bodies whose task is to provide opinion and assistance on Government legislative initiatives. A few of these Councils appear to be the addressees of mandatory consultation, whereas in other cases, prior consultation thereof is optional.

In no case may such councils be consulted by Members, nor does the omission of such consultations by the Government entail the summary rejection of the latter's bills. If such were not the case, an intolerable path, paved by a strong and profuse limitation to the legislative initiative would be opened (affecting both the Members and also the Chief Executive), with the total elimination of the instrument of political timing from the toolbox of lawmaking.

In addition, several of these cases of mandatory consultation are created by mere administrative regulations. They cannot be understood except in terms of the organisation of the Government's functioning.

Below is a sampling of these types of bodies.

4. The Consultative Council for Public Administration Reform

Administrative Regulation No. 18/2007 provides, in Article 5, that this Council is tasked with issuing opinions, reports, studies and making proposals on, *inter alia*, the legal framework of the Civil Service. The Council is an advisory body to the Government of the MSAR.

4.1 The Economic Council

The Economic Council, under the terms of Administrative Regulation No. 11/2000, performs consultative functions in the definition of economic development strategies and of economic policies in the MSAR. This Council is tasked, namely, to render its opinion on bills and draft normative acts regulating economic activity. The Economic Council is an advisory body to the Government of the MSAR.

4.2 The Council for Social Action

The Council for Social Action is competent, under the terms of Administrative Regulation No. 33/2003, to evaluate and to deliver opinions and recommendations, namely, on bills relating to the social action policy that the Government sees fit to submit for its appraisal. The Council is a consultative body that provides support to the Secretary responsible for

the area of social action, in view of the definition of the policies related thereto, as well as to assess the respective execution.

4.3 The Ethics Commission on Life Sciences

Decree-Law No. 7/99/M, of 19 February 1999, defines the composition and the competences of the Commission, which is a consultative body of the Chief Executive in matters of ethical issues raised by scientific progress, in the fields of biology, medicine, health, life sciences and biomedicine. The Commission must be consulted on the legal and regulatory measures to be adopted in the specific domain of its intervention, under the terms of Article 3, paragraph (2) of the aforementioned legislative act.

4.4 The Youth Council

The Youth Council is competent, under the terms of Administrative Regulation No. 12/2002, to issue opinions and to make recommendations, namely on bills and draft normative acts regarding youth policy that the Government sees fit to submit for its appraisal. The Youth Council is a consultative body that provides support to the Secretary who exercises competences in the area of youth policy.

In the MSAR legal order, several other Councils and Commissions should be consulted when taking normative initiatives. These Councils and Commissions are, *inter alia*, the Council for the Development of Tourism,⁵⁷⁴ the Consultative Council for Legal Reform,⁵⁷⁵ and the Fuels Safety Commission,⁵⁷⁶ among numerous other consultative and advisory bodies of the Executive branch.

5. Collaborative Entities and Bodies

There is a constellation of entities and bodies that are legally required to participate in the legislative procedure, offering consultive functions without orbiting the Government, ie not being typical Government consultative bodies. This is the case, for certain areas and matters, of the MLA as a public association, the Council of Judicial Magistrates and the Council of Magistrates of the Public Prosecution Service.

5.1 The Macau Lawyers' Association

The Legal Status of Lawyers, approved by Decree-Law No. 31/91/M, of 6 May 1991, as amended by Decree-Law No. 26/92/M, of 4 May 1992, and by Decree-Law No. 42/95/M, of 21 August 1995, establishes that the MLA shall be compulsorily heard on bills (or draft normative acts) which aim at regulating matters pertaining the judicial organisation, the

⁵⁷⁴ Article 3, paragraph [3] of Administrative Regulation No. 40/2011.

⁵⁷⁵ Chief Executive Order No. 59/2005.

⁵⁷⁶ Article 2 paragraph [9] of Administrative Regulation No. 38/2003.

practise of law, civil procedure and criminal procedure, pursuant to Article 30 of said decree-law. In such matters, the MLA's intervention is grafted onto the Legislative Assembly's general legislative procedure, as an additional step resulting from this specific legal imposition.

Doubts may arise as to the extent of this obligation concerning Members' bills and the correct moment for consulting the MLA — whether consultations should occur prior to or after the introduction of a bill to the Legislative Assembly? Or in a doubled scenario, when the MLA is consulted by the Government and *also* by the Legislative Assembly? Clearly, in the event of a Members' bill, consultations should not be formally carried out by individual Members, but rather by the institutional body Legislative Assembly, upon acceptance of the bill in question, either immediately, or at the outset of the examination on the specifics by a Committee.

It also seems undeniable that the Legislative Assembly, while obligated to remedy any possible illegality resulting from an omission to consult, does not have the power to summarily reject a legislative initiative by the Government requiring the prior consultation of the MLA, in view of the typified framework established in Articles 107 and 108 of the Rules of Procedure — such an omission shall have the nature of a mere irregularity.

On several occasions, instances have arisen where the MLA was not consulted before the introduction of Government bills, yet such omissions did not lead to the bills being rejected — a decision that, in retrospect, proved to be appropriate. This circumstance did not prevent the competent Committee, in the examination stage of the bill, from consulting the MLA. See, amongst many other examples, Law No. 9/2004, entitled, “Modifications, suppressions and addenda to the General Framework Law on the Judicial Organisation and to the Code of Civil Procedure” and the respective Report No. 2/II/2004 of the Third Standing Permanent Committee.

Similarly, in instances related to Members' bills such as Law No. 1/2009, entitled “Addendum to Law No. 21/88/M — ‘Access to the Law and to the Courts’”, and Law No. 16/2008, entitled “Amendment to Law No. 2/93/M — ‘Right of Assembly and Demonstration’”, the MLA was not consulted beforehand by the bill proponents. Nevertheless, the competent examining Committee did, in due course, consult that public association.⁵⁷⁷ This has been the common legislative practice in Macau.

5.2 Magistrates' Councils

The **Council of Judicial Magistrates** (composed of judges) is competent to “issue an opinion on bills relating to the General Framework Law on the Judicial Organisation and to the Legal Status of Magistrates” in addition to “studying and proposing the adoption of legislative or administrative measures geared towards the efficiency and the

⁵⁷⁷ See TSC, Report No. 2/III/2008.

improvement the judicial system.”⁵⁷⁸

5.3 The Council of Magistrates of the Public Prosecution Service

The Council of Magistrates of the Public Prosecution Service is competent to “issue an opinion on bills relating to the General Framework Law on the Judicial Organisation and to the Legal Status of Magistrates” in addition to “studying and proposing the adoption of legislative or administrative measures geared towards the efficiency and the improvement the judicial system.”⁵⁷⁹

The Legislative Assembly should always attempt to remedy any possible illegality resulting from an omission to consult, but does not have the power to summarily reject a legislative initiative by the Government, which omitted the due prior consultation of the Council of Judicial Magistrates and the Council of Magistrates of the Public Prosecution Service, in view of the typified framework established in Articles 107 and 108 of the Rules of Procedure — such an omission shall have the nature of a mere irregularity.

⁵⁷⁸ Article 95, paragraphs [15] and [16] of Law No. 10/1999.

⁵⁷⁹ Article 107, paragraphs [9] and [10] of Law No. 10/1999.

XI.

A SHORT STATISTICAL OVERVIEW

1. Introduction

Having completed several steps in my investigation of the very important issue of the legislative initiative and the several aspects that emanate therefrom, I would like to illuminate the praxis with some statistical data.

I shall carry out a statistical analysis of the bills throughout the various legislatures, starting 20 December 1999.⁵⁸⁰ I will largely rely on the efforts already performed by others,⁵⁸¹ herein quoted when appropriate.

From the indicative *legal superstructure*, I shall turn to the *base* of facticity in the world of real practice.

2. The Data

“After the transfer of administration from Portugal to China, on 20 December 1999, and based on data from five legislatures, from 12 October 1999 to 7 March 2014, the Chief Executive (CE) sent to the Legislative Assembly (LA) 86 Government bills and Members introduced nearly 50 bills to the LA. The vast majority of bills submitted by the CE to the LA were approved; as far as we know, three bills sent to the LA were withdrawn by the Government. Regarding the bills introduced by Members, 15 were approved, 22 were not approved in Plenary, 4 bills were withdrawn by the proponents, and 7 bills were summarily rejected or were not consented to. A percentage of ‘legislative success’ in the order of 31.2%.”⁵⁸²

⁵⁸⁰ For an analysis of the same issue in the context of the Territory of Macau, Carlos Veiga, ‘A iniciativa legislativa’ (O Direito Online 2014) <<https://odireitoonline.com/a-iniciativa-legislativa.html>> last accessed on the 29 January 2025, “In quantitative terms and based on data from the four legislatures from 1976 until 4 December 1989, the Governor presented to the Legislative Assembly (LA) a greater number of bills compared to bills submitted by Members. The Governor sent 179 bills to the LA and the Members presented 82 bills to the LA.”; while, with regard to the success rate of the initiated initiatives, it is recalled that “The vast majority of bills submitted by the Governor (to the LA) was approved. Regarding the bills presented by the Members to the LA, the vast majority were approved, a ‘percentage of’ legislative success of ‘over 80%’.”

⁵⁸¹ Carlos Veiga, ‘A actividade legislativa’ (O Direito Online 2014) <<https://odireitoonline.com/a-actividade-legislativa.html>> accessed 29 January 2025.

⁵⁸² *ibid.*

The quoted text goes on:

“The fifteen bills resulting from Members’ initiatives and approved as LA laws, were: Bill entitled “On the Legislature and the Legal Status of the Members of the Legislative Assembly”, Law No. 3/2000; “General Framework Law on Sciences and Technology”, Law No. 9/2000; “Organic Law of the Legislative Assembly of the Macau Special Administrative Region”, Law No. 11/2000; Bill entitled “Aggravation of punishment in the event of instrumentalisation of legally incapacitated persons for the commission of crimes”, Law No. 6/2001; “Amendments to Law No. 6/96/M, of 15 July, which approved the Legal Framework for Offences against Public Health and the Economy”, Law No. 2/2002; “Amendment to Decree-Law No. 47/98/M, of 26 October, which establishes the framework for administrative conditioning of activities”, Law No. 10/2003; “Amendment to Law No. 6/96/M, of 15 July”, Law No. 7/2005; “Law on the Protection of Personal Data”, Law No. 8/2005; “Alteration to the start of the legislative session”, Law No. 10/2008; “Amendment to Law No. 3/2000 — On the Legislature and the Legal Status of the Members of the Legislative Assembly”, Law No. 13/2008; “Amendment to the Organic Law of the Legislative Assembly of the Macau Special Administrative Region”, Law No. 14/2008; “Amendment to Law No. 2/93/M — Right of Assembly and Demonstration”, Law No. 16/2008; “Amendment to Law No. 21/88/M — Access to the Law and the Courts”, Law No. 1/2009; “Amendment to Law No. 3/2000 — On the Legislature and the Legal Status of the the Members of the Legislative Assembly”, Law No. 12/2009 and Bill entitled “Amendment to Law No. 11/2000 — Organic Law of the Assembly Legislative of the Macau Special Administrative Region”, Law No. 1/2010.”⁵⁸³

Whereas, and following the same text,

“The twenty-two Members’ bills, which were not approved by the plenary of the LA, were: ‘Special Probationary Framework for the Prevention and Investigation of Criminality’, 3rd legislative session of the II legislature; ‘Regulatory law on the Fundamental Right of Forming Trade Unions’. 4th legislative session of the II legislature (2004/2005); ‘Special Probationary Framework for the Prevention and Investigation of Criminality’, 4th legislative session of the II legislature; ‘Regulatory law on the Fundamental Right of Forming Trade Unions’, 2nd legislative session of the III legislature (2006/2007); ‘Amendment to Law No. 11/2003, of 28 July’, 3rd legislative session of the III legislature; ‘Amendments to the Administrative Litigation Proceedings Code’, 4th Legislative session of the III legislature (2008/2009);

⁵⁸³ *ibid.*

‘Law regulating the Fundamental Right of Forming Trade Unions’, 4th legislative session of the 3rd legislature; ‘Fundamental Right of Forming Trade Unions’, 4th legislative session of the IV legislature (2012/2013); ‘Civil Unions between Persons of the Same Sex’, 4th legislative session of the IV legislature; Bill entitled ‘Establishes the legal framework applicable to the prevention of domestic violence, to the protection and assistance of its victims and to the criminalisation of domestic violence’, 4th legislative session of the IV legislature; ‘Measures to Protect the Image of Detainees’, 4th legislative session of the IV legislature; ‘Legal Status and Protection of Animals’, 4th legislative session of the IV legislature; Bill entitled ‘Interpretative norm on of Decree-Law No. 33/81/M’. 4th legislative session of the IV legislature; ‘Promotion, awareness and dissemination of Human Rights Treaties and ILO Conventions’, 4th legislative session of the IV legislature; ‘Legal framework for the Updating of Rents in Residential Immovable Properties’, 4th legislative session of the IV legislature; Bill entitled ‘Legal action to challenge the confidentiality of information, the refusal to provide information or to conduct consultations’, 4th legislative session of the IV legislature; ‘Special procedure for the protection of the personality of the worker’, 4th legislative session of the IV legislature; ‘Special process for the legal protection of workers based on equality and non-discrimination due to gender and sexual orientation’, 4th legislative session of the IV legislature; ‘Legal framework applicable to services provided, through call centres, for the promotion, information and support to consumers and users’, 4th legislative session of the IV legislature; Bill entitled ‘Establishes the legal framework applicable to the prevention of domestic violence, to the protection and assistance of its victims and to the criminalisation of domestic violence’, 1st legislative session of the V legislature (2013/2014); ‘Legal framework for the Updating of Rents in Residential Immovable Properties’, 1st legislative session of the 5th legislature and Draft law entitled ‘Legal Status and Protection of Animals’, 1st legislative session of the 5th legislature.’⁵⁸⁴

Since 20 December 1999, one can surmise that, until 2018, about seven dozen bills were introduced on the most diverse subjects: fundamental rights,⁵⁸⁵ crimes,

⁵⁸⁴ Carlos Veiga, ‘A actividade legislativa’ (O Direito Online 2014) <<https://odireitoonline.com/a-actividade-legislativa.html>> accessed 29 January 2025.

⁵⁸⁵ The lawmaking impetus resulted, over the course of the various legislatures in the MSAR, from initiatives of around three dozen Members from various backgrounds and sectors, with several Members having introduced a significant number of legislative initiatives, either individually or together with other-colleagues. For example, Members Hoi Sai Iun, Tong Chi Kin, Tsui Wai Kwan, Cheang Chi Keong, Jorge Manuel Fão, Vong Hin Fai, Iong Weng Ian, Chui Sai Cheong, José Manuel de Oliveira Rodrigues, Philip Xavier, Leonel Alves, Kou Hoi In, Leong Wok Wa, Chan Chak Mo, Fong Chi Keong, Chan Meng Kan, Leong Heng Teng, Ng Kuok Cheong, Au Kam Sam, Chan Wai Chi, Pereira Coutinho, Ieong Tou Hong, David Chow, Lam Heong Sang, Kwan Tsui

consumer protection, legal status of the Members, organic structure of the Legislative Assembly, administrative offences, non-discrimination based on homosexuality, urban development, residency, technology, personal data, administrative litigation, animal protection, among several other matters.

Seventeen bills were approved, the rest were not, either because the Plenary so decided, or because they were withdrawn by the proponents, with a small number of bills having been summarily rejected.

There have been legislative sessions where no bills were introduced, while several sessions witnessed multiple bills from Members. Note that, in 2008, four bills initiated by Members were approved.

The described discrepancies result from decisions on political opportunity: each and every Member has the free choice, under the Basic Law, to introduce a bill or to refrain from so doing.

In view of this scenario, it has already been stated that,

“The previously highlighted quantitative trend regarding the Governor remains unchanged: the Chief Executive continues to introduce a higher number of bills to the Legislative Assembly compared to the bills presented by Members. This tendency, quite accentuated in the first legislatures of the LA after 1999, was somewhat altered in the IV legislature, 4th legislative session (2012/2013). The Chief Executive introduced 16 bills to the LA, 8 of which had been carried over from the 2011/2012 legislative session, and a directly elected Member introduced 12 bills.”⁵⁸⁶

A comparative-concluding synthesis may be postulated:

“The difference, in relation to the ‘legislative success’ of the Members in the four legislatures from 1976 to 4 December 1989, is that none of the bills presented in the IV legislature, 4th legislative session (2012/2013) of the LA, as well as the two bills presented in the 5th legislature, 5th legislative session (2013/2014), was approved.”⁵⁸⁷

These conclusions objectively reflect the “state of the art”. They are based on numbers that, in turn, allow one to project a certain reality.

Several of the initiatives specific to parliamentarians represent (necessary)

Hang, Vitor Ng, Lau Cheok Va, Ho Teng Iat, João Bosco Cheang, Au Chong Kit, Liu Yuk Lum, Lei Cheng I, Ho Ion Sang, Mak Soi Kun, Song Pek Kei, Tong Io Cheng, Ng Kuok Cheong, Au Kam San, Zheng Anting, *inter alia*. I should also stress that, in addition to the number of Members involved, their method of selection is also very diverse: directly elected, indirectly elected and appointed Members all appear on this list.

⁵⁸⁶ Carlos Veiga, ‘A actividade legislativa’ (O Direito Online 2014) <<https://odireitoonline.com/a-actividade-legislativa.html>> accessed 29 January 2025. See also Vitalino Canas, *Preliminares do estudo da Ciência Política* (Publicações O Direito 1992) 251 et seq.

⁵⁸⁷ Carlos Veiga, ‘A actividade legislativa’ (O Direito Online 2014) <<https://odireitoonline.com/a-actividade-legislativa.html>> accessed 29 January 2025.

repetitions of previous initiatives, given the failure to which they have been systematically doomed. The exemplary case consists of the bill(s) on the freedom to form trade unions,⁵⁸⁸ but others are worth mentioning, either in the reiteration of the attempts to have them approved, or in terms of their intrinsic value, such as, for example, the promotion of human rights treaties.

From this last set of bills, all but two thereof were pre-destined to fail. In fact, only the bill amending the Legislative Assembly's organic law was approved and published as law.

Let me say a few words on the much-vaunted projected reality, as reflected by the data.

3. Tentative Explanations

A first explanation is based on comparative law, ie there is a universal propensity towards a preponderance or prominence of the governmental legislative initiative.⁵⁸⁹

Some caution is warranted in any comparative undertaking.

We must first look at the numbers, statistical data and, second, perform a qualitative or substantive analysis — what kind of laws derive from governmental initiative, and which originate from the parliamentary side. Another factor that reinforces the prominence of the legislative initiative originating from governments is its complementary nature, when there is a parliamentary majority supporting the Government in office.⁵⁹⁰ In legal-constitutional systems wherein the Government does not have legislative competence, it will come as no surprise that the Executive shall seek to gain an upper hand in terms of legislative initiative.

It should also be noted that, in the dual systems of legislative initiative — the case of Macau, distinct from *pluralised or multi-opened* systems where parliamentary members, the Government, and other entities like heads of State or regional bodies can propose legislation⁵⁹¹ — potentially even allowing general citizenry to initiate popular initiatives — the prevailing tendency for Government predominance might further amplify.

Attention must be paid to at least two different issues: the number of legislative

⁵⁸⁸ On this matter, bills were introduced by a single Member, repeatedly, and later by a group of different Members; regardless, approval was not successful.

⁵⁸⁹ Cf for example, Manuel Aragón Reyes, 'La Iniciativa Legislativa' in *Estudios de Derecho Constitucional* (CEPC 2009) 647 et seq; Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 147 et seq.

⁵⁹⁰ A political party in a parliamentary majority is supportive of the government or, in the case of Macau, a majority that is generated by other means other than political party politics, first of all through the appointment of Members of the Legislative Assembly.

⁵⁹¹ At times accompanied by a reserved initiative reserve. See, for example, the legal-constitutional systems of Portugal, Italy and The Philippines.

initiatives introduced and processed, on the one hand; and the number of legislative initiatives approved, ie that are enacted into laws. There are examples in comparative constitutional law where the majority of approved laws result from governmental initiative; however, from the perspective of the number of introduced initiatives, most bills do not result from governmental impetus, rather from parliament.⁵⁹² As MANUEL ARAGÓN REYES affirms, “What is even more clear is the absolute predominance, not of government initiatives, but of the number of approved laws resulting from government initiatives, over the number of laws stemming from parliamentary initiative.”⁵⁹³

On the other hand, in systems where there are reserved areas of legislative initiative in favour of the Government, for example, on the budget law⁵⁹⁴ — or where the Government can seek legislative authorisations constitutionally (for instance, through a Government bill seeking an enabling law permitting the Executive to enact legislative or other normative acts in certain relatively reserved matters under Parliament’s terms, limits, conditions, guidelines and deadlines, as set out in the authorising law), it’s natural to witness an upsurge in governmental legislative initiatives. In the case of Macau, as observed, the ballast of the original legislative initiative, in favour of the Government, weighs heavily⁵⁹⁵ compared to most constitutional systems.

Although the castrating and substantively vast norm⁵⁹⁶ of Article 75 of the Basic Law (in addition to some others, as discussed) might be of some utility to explain this scenario, it shall not suffice to provide a total or full answer.⁵⁹⁷

While this framework might partially contribute to explaining the trend of decreasing initiatives due to variations in the calculus of political opportunity, it cannot justify the failure to approve Members’ bills or their absence. In truth, Members’ bills that are put to a vote shall already have passed the barb-wired hurdle of Article 75. These modalities of conditioned initiative and the Government’s exclusive initiative only

⁵⁹² Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 148–149, referring to the Portuguese case, where the number of Members’ bills during the years under analysis “clearly exceeds the number of Government bills”: but the advantage is reduced if “If one considers the totality of bills that are approved”. See also, with references to the Italian and Spanish cases, Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 647–648.

⁵⁹³ Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 648.

⁵⁹⁴ And whenever there are mandatory original legislative initiatives reserved to the Government. The example of the budget bill is emblematic.

⁵⁹⁵ On the other hand, mandatory original legislative initiatives reserved for parliamentarians are scarce.

⁵⁹⁶ Yash Ghai, from a comparative law perspective, explains that there is only one true normality in the established framework regarding public expenditure and revenue, and not in an absolute way, “The other restrictions appear to be unprecedented (and have no parallel in China itself).”: Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong University Press 1999) 252–253.

⁵⁹⁷ See also Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 10: “However, such huge constrictions to Members’ legislative initiatives in no way reflect any ineptitude in the development of their work, nor their passivity vis-à-vis bills introduced by the Executive. Members remain entitled to work for the population in matters related to the social well-being and the fundamental rights of citizens, as well as to play a monitoring role when legislative gaps are detected in the current legal system, and situations of outdated or inability to adapt the legal norms to the social reality, formulating, for this purpose, the bills deemed necessary to correct such situations.”

function as filters for initiatives, but not for approvals.

One should pay attention to the following words:

“Article 71, subparagraph (1) clarifies that the Legislative Assembly is competent to enact, amend, suspend and repeal laws, in accordance with the provisions of the Basic Law and legal procedures. However, the majority of members of the Legislative Assembly are not legal experts, nor are they necessarily experts in complex economic and social subjects. Consequently, in Macau, the Legislative Assembly is often in a passive stance in terms of legislation, a state of affairs which is somewhat related to the composition of the Legislative Assembly.”⁵⁹⁸

This is a point of some concern, as announced within the Legislative Assembly, which aims to create conditions for the effective exercise of legislative initiative by the Members. In effect, note the following statements in a formal Report:

“The Committee also considered the opinion of some Members with regard to the creation of a structure in the Organic Law specifically aimed at supporting Members, namely for aiding them in the drafting of bills and resolutions. After discussing the issue, the Committee concluded that this is a relevant issue, deserving further appraisal and study. However, the urgency in the approval of this bill has prevented the Committee from deepening this matter with a view to inclusion thereof in the current amendments to the Organic Law.”

In other words, *a few Members*, and the Committee, did reflect on this *relevant* issue. The same Report goes on:

“However and despite these recitals, the Committee considers that it is already possible, today, for Members to request specialised legislative support from the Legislative Assembly with a view to carrying out their tasks, namely for the purposes of drafting bills and resolutions. Such stems specifically from paragraph (3) and from subparagraphs (1) and (4) of paragraph (4) of Article 19 of the Organic Law. These norms, which provide for the functions of the Advisory Staff, establish that, in addition to technical consultancy in general, such staff may also assist Members in drafting legal texts and in effectuating studies and opinions.”⁵⁹⁹

In closing this chapter, I would like to mention Members’ bills on matters of

⁵⁹⁸ Song Xixiang, ‘Sobre as Relações entre o Poder Executivo e o Legislativo e o Judicial em RAEHK e RAEM’ (2012) 4 Revista de Estudos de ‘Um País, Dois Sistemas’ 119, 128.

⁵⁹⁹ SSC, Report No. 2/V/2015, Bill entitled “Amendment to Law No. 11/2000 – Organic Law of the Assembly Legislative of the Macau Special Administrative Region”.

great importance,⁶⁰⁰ including some aimed at the global or overall regulation of certain subjects — regardless of whether some might have required improvements on their specifics, as indeed largely occurs with Government bills — but which did not deserve the approval of the Plenary, since the first bill having been introduced during the 4th legislative session of the II Legislature: *Fundamental Right to Form Trade Unions*,⁶⁰¹ *Amendments to the Administrative Litigation Proceedings Code*,⁶⁰² *Legal framework for the Updating of Rents in Residential Immovable Properties*,⁶⁰³ *Prevention of domestic violence, protection and assistance of its victims and the criminalisation of domestic violence*,⁶⁰⁴ *Legal Status and Protection of Animals*,⁶⁰⁵ and *Promotion, awareness and dissemination of Human Rights Treaties and ILO Convention*.⁶⁰⁶

4. Emblematic Laws enacted pursuant to Members' Legislative Initiative

Notwithstanding the described difficulties, some bills achieved the objective of being printed on the pages of the OG.

Several laws that are in force today, emblematic in the sense that have greatly contributed to the well-being of the population and the consolidation of the MSAR legal system, originated, precisely, from bills initiated by Members of the Legislative Assembly after 1999. Or, in the following words of a former President,

⁶⁰⁰ In this regard, it is worth giving a brief note on some viewpoints that were informally aired in the past. A more radical one suggested that the initiative of the law, as exercised by Members, was so small that it would not even cover matters that are inherent to the autonomy and self-organisation of the Legislative Assembly, namely in terms of the Legal Status of the Members and the organic structure of the Legislative Assembly. Another thesis sought to defend and prove (in total contradiction with the Basic Law and unsupported by the facts) that Members could enjoy legislative initiative only in matters of self-organisation of the Assembly, whereas on other subjects, Members would have to limit themselves to bills to amend existing laws — in a word, they would be unable to create *ex novo* or innovative legal frameworks from the ground up! The latter standpoint forgets the law on the protection of personal data, which resulted, precisely from an internal bill, the acceptance of successive bills on the freedom to form trade unions... These theses are lacking in any and all legal-constitutional, procedural or factual bases whatsoever.

⁶⁰¹ With a view to regulating such a fundamental right and to fill the existing legal *lacuna*, despite the freedom to form trade unions being already established in several instruments of international law applicable and directly invocable in Macau. The bill created a special protective procedure by granting *ex novo* competences to the CFA and the Administrative Court, whilst also attributing the Department of Labour Affairs with the competence of keeping a specific registry of trade unions.

⁶⁰² The objective was to include a summary process in the Administrative Litigation Proceedings Code, with simpler and more expeditious procedures than those applied in the common process, as well as to create a small claims court for administrative law matters.

⁶⁰³ Intended to protect tenants, by limiting the contractual freedom with respect to the value of rents on residential real estate — such rents could no longer be freely updated, by mutual agreement of the parties, the basic criterion becoming the inflation rate of the year in question.

⁶⁰⁴ Aimed at preventing and suppressing the phenomenon of domestic violence and to supporting and promoting the autonomy, and the dignified living conditions, of victims of such violence, in addition to criminalising the conduct.

⁶⁰⁵ The object of which was to create a general legal framework for the protection of animals, by preventing cruelty to animals and by imposing several duties.

⁶⁰⁶ The scope was the promotion of knowledge and dissemination of information on treaties related to Human Rights and workers' rights.

“These laws that were passed, all had the ability to respond to the expectations of society, with the desired positive effects, either because they closed the gaps heretofore existing in the legal system, or by improving the deficient or anachronistic aspects of the existing system.”⁶⁰⁷

Such are the cases of Law No. 8/2005, Law on the Protection of Personal Data;⁶⁰⁸ Law No. 16/2008, Amendment to Law No. 2/9/3M — “Right of Assembly and Demonstration”;⁶⁰⁹ Law No. 1/2009, Addendum to Law No. 21/88/M — “Access to the Law and to the Courts”;⁶¹⁰ Law No. 9/2000, General Framework Law on Sciences and Technology;⁶¹¹ Law No. 2/2002, Amendments to Law No. 6/96/M, of 15 July, which approved the Legal Framework for Offences against Public Health and the Economy;⁶¹² or Law No. 10/2003, Amendment to Decree-Law No. 47/98/M, of 26 October, which establishes the framework for administrative conditioning of activities.⁶¹³

In addition, of course, to the laws necessary for the complete and proper operation of the Legislative Assembly, ie those laws relating to the legal status of the Members and to the organic structure of the Legislative Assembly.

⁶⁰⁷ Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 11.

⁶⁰⁸ Established, *ex novo*, the general legal framework for the protection of the fundamental right to privacy in the context of personal data, imposed the creation of a public authority with wide and varied powers, created a special protective procedure by granting new competences to the CFA and the Administrative Court and established a set of crimes and administrative offences. This law applies, across the board, to the whole Public Administration and Government, as well as to society in general. It has brought about a real transformation in the operation of entities handling personal data and has profoundly changed the policy on privacy and personal data.

⁶⁰⁹ This law solved doubts regarding the application and effective implementation of the fundamental right of assembly and manifestation, clarifying the competences of the CFA and the issue of (un)necessary legal representation.

⁶¹⁰ Article 4-A was added to Law No. 21/88/M, guaranteeing access to the law, to the Courts, to assistance by counsel in any process or proceedings, and at any stage thereof — as witness, declarant, deponent or defendant — as well as to obtain remedies by judicial means, and ensuring that everyone has the right to legal information and consultation, to legal representation and to be accompanied by a lawyer, regardless of the existence of a power of attorney (or evidence thereof), before any public authority, including judicial and criminal investigation authorities, irrespective of a person’s legal status, namely in view of such authorities. These modifications imposed duties of conduct on public authorities, namely on judicial and criminal investigation ones.

⁶¹¹ Defines the objectives and the necessary measures to be adopted, namely: to encourage the creation of scientific and technological research and development institutions, as well as the research carried out by the staff in this area; to promote the transformation of research results into products and their commercialisation; to encourage the training, admission and hiring of qualified staff, encouraging them to carry out activities related to the area; to reward institutions, persons and projects that have made a relevant contribution to the MSAR. The law creates the Fund for the Development of Sciences and Technology.

⁶¹² Amended Article 28, on the crime of fraud relating to goods/merchandise, and promoted the protection of consumer tourists, namely through the collaboration of tour agents. The law introduced significant modifications to the typified crime and the underlying protected legal interest, incorporating a new criminal policy based on the protection of tourists and an increased repression of black-market shops, selling counterfeit merchandise.

⁶¹³ This law subjects Internet cafes to administrative conditioning, as provided for in Decree-Law No. 47/98/M, of 26 October 1998, forbidding entry of children under 12; it also created new, and altered existing, administrative offences. Therefore, the administrative conditioning policy was partially modified.

XII.

THE RENEWAL OF THE LEGISLATIVE INITIATIVE

1. Introduction to the Problem

An important, complex and controversial issue within the legislative procedure is the renewal of the legislative initiative — or rather, the rejection thereof, within a given period.

Such an issue was recently raised in relation to a specific case, having been the object of an advisory report⁶¹⁴ by the CRPMM.

This type of rules, as revealed, in the Rules of Procedure, under the wording “*The bills not approved or definitively rejected may not be renewed during the same legislative session*”,⁶¹⁵ is quite common in constitutional history and in comparative law.⁶¹⁶

Through Resolution No. 1/2015, which reviewed the Rules of Procedure of the Legislative Assembly, the text of Article 109 was amended.

The new procedure framework is thus expressed:

“1. The following may not be renewed during the same legislative session, under the same form of initiative:

a) Members’ bills not approved or definitively rejected;

b) Government bills not approved or definitively rejected, without prejudice to the provisions of the Basic Law.”

This profound change is in deep disharmony with Macau’s constitutional history and the teachings of comparative law.

The Explanatory Note of the Draft Resolution to Amend the Rules of Procedure of the Legislative Assembly contains the reasons for such change:

⁶¹⁴ Report No. 1/V/2014, available on the official website of the Legislative Assembly.

⁶¹⁵ Article 109, paragraph (1).

⁶¹⁶ “It was an ancient rule that, when a bill was once passed or rejected, another of the same substance could not be brought in again during the same session”: Paul Mason, *Mason’s Manual of Legislative Procedure* (West Publishing Company 1989) 123–24. See also for the English system, Erskine May, *Parliamentary Practice* (24th edn, Lexisnexis 2011) 333, “A motion or an amendment which is the same, in substance, as a question which has been decided during the session may not be brought forward again during that same session.”

“The issue of renewing the legislative initiative has been widely discussed within the Committee. Thus, and with regard to Article 109, more specifically, the scope of paragraph (1), many Members have sent opinions to the Committee, as well as suggestions for alterations to its wording, with a view to clarifying the scope of this norm and its relationship with the Government’s powers in matters of legislative initiative. At the same time, the Committee undertook an analysis of the subject-matter — both scholarship and comparative law — concluding that there are norms similar to that of Article 109, paragraph (1) in the vast majority of the studied parliamentary rules of procedure, with the purpose of preserving procedural economy and dignity in the carrying out of parliamentary activity. However, the Committee considered that, in spite of the appropriateness of the principles underlying the norm of Article 109, paragraph (1), it is necessary to ponder its conformity with several norms of the Basic Law, namely, with Article 64, subparagraph (5) and with of Article 71, paragraph (1), according to which the Legislative Assembly is the sole body to ‘Enact, amend, suspend and repeal laws’, contrary to the Organic Statute of Macau, which enshrined, in its Article 5 that ‘the legislative function shall be exercised by the Legislative Assembly and the Governor’. Such is what the Committee now proposes to do with the new text of Article 109, paragraph (1). Thus, the limits to the renewal of legislative initiatives are now restricted to the respective proponents, Members or Government. Therefore, when a Member’s bill on a given subject is not approved or is definitively rejected in a legislative session, it can not be introduced again during the same legislative session. The same principle applies to the Government’s bills; in other words, if a Government bill is not approved or definitively rejected in a legislative session, the Government cannot resubmit it to the Legislative Assembly during the same legislative session, without prejudice to the exceptional cases set out in Article 52, subparagraph (2) of Basic Law. The Committee believes that the new text of Article 109, paragraph (1) now proposed — which has achieved broad consensus within the Committee, and also by several Members not belonging thereto, who attended the respective meetings — respects the powers of the legislative initiative of both the Members and the Government.”

In view of this new procedural understanding, doubts may be stirred — taking into account the praxis of little success in approving Members’ bills and a high rate of approval of Government bills — whether this path might lead down a road of further degradation of the status of Members’ bills. Even if substantively deserving of approval, there’s a possibility that these bills could face more *free* rejection. The concern stems from the notion that if a matter truly warrants regulation under the law, the Government retains the ability to introduce a bill on the same subject matter at any time.

The reference to Article 64, subparagraph (5) of the Basic Law⁶¹⁷ is useless, as the general power of the Government to introduce bills may not be interpreted as being absolutely unrestricted, namely for the purposes of renewing initiative legislatures *vis-à-vis* certain timeframes, as has been occurring in Macau (and as is often the case in comparative law). In addition, if the new procedural norm is correctly read, such is what actually happens under Article 109, paragraph (1), subparagraph (b) (again, excepting the cases under Article 52 of the Basic Law).

Equally improper is the reference that nowadays, and, unlike the Organic Statute of Macau, under which “*the legislative function shall be exercised by the Legislative Assembly and the Governor*”, the legislative competence in the MSAR lies only with the Legislative Assembly. What were the legal effects intended to be adduced from such a statement? That the Government may introduce bills, repeatedly and successively, until they are finally approved? That, after all is said and done, the Legislative Assembly only has the power to approve Government bills, but not the power to not approve them? No useful legally legitimising sense can be laid at the door of said declaration by the Committee.

I shall return to this subject below.

Under Article 52 of the Basic Law, an exception to Article 109 of the Rules of Procedure already prevailed *vis-à-vis* the previous text, which naturally applies to the current wording of Rules:

“2) When the Legislative Assembly refuses to approve the budget bill introduced by the Government, or a bill that, in the opinion of the Chief Executive, affects the overall interests of the Macau Special Administrative Region, and if consensus still cannot be reached after consultations, the Chief Executive may then dissolve the Legislative Assembly.”

In other words, to guarantee political stability, the right of suffrage and the results of elections — elements of a democratic nature present in Macau’s political system — which normally should endure for a complete and an entire legislature, the use of dissolution, as the weapon of last resort, is avoided by a mechanism whereby such outcome must be preceded by consultations and reintroduction, to the Legislative Assembly, of the budget bill or the bill that affects the overall interests of the MSAR. This is a peculiar specimen of renewed legislative initiative, perhaps close to a “devolution”. However, the MSAR requirements on a majority for approval remain exactly the same, as a specially qualified majority,⁶¹⁸ for example, of not less than two-

⁶¹⁷ “(5) Introduce bills and draft resolutions, and enact administrative regulations”.

⁶¹⁸ Article 51 of the Basic Law: “If the Chief Executive of the Macau Special Administrative Region considers that a Member’s bill approved by the Legislative Assembly is not compatible with the overall interests of the Region, he or she may return it to the Legislative Assembly within 90 days, for reconsideration, together with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the original bill by not less than a two-thirds majority of all the Members, the Chief Executive must sign and order publication thereof within 30 days, or proceed in accordance with Article 52 of this Law.”

thirds,⁶¹⁹ is unnecessary.

Having taken due notice of this constitutionally established exception, it is time to continue.

2. The Issue in Comparative Constitutional Law

Hereinafter are a few examples. In **Hong Kong**, LegCo's Rules of Procedure state:

“51. Notice of Presentation of Bills

(7)(a) Except as otherwise provided in subrule (7A) and Rule 66 (Bills Returned for Reconsideration), a bill which, in the opinion of the President, contains substantially the same provisions as another bill on which the Council has already taken a decision at second reading shall not be further proceeded with in the same session and shall be withdrawn.”

In **Portugal**, Article 167 of the 2005 Constitution states:

“Article 167 Initiative in relation to laws and referenda

4. Bills and draft referenda that are definitively rejected may not be resubmitted in the same legislative session, unless a new Assembleia da República is elected.”

In **Azores**, Article 45 of the Political and Administrative Statute states:

“Article 45 Regional referendum and legislative initiative

3 — Projects and proposals regarding regional legislative decrees or regional referendums that are definitively rejected may not be renewed within the same legislative session. .”

In **Madeira**, Article 45 of the Political and Administrative Statute states:

“Article 45 Limits of initiative

2 — Bills on regional legislative decrees that have definitively been rejected may not be renewed during the same legislative session.”

In **Cape Verde**, Article 144 of the Parliamentary Rules of Procedure states:

“Article 144 (Renewal of the initiative)

3. Rejected bills may be renewed twelve months from the date of such rejection, unless it coincides with the end of the legislature.”

In **East Timor**, Article 92 of the Parliamentary Rules of Procedure states:

⁶¹⁹ On this issue, see Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 248.

“Article 92 (Limits)

2. Bills that have been definitively rejected may not be renewed during the same legislative session.”

In **Angola**, Article 179 of the Organic Law of the Functioning and Legislative Process) of the National Assembly states:

“Article 179 (Limits)

2. Bills and amendment proposals that have been rejected may not be the object of renewed consideration during the same Legislative Session.”

In **Argentina**, Article 81 of the Constitution states:

“No bill totally rejected by one of the Houses may be renewed in that year’s meetings.”

In **Mexico**, Article 72 of the Constitution states:

“g. No bill rejected in the House where it was initiated may be renewed in that year’s meetings.”

In **Uruguay**, Article 142 of the Constitution states:

“When a bill has been firstly rejected by the House to which the other sends such bill, it shall by then be ineffective and may not be introduced until the following period of the Legislature.”

In **South Korea**, Article 92 of the National Assembly Act of the Republic of Korea states:

“Article 92 (Principle of Not Deliberating Same Bill Twice during Same Session), A bill which is rejected shall not be proposed or introduced again during the same session.”

In **Bolivia**, Article 163 of the 2009 Constituion states:

“The legislative procedure shall develop in the following manner: [...] 9. A bill that has been rejected may again be introduced in the following Legislature.”

Other examples could be identified, but it would be tiresome to reproduce the respective provisions. I would single out, *inter alia*, the following cases: Taiwan, South Africa, New Zealand, Italy and France.

As a rule, the accrued data points to a period of time coinciding with the duration of a legislative session. In other cases, this period of inhibition is limited to a given timeframe, regardless of its relation to the legislative session, for example, *x* months. There are also situations for alleviating the *cooling-off period*, by allowing the interdiction period to be removed, provided that such measure is approved by a qualified majority.

Other differences arise from the location or legal source of the norm: it may have a constitutional or a procedural provenance. In a few cases, the norm is contained in Constitutions (and/or the Statutes of autonomous regions); in other cases, it is established in both the Constitution and in parliamentary rules of procedure; finally, there exist cases, such as the HKSAR's and MSAR's, where this inhibition is an *ex novo* creation of the respective Rules of Procedure.

Rules such as these are indeed quite widespread in comparative law. As stated in the opinion of the CRPMM,

“From the outset, this Article 109, paragraph (1) epitomises a norm for the organisation of legislative work that is generally common to other jurisdictions, whether these belong to the “common law” system, or to the civil law systems of the European continental model, as is the case of Macau.”⁶²⁰

3. The Issue in Macau's Legal History

The idea of inhibiting the repetition of rejected initiatives is not a novelty in Macau Law, rather a principle that dates from afar in History.

In fact, the Rules of Procedure⁶²¹ previously in force before 1999 established the rejection of bills and amendment proposals “*the sole object of which are matters that have already been rejected by the Assembly*”⁶²² and, “*bills that have been definitely rejected may not be renewed during the same legislative session*”.⁶²³

The refusal to countenance renewals of legislative initiative, in light of the previous procedural framework, has been thus described:

“It has to do with the dignity and smooth operation of the Legislative Assembly and intends, among other purposes, to:

- prevent the Legislative Assembly from tear and wear, with regard to definitively rejected bills;
- prevent the Legislative Assembly from running the risk of approving, today, that which it rejected yesterday, and vice-versa;
- ensure that there is, consequently, a smooth operation of the Legislative Assembly, allowing it to respond to the multiple concerns that may suitably arise from those whom the organ represents.

⁶²⁰ Report No. 1/V/2014.

⁶²¹ One interesting point here is that while the Portuguese title of the Rules of Procedure before and after 1999 is the same “Regimento da Assembleia Legislativa”; the Chinese version varies vastly, “立法會章程” (Charter for Legislative Assembly) before 1999, and “立法會議事規則” (Rules of Procedure) after that.

⁶²² Article 119, paragraph (1), subparagraph (d) of the Rules, Resolution 1/93/M.

⁶²³ Article 119, paragraph (2) of the Rules, Resolution 1/93/M.

These are the reasonings that underpin the letter of the norm; this is the intended normative intent; we believe that this interpretation renders a better externalisation of the legislator's reasonable and meaningful will.”⁶²⁴

In other words, this configuration, with a few differences, essentially corresponded to the framework in force until 2015, operating as an inhibitor, applied without distinction, of Members' bills and Government bills for the duration of a legislative session. The big distinguishing feature of the pre-handover norm is that it included a substantive benchmark — “*the sole object of which*” — absent from the Rules in effect since 20 December 1999.

What results is a temporal conditioning of the normal powers of legislative initiative. It does not represent a material invasion of the rules of initiative, but only a limitation that operates, in a limited way, during a given period of time. Such a rule exists in many and diversified legal orders, in the context of very different political systems, including those with a clear predominance of the Executive. Reasons for this are given and explained below.

4. The Current Controversy: A Few Contributions

The issue at hand has provoked many doubts and contradictory interpretations, to which strongly felt political factors are, in practice, added.

My analysis shall naturally skirt said political factors, neither endorsing nor opposing opinions of that nature.

As previously mentioned, a recent amendment to the Rules of Procedure of the Legislative Assembly altered the relevant norm in this matter, which had become a boiling issue in some circles. However, I shall maintain the chain of my arguments, keeping in line with the version in force prior to the approval of said Resolution, so that, at the end of this chapter, I may inject some brief comments about the new framework. The task ahead is to resume the previously constructed rationale.

Proceeding with a good and updated starting point, the aforementioned report of the CRPMM:⁶²⁵

“This norm⁶²⁶ is based on two essential principles: the principle of procedural economy and the principle of dignity and prestige of parliaments.⁶²⁷ *The principle of procedural economy* translates into the

⁶²⁴ Report No. 2/87, of the CRPMM of the Macau Legislative Assembly, dated 4 December 1987.

⁶²⁵ Report No. 1/V/2014.

⁶²⁶ “*Bills not approved or definitively rejected may not be renewed during the same legislative session.*”: Article 109, paragraph (1) of the Rules of Procedure. Remember that this text was modified by Resolution No. 1/2015.

⁶²⁷ See, on this matter, João Ramos, *A iniciativa legislativa parlamentar - A decisão de legislar* (Almedina 2005)

understanding that a parliament should not go back on its deliberations, during a certain period of time (more or less short), on the assumption that if a new initiative on the same matter is accepted, such would obstruct normal activity, as it would oblige the parliament to a new — and possibly repeated — appraisal of normative contents previously considered and rejected. As to *the principle of dignity and prestige of parliaments*, such is related to the need to avoid the disrepute of legislative power: a reconsideration and a change of heart by parliamentarians about the same proposal, without a sufficiently minimal interval of time for a re-weighing of options having elapsed, may be detrimental to the dignity of the legislative body.” (emphasis added)

And furthermore:

“These principles also determine that the limitation contained in Article 109 of the Rules of Procedure may not operate when there is a mere formal identity between proposals, ie when they are based on a similar drafting, or even have, in the abstract, the same subject-matter. If such were the case, the *raison d'être* of inhibiting the renewal of initiatives, as identified above, would be distorted.”

As for assessment criteria, “the criterion for the analysis of situations that constitute renewals of initiatives must be a substantive criterion that makes it possible to identify the normative or prescriptive meaning of the initiatives in question.”⁶²⁸

What is meant by renewing a legislative initiative? A Member’s bill may be renewed as a Government’s bill and vice-versa. It is not enough, for example, to change the title or the internal structure of the Articles and introduce some aesthetic modifications, to defend that the new legislative initiative is different from the previous one. There is a substantive benchmarking to be made. The *rationale* for this rule of limiting renewals is self-evident — it is a corollary of the principle of equal dignity between a Member’s bill and a Government’s bill.

The above-quoted Report by the Committee on the Rules of Procedure and the Members’ Mandate delves into the question of whether such procedural norm is in conformity with the Basic Law, pointing out the potential danger that

“This may also additionally result in an evident misuse of Article 109 of the Rules of Procedure of the Legislative Assembly, thus opening the door to

⁶²⁸ The same Report goes on, with a broad thesis, that “in order to ascertain whether or not there is a substantive identity between the two legislative initiatives under consideration, the answers obtained, namely, to the following questions, may be helpful: The norms contained in the new initiative seek to protect the legal reality in the same way as the rejected initiative? Do the norms go in the same direction? Does this initiative lead to the same result as the rejected initiative? Do such norms also protect, totally or partially, the object of the rejected initiative? If the rejected initiative had been approved, would there still be a need to introduce the new initiative? Does the initiative follow the same principles and philosophy as the rejected initiative? Would the changes to be made to the legal order by the second initiative be the same as those of the rejected initiative?”.

the limitation of the Government's power of legislative initiative [Article 64, subparagraph [5] of the Basic Law of the MSAR]. In fact, it would be enough for a Member to introduce a bill doomed in advance to failure (either for not obtaining sufficient political approval, or for insufficiency or inadequacy of the bill *per se*), in order to block any initiative, within the same scope, by the Government of MSAR during the same legislative session, through the application of the above quoted Article 109 of the Rules of Procedure."

Allow me to briefly render my opinion on this issue.

The question of misuse is, in the absence of supporting evidence, a false one. It is not a true impediment to the exercise of the Government's legislative initiative (or vice-versa, in reality). Article 109's functions are of a propaedeutic and a conservatory nature — of the dignity of the institution and its Members. In a given case, if the introduction of a *similar* Government bill to the Legislative Assembly is so imminent, it shall suffice that a prospective Member's bill awaits voting thereon, or that it is approved on the whole in such a way that the aforementioned Government bill is actually introduced. Such a Government bill should only be prevented from entering the legislative process if a similar Member's bill *fails* to pass. Otherwise, there is no impediment for the new Government bill to be admitted. Subsequently, for example, it is possible to conjoin both initiatives during the stage of examination on the specifics. The above is a plainly legal discourse.

On the alleged violation of the Basic Law, based on isolated interpretations of some norms, namely Articles 64, paragraph (5), and 75, I do not see the least legal reason to lean towards any idea of unconstitutionality (if such were the case, it would have constituted a non-compliance in a dormant state for about a decade and a half, by the hand of an MSAR organ...). The expression "*in accordance with legal procedures*", which has been referred to herein, time and again, which points to the ideas of the proceduralisation of lawmaking and to the existence of norms instituting parameters, is alluded to in several norms of the Basic Law. In Article 75, only Members' bills are mentioned, but in the remaining provisions, the framework applies to any law, whether it results from a Member's bill or from a Government bill — Article 64, subparagraph (5) is also and equally applicable. Allow me to recall that the expression is used, besides Article 75, in the *pinnacle* norm, Article 71: "*The Legislative Assembly of the Macau Special Administrative Region is competent to: 1) To enact, amend, suspend and repeal laws, under the terms of this Law and in accordance with legal procedures;*". Without distinction as to the origin of the legislative initiative.⁶²⁹ Such is the same under Article 8 and Article 145.⁶³⁰

⁶²⁹ In practice, almost always originating from the Government.

⁶³⁰ By the way, in Article 2 of the Proposal to revise the Methodology for the Formation of the Legislative Assembly of the Macau Special Administrative Region, contained in Annex II of the Basic Law of the Macau

It is certainly not possible to deduce from the simplicity of the expression in Article 64, subparagraph (5) — “The Government of the Macau Special Administrative Region is competent: [...] 5) To introduce Government bills and draft resolutions, and enact administrative regulations; [...]” — that such could absolutely entail that no requirement could be attached to this power of initiative.

If it is not so, as I have tried to demonstrate — a different conclusion would be unreasonable. Imagine a Government bill on a matter that is absolutely outside the scope of the MSAR’s autonomy, or another not accompanied by an Explanatory Note or not written in Articles. The power of legislative initiative is also constrained by legal procedures, mainly those contained in the Rules. In fact, this seems to be the same opinion expressed in said Report: when the possible question of violation of the Basic Law was raised, the document continued with the Committee’s analysis and did not draw the necessary conclusion which, in the case in point, would have had to be the acceptance of the Government bill, thus removing the application of an unconstitutional procedural norm — which did not occur.

Another passage from the same Report calls for a more careful assessment. In fact, when insinuating that the norm of Article 109, paragraph (1), of the Rules of Procedure may not have fully respected the politico-legislative framework resulting from the Basic Law, while describing a difference *vis-à-vis* the framework established by the Organic Statute in force until 19 December 1999, by stating,

“since the Governor had legislative competence, limiting the power to renew a rejected legislative initiative would not cause the Governor political and legislative problems, namely a deadlock in the approval of a given legislative act, since the Governor could always, on his/her own, enact Decree-Laws on the matters that were subject to a negative deliberation by the Assembly.”

I must clarify that such was not the exactly the case. In fact, the report shows some awareness thereof in a footnote: “The Governor could always [do so], ie in matters not reserved to the Legislative Assembly.”

The use of the expression “*could always*” is disproportionate and not duly expressive of the previous situation. Numerous matters were absolutely and relatively reserved for the Legislative Assembly’s legislative competence. Moreover, although more limitedly, in parallel, the same *de facto* situation exists with the current independent administrative regulations, which may be enacted by the Government in matters not reserved to the law of the Legislative Assembly and under the terms provided for in Law

Special Administrative Region of the People’s Republic of China, one encounters the same framework, with respect to matters within the scope of the Government’s reserved legislative initiative:

“2. The provisions of the present proposal to revise of the methodology for the formation of the sixth Legislative Assembly and of the subsequent Legislative Assemblies are applied, until amendments thereto are approved in accordance with legal procedures.”

No. 13/2009.

On a different level, that of political options, the question can certainly be posed.⁶³¹ This will lie in deciding if, politically speaking, the principle set out in Article 109 of the Rules of Procedure merits continuity or not — whether it should undergo modifications, adjustments, or be eliminated altogether in the future. There could be consideration for rendering the framework more flexible, similar to various other legal orders, where such a limit may be surpassed by a specially qualified majority.⁶³²

As aforementioned, an amendment was made to the Rules of Procedure, modifying the text of the norm in question.

A preliminary correction: the same Report omits that, while it was true that under the Organic Statute, the legislative function was exercised by the Legislative Assembly and the Governor, the same type of problems present in the Explanatory Note did exist before the handover — albeit to a lesser degree — which was the ample area of matters reserved to the Legislative Assembly's legislative competence (both absolutely and relatively).

In other words, the impediments or constraints resulting from the impossibility of renewing a legislative initiative by the Executive in these cases remained, and the Government could not use a Decree-Law within the wide range of matters reserved to the Legislative Assembly's legislative competence. This happened in the past, as it does today.

As for Articles 64, paragraph (5) and 71, there is nothing more to add — these norms in no way interfere with the legislative procedural framework.⁶³³

The sole *new* constitutional norm invokable, as a justification or with any relevance to the issue of renewing the legislative initiative, is Article 52, subparagraph (2), as we have already noted previously. Since such an exceptional norm was already established in the Basic Law, it was applicable before the amendment to the Rules of Procedure became effective.

This is what the new procedural framework means. That is, if a Government bill is not approved or is definitively rejected during a legislative session, the Government may not reintroduce such bill to the Legislative Assembly during the same legislative

⁶³¹ As so happened, per Resolution No. 1/2015, Amends the Rules of Procedure of the Legislative Assembly.

⁶³² What is inadmissible, in my view, is to institute a differentiation that jeopardises the equal formal dignity between both types of bills. What Resolution No. 1/2015 did was precisely draw a dividing line between these two forms of legislative initiative.

⁶³³ Some even tried to resort to Article 51 of the Basic Law however, it was a baseless argument. In fact, in addition to Article 132 (Second deliberation on Members' bills) of the Rules, under Article 51 the Legislative Assembly will have already accepted and approved a Member's bill, which the Chief Executive returns to the Legislative Assembly if he or she considers that such bill is not in accordance with the overall interest of the MSAR; see, moreover, Article 50, paragraph 3), read in conjunction with Article 51, both of Basic Law. The Legislative Assembly may confirm the approved initiative by a majority of not less than two-thirds of all the Members. Hence, what Article 51 of the Basic Law triggers is a process for confirmation of legislative initiative and not a renewal thereof, under Article 109 of the Rules. They are, absolutely and unmistakably, separate issues.

session, except in the exceptional cases set out in of Article 52, subparagraph (2) of the Basic Law.

This amendment adds little of substantive value to the legislative procedure on the specific issue of renewing the legislative initiative, when the latter originates from the same proponent (or repeatedly) — the textual language is “*under the same form of initiative*” — besides an explicit insertion of the exceptions directly contained in the Basic Law. Naturally, taking into account the legislative practice — approving Government bills and not approving Members’ bills — this new *modus operandi* may result in an even greater practical prevalence of Government bills. From now on, the Plenary will be able to more easily reject a Member’s bill on a given matter, with the full knowledge that, if such a matter is really important and requires urgent regulation, the Government will, in due course, introduce a bill, without any temporal limitations relative to the legislative session.

A final word on Resolution No. 1/2015 — it failed to *prima facie* maintain the symbolic status of parity between all bills, by establishing an apparent differentiation depending on the type of initiative and by specifying such distinction through the use of separate subparagraphs for Members’ bills and Government bills.

5. Exceptions to the Restraints on the Renewal of Legislative Initiative

I have debated throughout the last few pages the general framework applicable to the inhibition of renewing legislative initiatives, formerly indistinguishable with respect to an initiative’s internal or external origin, nowadays differentiating according to the initiative’s provenance. An exception to this rule of inhibiting the renewal of legislative initiative has been admitted by legal scholarship⁶³⁴ — notwithstanding the silence of the law and the Rules of Procedure — in the very special and understandable case of the budget law and other laws essential for the necessary functioning of the MSAR in certain financial matters, such as laws on MSAR sureties, guarantees and loans.

Indeed, it is perfectly understandable that, if a budget bill *fails* to be approved, it may — or should — be renewed, regardless of the constraints of the ongoing legislative session.

I also referred to the issue of Article 52, subparagraph (2) of the Basic Law, both in terms of budgetary laws and in terms of laws deemed to affect the overall interests of

⁶³⁴ It is accepted that certain matters, “because of the variability of circumstances and the extreme relevance of financial matters for the functioning of the State”: are outside the scope of the prohibition of renewing a bill: Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 284.

the MSAR.⁶³⁵

6. Lapse of Legislative Initiatives

In the context of the renewal of the initiative, although what is really at stake is the lapse thereof,⁶³⁶ I should mention the rules laid down in Article 109, paragraph (2) of the Rules of Procedure:

“Bills not voted on during the legislative session in which they were introduced do not require renewal in the subsequent legislative sessions, unless the legislature reaches its term, the Legislative Assembly is dissolved and, with respect to Government bills, the Chief Executive renounces to, or is removal from, his or office.”

First rule, there is no need to renew an initiative until the term of a legislature. If a bill is introduced, it remains valid until the end of the legislature.⁶³⁷ This extension of effectiveness extends throughout the legislature, thus it may include up to three legislative sessions, provided that they belong to the same legislature. This is different to that in Portugal, for example, an extension of up to a single legislative session is allowed.⁶³⁸

Second rule, the legislative initiatives lapse, following the same framework for all bills, when the legislature ends and when the Legislative Assembly is dissolved. For Government bills, a special exclusive framework applies — such bills lapse in case the Chief Executive renounces⁶³⁹ to, or is removed from, his or her office.⁶⁴⁰

Such rule is important, insofar as the consequences for the legislative process of major events, such as the dissolution of parliament or the removal from office of the Chief Executive, are omitted in the Basic Law.

Are there other cases of lapse of a legislative initiative? For example, what if the Chief Executive resigns?⁶⁴¹ Or, in the most normal situations, when has his or her term of office elapsed?⁶⁴² Or if a new Chief Executive is selected due to the vacancy of the

⁶³⁵ Note that, in the Basic Law of Hong Kong, the corresponding Article 50 only refers to “*other important bill introduced by the government*”. About this Article and its possible implications for parliament as a rubber stamp, under the power of the Chief Executive, Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 248–249.

⁶³⁶ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 286.

⁶³⁷ With the start of a new legislature, it is always necessary to renew any initiative that may have lapsed. The political legitimacy of the Assembly is altered, Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 445.

⁶³⁸ Article 167, paragraph (5), of the Portuguese Constitution: “Bills and referenda proposals not voted on in the legislative session during which they were introduced do not require renewal during the subsequent legislative session, unless the legislature reaches its term.”

⁶³⁹ See the cases under Article 54 of the Basic Law.

⁶⁴⁰ See Article 15 and, in my view, Article 71, paragraph (7), first part, of the Basic Law.

⁶⁴¹ See Article 71, paragraph (7) of the Basic Law.

⁶⁴² Article 48 of the Basic Law. The continuation of the same officeholder or his or her replacement by a new holder can be verified, for example, at the end of two terms in office.

office?⁶⁴³ Does it make sense that Government bills shall likewise automatically and immediately lapse under these scenarios? Or should the new leader of the MSAR remain bound to legislative proposals made by his or her predecessor? This does seem to be a reasonable solution, so I would argue for a possible analogical application to such cases of the procedurally established framework; additionally, such normative body of political legitimacy changes in all the explored examples and not only in the cases expressly regulated in the Rules.⁶⁴⁴

Turning to another angle of approach, if a Member, proponent of a given bill, renounces to his or her mandate, under the terms of Article 18 of the Legal Status of the Members, does it make sense to also apply thereto Article 109, paragraph (2) of the Rules of Procedure? And in the case of a Member's disqualification? And ditto in the event of incapacity (not mere temporary inability) to exercise one's mandate? In these situations, regulated under Articles 19 and 20 of the Legal Status of the Members, should the affected Member's bills also lapse?

Whenever a Member's mandate ceases, should his or her bills automatically and immediately lapse, by simple analogy with the framework applicable to Government bills?⁶⁴⁵

My answer is affirmative.

7. Cancellation and Adoption of Initiatives: Referral

There are two other aspects to consider: the cancellation of the initiative and the adoption of the initiative.⁶⁴⁶ Both shall be analysed later, *apropos* the in-depth study of the common legislative procedure.

⁶⁴³ Article 55, second paragraph of the Basic Law.

⁶⁴⁴ The Rules of Procedure should also take into account changes in the holder of the office of Chief Executive, or the formation of a new Government, outside the cases of renunciation, resignation or removal from office, during a legislature. Such cases would also cause, as a rule, the lapse of the bills introduced by the previous Chief Executive and by the previous Government. Or, at least, the new Chief Executive and the new Government would be required to formalise a will/intent to maintain a legislative initiative pending in the Legislative Assembly, thus signalling the desire for it run its course. The idea is to exercise governmental powers and policy unbounded by the options of the former Executive; if such will/intent is not formally demonstrated, the bills should lapse.

⁶⁴⁵ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 286.

⁶⁴⁶ Devoid of convincing reasons, the concept of adopting an initiative was expunged from the procedural normative fabric and killed off by Resolution No. 2/2017, which amended the Rules of Procedure of the Legislative Assembly.

PART 4

LEGISLATIVE PROCESSES

XIII.

THE COMMON LEGISLATIVE PROCESS — INTRODUCTION AND STAGES

1. Introduction

Chapter I of Title IV of the Rules of Procedure is entitled “Legislative Processes” and Section I thereof “Common Legislative Process”. This procedural designation is erroneous as it gives the appearance that at least two legislative processes exist: one common and, *de minimis*, a special one.

Such plurality does not currently occur in our procedural framework. There is only one end-result, one final act, in a single form: the Law of the Legislative Assembly.

Indeed, there is no other procedure, no set of special elements added to the existing procedure, and no other forms of law.

In the legal framework previously in force,⁶⁴⁷ there indeed was a group of special legislative processes alongside the common one, and thus catalogued, which were those relating to the Organic Statute of Macau, legislative authorisations, and the ratification of decree-laws. This resembles the situation in Portugal, where special legislative procedures coexist with the common procedure. Sometimes, these special legislative procedures are characterised by a plurality in their object, predicated upon adopting additional procedures, either of a qualified/aggravating nature or with special lawmaking features.⁶⁴⁸

A natural question is whether the so-called urgent legislative process is a special procedure or an abbreviated one.⁶⁴⁹ My answer is negative.⁶⁵⁰

The urgency process is viewed *vis-à-vis* the common process, not in tandem with the binomial relationship between special and common processes, as pointed out by JORGE BACELAR GOUVEIA.⁶⁵¹ The urgency process does not have a special nature,

⁶⁴⁷ For a summary of the legislative procedure in force in the Territory of Macau, including the procedure relating to the Governor in the exercise of the legislative function, Jorge Costa Oliveira and Jessica Leão and Paulo Cardinal and more, ‘An Outline of the Macau Legal System’ (1993) 23 HKLJ 371. Taking advantage of the opportunity, for a synthesis of the legislative procedure in the HKSAR, Yash Ghai, *Hong Kong’s New Constitutional Order* (Hong Kong University Press 1999), *passim*, especially 359.

⁶⁴⁸ Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 439–440.

⁶⁴⁹ Agreeing with it, I believe, Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2015) 439.

⁶⁵⁰ Besides, see the systematic placing within the Rules of Procedure.

⁶⁵¹ Jorge Bacelar Gouveia, *Manual Direito Constitucional*, vol II (7th edn, Almedina 2021) 1282.

does not incorporate aggravating elements, nor is it intended to create a special category of legislative act. Rather, it streamlines the normal course of a procedure in the event of a relevant need or in times of crisis.⁶⁵² In fact, the systematic placing of the urgency process in the Rules concurs with the idea that it is not a special process *per se*.

2. The Stages of the Common Legislative Procedure

When studying the legislative procedure, it is normal to present a phase-by-phase, or stage-by-stage, outline or scheme, wherein the various moments and steps of the lawmaking route are inserted. This method of presenting the procedure facilitates a better and more immediate understanding of the winding and complex stages that lead to the final destination, the law.

As JORGE MIRANDA explains,

“The legislative process or procedure, by its very nature, has a temporal dimension, therefore the acts into which it unfolds shall be situated in relation to each other at different moments; it becomes appropriate and convenient to group the acts, which are closer and more inter-connected, in relatively homogeneous phases, identified by specific functions.”⁶⁵³

The problem is that dissent is rife in legal scholarship, even in view of specific legislative procedures. There are experts who identify three phases, or five, or four, and of course, comprising different designations and contents. In any event, here are some examples, namely one specifically targeted at Macau.

For instance, one hears of the following phases or stages:

By reference to **Portugal**:⁶⁵⁴

- **Initiative** — the moment when the creation of the legislative act begins its journey; it may be an internal and external initiative, reserved or shared, original or supervening;
- **Examination** — led by a specialised committee and comprising acts and procedures such as hearings, negotiation and public discussion, for the purposes of an in-depth assessment of the specifics of a legislative initiative;
- **Deliberation** — the most relevant moment in the entire legislative procedure, being the constitutive and voting phase; it includes several sub-moments, such as the various approvals, for example, in general, and on the specifics, as well as

⁶⁵² *ibid.*

⁶⁵³ *Direito Constitucional V*, 262.

⁶⁵⁴ Jorge Bacelar Gouveia, *Manual Direito Constitucional*, vol II (7th edn, Almedina 2021) 1283 et seq. See also, *inter alia*, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAF DL EDITORA 2015) 250 et seq.

promulgation and ministerial ratification, endorsement or countersignature;

- **Effectiveness** — corresponding to the entry into force of the legislative act, including the need to give the diploma the appropriate publicity, which is achieved through publication in the official journal or bulletin of the State.

Or, in another example, relative to **Macau**:⁶⁵⁵

- **Preparation** — including the legislative initiative and examination phases;
- **Main constitutive** — encompassing the debates and the voting phases, both on the whole and on the specifics;
- **Control (still with a constitutive value)** — comprising the signature of the Chief Executive and, in the case of refusal, the veto;
- **Integrative (of effectiveness)** — the publication in the OG and the reporting for the record to the Standing Committee of the National People's Congress.

For a broader comparative context, I shall mention yet another example, from the **Italian** legal order:⁶⁵⁶

- **Initiative** — the legislative initiative and the definition of its various entities empowered to exercise such power;
- **Examination** — taking place within a specialised committee, the specific role thereof varying according to the different types of legislative procedure;
- **Deliberation** — which develops differently depending on the different types of procedure;
- **Promulgation** — the competence of the Head of State;
- **Publication** — in the official journal or bulletin.

I could also try to make a brief tour through the legislative procedure in Hong

⁶⁵⁵ João Albuquerque, ‘*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*’ (unpublished and archived with the Author, 2013) 188 et seq.

⁶⁵⁶ Augusto Barbera and Carlo Fusaro, *Corso di Diritto Costituzionale* (Il Mulino 2012) 339 et seq. In reference to the Spanish legal order, J. Alonso Antonio and A. Alonso Antonio, *Derecho Constitucional Español* (Editorial Universitas, S.A. 2015) 559 et seq using a different terminology, preferring the expression “stages” to that of “phases”: the prior stage; the decision-making stage; and the perfection stage.

Kong, its various phases, *the journey of a bill*,⁶⁵⁷ including the informal pre-consultation stage between the Administration and Parliament, as a matter of practice and common sense, and the various *readings*, but I do not have the required time, nor space, to pursue such an undertaking in a *comprehensive* manner.⁶⁵⁸

Similarly with respect to the legislative procedure adopted in mainland China, I shall be unable to plunge here into its *Legislation Law*,⁶⁵⁹ or to discuss the original impact of such legal enactment in promoting the idea of the *rule of law*.⁶⁶⁰

⁶⁵⁷ Margaret Ng, 'The Legislature' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 294.

⁶⁵⁸ For a good summary, Margaret Ng, 'The Legislature' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 292 et seq.

⁶⁵⁹ See, with many references and a contextualisation, Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers 2008) 229 et seq.

⁶⁶⁰ Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff Publishers 2008) 237.

XIV.

THE COMMON LEGISLATIVE PROCESS — THE STAGES OF THE LEGISLATIVE PROCEDURE IN MACAU’S PARLIAMENTARY LAW

It is paramount to keep in mind the specific — and atypical — legislative procedure in the MSAR.

Although there might be natural approximations or adjustments in the procedural phases, or in other phases as classified by different authors, the truth is that, in the case of the MSAR, the option of placing the voting in general — a typically constitutive moment — before the appraisal in committee — a clearly examining moment — which, in turn, emerges “sandwiched” between voting in general and voting on the specifics (both are constitutive moments), makes such grouping of acts or moments difficult or useless, as the very notion of a group or set entails homogeneity and a proximity of acts.⁶⁶¹

I shall therefore undertake a guided tour of the different moments of the legislative procedure of the MSAR,⁶⁶² without pit-stops to assemble such moments into groupings. The provisions hereinafter invoked, without further reference, shall pertain to the Rules of Procedure of the Legislative Assembly.

1. On the Legislative Initiative

This is the first step in the legislative procedure: its impetus.⁶⁶³

To avoid being overly repetitive, in view of what I have already written above, I shall only recapitulate by way of replicating the applicable norms.

The initiative of the law belongs to the Members and the Government of the MSAR, without prejudice to the provisions of Articles 104 and 105. The original legislative initiative takes the form of a Member’s bill, when exercised by the Members;

⁶⁶¹ This is why I disagree with the grouping Preparatory phase (legislative initiative and examination)/Main constitutive phase (debate and voting), since the examination stage, if I am seeing correctly, interposes itself between two moments of the constitutive phase, ie the voting in general and the voting on the specifics.

⁶⁶² For an overview, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 480 et seq; João Albuquerque, ‘*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*’ (unpublished and archived with the Author, 2013) 187 et seq.

⁶⁶³ Legislative initiative is not to be confused with lawmaking impetus. See, for example, Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268 et seq. A few considerations on this issue shall be made below.

and a Government bill, when exercised by the Government. The supervening legislative initiative reserved for intra-parliamentary actors (Members and committees) takes the form of an amendment proposal, pursuant to Article 106.

Members' initiatives may be introduced by a single Member, or collectively, by a maximum of nine Members.

Government initiatives shall be signed by the Chief Executive and shall mention that the MSAR Executive Council has been consulted thereon — thus, there is a formal *ex ante* moment *vis-à-vis* the legislative procedure itself. In a broader sense, and only in the case of Government bills, the legislative procedure may not be triggered with the introduction of the initiative to the Legislative Assembly, but only after consultation with the Executive Council.

There are initiatives in a vast shared area (most cases), conditioned initiatives (Article 105), initiatives reserved to the Government (Article 104, complemented by provisions of the Basic Law), as well as initiatives reserved to Members (notwithstanding the latter's omission in the Rules, such reserved initiatives result from the structuring principles of the political system and are confirmed by the praxis). There is also a temporal limit to legislative initiatives, reflected in the renewability (or not) thereof.

At this juncture, I shall not discuss the supervening legislative initiatives, as their relevance comes at a later moment.

Next, the President of the Legislative Assembly exercises his or her duty as the guardian or gatekeeper of constitutionality and legality. Having received a bill, he or she decides on the acceptance or rejection thereof — based on the substantive, organic and formal limits⁶⁶⁴ established in the Rules of Procedure, but also, and necessarily, on the indispensable issue of constitutional conformity.⁶⁶⁵ He or she may not decide on the opportunity or political convenience of a bill. The Presidents's decision is subject to notification to all Members, who also receive a copy of the (accepted) bill, with a deadline for appraisal thereof, pursuant to Article 111.

In the meantime, an informal moment of technical assistance may occur, consisting of a prior assessment conducted by an adviser or an advisory team, to screen the bill's conformity with the Basic Law, with the Rules of Procedure and with Law No. 13/2009.

The President's decision to reject, accept or order the reform of a bill is appealable to the Plenary, under the terms of Article 111. The legislative procedure shall terminate here, in case the rejection is confirmed and thus rendered definitive.

⁶⁶⁴ “(a) Be introduced in writing; (b) Be drafted in Articles; [...] (c) Contain a designation that succinctly identifies its main object; (d) Be accompanied by an explanatory note.”: Article 108.

⁶⁶⁵ The Rules omit, as detected above, a general norm on the rejection of a bill in non-conformity with the Basic Law (including, I would venture to say, the Joint Declaration and maybe the international treaties, de minimis the ones provided for in Article 40 of the Basic Law).

1.1 Cancellation

The aforementioned Resolution No. 2/2017 introduced significant modifications in this matter. Henceforth: “*The proponents of a bill may withdraw it until the debate on the specifics thereof begins.*”

The Explanatory Note of this Draft resolution to amend the Rules of Procedure of the Legislative Assembly reads as follows:

“The current rule in paragraph (1) of this Article allows legislative initiatives to be withdrawn until the end of the general debate, in the case of original initiatives, or until the end of voting on the specifics, in the case of supervening initiatives. It appears, however, that for various reasons, its has been necessary to withdraw some legislative initiatives after its approval in general;⁶⁶⁶ therefore, this norm has to be amended in accordance with the Legislative Assembly’s operating practice. Thus, several Members suggested that such rule be changed insofar as to enshrine the following: any bill may be withdrawn by its proponents until the final stage of its appraisal, ie until the beginning of the debate on the bill’s specifics. The Committee considers that, in this matter, the primacy of will/intent of the proponent (Members and Government) should be respected, which explains the suggested amendment to the norm, in harmony with the opinions received in the two hearings carried out by the Committee.”

The legislative procedure may terminate at this stage (or in the immediately following one), ie also in the event of acceptance of a bill. Before, such an eventuality depended on the respective proponents — and only these actors, naturally — withdrawing such bills until the end of the general debate.⁶⁶⁷ Nowadays, such an outcome has been deferred until the beginning of the debate on the specifics. In any case, a proponent has

⁶⁶⁶ This formal text of the Legislative Assembly alleges “that, for several reasons, there has been already a need to withdraw some legislative initiatives after their approval on the whole”: after accepting what was obvious under the then applicable framework, ie that original legislative initiatives could only be withdrawn until the end of the general debate — why did the Committee not draw the logical conclusions and, instead, muddle the waters? It is one thing to amend and adapt the Rules to a sustained praxis; a wholly different matter is a praxis that was (repeatedly) violating applicable procedural norms, thus generating an obvious non-conformity with the Rules — by means of invalidating deficiencies or mere irregularities. This was the adopted practice at times: a disagreement with the Rules resulted in an amendment thereto, without pondering the negative conclusions to be reached, nor signalling the practices to be avoided. Could this sanitised approach open the gates for non-compliance with the Rules?

⁶⁶⁷ Article 110, paragraph (1). This was the last moment when such could happen. The withdrawal until the end of the debate on the specifics, a *later moment* in the legislative procedure, applied only to amendment proposals, as is clear from the procedural norm. In other words, this is a properly integrated situation and should not raise any interpretative doubts. With a different conclusion, and of doubtful compliance with the above, see Deliberation No. 5/2009/Board, available at <https://www.al.gov.mo/uploads/attachment/diarioTwo34/918375862082078a2a.pdf>, in which it is argued that there is an “omitted case” requiring such gap to be filled; also, that a bill may still be withdrawn until the end of voting on the specifics by the plenary. I would like to bring forth the above note regarding the amendment introduced by the 2017 Amendment to the Rules of Procedure: this new framework has, at least, the merit of duly regulating the behaviour or practice already set in motion, which were hitherto of dubious procedural conformity.

the power to cancel his or her legislative initiative.⁶⁶⁸

One must underline that there are deadlines and exclusionary moments for the exercise of this prerogative, as a factor that both asserts the principle of the separation of powers, and also expresses the Legislative Assembly as the (formal) preserve of the legislative procedure from a certain procedural moment onwards.⁶⁶⁹ After the general debate concluded, under the previous procedural framework, and until the beginning of the debate on the specifics, under the current framework, the proponent of a bill is “dispossessed” thereof. Its fate is now entrusted to the Plenary of the Legislative Assembly.⁶⁷⁰

With the cancellation of an initiative (as well as, for example, the renewal thereof), the rationale is identical and without distinction as to the proponents, be it the Government or the Members, ie all bills are treated under the same rules, with equal dignity. Such is the procedural framework, which is neither lacunose, nor doubtful.

From that moment onwards, the Legislative Assembly, as a body, has the preserve of the process, removing the initiatives from the proponent Members or Government. The focus swings — a natural and common feature in comparative law — from the entities competent to exercise legislative initiative, to the competent legislative body, ie the lawmaking entity with the power to approve the initiative.

The procedural framework underwent modifications under the 2017 review of the Rules, as alluded to above. One other change was the suppression of the possibility to adopt an initiative, as I shall demonstrate in a while.

In cases of mandatory legislative initiatives, such as the budget bill, the cancellation of the initiative should not be considered acceptable.

1.2 Adoption of an Initiative

This traditional mechanism was expelled from the Rules by the 2017 review. However, it’s worth mentioning for several reasons: its significance, the efficiency and rationality it brought to the legislative procedure, its alignment with a vision of the legislative procedure that stressed the switch of domain or the preserve of the process after the introduction of initiatives, and finally, the potential consideration for its future reinsertion into the Rules, as should reasonably be envisaged.

Proceeding with the analysis of the framework applied in the MSAR for nearly

⁶⁶⁸ An amendment proposal (modification, substitution, addendum, suppression) that is accepted may also be withdrawn by the respective proponent until the end of the debate on the specifics.

⁶⁶⁹ Until such moment, the holder of the specific legislative initiative has the capacity to “*freely dispose of the text*”: as stated by Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 641. Afterwards — a moment that is variable in comparative law — “*Once this fact has occurred [...] there is volition in the House and withdrawal is no longer possible*.”: *ibid*.

⁶⁷⁰ Without prejudice to the admissible exceptional cases of veto and the framework provided for in Article 17 of the Basic Law for returning the law by the Standing Committee of the National People’s Congress.

two decades: a legislative procedure could survive, even against the will/intent of its proponents, be these Members or the Government, “*If another Member adopts, as his or her own, any and all bills intended to be withdrawn, the initiative shall continue as the bill or bills of the adopting Member*”, Article 110, paragraph (2) — ie the adoption of an initiative.

The power to cancel a legislative initiative was curtailed⁶⁷¹ by the possibility of adoption. The reasons for the latter were the efficiency and rationalisation of parliamentary work, by being able to conserve others’ initiatives — “if this initiative by substitution were not admissible, the other holders of the power of initiative could always introduce a bill with the same content as the withdrawn one; such an event would, in principle, lead to a useless repetition of the procedural phases already undergone.”⁶⁷²

A complex question is whether the adoption of an initiative in matters reserved to the Government’s legislative initiative is acceptable. That a Member could, in general, adopt a legislative initiative by the Government was clearly established in the Rules — *adopts, as his or her own, any and all bills*. The problem will only surface if the Government bill regulates matters within the scope of its reserved original legislative initiative,⁶⁷³ for example, on the political structure. I am convinced, *de minimis* by the literal or textual element of interpretation of the procedural norm — *any and all bills* — that the legal order of Macau does not impede the acceptance of adopted bills, even in such cases of reserved legislative initiative. The grounds for exercising such reserved initiative, the political reasons, the issue of timeliness, etc, shall already have blurred since the original bill was introduced to the Legislative Assembly.

The Explanatory Note of the Draft resolution to amend the Rules of Procedure of the Legislative Assembly, 2017, simply refers to this subject thusly: “The repeal of paragraph (2) of this Article was deliberated, since the adoption, by other Members, of a withdrawn legislative initiative, does not correspond to the legislative practice of the Legislative Assembly.” Nothing else was mentioned.

Such norm was not inapplicable through lapse thereof: it performed a traditional function (at least potentially), it was intended to boost the efficiency and rationality of the legislative procedure — such function reinforced with the advancing of the permissible moment for cancellation of the initiative, as operated by the same review of the Rules, ie bills already approved in general and with examination concluded in committee, may be withdrawn — and, finally, there are many procedural norms, which, being of little or no practical utility, have not been — nor should they be — suppressed. For example, norms designed for exceptional or special situations, as is precisely the case of adopting a

⁶⁷¹ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 98.

⁶⁷² *ibid.*

⁶⁷³ Not agreeing with adoption in matters of reserved original legislative initiative, Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 98, mentioning a frustration of such reserved initiative.

legislative initiative.

2. On the General Debate

At this phase, but not only herein, the principle of prior knowledge of the texts comes into full effect: “No documents, including bills, reports, advisory opinions and memoranda of the committees, may be debated or voted on, either on the whole, or on the specifics, without having previously been published in the Legislative Assembly Bulletin or distributed to the Members, at least five days in advance.”, according to Article 112.

Resolution No. 2/2017 amended this norm, by establishing: “2. The preceding paragraph shall not apply to: a) Documents relating to urgent meetings, which are distributed with the respective written summons;”.⁶⁷⁴

The general debate focuses on the principles and the system of each bill, as well as its opportunity from the political, social and economic points of view.

The general debate is divided into two phases.

In the first phase, the first proponent or signatory, in the case of Members’ bills, or a Government representative, in the case of Government bills, takes the floor to address the Plenary. In accordance with Resolution No. 1/2015, which amended the Rules of Procedure of the Legislative Assembly, Article 60 (Right to take the floor for presenting bills and proposals) was replaced by the following text: “*The right to take the floor for the purpose of presenting bills is limited to the brief indication of the object thereof and may not exceed twenty minutes.*”,⁶⁷⁵ followed by the clarifications that may be requested from the addressors.

The second phase, which may take place during a different plenary meeting, is exclusively dedicated to the debate, and the Plenary may deliberate that such debate be narrowed down to divisions of a bill, whenever such autonomy is justified.

The debate ends when there are no more scheduled speakers, and after the debate

⁶⁷⁴ In the respective Explanatory Note, one may read: “In view of the regulation of urgent Plenary meetings and the issuance of votes, there is a need to change this Article, in order to provide that documents related to these two matters shall not abide by the five-day advance deadline applicable for the remaining documents to be debated and voted on at the plenary meetings.” In effect, as referred to in the same document, “The Basic Law, in Article 74, paragraph (5) stipulates that “the President of the Legislative Assembly is competent to call urgent meetings on his or her own initiative or at the request of the Chief Executive”. However, the Rules of Procedure do not specifically regulate these meetings, namely the deadline for calling them and the respective distribution of documents. Following up on the opinions expressed in the consultation carried out during the current legislative session, the Committee is now proposing a period of 24 hours for summoning urgent meetings, as well as for the simultaneous distribution of documents related thereto.”

⁶⁷⁵ The Explanatory Note of the draft Resolution mentions the following: “Article 60 of the Rules of Procedure makes a substantive delimitation of the issue, determining that taking the floor for this purpose should be limited to the brief indication of the object. However, there have been difficulties in its application, so several Members have sent their opinion to the Committee that a maximum time for speaking be introduced. Having debated the matter within the Committee, taking as a reference said opinions, it was possible to reach a consensus on this matter, so the Committee is now proposing 20 minutes as the maximum limit for the presentation of bills.”

is over, the voting in general takes place. The President may postpone voting to a new plenary meeting. In other words, this constitutive moment may, or may not, temporally coincide with voting in general. In practice, there have been examples of both situations.

2.1 Incidental Procedural Issue: On the Conflict of Interests

At this stage,⁶⁷⁶ an incidental procedural issue may arise due to the existence of a conflict of interests.⁶⁷⁷ In other words, the framework governing the conflict of interests, as a preventive regulatory mechanism in terms of transparency and smooth procedures, always has the potential to lead to a specific procedural incident.⁶⁷⁸

The Legal Status of the Members establishes that Members may not participate in the debate and voting on matters in relation to which they have an interest, whether pecuniary or not, provided that such interest is direct, personal and immediate.⁶⁷⁹ The existence of such interests shall be declared by Members until the beginning of the debate on the matter in question. The declaration must be in writing⁶⁸⁰ and addressed to the President of the Legislative Assembly or to the President of the committee wherein the matter is to be debated or voted on. Such a declaration is communicated to the Plenary or to the other members of the committee, whichever is applicable. In such a scenario, therefore, there is no place for deliberation on the existence of the conflict of interests — the Members recognise and declare such fact.

This framework applies indistinctly to the legislative procedure, resolutions and other procedures.

Any Member may — by stating sound reasons, but not necessarily in writing —

⁶⁷⁶ Apparently, this incident may also be actionable during the examination of the specifics in the Committee. See Article 35, paragraph (2) of Law No. 3/2000, *On the Legislature and the Legal Status of the Members of the Legislative Assembly*. At least one case is known to have thus occurred. Consider the following hypothesis: during the presentation, debate and voting on the whole, the Member concerned was absent; at the first meeting of the competent committee entrusted with the examination of a bill on the specifics, the Member both belongs to said committee and is present at such meeting.

⁶⁷⁷ Law No. 3/2000, *On the Legislature and on the Legal Status of the Members of the Legislative Assembly*, Articles 34 et seq. Note that, unlike other systems, there is no broad set of guarantees accompanied by impediments. As a matter of fact, it has already been mentioned that the legal framework of the conflict of interests is still insufficiently addressed, Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 403. There is also no provision for an Ethics Committee, nor for registration or deposit of Members' interests with the regional Parliament. In Hong Kong, the registration of interests is regulated under Article 83, *Registration of Interests, Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended to 31 October 2014)*.

⁶⁷⁸ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 407. However, in cases of possible or potential conflict of interest, its activation should occur even if there is a mere appearance of such conflict, as the author emphasises, on page 408.

⁶⁷⁹ Article 34, paragraph (1), further adding, in paragraph (2): "For the purposes of the preceding paragraph, also included are interests of the same nature held by persons who have family or kinship relationships with Members." I shall not develop the complex concept of direct, personal and immediate interest.

⁶⁸⁰ I believe that, if it proves de facto impossible to declare, in writing, with any anticipation (for example, an issue raised unexpectedly) and a plenary (or committee) meeting is taking place, the conflict of interest may (and should) be declared verbally, with the principle of orality of the plenary (or committee) prevailing.

invoke⁶⁸¹ the existence of the interest *vis-à-vis* another Member, without prejudice to the latter's own declaration.

In this situation — and unlike what happens in the event of a declaration, which does not require deliberation — the Plenary or the committee, whichever applicable,⁶⁸² shall deliberate on the existence of the invoked interests, provided that no declaration to that effect is forthcoming from the Member potentially in a situation of conflict of interests. The Member concerned must be heard on the Colleague's allegations, in order not only to objectively assess the existence of the invoked interest, but also to ensure the right to an adversarial defence and the protection of his or her honour.⁶⁸³

The formal recognition of a conflict of interest does not preclude the right of the Member, or Members, to attend plenary or committee meetings, nor the right to provide requested information and clarifications. The declaration or deliberation, in the sense that the interest under Article 34, paragraph (1) of the Legal Status of the Members, does, if in fact, exist, has the effect of preventing the concerned Member(s) from addressing the issue and from exercising the right to vote thereon.⁶⁸⁴

The willful failure to declare the existence of a conflicting interest by Members, until the beginning of the debate of the matter in question, is censured by the Plenary or by the committee, whichever applicable, with the issuance of a vote to that effect, which is published in the OG.⁶⁸⁵ There are no other legally applicable penalties, namely disciplinary ones.

This is what the current law establishes. For reasons that are easily understandable, such as transparency and ethics in the conduct of public affairs, a procedural incident is opened, reflected, albeit timidly, in the normal course of the legislative procedure, especially by preventing the exercise of the right to vote. Such right would have been harmed or contaminated due to interests alien to the exercise of the parliamentary function, thus being able to illegitimately distort the true exercise of the function for which the Member was elected or appointed.⁶⁸⁶ In other words, the idea is to “reinforce the guarantee of neutrality, impartiality and independence in the exercise of

⁶⁸¹ Which is understandable. Think of a situation whereby a Member is made cognisant of a possible conflict of interest affecting another Member. It makes no sense to compel the former to write (and translate?) such invocation as the Assembly's work proceeds.

⁶⁸² Therefore, under the current procedural norms, the *decision* on the existence of a conflict of interest affecting Member Mr. Sou Ka Hou, taken by an act of the Board, defies comprehension.

⁶⁸³ Only thus will the *due process* be respected, allowing for the Member concerned to formally defend him or herself, in a procedurally established manner, before the competent body.

⁶⁸⁴ Under Article 36, paragraph (2): “Failure to exercise the right to vote, under the terms of the preceding paragraph, does not count as an abstention.”

⁶⁸⁵ Article 37 of the Legal Status of the Members.

⁶⁸⁶ “All Members, whether elected or appointed, represent the interests of the Macau Special Administrative Region, [...] and of the respective population”: Article 7, paragraph (2) of Law No. 3/2000, On the Legislature and the Legal Status of the Members of the Legislative Assembly.

the Member's mandate."⁶⁸⁷

A comparative law note on a pair of systems: Portugal and Hong Kong.

In Portugal, Members must declare a conflict of interest when they introduce a bill or intervene in any parliamentary work, whether in committee or in the Plenary. To this end, situations of conflict of interest are considered to be those in which Members *per se* or certain family members are the legal holders of rights or parties to transactions the existence, validity or effects of which may be modified as a direct consequence of the law intended to be approved; also included are situations where Members belong to corporate bodies or are representatives, proxies, employees or permanent collaborators of partnerships, companies or legal persons with a disinterested purpose, the situation of which may, directly or indirectly, be modified by the law to be approved by the Assembly of the Republic.

In the neighbouring HKSAR, LegCo Members may not vote on any matter in which they have a direct monetary interest, unless such interest is common to the rest of the population of Hong Kong, to a certain sector, or the matter in question is related to a Government policy.⁶⁸⁸

“Underlying the conflict of interest issue is tension or, better still, the conflict between the protection of the public interest (as a general interest), on the one hand, and the fundamental rights of property, of private initiative and passive suffrage, on the other. Truly, values such as equality and competitive pluralism are also at stake.”⁶⁸⁹

Consequently, in addition to moral and ethical boundaries, politico-institutional⁶⁹⁰ and legal criteria, values and objectives are, inevitably, at the forefront of this theme.

This mechanism of guarantee and political marketing (in the sense that it places Members who declare conflicts of interests on the pedestal of probity, transparency and righteousness — “*when in doubt, I favour the public interest*”) serves to increase and

⁶⁸⁷ Cristina Máximo dos Santos, *Incompatibilidades e impedimentos dos Deputados à Assembleia da República e às Assembleias Legislativas Regionais dos Açores e da Madeira* (Coimbra Editora 2007) 897.

⁶⁸⁸ Cf “84. Voting or Withdrawal in case of Direct Pecuniary Interest (1) In the Council or any committee or subcommittee, a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy. (1A) In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.”: Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended on 31 October 2014).”

⁶⁸⁹ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 401.

⁶⁹⁰ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 404.

guard neutrality, impartiality and independence in the exercise of a Member's mandate.⁶⁹¹

The maxim is to exclude a Member's participation in, and voting on, issues wherein, or from which, a personal benefit — or pertaining to someone close to him or her — namely pecuniary, or a conflicting extra-parliamentary issue, may arise.

Differently, a Member is not excluded from *benefitting from the duties of his or her office*, because he or she is acting solely *as such* and as a representative of public interests.

For example, a Member may, of course, vote for himself, in any *intra-parliamentary* election, whether in a plenary meeting or in committee.

Naturally too, any parliamentarian may exercise his or her procedural right to defend one's own honour and dignity — as a Member, I should point out.⁶⁹²

Similarly, the challenges for redress and appeals, namely in Article 91 (Internal appellate proceedings),⁶⁹³ could not be adequately understood, when the matter in hand impacts the exercise of a Member's functions. If, for example, a Member challenges the rejection of a bill, will he or she also be in a situation of conflict of interest? (The bill was introduced by that very same Member and not by another Colleague.) Or a challenge to a rejection of an amendment proposal? I surmise that, evidently, it would be absurd to claim a conflict of interests in these situations.

Finally, a Member may also take the floor and address parliament to lodge a protest, as provided for in the Rules,⁶⁹⁴ when the issue in hand is precisely the exercise of the mandate.

⁶⁹¹ Cristina Máximo dos Santos, *Incompatibilidades e impedimentos dos Deputados à Assembleia da República e às Assembleias Legislativas Regionais dos Açores e da Madeira* (Coimbra Editora 2007) 897.

⁶⁹² See Article 64 (Explanations): "Any Member may address to request explanations for the purpose of defending his or her honour and dignity."

⁶⁹³ "1. The acts by the President and the Members of the Board, enacted in the exercise of the powers provided for in the present Rules of Procedure, are subject to challenge for redress thereto and to appeal to the Board. 2. The Board's deliberations, in the exercise of the powers provided for in the present Rules of Procedure, are subject to challenge for redress thereto and to appeal to the Plenary."

⁶⁹⁴ On protests, under the procedural framework, see Report No 1/VI/2019, of the CRPMM. I should start off by stating my disagreement, on several points, with the content of said Report. The Committee — a specialised one, in these matters — admitted, in accordance with plainly evident factuality, that, since there is no provision for the publication of written protests in the Legislative Assembly's Bulletin, there may be written protests and not only oral ones; however, such protests, in a tortuous interpretation, would only be admissible if and when, at the end of the plenary meeting, it had not been possible to present them orally(!). The same Report accepts the existence of counter-protests, despite the complete silence thereon in the Rules. So: where there is an express provision on written protests, the committee interprets this power in a highly restrictive way, whereas here, despite being absent from the normative provisions of the Rules of Procedure, the committee interprets very broadly and generously, granting such prerogative. Why such disparities in approach? Why these winding paths? Why the absence of an interpretative compass? Furthermore, I am surprised by this attitude when, in such a Report — which operates a highly restrictive interpretation by distinguishing (and re-creating) where the legislator/norm-maker did not distinguish (stating that there can only be written protests in special cases, such as the end of the plenary meeting) — furthermore candidly and rightly affirms, on another issue, "*where the legislator does not distinguish, the interpreter should not distinguish*". This is precisely the error repeated in that very same Report...

2.2 On the Conflict of Interests continued — The Praxis in a Process of Suspending a Member’s Mandate

It is beyond comprehension how the Board of the Legislative Assembly⁶⁹⁵ declared, pursuant to an unreasoned advisory opinion by the CRPMM, that a conflict of interest existed in relation to Member Sou Ka Hou *vis-à-vis* a process in which said Member was the subject of a possible suspension of his own mandate.

In these cases — of suspension of mandate and of disqualification from office — the whole dynamics of the conflict of interest framework is worthless, when the intended protective scope is the public interest, namely parliamentary representation, both with regard to the exercise of the mandate by the Member in question, and also, essentially, in relation to the Legislative Assembly as an institution.⁶⁹⁶ A contrary viewpoint would be tantamount to a gross undermining — and a possible reorientation to other types of objectives — of such framework.

This case of suspension of mandate, the only one so far in the History of MSAR and the second one in Macau, deserves some extra reflections, considering the number of legal mistakes which occurred.

2.3 The Political Act or Acts Performed in the Exercise of the Political Function — A Few Considerations

A first and unavoidable point — the decisive point in the ensuing judicial dispute — is whether the decision to suspend a Member is, in the legal order of the MSAR and the adopted legal terminology,⁶⁹⁷ a political act or an act performed in the exercise of political function. Secondly, if it is a political act, is it justiciable?⁶⁹⁸ If such an act is not, in

⁶⁹⁵ Deliberation No. 35/2017, dated 22/11/2017, in which it was determined, namely, that the Member in question was in a situation of conflict of interests, being thus prohibited from participating in the debate and voting. Furthermore, this Deliberation is illegal, because this body is devoid of competence to deliberate on conflict of interests (cf. Article 35, paragraph 4) of the Legal Status of the Members) — the Legislative Assembly, meeting in plenary is the competent decision-making body. The letter and the spirit of the law are perfectly clear, and doubt-free, and there is, obviously, no omitted case or procedural lacuna, contrary to what the Board tried to argue in self-contradicting terms. See, moreover, the Decision of the CSI in Case No. 20/2018, where the Court ruled that “*It is not for the Court to ascertain (for judicial procedural reasons) whether it (the Board) did so legitimately, or if whoever could have deliberated was the Plenary of the Legislative Assembly as the author of the decision to suspend the Member’s mandate.*” Moreover, this same Decision emphasises several irregularities or illegalities, for instance: “*The Committee, which had met twice, drew up a document which it called “Report”: not a true advisory opinion, but rather something approaching a mere narrative or descriptive report; or when, referring to the single or implicit objective of the deliberation to suspend the mandate, the following transpires: “We are not saying whether such was well or badly executed.”*”

⁶⁹⁶ As mentioned in Report No. 1/VI/2017, CRPMM, “the suspension of the mandate is relevant not only to the Member concerned, but also, and essentially, to the Legislative Assembly as an institution.”

⁶⁹⁷ Article 19, subparagraph (1) of Law No. 9/1999, *General Framework Law on the Judiciary Organisation* (GFLJO).

⁶⁹⁸ Article 19, subparagraph (1) of Law No. 9/1999: “The following are excluded from administrative, fiscal and customs jurisdiction and litigation: 1) Acts practised in the exercise of the political function and liability for

principle, justiciable, are there exceptions? In other words, may a political act that may not be, in principle, justiciable, be legally challenged, especially when the impugned act infringes upon fundamental rights?

This is not the most suitable place to comment — in detail and in depth — on such a complex issue,⁶⁹⁹ but I would like to jot down the following considerations.

The concept of a political act,⁷⁰⁰ mainly for the purposes of its immunity from judicial control, is a concept in crisis and has, therefore, been gradually reduced. Indeed, in the words of VIEIRA DE ANDRADE, “However, the concept of political act must be the object of a restrictive interpretation.”⁷⁰¹

As emphasised, “the concept of political act must be interpreted restrictively, otherwise the Rule of Law shall be frustrated, as it requires that such a category of acts be reduced to a minimum”.⁷⁰² Or, in a work related to the Law of Macau, “In no case may we say that (political) acts are outside and above the legal order.”⁷⁰³

This is the “point of arrival of a long and distressing path in the struggle against the possibility of invoking political motivations to limit the powers of control of the legality of the Administration by the administrative courts.”⁷⁰⁴

Or, in the words of another Author,

“It is thus necessary to adopt a restricted concept of political acts [...]”

On the other hand, the hypothesis of an extension of the scope of the non-justiciability of acts, which could be linked to letter of that Article 4⁷⁰⁵ has

damages emerging from such exercise, either by commission or by omission.” The function of this norm is to limit the sphere of administrative litigation, and not of any other area of competence or jurisdiction of the courts of Macau. *À propos*, Marcelo Rebelo de Sousa, *Lições de Direito administrativo*, vol I (Lex 1999) 87–88, saying that it is “immediately evident” that political acts do not pertain to administrative activity. Afonso Queiró, «Actos de Governo» e contencioso de anulação (BFDC 1969) 24–25, contends that this type of norms is “totally superfluous”: because the administrative courts would, by their very own nature, be incompetent to hear cases on political acts; other courts, however, might have such competence.

⁶⁹⁹ “The conceptualisation of so-called political acts has challenged the astuteness of public law experts, without reaching a consensual and satisfactory definition.”: Hely Lopes Meirelles, *Direito administrativo Brasileiro* (19th edn, Malheiros 1994) 609, or “The concept of political act – and in general that of political activity – has been one of the most arduous problems posed by public law theory; its breadth and importance is easily imaginable if one thinks of its repercussions on the principle of legality of state action and the very concept of the Rule of Law.”: José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 *Revista de Administración Pública* 73, 73–74.

⁷⁰⁰ A creation mainly of French law, or, more remotely, as a precedent to political acts, according to some, derived in particular from the ancient (Persian) Satraps, “*wrongly designated as tyrants, whose acts were not controlled and whose measures were cruel and unjust*”: Paula Eguizabal Cerna and Jose Humberto Aguilar and Ruben Adolfo Márquez, *El control jurisdiccional de los actos políticos* (Universidad de El Salvador 2011) 6.

⁷⁰¹ Vieira de Andrade, *A Justiça Administrativa* (Almedina 2009) 59.

⁷⁰² Diogo Freitas do Amaral, *Direito Administrativo, IV*, (Lisboa 1988) 164.

⁷⁰³ Jorge Bruxo and Luciano De Almeida, *Manual de direito processual administrativo contencioso* (IPM 2014) 24.

⁷⁰⁴ Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 186.

⁷⁰⁵ Referring to the legislation of the Portuguese legal order, very proximate in this particular question to the

to be put aside, as it would be contrary to the general evolutionary direction of administrative litigation, which clearly favours the expanding control over the acts of public authorities, [...] granting greater protection of citizens' legitimate rights and interests."⁷⁰⁶

A possible approximation to a political act, just for the purposes of a better understanding by the reading, is that of acts practiced by high organs of the State — or by the Region — in the exercise of primary political functions, which do not lead to legislative nor judicial acts. This is not a definition or notion, but only an initial conceptualisation useful for the discussion ahead.

Regarding relevant legal theory on the issue, FERNANDO ALVES CORREIA opined that political acts “represent the exercise of faculties directly conferred by the Constitution, without being subject to ordinary law”.⁷⁰⁷ According to AFONSO QUEIRÓ, “Those acts the practice of which is provided for in the Constitution, with a content that is determined or circumscribed by ordinary laws, are not political acts.”⁷⁰⁸ Alternatively in addition to acts related to foreign policy, if one prefers, and according to the same Author, the so-called “auxiliary acts of constitutional law” are acts “aimed at setting the constitution in motion and at providing for its functioning.”⁷⁰⁹

A primal criterion is erected, based on the superior normative source on which the exercise of a political act finds its fountainhead, ie the constitutional level. If one accepts the transplantation of this doctrine to the MSAR, then it would be irrefutable to deny that the act of suspending a Member has the nature of a political act, since nothing in the Basic Law even contains or hints at the suspension of the mandate.⁷¹⁰ Therefore, in this case, the act of suspension would never be a political act or an act practiced in the

aforementioned Article 19.º, paragraph (1) of the GFLJO, Article 4 of the Portuguese “counterpart” law establishes: “*Administrative and fiscal jurisdiction to adjudicate on litigation is excluded, when the object thereof is, namely, the challenging of: (a) Acts practised in exercising the political function.*”

⁷⁰⁶ Jorge De Sousa, ‘Poderes de Cognição dos Tribunais Administrativos Relativamente a Actos Praticados no Exercício da Função Política’ (2007) 3 Revista Julgar 134. Cristina Queiroz says: “*the progressive affirmation of the Rule of Law in the form of a “State of jurisdictions” entails a substantial reduction in the category of political acts as non-justiciable acts.*”: Cristina Queiroz, *Os Actos Políticos no Estado de Direito: O Problema do Controle Jurídico do Poder* (Coimbra 1990) 216. See also eg Fernando Condesso, who speaks about the “*substantive reduction of the non-justiciability (of political acts)*”: Fernando Condesso, *Lições de Direito Administrativo Geral* (2016) passim; Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 184; Alexandre Dos Santos Priess and José Everton Da Silva and Guilherme Thomé de Melo, ‘O controle jurisdicional dos atos políticos: uma força entre a tirania e a judiciocracia’ (2016) 35 Revista Da Faculdade De Direito Da UFRGS 98, et seq.

⁷⁰⁷ Fernando Alves Correia, *Justiça Constitucional* (Almedina 2016) 187. See also, *inter alia*, Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 Revista Jurídica UDABOL 83, 121.

⁷⁰⁸ Afonso Queiró, *Lições de Direito Administrativo* (Coimbra Editora 1976) 75.

⁷⁰⁹ Afonso Queiró, ‘*Actos de Governo*’ e *contencioso de anulação* (BFDC 1969) 22–24. See also Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 184–185, who highlights that “most auxiliary acts of constitutional law are practised by the President of the Republic or by the Assembly of the da Republic.”: 185.

⁷¹⁰ What is foreseen, for sure, is the disqualification from office under Article 81 of the Basic Law and, on the other hand, Article 80 does not touch on the issue of suspension. This is a creation of ordinary law.

exercise of political function, in accordance with the above adopted legal terminology, and would not benefit from the protective cloak of non-justiciability referred to in Article 19 of the General Framework Law on the Judiciary Organisation (GFLJO). A different question would be to examine which is the competent jurisdiction — the administrative one or another.

However, in view of the inherent nature of the act in question, I am not opposed to its qualification as a political act or an act practiced in the exercise of political function — this conclusion cannot, if the contradiction is to be avoided, be supported in the legal scholarship previously quoted.⁷¹¹

What I submit, without hesitation, is that any and all acts by a public power (including a political act) which conflict with or violate fundamental rights — and constitutional norms, it must be added as a matter of course — shall always be subject to judicial scrutiny. Always. Regardless of jurisdiction, competencies of courts, and types of judicial procedure or proceedings. Some remedial paths shall always be available, and in the case of Macau, the more so through a generous application of the *Principle of formal adjustment* established in Article 7 of the Code of Civil Procedure⁷¹², in order thereby to comply with the constitutional commands of the Basic Law — Articles 4, 11, 36, *inter alia*.

Exempting an act from judicial control would, among other things, be unnatural under the Rule of Law. It would constitute a reversion to other types of state organisation of past eras, at least to the French tendency, until a few decades ago, of an exaggerated protection of governmental acts.⁷¹³

My position is in uniform alignment with the growing doctrine in several legal orders, defending the jurisdiction of the courts — at least in the strictest or *de minimis* extent that such is necessary to protect fundamental rights — even when there is, or has

⁷¹¹ Fernando Alves Correia, *Justiça Constitucional* (Almedina 2016); Afonso Queiró, *Lições de Direito Administrativo* (Coimbra Editora 1976); Afonso Queiró, «*Actos de Governo*» e *contencioso de anulação* (BFDC 1969).

⁷¹² On this principle, namely its potential and relevance see eg Armando Isaac, ‘O princípio da adequação formal: ensaio de algumas nótulas e dúvidas’ (2001) 10 Boletim da Faculdade de Direito 59, 59 et seq.

⁷¹³ An altered panorama, above all “*since the creation of the Constitutional Council and after the 2009 constitutional reforms*”: as reported, for example, by Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 Revista Jurídica UDABOL 83. On the French contribution to the maximisation of the non-justiciability of these acts, and on the respective historical context, see eg José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 Revista de Administración Pública 73, 74 et seq; Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquímides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 35 et seq.

been a norm similar to that of Article 19 of the GFLJO,^{714 715} either under principles such as the effective judicial protection, constitutionality, or simply based on the root fundamentals of the Idea of the *Rule of Law*.

As HELY LOPES MEIRELLES states,

“But, as no one can contradict the Constitution [...] it follows that no act of the Public Power shall cease to be examined by the Judicial Power, if unconstitutional or harmful to a subjective right. The simple claim that an act is political act is not enough to limit judicial control, as it shall always be necessary for the Justice Power itself to verify the nature of such act and its consequences before the individual right of the applicant.”⁷¹⁶

⁷¹⁴ A good example is the Spanish Law of 1956, the *Ley de la Jurisdicción Contencioso-Administrativa*, which, in a similar legislative technique, exempted “political acts of the government” from administrative jurisdiction. Spanish scholarship, due to the entry into force of the new constitution and the establishment of principles “*immanent to the Rule of Law*”: considered this legal norm to have been derogated by the Constitution, Eladio Escusol Barra and Jorge Pérez, *Derecho Procesal Administrativo* (1st edn, Editorial Tecnos 1995) 301. Further informing that jurisprudence also chose to consider it necessary to interpret the norm in accordance with the Constitution, stating *inter alia*, that “*The doctrine of the political act cannot be invoked as a basis for the inadmissibility of administrative litigation, since the judge will be obliged to become acquainted with the act in order to determine if there are regulated contents of the act which may be justiciable*”: page 302. See also Eduardo García de Enterría and Tomás Ramón Fernández, *Curso de Derecho Administrativo*, vol II (CIVITAS 2004) 612–13, pointing to the derogation of such norm with the entry into force of the 1978 Constitution. This fundamental law provides for the following: “*Article 9: 1. Citizens and public powers are subject to the Constitution and the rest of the legal order. 2. Public powers shall promote the conditions for the liberty and equality of individuals and groups to be real and effective, by removing the obstacles that prevent or hinder their complete enjoyment, thus facilitating the participation of all citizens in political, economic, cultural and social life. 3. The Constitution guarantees the principle of legality, normative hierarchy, the publicity of the norms, the non-retroactivity of unfavourable norms on punishment and of norms restrictive of individual rights, legal certainty, and the accountability and the interdiction of arbitrariness by the public powers.*”: And also Articles 24, paragraph (1), “*All persons have the right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests, without, in any case, the right to defence being denied.*”: and 103, paragraph (1): “*The Public Administration serves the general interests with objectivity and acts in accordance with the principles of effectiveness, hierarchy, decentralisation, de-concentration and co-ordination, being fully subject to the laws and to the Law.*” (the latter, capitalised, in the sense of the legal order/system *per se*). By simply reading these norms, it is not difficult to find a correspondence between them and the norms and principles of the Basic Law of Macau.

⁷¹⁵ The aforementioned 1956 law was subsequently replaced by Ley reguladora 29/1998 de la Jurisdicción Contencioso-Administrativa: “Article 2 – The courts with administrative jurisdiction shall adjudicate on cases that arise in relation to a) The judicial protection of fundamental rights and the contents regulated in, and the quantification of damages/compensation to be paid or awarded, all of which pertaining to acts of the Government and to the Councils of Government of the Autonomous Communities, whatever the nature of such acts [...].” This new law, in addition to normatively establishing in ordinary law what legal scholarship and jurisprudence had been defending since the 1978 Constitution, had a recognised catalytic effect across borders, serving as a paradigm for other legal orders and systems. For example, “In our country, and with a strong influence from Spanish law [...] we adhere to the theory that acts of government are under the control of the Courts of Justice, without prejudice to certain requirements, which are: a) a violation of fundamental rights; b) a substantive content for the act to be justiciable; c) a resulting compensation for damages.”: Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquimides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 156 et seq citing various doctrine and jurisprudence from that country.

⁷¹⁶ Hely Lopes Meirelles, *Direito administrativo Brasileiro* (19th edn, Malheiros 1994) 609. Vide ainda, por exemplo, Alexandre Dos Santos Priess and José Everton Da Silva and Guilherme Thomé de Melo, ‘O controle

On the other hand, “the possibility of pointing to an ideal content — positively demonstrated — of a separation of powers, as an acceptable reason for violating fundamental rights, is unthinkable.”⁷¹⁷ Or, using a different terminology — which, in this specific domain, equates with a wholly different set of *concepts* — WANG KAI states thus:

“we understand that the scope of state acts exempt from the scrutiny of administrative action is very reduced; in some countries, the acts of the state are not administrative acts, which is the reason why they cannot fall within the scope of the administrative action. On the other hand, the political nature of the acts, as a reason invoked to reject scrutiny via administrative action is less marked; if that reason is used, in view of the people’s right to judicial action, this will leave an impression of denial of justice.”⁷¹⁸

CARLOS BLANCO DE MORAIS alludes to an anachronistic *lacuna* and an unexplainable blank area:

“Nonetheless, there are organic-formal and temporal requirements of an objective nature that constitute constitutional impositions on political acts, being incomprehensible that their omission be non-justiciable, since their occurrence may be arbitrary and potentially create grave institutional crises”⁷¹⁹

JOSÉ FERNÁNDEZ-VALMAYOR, in a classic text, teaches:

“The immunity of certain acts (especially in the international field) is perfectly explained without a necessary reference to the theory of political acts; immunity, moreover, derived from the non-existence, in particular, of a right against those types of acts, which cannot directly affect the sphere of private rights.”

jurisdicional dos atos políticos: uma força entre a tirania e a judiciocracia’ (2016) 35 Revista Da Faculdade De Direito Da UFRGS 98, 110–11, “one may conclude that judicial control over political acts is possible, since every act practiced by the State is linked to the constitutional norm. In addition, the Judicial Power can assess any threat or violation of individual or collective rights, even if it arises from the exercise of a political act, due to the principle of non-exclusion of judicial control.” See also Marco Caldeira, *Actos Políticos, Direitos Fundamentais e Constituição* (AAFDL 2014), *passim*.

⁷¹⁷ Pedro Fernández Sánchez, *Lei e Sentença, Separação dos Poderes Legislativo e Judicial na Constituição Portuguesa*, vol II (AAFDL 2017) 789.

⁷¹⁸ Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 86.

⁷¹⁹ Carlos Blanco de Moraes, *Justiça Constitucional: Tomo I* (Coimbra Editora 2002) 530–31. See, in this context, Jorge Miranda, ‘Juizes constitucionais e Parlamentos - A experiência de Portugal’ (2019) 74 Revista do Ministério Público do Estado do Rio de Janeiro 119 “the Constitution confers jurisdiction on the Constitutional Court to judge, at the request of Members, the appeals relating to the disqualification from office and to the elections held in the Assembly of the Republic, as well as in regional legislative assemblies [art. 223, paragraph 2, subparagraph (g)]. It is progress towards strengthening the Rule of Law, which means that political acts that may affect Parliament’s democratic guarantees are subordinated to judicial control. The process is regulated in the organic law of the Court (Articles 91º-A and 102º-D). The doctrine of internal deficiencies is in crisis vis-à-vis the demands of the rule of law.” I repeat: when fundamental rights are at stake, the door to judicial protection should always be opened, regardless of the political nature of the offending act.

Underlining immediately,

“And precisely when these acts, through their application, come into direct relationship with the rights of individuals, then — as we have observed in the international arena — they will be perfectly justiciable by the common judge.”⁷²⁰

In the context of another legal order,

“Colombian constitutional jurisprudence, before and after the 1991 Constitution, has recognised the existence of political acts, namely by the President of the Republic; although it recognises a sphere of greater freedom in their issuance, such at no time represents an endorsement of arbitrariness by the Executive, since it has established clear parameters for the control of said acts.”⁷²¹

And in another,

“The other acts of political direction enacted by the Government, which generate legal effects, violating subjective rights and legitimate interests, shall be subject to legal challenge before the administrative jurisdiction, which may control the regulated content. Faced with the position of those who defended the inadmissibility of the appeals against the acts considered “of government”, by denying their administrative nature, jurisprudence — and also most of scholarship — has ended up recognising the possibility of judicially controlling said acts, just like discretionary administrative acts. The recognition of the right to effective judicial protection requires it. Consequently, the general rule is that the acts of political direction of the Government, insofar as they do not have the rank of law and generate legal effects, will be open to challenge as to their regulated content before the

⁷²⁰ José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 *Revista de Administración Pública* 73, 129–30.

⁷²¹ Andrés Pizón Manzanera, *Acto político una visión desde las Constituciones colombianas 1821-1991* (Universidad del Rosario 2014) 62. And “the other acts of political direction by the Government generating legal effects, violating subjective rights and legitimate interests, will be open to challenge at the level of administrative jurisdiction, which may control its regulated contents. Faced with the position of those who defended the inadmissibility of the appeal against acts considered “of government”: by denying their administrative nature, jurisprudence — and also most of legal scholarship — has finally recognised the possibility of such acts being justiciable, just like discretionary administrative acts. The recognition of the right to effective judicial protection requires it. Consequently, the general rule is that the acts of the political direction of the Government, insofar as they do not have the rank of law and generate legal effects, will be open to administrative litigation on their regulated content; the courts, however, may not replace the individual decision on the merits of the case. The acts of political direction of the Government, which are not legislative in nature, may be challenged in the same way as discretionary administrative acts.”: Víctor Sebastián Oneto, ‘Los actos de Gobierno en el Derecho peruano’ (2008) 1 *Ita ius esto* 142. See also, with several comparative law references, Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquímides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 35 et seq with elements of comparative law, of legal history and even pre-history, Paula Eguizabal Cerna and Jose Humberto Aguilar and Ruben Adolfo Márquez, *El control jurisdiccional de los actos políticos* (Universidad de El Salvador 2011) 1, 18 et seq.

administrative jurisdiction, which, however, may not replace the decision on the merits of the case. In other words, the acts of political direction issued by the Government, which are not legislative in nature, will be open to challenge according to the rules of discretionary administrative acts.”

The above quoted arguments are applicable to other legal orders — Portugal, Brazil, Spain, Peru, Chile, Argentina, and even France,⁷²² *inter alia* — with regards to constitutional norms and principles that firmly ground the justiciability of political acts, at least in certain cases, such as the violation of fundamental rights. I contend that they are equally applicable to the MSAR legal order.

As a matter of fact, Article 4⁷²³ of the Basic Law establishes the principle of protection and safeguarding of fundamental rights, operating as a general duty of the MSAR, and of any and all of its organs and institutions, which are commanded to protect and not violate fundamental rights — as I have been openly espousing, for many years and in various fora.⁷²⁴

On the other hand, the intertwining principle of effective judicial protection prevails in Macau — Article 36 of the Basic Law. The following words by LINO RIBEIRO, referring to this Article, is clear:

“While the first paragraph establishes a general principle of effective judicial protection, which guarantees to all citizens the judicial route to protect all subjective legal positions, the second one ensconces a special principle of effective protection, which guarantees access to administrative justice to protect legitimate rights and interests.”⁷²⁵

Dismissing any possibly remaining doubts, JOSÉ MELO ALEXANDRINO states:

“The Basic Law does not expressly refer to ‘effective judicial protection’

⁷²² Cf however, “there still exists the doctrine of exempting “acts of government” from administrative judicial control, which has traditionally created an area immune to the control of legality, albeit increasingly reduced.”: informs Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 Revista Jurídica UDABOL 83.

⁷²³ “The Macau Special Administrative Region shall safeguard, in accordance with the law, the rights and freedoms of the residents of the Macau Special Administrative Region and of other persons in the Region.”

⁷²⁴ Cf Paulo Cardinal, *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CREC-DM, 2015), *passim*.

⁷²⁵ Lino Ribeiro, ‘A justiça administrativa no contexto da Lei Básica de Macau’ (2002) 13 BFD 223, 225. In agreement with the idea that the principle of effective judicial protection is directly present in the Basic Law,, Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 135, José Cândido de Pinho, *Notas e Comentários ao Código de Processo Administrativo Contencioso*, vol 1 (CFJJ 2018) 10 et seq; Paulo Cardinal, ‘The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region’ in *Estudos de Direitos Fundamentais no contexto da JusMacau* (Fundação Rui Cunha/CREC-DM, 2015) 497–98, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013) 126 et seq; Luís Pessanha, ‘Contributo para uma tutela jurisdiccional cautelar efectiva no contencioso administrativo de Macau — por mares nunca antes navegados’ (UMAC 2008) 297 et seq; *inter alia*.

but the courts of Macau have not stopped referring to it often. [...] In accepting the developments registered at the level of international law [...] in my view, this attitude in favour of guaranteeing freedom and improving the Rule of Law makes perfect sense [...] in addition, the idea is expressly included in Article 2⁷²⁶ of the Administrative Litigation Proceedings Code.”⁷²⁷

Whenever a violation of a fundamental right is in question, it is insufficient to preclude judicial control by invoking the political nature of the harmful act. The framework outlined in Article 19 of the GFLJO comes into play, should it be regarded as an absolute negative jurisdictional limit for the courts of Macau.⁷²⁸ By virtue of the principles set out in Articles 4 and 36 of the Basic Law, allied with Article 11 (which mandates that all legislation must comply with the Basic Law), Article 19 shall be either set aside or interpreted in conformity with the Basic Law. Such a conclusion would only be rendered incorrect if the Basic Law itself, or another norm of the current constitutional order, directly excluded the justiciability of political acts, which, as is well known, is not the case at all.

Article 19 of the Basic Law excludes from the jurisdiction of the local courts only one category of acts expressly identified in the Basic Law, which are the acts of the

⁷²⁶ Establishing the following: “(Principle of effective judicial protection) To every subjective right or legally protected interest corresponds one or more procedural means aimed at the effective judicial protection thereof, including the precautionary and anticipatory procedures necessary to safeguard the usefulness of such means.” On this norm, for example, José Cândido De Pinho, *Notas e Comentários ao Código de Processo Administrativo Contencioso*, vol I (CFJJ 2018) 9 et seq.

⁷²⁷ José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 127–128. In agreement with the idea that the principle of effective judicial protection is directly present in the Basic Law, see Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 135; Paulo Cardinal, ‘The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region’ in *Estudos de Direitos Fundamentais no contexto da JusMacau* (Fundação Rui Cunha/CREDDM, 2015) 497–98; Luís Pessanha, ‘Contributo para uma tutela jurisdiccional cautelar efectiva no contencioso administrativo de Macau — por mares nunca antes navegados’ (UMAC 2008) 297 et seq.

⁷²⁸ The CSI ruled on the “incompetence of the Macau Courts to accept the case”: although the CFA concluded the following: “In view of the position taken, it seems that the detected deficiency should generate not a lack of competence, but rather a lack of jurisdiction of the courts of Macau, since the term “competence” is generally used to mean the fractioning of the powers of each Court in particular, ie “the measure of jurisdiction assigned to each court.”: Case No. 61/2018.

State.⁷²⁹ Only such typology of acts⁷³⁰ may, therefore, escape the judicial scrutiny of the courts of the Region, precisely due to an express constitutional norm. Moreover, such entails the establishment of a general principle of full and complete jurisdiction for the courts of Macau.⁷³¹

WANG KAI notes that, in effect:

“The courts of the Macau Special Administrative Region shall have jurisdiction over all cases in the Region, except for the restrictions on their jurisdiction that shall be maintained, imposed by the legal order and by the principles previously in force in Macau. [...]

The courts of the Macau Special Administrative Region shall have no jurisdiction over acts of the State, such as defence and foreign affairs.” All of this looks, and is, crystal clear.⁷³²

My conviction is that the courts of Macau should therefore have ruled on the case that was brought to them, in the name of, and by implementing, the above-mentioned constitutional principles effective in our legal order, which override any possible legal norm that apparently removed their competence or jurisdiction to decide on a given act, even though it was considered to be a political one.⁷³³ It was alleged by the applicant that there was a violation of fundamental rights and also of the norms and principles of the Basic Law — the courts could not have issued what was, in essence, a ruling of quasi-

⁷²⁹ “The notion of Acts of State first appeared in the Code of Administrative Procedure (CAP) of China, Article 12 (1), which provides: people’s courts do not admit charges brought by citizens, legal persons, or other organisations, in relation to the following issues: national defence, external relations, among other acts of the State. Article 2, “Interpretations on various issues regarding the application of the Administrative Procedure Code by the Supreme People’s Court” (hereinafter referred to as “Interpretations”), of 2000, gives an interpretation of Article 12, paragraph (1) of CAP, saying that acts of the State are acts related to national defence and external relations, practised on behalf of the State, by the State Council, Military Commission of the Central Government, Ministry of National Defence and Ministry of External Relations, with the power delegated by Constitutional Law and by the laws, and acts of declaration of the state of emergency, declaration of the state of siege, general mobilisation, *inter alia*, practised by the organs of the State, with the power delegated by the Constitutional Law and by the laws.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81.

⁷³⁰ See, delimiting the acts originating, precisely from the State: “Acts of the State in the Basic Laws of the Special Administrative Regions — to define acts of the State? In the first place, we shall determine who are subject s or authors of the acts of the State. According to the “Interpretations”: it appears that such authors are all the State organs of the state.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 91.

⁷³¹ “The reason for the enjoyment of such a wide jurisdiction by the courts of the Special Administrative Regions is due to the provisions of Articles 158, paragraphs (2) and (3), and 143 of the Basic Laws of Hong Kong and Macau, respectively.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 92.

⁷³² *ibid.*

⁷³³ Again, Eladio Escusol Barra and Jorge Pérez, *Derecho Procesal Administrativo* (1st edn, Editorial Tecnos 1995) 302, “The doctrine of the political act cannot be invoked as a basis for the inadmissibility of administrative litigation, since the judge will be obliged to have cognisance of the act, in order to determine whether there are regulated contents therein of a justiciable nature.”

non liquet, instead, they should have had enacted a decision⁷³⁴.

We therefore reaffirm, without compunction, that any act by public power in Macau, including a political act, that violates fundamental rights — and/or constitutional norms — shall be justiciable. This holds true at all times.⁷³⁵ In the case of Macau, this is particularly applicable through a generous application of the *Principle of formal adjustment* as outlined in Article 7 of the Code of Civil Procedure, in compliance with the constitutional commands of the Basic Law — Articles 4, 11 and 36, *inter alia*.

Perhaps if Article 19 of the GFLJO were a true obstacle, then either such norm should be considered derogated by the local *bloc de constitutionnalité*, starting with the Basic Law, or else one would proceed to its corrective interpretation in light of the applicable constitutional norms and principles.⁷³⁶

2.4 A Few Other Issues

The Committee on the Rules of Procedure and Members' Mandates did not issue a true opinion under the procedurally devised normative framework, but rather a kind of mere record of proceedings.⁷³⁷ It did not express an opinion on the matter in hand.⁷³⁸

Among various deficiencies, the Committee failed to scrutinise or prepare procedurally for a formal suspension process, an obligation it should have fulfilled.⁷³⁹ It denied the affected Member the right to present a defence or be heard before the Committee. Consequently, the so-called "Report" lacked such Member's defence. Furthermore, coupled with the impossibility of such Member addressing his peers at any plenary meeting, no Member of Legislative Assembly had the opportunity to know the arguments in defence of the affected Colleague! The Plenary deliberation, published in the OG, Deliberation No. 21/2017/Plenary,⁷⁴⁰ contains two Articles. However, only the first article was subjected to a vote in the Plenary, while the second article, pertaining to the effectiveness of the deliberation, was not voted upon.

⁷³⁴ Regardless of whether, in the course of such assessment, they concluded that these rights, principles and norms were violated, or not.

⁷³⁵ Except for the constitutionally established exception regarding the acts of the State.

⁷³⁶ As was the Spanish case, in relation to the norm contained in the 1956 law. This tendency has been a hallmark in many legal orders, hand in hand with a necessarily restrictive concept of what political acts should constitute, as the majority of modern legal scholarship now supports.

⁷³⁷ Different documents — see "Article 88 (Acts of the committees) 1. The acts of the committees take the form of reports, opinions, memoranda or deliberations, as the case may be."

⁷³⁸ On the other hand, the Committee saw fit to render an opinion on a different issue: it groundlessly detected a situation of conflict of interests; it also deemed proper to draw up a ballot form excluding the option of abstention...

⁷³⁹ Cf subparagraph (b) of Article 26: "The Committee on the Rules of Procedure and Members' Mandates is competent to: (...) Conduct the enquiry proceedings relating to the processes of disqualification and suspension of mandates and to issue the respective reports, under the terms provided for in the Legal Status of the Members".

⁷⁴⁰ "Article 1 (Suspension of a Member's mandate) The Plenary of the Legislative Assembly deliberates the suspension of Member Sou Ka Hou's mandate. Article 2 (Entry into force) The present deliberation shall enter into force immediately upon approval thereof."

As mentioned above, there was a precedent in this matter before the advent of the MSAR. In 1997, a process to suspend a mandate was triggered and procedurally followed through, with due examination. The affected Member exercised his right of defence before the Committee on the Rules of Procedure and Members' Mandates, the essential content of his defence was reproduced in a Report (this time a true advisory opinion) and the committee also alerted the remaining Members to a given fact that potentially could be decisive for the Plenary's deliberation — the process ended with the decision to not suspend the Member.⁷⁴¹

This sidebar on a recent history exemplifies how legality is overshadowed, in several moments and aspects.

2.5 Consequences for the Legislative Procedure — Notes on the Issue

A few issues — not answered directly and expressly in the law — may be raised here.

What is the legal solution or outcome if a particular conflict of interest was not declared nor invoked? A Member, who should have been prevented from voting, did vote. Does this non-compliance affect the perfection of the act, ie does it affect the approval of a given law? Imagine, for instance, that a certain bill was passed into law with the minimum number of votes required by the Basic Law, insofar that, in case the Member prevented from voting had not voted, the law would not have been approved (one should remember that the failure to exercise an impeded vote only carries the effect of not counting as an abstention) — should such law be invalidated due to the *subsequent* discovery of conflicts of interest? The MSAR legal framework, including the Legal Status of the Members, omits this possible situation.

A sanction exists, consisting in the issuance of a vote of censure published in the OG. In some legal orders, sanctions of the same or similar nature are applicable. For example, in Hong Kong:

“Any Member who fails to comply with Rule 83 (Registration of Interests), 83A (Personal Pecuniary Interest to be Disclosed), 83AA (Claims for Reimbursement of Operating Expenses or Applications for Advance of Operating Funds) or 84 (1) or (1A) (Voting or Withdrawal in case of Direct Pecuniary Interest) may be admonished, reprimanded or suspended by the Council on a motion to that effect.”⁷⁴²

VIEIRA DE ANDRADE's teachings may be of assistance as a first line of approach, with his distinction between invalidating (procedural) deficiencies (“*illegalities*”

⁷⁴¹ CRPMM, Report No. 2/97 — the right to be heard is expressly mentioned; in addition, during such hearing, the Member in question shall be allowed to produce evidence. The Committee underlined, in this short and lean report, the requirements and the guarantees to be accorded to the Member's defence. Any final position by the Committee shall take all of the above into account.

⁷⁴² 85. Sanctions relating to Interests, Operating Expenses or Operating Funds, the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended as of 31 October 2014).

that potentially affect the effectiveness of the act”) and non-invalidating (procedural) deficiencies (“irregularities”).⁷⁴³ In the event that the vote cast by a Member in a conflict of interest does not alter the general vote, such situation should be classified as a mere irregularity, as a non-invalidating deficiency of the final act, ie the approved law.

What should the answer be if the vote (or votes) cast, despite a conflict of interest, could alter the final result of the voting? In order to provide an answer, one shall have to analyse the history of this legal framework.

Members’ Bill No. 12/I/2000-1, which resulted in Law No. 3/2000, *On the Legislature and the Legal Status of the Members of the Legislative Assembly*, contained, in the original text of Article 37 (corresponding to the current Article 36), the following norm in paragraph (3) thereof: “*The vote cast by a Member in relation to whom the existence of the interest provided for in Article 35, paragraph (1), is verified in a supervening manner, is deemed to be null and void.*” This provision, if retained, might have offered a resolution — albeit with potential adequacy concerns, given Macau’s small size and intricate network of local interests — by introducing a procedural sanction and legal consequence. This could have resulted in the subsequent invalidation of a law if the nullified vote (or votes) had a decisive impact on reaching the required majority.

Alas, this norm was the object of deeply felt hesitations when debated in the Plenary.

In the plenary meeting in question, one of the bill’s proponents argued the following:

“In principle, I think that, in the event of nullified votes, as referred to in the preceding paragraph, if such nullity influences the result of that voting, my contention is that there are only 11 votes. If the deliberation has not yet entered into force, in fact, regardless of its publication, such deliberation provides for a date for its effectiveness and if it is still pending, the Madam President of the Legislative Assembly should submit the matter of said deliberation to be considered and put to a new vote in the Plenary of the Legislative Assembly [...]. If the deliberation does not influence the result of voting, there is no need to debate it again at the Plenary. If the deliberation

⁷⁴³ Vieira De Andrade, *As Formas Principais da Actividade Administrativa: Regulamento, Acto e Contrato Administrativo - Sumários das Lições de Direito Administrativo II, Academic Year 2009/2010* (archived with the Author, Coimbra 2010) 53, 59. Allow me to recall the following words from the Author, “i) the irrelevance of the procedural or formal deficiency, in the event that such deficiency has not resulted in an effective harm to the values and interests protected by the violated norm, if such values or interests have been sufficiently protected via another route; ii) the conservation of the act, ie its non-annulment by the judge, despite its invalidity, when the content of the act cannot be any different and there is no relevant interest in the annulment [...] I would also tend to admit the irrelevance of the deficiency or the conservation of the act when it is evidenced, beyond any doubt, that a formal deficiency had no influence on the decision.” See also Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. Although in a different setting, with evident and interesting connecting points, the various texts in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004).

has already entered into force, it could not be returned again to the Plenary.”⁷⁴⁴

The explanation generated many doubts in the Plenary. Several Members spoke out for the norm on the nullification,⁷⁴⁵ while others, on the contrary, noted that “even if the voting of the Member were null and void, it shall not influence the result of voting [...]”, therefore, “It is not necessary to add that the voting is null and void.”

In view of these misgivings and a lack of consensus on how to resolve the situation, such draft norm was suppressed from the text of the bill, thus leaving this important issue unregulated.

There was, I would submit, a refusal by the Plenary to consider the nullity of votes cast in violation of a conflict of interest, when verified subsequent to the result of voting being declared.⁷⁴⁶

One could reference several principles that might aid in salvaging this flawed element of the legislative procedure: the principles of conservation of (procedural) acts,

⁷⁴⁴ Colectânea de legislação regulamentadora da Assembleia Legislativa, 1.º volume, da Legislatura e do Estatuto dos Deputados (Partial transcript of the Plenary meeting held on 23 February 2000), 497 et seq. “There is still an issue: in the legal sense, the individual act of the Member, ie such act is not in accordance with the act provided for in paragraph 1) of Article 35, which leads to the Member’s voting to be, this time, null and void, whether it be on the bill or on on the deliberation approved by the Legislative Assembly. In case the result is influenced, the Member’s voting is null and void. However, it seems that some Members have said that this situation rarely exists, and the procedural protocol is also very complicated. Our Rules of Procedure do not provide for such situations, neither did the old Organic Statute; moreover, one cannot take as a reference neither the preceding background, nor the new example. Therefore, after reflection, since this issue is very complicated, I shall directly simplify it, as the plenary of the Legislative Assembly is supreme. In short, by adding paragraph (4) after paragraph (3). The vote of the Member referred to in the preceding paragraph in paragraph (3), is null and void, and shall have no bearing on the result of that voting. My proposal is that if we agree that the voting is not retroactive, we may continuously proceed with other procedures; however, such act has already violated Article 35, paragraph (1). According to Article 38, such acts must be censured. A censure is the simplest and most direct way moving forward. Otherwise, the problem cannot be solved, and our time is very limited.”

⁷⁴⁵ Having affirmed, for example, that “I believe that the nullity of the votes of the respective Members will influence the retroactive effectiveness of the result of the voting; however, the degree of such influence depends, at this moment, on the progress of the procedures relating to the approved draft resolution or bill.”: Colectânea de legislação regulamentadora da Assembleia Legislativa, 1.º volume, da Legislatura e do Estatuto dos Deputados (Partial transcript of the Plenary meeting held on 23 February 2000), 497 et seq.

⁷⁴⁶ For Hong Kong: “Rule 84(4) of RoP provides that any Member may move without notice a motion to disallow the vote of a Member on the ground of his direct pecuniary interest in a question immediately before the result of the voting is declared.”: LC Paper No. FC78/13-14/01 — Disclosure of pecuniary interest under Rule 83A and Restriction against voting in case of direct pecuniary interest under Rule 84 of the Rules of Procedure. “Under Rule 84(6), If the motion to disallow a vote is agreed to, the result will be altered accordingly. [...] Based on the principle that it is a Member’s responsibility to disclose his pecuniary interest in a matter being considered to enable other people to judge if his views on the matter have been influenced by his interest, it has been the view of [Committee on Members’ Interests] of the previous term of LegCo that a Member should disclose his pecuniary interest at the beginning of his speech on the matter. For [Finance Committee] proceedings, since the consideration of an agenda item as defined in paragraph 22 of the [Finance Committee] Procedure involves members expressing views or asking questions of the Administration on that agenda item, it has been the practice of [the Finance Committee] for members to disclose their pecuniary interest at the beginning of their speech or question on a proposal being considered by the Committee. The Chairman will, at the start of each meeting, remind members that if they have any direct or indirect pecuniary interest in any matter being dealt with at the meeting, they should disclose the nature of such interest before they speak on the matter in accordance with Rule 83A of RoP.”

procedural economy, stability of the legal system, and the protection of confidence and legal certainty. These principles come into play primarily, if not exclusively, concerning a law that has already been published — not before this point.

There may, nonetheless, be extreme situations in which the vote cast by a Member in an undeclared or uninvoked conflict of interest may, in the end, constitute an invalidating deficiency — in other words, affecting the validity of the law, even though the latter might already have been published in the OG, reported for record to the Standing Committee of the National People's Congress, and the *vacatio legis* period elapsed.⁷⁴⁷

Examples of such situations would be: when such deficiency violates norms or principles of the Basic Law, such as the rules requiring certain qualified majorities, provided that such thresholds could not have been reached without the impeded votes;⁷⁴⁸ and when a law approved irregularly — meaning that the impeded vote was decisive in the respective deliberation — results in a violation of a fundamental right, namely, but not solely, a fundamental right directly established in the Basic Law.

In the first case, it will be very difficult to verify an autonomous violation *per se* of the Basic Law (apart from the question of achieving the required majorities). In the second example, one might imagine the third parties' fundamental rights being affected by the approval of a law by virtue of a vote or votes in a situation of conflict of interest; perhaps such situation may occur and a supervening verification may not be impossible — I am referring to possible manifest and gross violations of the conflict of interest framework that negatively impact on the fundamental rights of others.

⁷⁴⁷ Therefore, I cannot agree with the position taken in Report No. 1/VI/2019, of the CRPMM, that “*when the legislative procedure is concluded*”: it is impossible to produce legal effects on this law and, therefore, the “*Submitted challenge may not be considered, as such procedure could not possibly produce any useful effect.*” Confront and remember the CFA Decision in Case No. 61/2018, alluding to a principle of proof of resistance, when the vote is not essential to the existence of the necessary majority, but also referring to the undue exclusion of a person in the voting process or the lack of summoning of a Member to the meeting — the majority of scholarship and case-law are inclined towards the invalidity of the deliberation, even if the vote in question did not change the outcome of the voting. The Decision reads, “*If there is an evident public interest in the preservation of deliberations that were passed, in many cases constituting the approval of laws, it seems that a principle of proportionality shall have to be asserted, which entails a weighting of values between the importance of the (possible) deficiency and the importance of preserving the deliberation, in terms of protecting said interest. [...] given that the appellant's vote would not have been decisive in any deliberation taken by the Legislative Assembly, during the mentioned period, it seems to us that the possible deficiency — if it exists — must be considered to have been remedied.*” Evidently, this path is more reasonable and balanced than Report No. 1/VI/2019, of the CRPMM, which dealt with a proximate issue. This debate does not end here, in my view. In fact, the mere unlawful absence of a Member, although necessarily limited to 1 vote (his/her own) still leaves ample space to question if his or her presence — peppered with addresses, interventions, arguments — could, perhaps, sway other Members when it came time to voting.

⁷⁴⁸ Consider, for example, the super-qualified majority required by Article 51 and the potentially cataclysmic outcome, if the Chief Executive considers that a Member's bill approved by the Legislative Assembly is not compatible with the overall interests of the MSAR, thus returning it to the Legislative Assembly for reconsideration, within 90 days, with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the bill in dispute by not less than a two-thirds majority of all the Members, the Chief Executive must sign and publish it within 30 days, or proceed in accordance with Article 52 of the Basic Law. In the legislative process, nothing is approved, as is known, without normally qualified majorities — Article 77 of the Basic Law.

In such cases, higher values and principles must prevail — the principle of constitutionality and the principle of protection and safeguarding of Fundamental Rights are always at the summit of the legal order.⁷⁴⁹

Consider, from a different perspective yet with evident parallels, the situation in Hong Kong. The doctrine, articulated in the work of KEMAL BOKHARY, allows exceptions to the general principle of non-judicial intervention in LegCo processes. These exceptions could arise “where the Legislative Council has conducted its business in such a way as to infringe the constitutionally protected right of an individual which is intended by the Basic Law to be enforceable in a court of law.”⁷⁵⁰

It is indeed a very complex issue. In the absence of a solution expressed in the letter of the law, it should be solved on a case-by-case basis, guided by the presiding principles in question.

3. Voting on the Bill in General

The voting in general is on each bill.⁷⁵¹ Such a voting is circumscribed to the principles and system of each bill, as well as on the political, social, and economic opportunity thereof. In other words, there is an interconnectedness between the general debate and the voting of a bill in general, although the Rules of Procedure do not expressly say so.⁷⁵²

Failure to approve a bill in general is deemed to be a definitive rejection thereof; such bill may not be renewed during the same legislative session, thus terminating the respective legislative procedure.

The approval of a bill in general means the continuation of the procedural *itinerary* but does not guarantee the final approval, ie it is not synonymous with the future existence of a law. As CARLOS BLANCO DE MORAIS warns: “it is true that a favourable vote only guarantees that the legislative initiative shall be subject to voting on its specifics and does not suggest approval thereof in such subsequent phase.”⁷⁵³

After a bill is approved in general, the respective text is sent by the President to a committee, for examination on its specifics, taking into consideration the volume of work distributed and the specialisation of the committee by subject-matters — if such committees exist, which today do not, given that, in practice, legislative initiatives have

⁷⁴⁹ Articles 11 and 4 of the Basic Law, respectively.

⁷⁵⁰ Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn, Sweet and Maxwell 2015) 281. See also, Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 310 et seq. However, “the court refused to regard compliance with procedural regularity in the law-making processes of a legislature as a condition of the validity of an enacted law”: Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 26, referring to *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI).

⁷⁵¹ Cf “as globally considered”: José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 243.

⁷⁵² See, moreover, Article 119, subparagraph (a).

⁷⁵³ Carlos Blanco de Morais, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 410.

not been distributed to any *specialised committees* under the modality of monitoring committees on certain matters.⁷⁵⁴

How is a bill approved? A simple majority is not sufficient. The approval of a bill requires the favourable vote of more than half of the total number of Members, under the terms of Article 81, paragraph 2, except in cases where a qualified majority of not less than two-thirds is imposed. In this respect, Article 77, paragraph (1) of the Basic Law mentions only (at least in the Portuguese language version) Members' bills; the Rules of Procedure, however, cover all legislative initiatives (Members' and Government's bills). What is the legal solution or outcome? Is it just a question of poor translation?⁷⁵⁵ Maybe yes, maybe not.

It should also be noted that the Plenary may immediately deliberate that the debate and voting on the specifics take place in a standing committee, or an ad hoc committee⁷⁵⁶ for such purpose created. This last option, which is not applied in practice, entails a procedural path divergent from the most common one, as described below.

4. Examination on the Specifics in Committee

The examination in committee consists, per Article 119, of an assessment of the specific solutions contained in each bill, focussing, in particular, on:

- “(a) The adequacy of these solutions vis-à-vis the principles and system of the bill as approved in general;*
- (b) The search for the most appropriate legislative means for the proper execution of the bill;*
- (c) The repercussions of the bill on the legal principles and the legal order;*
- (d) The legal-technical perfection of the normative provisions.”*

⁷⁵⁴ There are no real specialised committees, as in the past; in the meantime, monitoring committees were created for certain matters and, given that the composition of such committees is exactly the same as that of the standing committees (the only variance being the president and vice-president of each), one might think that, in this fashion, one would, in practice, achieve potential specialisation. However, such is not the case, with one possible exception: the duality formed by the FSC and the Monitoring Committee on Land Affairs and Public Concessions.

⁷⁵⁵ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483, states: “The Basic Law’s provision, certainly by error/mistake, only mentions Members’ bills and draft resolution, omitting the Government’s initiatives.”

⁷⁵⁶ The following are examples of ad hoc committees: one of “mere” monitoring, the AHC for Monitoring and Participating in the Drafting of the Legislative Texts Relating to the Civil Code, the Code of Civil Procedure and the Commercial Code, having issued Report No. 1/99, *Draft Commercial Code of Macau*, Report No. 2/99, *Draft Civil Code of Macau*, and Report No. 3/99, *Appraisal of the Project relating to the new Code of Civil Procedure of Macau*, and two other ad hoc committees with an intervention resembling standing committees: the AHC for the Consideration of the Government Bill on the Legal Framework for the Operation of Games of Chance, the object of which was the bill entitled “*Legal framework for the operation of games of chance*”. This committee was created by Deliberation No. 7/2001/Plenary, “*in order examine the bill on the specifics and to perform the respective final drafting*”; and the AHC for the Analysis of Legislative Initiatives Relating to the Civil Service, which intervened in three legislative processes.

The express reference in subparagraph (a) reinforces the principle that, under this system, the final approved text, as the end-result of the legislative procedure, may not challenge the principles and the system of the bill as approved in general.⁷⁵⁷

Once again, a Report by the CRPMM is worth quoting:⁷⁵⁸

“The procedural provision whereby ‘the general debate concerns the principles and the system of each bill, as well as the political, social and economic opportunity thereof’, clearly entails that, in case of approval in general of any Government Bill, the committee entrusted with the respective examination on the specifics is “mandated” to follow the terms under which the general debate was undertaken, more precisely *vis-à-vis* the principles and the system of the bill, as well as to evaluate the criteria of opportunity laid down by said provision.”

While adding — I believe against the dynamic backdrop of praxis, to be discussed below:

“This means that the examination on the specifics is framed by the general debate, but it does not authorise the assertion that such debate alone may influence and determine the course of said examination. One need only think of the legal-technical analysis, which can hardly take place during a general debate and is thusly reserved for the stage of the specifics.”

The same Report goes on:

“The general debate is not the sole route map of the examination on the specifics, nor can the former stage crystallise the legislative process. It is during the stage of the examination on the specifics that one may truly assess, in detail, the scope of the proposed norms, as viewed from several perspectives, the technical options through which such norms are construed and, consequently, such stage is the correct locus and moment to understand the legislative policies in greater depth and the norms intended to serve them.

⁷⁵⁷ See Report No. 1/III/2009 of the CRPMM, Issue of violation (or not) of procedural rules when the text of the alternative version of the Government Bill entitled “Amendment to the Stamp Duty General Schedule” differed, during the stage of examination on the specifics, from the initial Bill as approved on the whole. One may read in said report: “the question arose as to whether the modifications to the text of the aforementioned Bill, introduced during the examination of the specifics thereof by the Third Standing Committee of this Legislative Assembly, may or may not constitute a violation of the Rules of Procedure, insofar as the alternative version of such Bill submitted for said examination was different, in varying degrees of intensity and merit, as understood by several Members, from the original version, as approved on whole on 15 January 2009. Such Members raised the issue and supported the opportunity for an intervention by the CRPMM. The President of the Legislative Assembly considered, as afforded by her procedural powers, to suspend the debate on the specifics and to request that this Committee issue a Report [...]”.

⁷⁵⁸ Report No. 1/III/2009 of the CRPMM. The quoted report enunciated, in a somewhat flexible manner, the untouchability of the principles and system contained in Government bills, and did not fail to reconcile the amendments thereto with such principles and system. The Committee concluded that, despite the existence of profound modifications, the amended version was nonetheless in conformity with the legislative policy endorsed by the Plenary during the stage of approval in general.

Therefore, it is the appropriate stage for introducing adjustments and improvements which may be deemed convenient, in order to submit the text of the Government Bill for debate and voting on the specifics by the Plenary.”

In conclusion, “In the context of debating and voting on the specifics, it is incumbent upon the Plenary, with full and prior knowledge of the committee’s report, to decide, with finality, on the merit of the norms submitted thereto.”

I must underscore that the Rules, by placing the stage of approval in general before that of examination — ultimately ending with a Committee Report — and in view of the sustained praxis, funnels such work on the specifics to the epicentre of the committees’ tasks and functions.⁷⁵⁹

The dynamics of profound modifications⁷⁶⁰ to technical solutions and, under Article 119, subparagraph (a), add to several cases of modifications to politico-legislative options,⁷⁶¹ and to the reality of legal-technical improvements that parliamentary practice

⁷⁵⁹ See Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 32: “the majority of Members adopts an attitude of total adherence to Government Bills. Even if such bills contain flaws or contradictions in the underlying political options, those Members have been expressing their belief in the possibility of introducing the necessary modifications during the examination on the specifics by the specialised committees, at a later stage of the legislative process.”; see also, “under the current legislative procedure, the work performed by the committees, of assessing and effectively monitoring the proponent, directly affects the quality of the legislation and the efficiency thereof”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 *Administração* 997, 1023. An example may be brought forth by Report No. 1 II/2003 of the FSC, on the Government Bill entitled “Framework of the careers, positions and remuneration of Customs staff”: the Plenary approved, on the whole, a bill containing norms in clear transgression of the Basic Law; the situation was subsequently resolved only in committee.

⁷⁶⁰ An important study, yet to be performed, would be a comparative analysis of the texts of Government bills, in their original version and in the final version of the laws published in the OG. Many will be the cases of deep and significant modifications, in some instances showing clear legal-technical improvements, in others better suitability of the “new” solutions *vis-à-vis* the values and principles of justice, constitutionality, legality, etc. Is there is an effective parliamentary contribution to “good legislation”: albeit masked as the second or third versions authored by the Government. Apropos, “*There have been many Government bills, throughout the three legislatures of this Region, which have undergone modifications – at times profound –, between the original version, as approved on the whole, and the alternative version, as approved on the specifics.*”: Report No. 1/III/2009 of the CRPMM.

⁷⁶¹ These modifications may not endanger a bill’s principles and system, insofar as these become unrecognisable, or absolutely dissimilar, from the ones approved on the whole. Remember that “*The legislative process is, by its very nature, a process for confronting and laying out all interests, political options and values judgments; it is a process for the seeking of, and reaching, a consensus in a democratic way, through the will of the majority.*”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 *Administração* 997, 1016. Indeed, as illustrated by Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 24: “*The Executive is reluctant to accept reasonable opinions and suggestions presented during the examination of bills by the Plenary; it has been necessary to engage in several fora with the authorities, namely through negotiations.*” See also Ji Chaoyuan, ‘Sobre o Constitucionalismo do Regime Político da Região Administrativa Especial de Macau’ (2012) 1 *Revista de Estudos de ‘Um País, Dois Sistemas’* 77 et seq.

Recalling again that “*The legislative process is, by its very nature, a process for confronting and laying out all interests, political options and values judgments; it is a process for the seeking of, and reaching, a consensus in a democratic way, through the will of the majority.*”: Liu Dexue, ‘Considerações sobre as

has allowed to be formally adopted as the proponent's own, in the case of Government bills.

Internal meetings of the Committee prepare the analysis of a bill on a substantive level; in meetings with a proponent, consensual solutions are sought with the Committee — in the case of Government bills, to formulate suggestions for improvement thereof.

Amendment proposals may be introduced at this stage, in relation to any and all bills, excepting those removed from the supervening legislative initiative of the Members and the committees.

A reference is due to technical meetings, ie between the Advisory Staff of the Legislative Assembly and the Government Advisors (in a broad sense), in the case of Government bills. Not infrequently, such practice, exercised by all concerned in accordance with political options, allows for drawing up the version of a bill's text to be voted on in the specifics.⁷⁶²

4.1 Committee Report

The Committee report⁷⁶³ deserves special emphasis.⁷⁶⁴ This formal document issued by

estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”” (2014) 102 *Administração* 997, 1016. See Report No. 1/III/2009 of the CRPMM: “The legislative process triggered by a Government bill requires the interaction between the Government and the Legislative Assembly: in light of the applicable constitutional and procedural norms, co-operation is the operative concept. Such cooperation is complex and does not always follow the same contours and modalities, as it covers a varied set of acts, across the several stages of the legislative process, under which both bodies' spheres of intervention are disciplined and calibrated by the separation of powers.” See also JI CHAOYUAN, *Sobre o Constitucionalismo do Regime Político da Região Administrativa Especial de Macau*, *Revista de Estudos de “Um País, Dois Sistemas”*: Vol. I, 77 et seq.

⁷⁶² To exemplify: “In addition to the aforementioned formal meetings, there were several working meetings, held both internally and at the level of legal-technical discussions between the advisory staff of this Legislative Assembly and representatives of the Executive..., which contributed, in the spirit of mutual and frank co-operation, to several technical improvements of the Government bill's final version.”: FSC, Report No. 3/V/2014.

⁷⁶³ “Descriptive reports” are used for other purposes, for example, in the context of petitions and monitoring committees, with a view to reporting facts. As such, they resemble minutes of meetings rather than documents for formulating opinions. For the latter purpose, the appropriate act is the Committee Report, notwithstanding the letter of Article 120, paragraph (2) of the Rules. Due to its collegiate nature, the Legislative Assembly is a complex body, unfolding into a plethora of other bodies, both individual (for example, the President of the Legislative Assembly) and collegiate (for example, the Board and the committees). “*If parliaments are unimaginable without a Plenary, the truth is that modern parliaments cannot likewise be imagined without parliamentary committees.*”: Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 299.

⁷⁶⁴ Underlining the Report within the examination stage, José Melo Alexandrino, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 252. See also Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 401. In Macau, as in most modern parliaments, the work performed by parliamentary committees is of the utmost importance. As said, in general, “*Today, the conventional notion is that a strong system of committees, however defined, is a necessary if not sufficient condition for the legislature to operate effectively, not least in terms of influencing the content of legislation and holding the executive accountable.*”: Martin Shane, ‘Committees’ in Martin Shane and Thomas Saalfeld and Kaare Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 352. Or “*In*

the committee, as a collegiate body, is wherein the assessment of the specific solutions contained in each bill is reached, focussing, in particular, on: the adequacy of such solutions *vis-à-vis* the principles and system of the bill as approved in general; the search for the most appropriate legislative means for the proper execution of the bill; the repercussions of the bill on the legal principles and the legal order; and the legal-technical perfection of the normative provisions. The said appraisal in committee, as embodied and *publicised* by the Report, corresponds to a qualified form of *internal preparation* within the legislative procedure.⁷⁶⁵

In most cases, it is in the Report that the rationale underpinning the text's options is encapsulated and the progress of the committee's work is reported. The Report is probably the most relevant interpretative tool for measuring and capturing the legislative intent of a bill.

A few more words on the committee Report are warranted.

There is no pre-established template for drafting and correlating the contents of a Report — and arguably, such a template may not be necessary. Similarly, fixed rules governing its structure, length, depth, style, etc, are absent. In most cases, reports follow a very similar itinerary, including sections such as introduction, context, general assessment,⁷⁶⁶ examination of specifics (often article by article), and conclusions. Occasionally, additional chapters addressing related issues or appendices may be incorporated.

4.2 Dissenting Votes

Another issue worth mentioning is the possibility of not only dissenting votes being tallied, but also of the reasons underlying such dissent being declared/stated.

While, in truth, such practice is uncommon,⁷⁶⁷ it is no less true that there is no

most legislative bodies, committees are the workhorses of the legislative process": Sebastian Saiegh, 'Lawmaking' in Martin Shane and Thomas Saalfeld and Kaare Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 482, and "Indeed, committees are widely recognised as important arenas of legislative deliberation [...] Committees are critical parts of the organisation of most legislatures": Ingvar Mattson and Kare Strom, 'Committee effects on Legislation' in Mark Hallerberg and Döring Herbert (eds), *Patterns of Parliamentary Behavior: Passage of legislation across Western Europe* (Routledge 2004) 91–92.

⁷⁶⁵ Carlos Blanco de Morais, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 401.

⁷⁶⁶ This general assessment is common and its requirement self-evident; moreover, the approval on the whole precedes a real study of the principles and the system of the bills, as we have shown. An in-depth and detailed analysis would hardly be cogent if not previously informed by an analysis of those principles and systems. However, in the past there was a certain tendency to exclude such a general assessment from reports.

⁷⁶⁷ The absence of a committee Member's signature on a Report may signal dissent; the more widespread practice is to insert references in a Report, to the effect that *some Members do not agree with this solution or the committee did not reach consensus on this point*, or, more rarely, by attaching opinions on the proposed text of a bill. In other words, dissenting votes are accounted for substantively but not formally, ie without recognising, exercising and guaranteeing the right to dissent from the majority and for such vote to be identified, namely for reasons of political accountability.

procedural obstacle thereto.⁷⁶⁸

On the contrary, either by following the general principles on the functioning of collegiate bodies,⁷⁶⁹ namely those pertaining to the rights of members thereof, or by an integrated interpretation of the Rules of Procedure, one arrives at the unblemished right of committee Members to include their dissenting votes in Reports and, consequently, to be able to explain and state the reasons thereof.

Allow me to delve briefly into this issue.

Collegiate bodies, be they political, administrative (and private/civil), etc, obey a set of operating principles⁷⁷⁰ inherent to their collegiality, including the rights and duties of their members. The norms that impact the operation of public collegiate bodies are found, namely, in the Basic Law, in the Administrative Procedure Code,⁷⁷¹ and in the Rules of Procedure of the Legislative Assembly.

Members of collegiate bodies naturally have, among others, the following rights: to attend the meetings of the body to which they belong; to be informed of, and summoned to, such meetings; to have access to documentation supporting information on the work of the collegiate body; to participate in discussions; and, obviously, to vote and to express/declare the reasoning behind a dissenting vote — this is a general principle governing collegiate bodies.

Paragraph (1) of Article 30 (Record of dissenting vote in the minutes) of the Code of Administrative Procedure Code establishes the following: “*The members of a collegiate body may record their dissenting vote in the minutes, together with the reasons for such vote.*” In truth,

“A dissenting vote is, after all, a declaration/statement made by a member of a collegiate body, through which he or she publicly expresses, before the peers, his or her vote and, eventually, the respective reasons. [...] If the member in question wishes to record the dissenting vote [...] he or she shall make a statement into the minutes to the effect that the vote was not cast in favour of the deliberation or resolution taken [...] Such is enough to make

⁷⁶⁸ One may not likewise support the existence of a custom — there is no conviction of any prohibited act or behaviour in this regard.

⁷⁶⁹ For a summary of the current framework, Mai Men Ieng, ‘Breve ensaio sobre os princípios de órgão colegial administrativo’ (2008) 80 Administração 425 et seq.

⁷⁷⁰ See Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 29 et seq speaking, for example, of the principle of internal self-organisation, the majority principle, the principle of accountability. See also Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 80 et seq.

⁷⁷¹ Which serves, mutatis mutandis, as a common default set of norms for filling unregulated gaps or lacunae on the functioning of political collegiate bodies. Expressing this idea of normative application to other collegiate bodies, Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 191.

his or her position public.”⁷⁷²

This principle is also enshrined under private law. Article 146, paragraph (2), subparagraph (d) of the Civil Code provides for the obligation to include in the minutes “*The record of the vote cast by any member of the body who so requests*”.

The principle in hand is detected beyond these normative acts. In the Rules of Procedure of the Legislative Assembly, one encounters clear manifestations of such principle, in alignment with the above-mentioned operating framework.

Article 4 establishes the duty of Members to participate in voting. Since the right to vote is evident,⁷⁷³ in this case on a Report, unanimity may not, in consequence, always be required. Any Member may vote differently from the majority and record such dissent as an externalised and formal statement in the appropriate locus, the text of the Report, ie not only internally but informally. In fact, as established under Article 82, paragraph (2), “*No Member in attendance may refrain from voting, without prejudice to the right of abstention.*”

Furthermore, the Rules of Procedure devote several norms to the issue of declarations/statements of votes. Significantly, Article 66: “*1. Any Member may issue oral or written statements of his or her vote, for the purpose of explanation thereof.*”⁷⁷⁴ This is the established general principle. Although formulated *apropos* plenary meetings, the principle is nevertheless expressed with a general, wide scope.

Several other procedural norms regulate this subject matter: for example, Article 58 provides for the floor to be given to Members to make addresses, in particular, to issue statements of vote; such statements are published in the Legislative Assembly’s Official Gazette, pursuant to Article 97, paragraph (2); the statement of vote is expressly mentioned under the rules for the debates on issues of public interest, per Article 139, paragraph 4).⁷⁷⁵

It would be contradictory if Members could enjoy the right to make statements concerning their votes, especially of dissenting ones, in plenary session, by nature a public and more solemn meeting, and could not do likewise in committee, a body operating, as a rule, behind closed doors. Even stranger would be the proposition that a Member may not record a dissenting vote in his or her committee’s Report, but later, in the Plenary, freely exercise the right of giving an account of such occurrence and recording his or her

⁷⁷² Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 242–43, adding that the record of a dissenting vote is obviously a written one.

⁷⁷³ The collegiate will of the committees and of the Plenary is formed by voting, and not, for example, by acclamation.

⁷⁷⁴ The next paragraphs stipulate thus: “2. Oral statements may not exceed three minutes. 3. Written statements shall be delivered to the President by the end of the respective meeting.”

⁷⁷⁵ Article 73 (Collaboration or attendance of other Members) may also be invoked: “*Members may send written observations to committees on matters within the competence thereof.*” If Members not belonging to a committee may send written observations thereto, from this idea of openness and transparency it must follow that such possibility shall also apply to committee members.

position.

Moving on to other connected issues of relevance.

4.3 Other Issues

The role of the Legislative Assembly's Advisory Staff⁷⁷⁶ is of particular significance,⁷⁷⁷ in the search for the most adequate technical solutions, in the research of elements in comparative law, in the filtering of possible non-conformities with constitutional norms, in the material and formal harmonisation of the internal solutions of each bill

Normally, this stage, which is typically preparatory but pre-delimited by the approval of a bill in general, is the procedural moment for carrying out consultations and hearings, be they mandatory or not. In this area, the parliamentary legislative procedure is very open.

In fact, not only is there a general and permanent invitation on the website of the Legislative Assembly,⁷⁷⁸ so that "Residents may send their opinions on bills to the Legislative Assembly by post or via e-mail,"⁷⁷⁹ but it is also not uncommon for the Legislative Assembly to conduct mandatory consultations not previously carried out by the Government, to engage in mandatory consultations on Members' bills, to repeat consultations, and to widen the spectrum of entities to be consulted (for example, invitations to representative bodies to opine or to participate in Committee meetings).

At this stage, the committee may invite third parties to the Legislative Assembly,

⁷⁷⁶ Cf "A parliamentary advisory service is defined as any action carried out by one or more persons who, by delivering information, opinions, advice or recommendations on a specific matter, intends to support Parliament or Congress, its bodies or members, in the exercise of their public functions": Nicolás Martínez and Mario Poblete and Joaquín Ugalde, 'Hacia una conceptualización del impacto legislativo de las asesorías parlamentarias' (2014) 3 Revista Chilena de Derecho Parlamentario 92, 95.

⁷⁷⁷ See for example, "Among the players that contribute to an increased level of legislative certainty are the parliamentary advisory services." and "Parliamentary research and advisory services are essential for increasing legislative certainty.": Nicolás Martínez and Mario Poblete and Joaquín Ugalde, 'Hacia una conceptualización del impacto legislativo de las asesorías parlamentarias' (2014) 3 Revista Chilena de Derecho Parlamentario 92, 92 and 96, respectively.

⁷⁷⁸ See, on this, João Santa Rita, 'A internet e a participação dos cidadãos na feita das leis' (2005) 39 Legislação 40, who speaks of the internet as a means for participation in the legislative process, which has greatly broadened the extent of generalised consultations, and presents several technical aspects capable of enhancing openness and participation. See also, with some relevance, Marina Pietrangelo, 'Qualche riflessione sui metodi della consultazione popolare al tempo di Internet, a margine dei referendum consultivi veneti su indipendenza e autonomia' (*federalismi.It*, 26 January 2015), downloaded on https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=28641&content=&content_author=.

⁷⁷⁹ Such opening up of the Legislative Assembly has provided effective results: many contributions and suggestions have been received in this way and, at times, such possibility is mentioned in Reports, which have included the former in attachment to the latter. For example, "On the other hand, the Committee received contributions over this period, in pursuance of a policy of openness of the Legislative Assembly, translated into "Residents may send their opinions on bills to the Legislative Assembly in writing or via e-mail": FSC, Report No. 3/V/2014.

under Article 74 of the Rules of Procedure, request information and opinions,⁷⁸⁰ and conduct fact-seeking or study missions.

The committee finalises its work by delivering its duly grounded report, within the timeframe allotted by the President of the Legislative Assembly, after consulting with the President of the Committee. If no deadline has been set, the report must be submitted to the President of the Legislative Assembly, in the case of bills, no later than thirty days from delivery of the respective text to the committee; with respect to amendment proposals, the default deadline is seven days. The committee may request an extension to the deadline, which normally occurs as a result of the complexity of the task, difficulties in the relationship with the proponent, etc

Especially concerning Members' bills, the Committee may present amendment proposals — and even substitution or replacement texts — as mentioned and exemplified above.

In the event that the committees fail to deliver their reports within the allowed period — the pre-determined deadline or that of the extensions — the bills are submitted to the Plenary, for debate and voting on the specifics, regardless of the reports.

This phase is thus concluded. From such moment onwards, the so-called second version (or third version, etc) of the Government bills enter the legislative procedure, in lieu of the originally submitted versions from which the entire process arose. Such eradication of the Government's legislative initiatives has no procedural grounding.

5. Debate and Voting on the Specifics of a Bill

We enter the next stage: after the moment of legislative initiative, the procedure carries on with a constitutive step (approval in general), going on to a preparatory phase (examination on the specifics), and returning to a constitutive moment (debate on the specifics). Amendment proposals (modification, suppression, substitution, or addendum) become relevant at this stage.

Two possible routes are now open.

5.1 Debate and Voting on the Specifics of a Bill — General Rule

The debate and voting on the specifics⁷⁸¹ deal with each and every article. The President of the Legislative Assembly may decide to put more than one article or amendment

⁷⁸⁰ “Therefore, in the event of a legally required consultation which has not yet taken place, either because the Government omitted such step before submitting its bill, or because the bill in question was initiated by Members, such consultation must be performed now.”: António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 481.

⁷⁸¹ I must reiterate that, in the case of Government bills, the texts subject to debate and voting are not the same ones which ran the course of the preceding moments — the second version (or third version, etc) of the bills are voted on now, in lieu of the texts previously approved in general.

proposal to the vote simultaneously or, at his or her own initiative, in view of the complexity of the subject-matter, or at the request of any Member, proceed to voting by paragraphs or subparagraphs.

The order of voting on the specifics is as follows:

- (a) Proposals for suppression;
- (b) Proposals for substitution;
- (c) Proposal for modification;
- (d) Debated text, with the inclusion of the amendment proposals, as approved;
- (e) Proposals for addenda to the text voted on.

If two or more amendment proposals of the same nature are submitted, they are put to the vote in the following order:

- a) Proposals submitted by the committee;
- b) Proposals submitted by Members;
- c) In each of the preceding paragraphs, in the order of the respective submission.

At the request of any Member, the Plenary or the committee may decide to postpone — only once — the vote on the specifics to the next plenary or committee meeting, as the case may be.

The re-appraisal of the text by a committee is possible:

“Upon deliberation of the Plenary, at the request of any Member, and until the start of voting is announced, the text of a bill may be sent to any committee for the purpose of a new examination on the specifics, within the deadline set out by the Plenary.”

There are no known cases of effective use of such possibility, apart from a single exception.⁷⁸²

5.2 Exceptional Case of Voting in Committee and Final Overall Voting

Pursuant to Article 121 of the Rules of Procedure, the Plenary may, at any given moment,

⁷⁸² Cf “The subject-matter generated some debate in the Plenary and, because it was not possible to harmonise positions, the Plenary decided, in accordance with the [...] Rules of Procedure, to suspend the meeting and send the bill to the Committee for re-appraisal.”; and “In conclusion, the Committee considers that the amendments now effectuated – which are duly highlighted in the new version of the Government bill submitted to the Legislative Assembly — clarify the Members’ doubts; as such, the bill may now be voted on in its entirety.”: FSC, Report No. 2/ II/2004, Government bill entitled “Law Relating to the Legal Status of Refugees”.

decide to submit the vote on the specifics to the competent committee,⁷⁸³ or, if more than one exists, to that which it considers most appropriate for the purpose.

In such case, the President of the Legislative Assembly sets a deadline that reasonably allows for not only the drafting and presentation of the committee's record of proceedings, but also the subsequent debate and voting on the specifics — for reasons of transparency of the legislative process, the debate and voting of a bill or shall always be recorded and documented in minutes, which are attached to the committee's descriptive report.

However, there can always be a call-back of voting: the Plenary may, at any time, call the vote on the specifics back to itself, by means of a resolution at the request of any Member.

The stage of final overall voting only occurs when a prior vote on the specifics in committee is held, entailing the non-application of the special features thereof to the legislative procedures wherein voting on the specifics is carried out in plenary session.

The texts of the bills approved on the specifics in committee are delivered to the President of the Legislative Assembly, for the purpose of final overall voting in the Plenary. Any member may request a debate on given articles, and also submit proposals to amend the text approved in committee, until the period of final overall voting commences.

The effects of a negative decision taken in the final overall voting are indeed quite particular. The bill is, for lack of a better metaphor, “resurrected”, with the consequent restarting of the legislative procedure:

“1. In the event of non-approval of the text of a bill in final overall voting, the Plenary may deliberate to:

a) Send the original text to an ad hoc committee established specifically to perform a new examination, debate and voting on the specifics, without prejudice to the provisions of Article 123, or

b) Proceed to a new debate and voting on the specifics in the Plenary.”

Failure to approve the text of a bill, as set forth above, is tantamount to its definitive rejection.

6. Final Drafting

Subsequent to these votes and approvals, the legislative procedure moves on, returning to

⁷⁸³ See an example, Committee on Social Affairs, Education and Culture, Report No. 6/94, Vote on the specifics of the bill on the General Framework Law on Family Policy, “*I. Following the deliberation taken in the plenary session of 8 July 1994, the vote on the specifics of the bill draft law in question was submitted to this Committee under Article 137, paragraph 3), of the Rules of Procedure.*” and “*II. On the vote, 2. The bill was voted on as follows*” — after the issuance of the normal analytical report by said Committee.

an absolutely common pipeline, to the final drafting stage.

The final drafting Committee is endowed with the power of absolute and final say, as procedurally defined.⁷⁸⁴

The said committee decides on its own,⁷⁸⁵ without requiring the consent of the bill's proponent or of any other party.⁷⁸⁶ It is crucial to note that the final drafting must not alter the legislative intent, limiting itself to enhancing the systematisation and style of the text perfecting the systematisation and style of the text — for instance, to eliminate the brackets for identification of normative acts, to correct typos, to harmonise the wording, and to introduce other formal improvements, mainly in the domain of formal legislative technique.

In practice, the final drafting is often carried out between the Legislative Assembly's Advisory Staff and the President of the Committee.⁷⁸⁷

The definitive text is confirmed with the signature of the President of the Legislative Assembly, under Article 130 of the Rules of Procedure;⁷⁸⁸ refusal to sign, on political grounds, is not allowed.

⁷⁸⁴ Article 129, paragraph (2): "The final drafting committee may not modify the legislative intent and shall limit its task to perfecting the systematisation and style of the text."

⁷⁸⁵ Perhaps in view of the trappings of a bill's proponent as the "owner" of the legislative process — which, at this stage, is increasingly untrue — the final wording, in practice, sometimes is determined or consented by the proponent, in apparent non-compliance with the procedural framework.

⁷⁸⁶ Cf. "It should be stressed that this was one of the few provisions warranting an amendment from the proponent, a fact worth noting, given the general context of this Government bill. This issue is raised in the present document as a courtesy and to foster a good collaborative environment, as its resolution depends entirely and exclusively on the Committee, under the terms clearly set out in Article 129 of the Rules of Procedure. If the Government does not proceed with the amendment, the drafting committee shall do so, at the stage of final drafting. [...] Furthermore, as has become evident, this issue may, if not resolved beforehand, be fully addressed at the moment of the final drafting." FSC, Report No. 2/V/2017, "Control of the cross-border transport of cash and bearer negotiable instruments". See also, "One must also mention that the final drafting of the texts of approved bills is the responsibility of the competent committee; such committee may not modify the legislative intent, and shall limit its role to improving the systematisation and style of the text, as commanded by Article 129 of the Rules of Procedure." FSC, Report No. 5/VI/2018.

⁷⁸⁷ A tendency — in direct and unequivocal non-conformity with procedural law — for the final drafting to be carried out, or subject to a prior "validation": by the proponent, is detectable, ie committees withholding the final drafts of Government bills until obtaining the support of the Executive or its departments or services.

⁷⁸⁸ In the past, a framework existed for Members to challenge the final draft — eg the inaccuracies therein — within five days; the President was responsible for deciding such challenge, and the text was considered to be definitive provided that no challenges were submitted, or after the decisions thereon were delivered, in accordance with the original wording of Articles 128 and 129, paragraph 1), revoked by Resolution No. 2/2009, *Amendment to Resolution No. 1/1999, which approved the Rules of Procedure of the Legislative Assembly*. Recalling said suppressed provisions: "Article 128 (Challenges) 1. Any Member may challenge inaccuracies, within five working days after receiving the text of the final draft. 2. The President is responsible for deciding the challenge, within forty-eight hours; the challenging Member may appeal to the Plenary until the meeting following the announcement of said decision is held. 3. If the text may only be communicated after the normal period of operation has ended, or during suspensions thereof, the powers of the Plenary provided for in the preceding paragraph are exercised by the Board. Article 129 (Definitive text; confirmation) 1. The unchallenged text, or the one reached after decisions on challenges thereto have been delivered, is considered definitive. 2. The definitive text is confirmed with the President's signature." Making an express reference to this framework, José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 243.

7. Signature by the Chief Executive and Veto

This moment embodies the start of the legislative procedure's monitoring stage. Bills approved by the Legislative Assembly become law after being signed by the Chief Executive. This act roughly corresponds to a control of the merits and the constitutional conformity of the texts approved by the Legislative Assembly and signed by the respective President.

The Chief Executive may, however, decide in certain cases to refuse to sign,⁷⁸⁹ ie to *veto politically*,⁷⁹⁰ giving rise to a *second deliberation on Members' bills*.

Article 132 of the Rules of Procedure establishes the framework:

"1. In the event of refusal to sign a Members' bill, under the terms of Article 51 of the Basic Law, such bill is resubmitted, within ninety days, to the Legislative Assembly, for the purpose of confirmation thereof.

2. The new appraisal is carried out in a plenary meeting to such end scheduled by the President.

3. The voting in general shall be on such confirmation.

4. The debate on the specifics shall occur provided that, until the end of the general debate, amendment proposals are submitted; in such case, voting shall be solely on the articles within the scope of said proposals.

5. In the case provided for in the preceding paragraph, voting on the specifics may precede the vote on the whole, if so decided by the Plenary, at the request of no less than three Members. 6. There shall be no final drafting of the text left unchanged after the second deliberation."

A decision by the Legislative Assembly to confirm a Members' bill requires approval by a vote of no less than two-thirds of all Members, under Article 51 of the Basic Law. Faced with such deliberation, the Chief Executive has two alternatives: either sign the bill and order publication thereof, within 30 days, or dissolve the Legislative

⁷⁸⁹ Underlining this point and framing it in the context of "*mutual co-operation and cross-restrictions between the executive and the legislature*": Song Xixiang, 'Sobre as Relações entre o Poder Executivo e o Legislativo e o Judicial em RAEHK e RAEM' (2012) 4 Revista de Estudos de 'Um País, Dois Sistemas' 119, 121, "*the executive imposes restrictions on the legislature: in the legislative process, the Chief Executive may refuse to sign, and even dissolve the Legislative Assembly*".

⁷⁹⁰ Lino Ribeiro, *Curso de Procedimento Administrativo* (SAFP 2001) 28; José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 246; Carlos Blanco de Moraes, 'A organização do poder político-legislativo no território de Macau — Durante e após a transição para a soberania Chinesa' in *Estudos em Homenagem ao Prof. Doutor Rogério Soares* (Coimbra Editora 2001) 171. See also Cheong Pou Man, 'Conhecer a Lei Básica de Macau Através da Teoria e Regime Democráticos' (2002) 58 Administração 1139, 1283.

Assembly.⁷⁹¹

Indulge me with a recollection of the observations made above, regarding the exclusion of Government bills from this framework. Nonetheless, it is questionable whether such logic applies in the following scenario, implausible in practice, but legally possible: what happens if Members, through amendment proposals, modify the original text of a Government bill to a degree deemed unacceptable by the Chief Executive, who consequently might wish to veto the future law, as worded by the Members? Should such case not be contemplated? Would the so-called supremacy of the Chief Executive over the Legislative body not impose an extension of the power to veto? If so, does the Basic Law, in its narrative, allow for this enlargement?⁷⁹²

A final question: could this case be construed as a special procedure?

This stage exhausts the Rules of Procedure's regulation of the legislative procedure, but does not mark the end of the legislative procedure. In fact, there are other *ex post* "moments", beyond the Rules of Procedure: publication, and — although outside the scope of the legislative procedure *per se* — reporting of the law for record in Beijing.

8. Publication

The Chief Executive,⁷⁹³ after signing the laws,⁷⁹⁴ sends these for publication in the OG.

One may contend that the publication of laws, and of all other normative act⁷⁹⁵

⁷⁹¹ Cf an emphasis on the notion of general interest, "In the context of the aforementioned Articles 51, 52 and 54, these are of the same nature, providing a balance between the Chief Executive of the Macau Special Administrative Region (MSAR) and the Legislative Assembly, particularly with respect to the legislative power. In the event of a serious dispute regarding legislation between the Chief Executive of the Macau Special Administrative Region and the Legislative Assembly, the general interest is the basis for consideration and judgment.": Wu Tianhao, 'Sobre o "Interesse Geral" Mencionado na Lei Básica da Região Administrativa Especial de Macau' (2012) 1 Revista de Estudos de "Um País, Dois Sistemas" 122.

⁷⁹² Inasmuch as this issue is legally framed in the Basic Law and the Rules of Procedure, I believe no such veto may exist. See António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483, especially 484.

⁷⁹³ Lino Ribeiro, *Curso de Procedimento Administrativo* (SAFP 2001) 28, highlights this important intervention by the Chief Executive at this stage of the legislative process, one of "*integrating effectiveness*": *in addition to the stage of control, as discussed*: wherein the *right to veto* is placed, "*linked to the requirement of signature*".

⁷⁹⁴ The other acts of the Legislative Assembly, including those of a normative nature, are published by the sole order of the President of the Legislative Assembly.

⁷⁹⁵ In its entirety and both official languages. Therefore, it can hardly be understood why many international instruments appear in the OG, without either the Chinese or Portuguese language, and sometimes with a partial version in only one official language! For example, Chief Executive's Notice No. 69/2011, published in the OG, No. 42, Series II, of 19/10/2011, uses Japanese (by the Government of Japan) and Chinese (by the Government of the People's Republic of China). There is no translation of the note, issued in Japanese, into the two official languages, Chinese and Portuguese, and there is no translation of the note, issued in Chinese, into Portuguese. Consider also Chief Executive's Notice No. 49/2011, published in the OG, No. 36, Series II, of 07/09/2011, which uses Portuguese (by the Government of the Republic of Mozambique) and Chinese and Portuguese (by the People's Republic of China), with no translation into Chinese of the note issued by the Republic of Mozambique; Chief Executive's Notice No. 10/2014, ordering the publication of the authentic English language

(resolutions, independent administrative regulations, complementary administrative regulations, national laws, national regulations, instruments of international law) in the official journal has a “certifying effect: the published text is the legal one, with a presumption of being in conformity with the original text.”⁷⁹⁶

This is a stage concerning the effectiveness of the legislative procedure, without which no legal effects may arise — Article 78 of the Basic Law establishes that “*Bills approved by the Legislative Assembly of the Macau Special Administrative Region only enter into force after being signed and published by the Chief Executive.*” In accordance with such constitutional obligation, Article 3 of the Law on forms and templates of legal enactments provides: “*Under penalty of legal ineffectiveness, the following are published in Series I of the Official Bulletin: (1) The laws; [...]*”.

version of the “Agreement between the Government of the Macau Special Administrative Region of the People’s Republic of China and the Government of Japan on the Exchange of Information on Tax Matters”: without a Chinese version nor a Portuguese one! It should also be noted that certain international acts originating from the United Nations Security Council, which were systematically published in the two official languages of the MSAR, are now being published in Chinese and English, with no translation into Portuguese; for example, Chief Executive’s Notice No. 74/2011, published in the OG, No. 43, Series II, of 26/10/2011, which orders the publication of Resolution No. 1988 of the United Nations Security Council, makes use of the English and Chinese languages, without a translation into Portuguese. What can one say? First, other international agreements have been published, correctly from a technical point of view and, in accordance with the usual practice, in the two official languages (or with the required translation into both official languages) in the OG; for example, Chief Executive’s Notice No. 28/2011, published in the OG, No. 32, Series I, 08/08/2011, Chief Executive’s Notice No. 29/2011, published in the OG, No. 32, Series I, of 08/08/2011. Second, it is highly doubtful whether international acts not properly published in the official languages are effective, given that the consequence of a failure to publish in the OG, or of a defective publication, is legal ineffectiveness. Third, it is neither understandable, nor acceptable, that English has emerged as a kind of authentic language, alongside and in full equality with the authentic Chinese version, while Portuguese is not even used. In this regard, “*The unity and publicity of the Law have always been fundamental principles of the Macau legal system. The Basic Law enshrined the principle of the continuity of the legal system, therefore said their fundamental principles must be understood to have been maintained [...]* It is from the publicity given to the texts of treaties, of the acts relating thereto, as well as others acts to be executed, that the application of international law becomes possible in our system [...] In the field of conventional (multilateral or bilateral) international law, the publicity of acts (other than just treaties) is especially important: not only is it obviously necessary to acquire knowledge of the texts of the treaties (which are have the value of law, thus requiring cognisance of their existence), but also because it is essential to know when and how they are applied.”: TSC, Report No. 2/II/2002; “*The application of official bilingualism in Macau is not only one of the important characteristics of the regional society, but also an advantage. [...] The official languages are used on official occasions, ie in the performance of the functions of administrative bodies, in the production of legal enactments by legislative bodies and the rulings by judicial bodies.*”: Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 45; “*With the establishment of the Macau Special Administrative Region, the custom of using the Portuguese language in the judicial system is preserved, one of the characteristics of Macau. The use of Portuguese, as a legal-technical language, reveals the origin of the legal system previously in force in Macau, maintaining the uniqueness of the judicial language, thus ensuring, both from a legal scholarship and a case-law point of view, the intrinsic relationship with the original system.*”: Zhu Lin, ‘A situação da língua chinesa nas sentenças judiciais de Macau — Duma perspectiva dos direitos fundamentais’ (2007) 75 *Administração* 159; and finally, “All local bodies in the Region must use the official languages and may not reject the use thereof, nor just use only one and reject the other.”: Xiao Weiyun, *Conferência sobre a Lei Básica de Macau* (Associação Promotora da Lei Básica de Macau, Macau, undated) 66. See also, for a comprehensive clarification of language in the shaping legal rights and duties, Pedro Pereira de Sena, ‘Direito Linguístico: direitos e deveres nas palavras da lei’ (1997) 36 *Administração* 385 et seq.

⁷⁹⁶ José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 248.

Failure to publish a law results in its original ineffectiveness:⁷⁹⁷ the law may indeed exist and be valid, but it does not produce “*any legal effects*”.⁷⁹⁸

The concept of publication is — for several reasons, eg the idea of publicity *per se*⁷⁹⁹ — the focal point for the purpose of determining the period of *vacatio legis*; in the words of MENEZES CORDEIRO, “a nuclear importance: the *vacatio* deadlines are counted from such event, and it is certain that, before publication, legal enactments are ineffective.”⁸⁰⁰

Next comes a stage located nearly outside the range of the legislative procedure, with the purpose of ordering and formalising the participation of subjects within political bodies; notwithstanding such assertion, the entry into force phase does belong to said procedure.

9. Entry into Force

The moment of publication of laws should not be confused with the moment of their entry into force. Although such moments may coincide in time, normally the entry into force operates at a later date.⁸⁰¹

The period between those two moments is termed *vacatio legis*:

“The *vacatio legis* period is intended to enable the addressees to know the law before it begins to take effect. More than allowing potential addressees to know the law, this period of *vacatio legis* reinforces the legitimacy of legal norms. It is a clear indication of the undesirability of ‘surprise laws’, ignored by their addressees and, as such, leading to non-compliance.”⁸⁰²

The Law on forms and templates of legal enactments⁸⁰³ establishes as a first and general principle that laws (among other normative acts such as resolutions and administrative regulations) enter into force on the day stipulated therein. This rule allows the lawmaker to “determine, on a case-by-case basis, the date of entry into force of each

⁷⁹⁷ The ineffectiveness is original in nature whenever “*the act or fact is contemporary with the making of the law*”: Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 129.

⁷⁹⁸ Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 130.

⁷⁹⁹ As Iong Ka Ton defends, ‘Considerações Sobre a Divulgação Jurídica Promovida pela Administração Pública de Macau’ (2001) 54 *Administração* 1439, 1440: “*Once the law has been made, publication comes next. The publication of the law is, of course, a process of legal dissemination. Bills are not laws until they are examined and approved by voting within legislative bodies, and, furthermore, the other legally required procedures are completed. These laws do not produce the intended effects of regulating social relations and the conduct of the population, even if generally known by the latter. For the law to be known to all and to duly produce effects, it has to be made public, with a view to the understanding, execution and compliance with the law by the population and the civil service.*”

⁸⁰⁰ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 *A Feitura das Leis* 365, 366.

⁸⁰¹ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 *A Feitura das Leis* 365.

⁸⁰² TSC, Report No. 2/II/2005, Government bill entitled “Electronic documents and signatures”.

⁸⁰³ Article 10, Law No. 3/1999 dated 20 December 1999.

law, by taking into account its inherent characteristics, and, most relevantly, results in the establishment of a period of *vacatio legis*, even if subsidiary (which is nothing more than the period, between the publication of the law and its entry into force, recognised as “normal”).⁸⁰⁴

In other words, a decision-making autonomy in this particular regard is recognised for each and every law, taking into account the judgment of the lawmaker⁸⁰⁵ on aspects such as opportunity, necessity, complexity, novelty, scope and relationship of the new framework to be introduced in the legal order with other sources of law and normative acts — namely the correlation with complementary acts. This means that the *general vacatio legis* may be suppressed, shortened, or extended.⁸⁰⁶

In this respect, the Civil Code is also convergent, as a law on laws: Title I, On the laws, their interpretation and application.

There is, therefore, a normative duplication,⁸⁰⁷ stemming from the same formal source (law), on the same subject-matter (law, excluding other normative acts?⁸⁰⁸), the solution being identical in both sources. Albeit with a different wording, Article 4 of the Civil Code⁸⁰⁹ points equally to the principle of the autonomy of each law in defining the moment of its entry into force and follows the same general subsidiary criterion of such event occurring on the sixth day after that of publication, provided the law in question is silent on the issue.

This decision-making autonomy for and of each legislative act⁸¹⁰ may operate by indicating a pre-determined date, by establishing that the entry into force shall take

⁸⁰⁴ TSC, Report No. 2 II/2005, Government bill entitled “Electronic documents and signatures”.

⁸⁰⁵ Such judgment may differ from that of the proponent. See, for example, TSC, Report No. 2 IV/2012, which considered that the entry into force, originally set for the following day, should be amended to 30 days after publication, in order to allow the competent departments and bodies to become better familiarised with the new legal framework. Other examples can be consulted in the TSC’s Report No. 4/IV/2013, invoking legal clarity and certainty and an adequate preparatory timeframe; “*The Committee considers that the proposed vacatio legis period should be lengthened to 180 days, albeit per a previous informal suggestion by Government In short, half a year is a very reasonable period for the purposes of the entry into force of this law, allowing it to be known by the special addressees and for measures to be taken to adapt to the provisions of the law.*”: TSC, Report No. 3/II/2005; or “*The provision, contained in the initial version of the Government bill, for the law to enter into force on the day following its publication, is not suitable.*”: TSC, Report No. 2/II/2005.

⁸⁰⁶ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 365, 366. The author defends that the suppression or the shortening of the *vacatio legis* tend to occur when there is a need for immediate legislative action, while the enlargement thereof is justified in view of especially complex legal enactments, *ibid*, 367.

⁸⁰⁷ See, for a criticism of this type of norms being included in the Civil Code, Jorge Miranda, ‘Em vez do Código Civil, uma lei sobre leis’ (2007) 47 Legislação 21, 25 et seq.

⁸⁰⁸ Law regardless of its source. The issue is whether other normative acts — be they endowed or not with the legal force and value of law — should be included. An example to consider are the normative orders.

⁸⁰⁹ “Article 4 (Entry into force of the law), 1. The law, regardless of its source, only becomes mandatory after being published in the Official Gazette. 2. Between the publication and the moment of entry into force, a period of time, as determined by the law, shall elapse; in the absence of such determination, the law shall enter into force on the sixth day following that publication.”

⁸¹⁰ José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CREDE-DM 2016) 92, mention “the nearly uniform practice in the MSAR for legal enactments to contain a provision on the entry into force”.

place after a certain period of time from the day of publication, or by conditioning the entry into force to acts to be practiced in the future, namely by other entities (for example, the publication of an administrative regulation by the Chief Executive).

The date of entry into force may vary greatly. For example, we encounter laws that come into force 180 days after the date of their publication,⁸¹¹ others after 90 days,⁸¹² or 30 days following publication;⁸¹³ some specify that the entry into force occurs on the day following publication,⁸¹⁴ by adopting the different technique of choosing a given calendar day,⁸¹⁵ such as a waiting period of half a year, a couple of months, etc

Other cases do not actually establish the entry into force, but such date is determinable, although no longer by the legislator: either is by conditioning the entry into force — usually of to just a few norms — to complementary enactments, or to other factors the moment of which occurrence may be uncertain.

The latter situation is exemplified in the case of the Administrative Litigation Proceedings Code: under Article 9 of Decree-Law No. 110/99/M, of 13 December 1999, which approved said Code: “*The present legal enactment and the Code hereby approved enter into force on the date on which the Court of Final Appeal begins to operate.*”

The legislator may, for several reasons, revise the decision previously taken on the appropriate moment for the entry into force and, by means of a normative act of identical legal value — as must be — modify such moment to a different, usually later, one.⁸¹⁶ For example, the entry into force of the Civil Code and the Commercial Code was postponed by one month, from 1 October to 1 November 1999.⁸¹⁷

It should be noted that, when dealing with the so-called *Great Codes*,⁸¹⁸ it is

⁸¹¹ Law No. 8/2014, Prevention and control of environmental noise, or Law No. 3/2014, Legal framework on the occupational safety card in the building industry.

⁸¹² Law No. 9/2012, Deposit Guarantee Scheme.

⁸¹³ Law No. 2/2012, Legal framework on video surveillance in public spaces.

⁸¹⁴ Law No. 1/2009, Addendum to Law No. 21/88/M — “Access to the Law and to the Courts”.

⁸¹⁵ For example, “*The present law enters into force on 1 March 2014.*”: Law No. 11/2013, Law on Safeguarding of Cultural Heritage; “*The present law enters into force on 1 January 2011.*”: Law No. 4/2010, Legal Framework on Social Security; and “*The present law enters into force on 15 August 2009.*”: Law No. 13/2009, Legal framework governing the internal sources of norms.

⁸¹⁶ I am unaware of cases where the entry into force has been antedated or brought forward by reference to a moment in time already established in a published law, probably because such may blemish the principles of legal clarity and certainty, negatively affecting the predictability created with the publication of the law and the original norm on the *vacatio legis*. Nonetheless, in view of the existence of long periods before the entry into force, and the urgent need to regulate certain subject-matters — which may even be greater after the publication of the law in hand — such a possibility should perhaps not be ruled out, albeit of infrequent occurrence, as it flouts the legitimate legal expectation previously created about the moment when the regulatory framework would have started to be applied.

⁸¹⁷ Cf the preamble of Decree-Law No. 48/99/M, of 27 September: “Given that the conclusion of the legislative process relating to the Code of Civil Procedure was possible only at the present moment, it is not viable to set the date of 1 October for said Code to enter into force; consequently, it is advisable to postpone, for one month, the entry into force of the Civil Code and of the Commercial Code, thus enduring that these three Great Codes may enter into force at the same time.”

⁸¹⁸ See, for example Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 365, 367.

common and suitable to establish a reasonably long *vacatio legis* period.⁸¹⁹ In Macau's case, due to very specific contingencies in the transition process,⁸²⁰ such major legal codes entered into force after a somewhat reduced period of *vacatio legis*.

A very unique example of very long period of *vacatio legis* is the Macau Basic Law.⁸²¹ This constitutional law was adopted on 31 March 1993, at the First Session of the Eighth Legislature of the National People's Congress of the People's Republic of China and promulgated by Decree No. 3 of the President of the People's Republic of China, to enter into force on 20 December 1999. In other words, it underwent a *vacatio legis* period of more than six and a half years.⁸²²

Unless a law determines the date of its entry into force, then general criterion kicks in: "In the absence of a determined day, the legal enactments referred to in the preceding paragraph enter into force on the sixth day after that of publication."⁸²³ — in other words, such is the default *vacatio legis*.⁸²⁴

The entry into force of laws and other normative acts only occurs after publication thereof in the OG of the MSAR, the official journal serving as the proper and appropriate means to inform the community of the creation of new legislative acts, which shall enter into force and thus become capable of producing legal effects. Upholding principles such as democracy, transparency, and legitimacy, it is imperative that laws are

⁸¹⁹ "The present legal enactment and the Code of Criminal Procedure hereby approved enter into force on 1 April 1997, being solely applicable to procedures initiated after such date, regardless of the moment when the offence was committed; procedures pending on said date shall continue to be governed by the repealed legislation until a final res judicata decision thereon has been delivered.": Decree-Law No. 48/96/M, of 2 September 1996. This legal enactment was approved on 15 August 1996.

⁸²⁰ Cf, as an example of these specific contingencies, "Finally, it must be reiterated that the absence of a new judicial organisation compatible with the Basic Law will prevent the new Code of Civil Procedure (CPC) from unveiling the full gamut of its potentialities, especially in the domain of appellate procedures. The Committee is hopeful that the current impasse will be quickly resolved, so that the CPC may be completely implemented as soon as possible.": AHC for Monitoring and Participating in the Drafting of the Legislative Texts Relating to the Civil Code, the Code of Civil Procedure and the Commercial Code, Report No. 3/99, Appraisal of the Project relating to the new Code of Civil Procedure of Macau.

⁸²¹ Jorge Bacelar Gouveia, 'Fontes do Direito e Direitos Fundamentais em Macau' in *Direito Constitucional de Macau* (IDILP 2012) 79.

⁸²² At the time, issues such as "pre-effectiveness": convergence, consideration of the content of the Basic Law as a reference point for the legislative reforms to be undertaken, were discussed, I have always taken the view that such were distinct questions. See Paulo Cardinal, 'A Transição e o sistema político de Macau: continuidade ou convergência?' (1997) 4 *Revista Jurídica de Macau* 27, 34 et seq; and Manuel Escovar Trigo, 'A transição na Declaração Conjunta' (Simpósio sobre população e desenvolvimento em Macau, Macau 1993): "Since the Basic Law has not entered into force, and does not have pre-effectiveness, the essential question — from a legal point of view — is that which pertains to its present "reference" value, and to its possible claim to retroactive application, after it enters into force. A positive legal reference value is on legislative policy, regarding the adaptation of the current system to the future one of the MSAR, in addition to issues of predictability, publicity and accessibility for its addressees. In the development of Macau's legal system, one should not, naturally, be indifferent to the approval of Basic Law, nor its normative content."

⁸²³ Article 10, paragraph (2), of Law No. 3/1999.

⁸²⁴ As Menezes Cordeiro points out, "the generic *vacatio legis* periods are subsidiary in nature.": Menezes Cordeiro, 'Problemas de aplicação da lei no tempo. Disposições transitórias' (1986) 2 *A Feitura das Leis* 365.

not clandestine, unwritten, or informal.⁸²⁵

There exists a possible differentiation between entry into force and production of effects.⁸²⁶ Normally, the moment of entry into force corresponds to the moment when the legislative act becomes effective, both phenomena being therefore concurrent.

However, such synonymy may not always be the case: “The entry into force of a law should not be confused with its effectiveness, which may be retroactive.”⁸²⁷

Indeed, the legislator may intend to change the typical moment for a law to take effect, which is that of the entry into force.⁸²⁸ In such cases, the production of effects becomes temporally distinct from the moment of entry into force.⁸²⁹ The effects reverberate over time in a different way, either with a view to a postponing the production thereof to a certain moment in the future — often determined with the approval and entry into force of another complementary legal enactment — or, conversely, to facts which have already occurred, thus producing retroactive effects, projected into the past.⁸³⁰

In addition to limitations under constitutional and international law, good legislative policy dictates that “retroactivity, even if admissible, should be avoided. Life follows its own natural course of events, generating stability and confidence. The intention to modify the past, in itself, constitutes a harmful social disturbance, which the legislator should only consider if absolutely necessary.”⁸³¹

In conclusion, the entry into force of a law refers to the moment from which such law becomes applicable in the legal order; it is rooted in the very idea of a normative act. Whereas legal effectiveness pertains to the moment from which a segment — small or large, but always a segment — of the normative fabric contained in a law begins to produce effects in the legal order. Such production, in principle, may either be projected

⁸²⁵ “It should be noted that if a law is applied by the Administration before publication or, after such event but before the term of the *vacatio legis*, the acts issued under such application shall be ineffective, except in putative situations.”: Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 471.

⁸²⁶ Cf José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016) 91, who also alert to the difference.

⁸²⁷ João Gil de Oliveira and José Cândido de Pinho, *Código Civil de Macau — Anotado e Comentado*, Livro I, vol I (CFJJ 2018) 99.

⁸²⁸ “The entry into force refers to the moment when a legal enactment or some of its provisions begin to be applicable, becoming officially part of the legal order. Effectiveness reflects the moment when a legal enactment, or some of its provisions, once entered into force and applicable, begin to actually produce effects.”: José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016).

⁸²⁹ And not before. See José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016) 91, who mention “*once entered into force*”.

⁸³⁰ The entry into force of a law — or of another normative act — must always precede the production of the respective desired effects, given that a law, if not yet in force in the legal order, does not belong thereto, and is obviously devoid of effectiveness. After the entry into force of a law, it is possible for norms to have retroactive effects.

⁸³¹ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 377.

retroactively,⁸³² or, more commonly, deferred to a later time, eg after the approval of a complementary administrative regulation.

The legislative procedure is thus concluded.

⁸³² One must be mindful of the guarantee anchored on the prohibition of more unfavourable retroactive laws in certain subject-matters, especially in the fiscal and criminal law domains; see a manifestation thereof under Article 29 of the Basic Law. On this issue, see, for instance, Jorge A. F. Godinho, 'A Lei Basica e o Direito Penal' (1993) 6 (19/20) *Revista de administração publica de Macau* 153, 165, and Jorge A. F. Godinho, *Macau Business Law and Legal System* (LexisNexis 2007) 16.

XV.

THE COMMON LEGISLATIVE PROCESS — THE POST-PROCEDURE

1. Post-Procedure: Reporting for Record

This stage is not an integrative one and does not pertain directly to effectiveness within the scope of the legislative procedure,⁸³³ nor is it subsumed into the control stage of the legislative procedure⁸³⁴ *per se* — it has the nature of an additional stage, one of mere record, required of all MSAR laws. This record shall not be confused with other acts, such as promulgation or ministerial referenda, and does not hinder the full effectiveness of a law.

Confirming the location of said stage outside the legislative procedure, a possible return of the law shall operate as “*a purely suppressive repeal*”.⁸³⁵

Under Article 17 of the Basic Law,⁸³⁶ “Laws enacted by the legislature of the Macau Special Administrative Region must be reported to the Standing Committee of the National People’s Congress for the record. The reporting for record shall not affect the entry into force of such laws.”, to which the principle of non-retroactivity is added, “This cessation of effects shall not be retroactive, unless otherwise provided for in other laws of the Macau Special Administrative Region.”⁸³⁷

⁸³³ Guo Tianwu, ‘Uma abordagem sobre alguns problemas relacionados com a supervisão legislativa da Região Administrativa Especial de Hong Kong’ (2008) 80 Administração 433, 442, says: “This mode of supervision is, of course, an a posteriori control. It may only exercise oversight over the legislative outcome, and not over the legislative process.”

⁸³⁴ With a different point of view, José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 247.

⁸³⁵ Carlos Blanco De Moraes, ‘A organização do poder político-legislativo no território de Macau — Durante e após a transição para a soberania Chinesa’ in *Estudos em Homenagem ao Prof. Doutor Rogério Soares* (Coimbra Editora 2001) 143.

⁸³⁶ Li Yanping, ‘Governança constitucional iniciada em localidades — Inspiração do mecanismo de apreciação das Leis Básicas de Hong Kong e de Macau’ (2010) 87 Administração 113, 122: “*The Basic Law establishes the mechanism of reporting for record in order to guarantee the supreme legal position of the Basic Law in the regions of Hong Kong and Macau*”; Guo Tianwu, ‘Uma abordagem sobre alguns problemas relacionados com a supervisão legislativa da Região Administrativa Especial de Hong Kong’ (2008) 80 Administração 433, 442 et seq; Carlos Blanco De Moraes, ‘A organização do poder político-legislativo no território de Macau — Durante e após a transição para a soberania Chinesa’ in *Estudos em Homenagem ao Prof. Doutor Rogério Soares* (Coimbra Editora 2001) 142–43.

⁸³⁷ In divergence, see João Albuquerque, ‘*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*’ (unpublished and archived with the Author, 2013).

This mechanism, applicable exclusively to laws and not to the Rules of Procedure⁸³⁸, resolutions, or administrative regulations (including those complementing laws), should be regarded, beyond the confines of the legislative procedure, as a supervening phase of non-judicial control of constitutional conformity of laws; as mentioned above, such phase does not condition — until the record is accepted — the full effectiveness of the law.

⁸³⁸ And limited to the cases referred to in Article 17 of the Basic Law, ie there is no standard for complete control of constitutional compliance, encompassing the entirety of the Basic Law's norms and principles; the sole issues at stake are the affairs within the competence of the central authorities, and the relationship thereof with the MSAR.

XVI.

THE URGENCY PROCESS

1. Introduction

The urgency process is regulated under Articles 155 et seq⁸³⁹ of the Rules of Procedure, displaced from the normative locus of the legislative procedure.⁸⁴⁰

It is not, as seen above, a special legislative process *per se*. Therefore, it is definitely not a special legislative process, as opposed to, or in a relationship *vis-à-vis*, the common legislative process, but rather a rushing of a legislative process, in its common form (or specialised if such a process exists; currently, no special process has been established).

The urgency process should be viewed in relation to the normal — and not the common — process.⁸⁴¹ Indeed, the urgency process is stripped of a special nature, for it does not incorporate qualifying elements, nor is it intended to produce a special category of legislative act; it entails a streamlining of the normal course, caused by the emergence of a relevant need or crisis.⁸⁴²

In fact, the location of the urgency process in the Rules, as well as the absence of a formal attribution, seem to indicate and confirm the idea that no special nature is attached thereto.

What is the object thereof? Any bill.⁸⁴³

2. Procedure

The urgency process must be requested until the beginning of the general debate of the bill, at the initiative of any Member and of the Chief Executive.

The Plenary may decide, after a debate, to adopt the urgency process, according

⁸³⁹ Namely: Article 155 (Object), Article 156 (Deliberation on the urgency), Article 157 (Effects of the deliberation), and Article 158 (Subsidiary framework).

⁸⁴⁰ The same was already the case, for example, in the Legislative Assembly's Rules of Procedure of 1977: the urgency process appeared in an autonomous Chapter IX, separate from Chapter VI (Forms of Processes), encompassing the common legislative process and several special legislative processes.

⁸⁴¹ Jorge Bacelar Gouveia, *Manual Direito Constitucional*, vol II (7th edn, Almedina 2021) 1282.

⁸⁴² *ibid.*

⁸⁴³ Also applicable to the procedure on resolutions.

to the circumstances and the assessment of the urgency's reasonableness and necessity.

The application for adoption of an urgency process⁸⁴⁴ *per se*, is not binding; and regardless of its provenance, the decision by the Plenary should depend on the reasons and their underlying rationale,⁸⁴⁵ as presented in the application. Furthermore, this process is conceived as an exception measure, and should not be disguised as a feature of normalcy,⁸⁴⁶ nor as a means for overcoming any expected resistance in parliament.

A nebulous issue concerns the majority required for approval — will a simple majority suffice or, perhaps — for example by analogy — might one defend the need for an absolute majority? Article 81 of the Rules of Procedure seems to point to a simple majority, the decision itself taking the form of a simple deliberation of the Plenary.

This doubt was unequivocally clarified in the 2017 review of the Rules of Procedure. Paragraph (2) of Article 81 was amended to “2. *Deliberations aimed at approving the following shall be passed by more than half of the total number of Members: [...] (b) The adoption of the urgency process, under Articles 155 to 158.*”⁸⁴⁷

A point that really deserves to be stressed is that the urgency process should only occur when there is a grounded urgency, incompatible with the adoption of the common legislative process. The urgency process should not be adopted for the sake of political convenience, still less so if the outcome is a downgrading, or *degradation*, of the form of the normative act, from a law to an administrative regulation⁸⁴⁸. As a Committee's Report laid out:

“or rather, in addition to the possibility of adopting the form of law, it was asked whether, to shorten the slowness of the process, it would be possible to update the amount through an administrative regulation or an executive order; it is a technical and legislative issue. The conclusion reached was that the amount of the compensation under appraisal is within the scope of the

⁸⁴⁴ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 581.

⁸⁴⁵ The request for urgency must be made “with some particularity”: Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers 2001) 313. Another example under comparative law may be seen in Spain, where, in addition to a pre-formatted urgency process (with a reduction in half of all procedural deadlines), has another process called “single reading”: albeit seldom used, for elementary texts, which sometimes are justified by extreme urgency, Fernando Santaolalla López, *Derecho Constitucional* (Dykinson 2004) 320. In other words, the requirement of exceptionality, and/or of true urgency, are factors which condition the use of this type of abbreviated legislative procedures.

⁸⁴⁶ Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers 2001) 325.

⁸⁴⁷ From the respective Explanatory Note, “Several Members considered that notwithstanding the fact that urgent processes for the approval of legislative initiatives are adopted by means of simple deliberations of the Plenary, these should garner the same political consensus as the legislative initiatives. Consequently, they proposed a modification to the quorum for decision-making, to the effect that approval of the deliberation on an urgency process would require the favourable votes of more than half of the total number of Members.”

⁸⁴⁸ A recurring criticism of legislative procedures and parliaments is the “excessive use of unorthodox legislative procedures that short-cut the normal legislative process, such as fast-track and omnibus legislation”, Ittai Bar-Siman-Tov, ‘Mending the Legislative Process – The Preliminaries’ (2015) 3(3) *Theory and Practice of Legislation* 245. The abuse of this practice can also be deemed as putting in crisis what some define as the legislature transparent dedication to lawmaking, Jeremy Waldron, ‘Representative Lawmaking’ (2009) 89 *Boston University Law Review* 335, 336.

guarantee of fundamental rights, under Article 39 of the Basic Law, Article 40 of the same Basic Law, and Article 6, paragraph (1), of the Legal Framework Governing the Internal Sources of Norms (Law No. 13/2009). Therefore, the matter in hand is included in the area reserved to the law, and may not be regulated under an administrative regulation or an executive order. On the concern over the slowness of a legislative process that could, as such, be harmful to workers' interests of workers, the solution may be found by adopting the urgency process (Articles 155 to 158 of the Rules of Procedure), under which the examination on the specifics in committee may be dispensed with.”⁸⁴⁹

In other words, this deviation from the common process must embrace a grounded need for an immediate assessment and decision on a given subject-matter:⁸⁵⁰ “it is intended to permit the speeding up of the parliamentary procedure [...] in view of circumstances that require a timely deliberation.”⁸⁵¹

There is no strictly established urgency process — a range of specific possibilities may, on a case-by-case basis, conform to a given urgency process.

The following features may serve to mould the urgency process: exemption from examination on the specifics in committee; exemption from final drafting by the competent committee (or a reduction of the respective deadline); or the approval, both in general and on the specifics, during the same plenary meeting (a very speedy shortcut).

Finally, if the Plenary does not determine a specific deadline, the period for final drafting is residually reduced to two days.

One or two additional observations are pertinent.

Naturally, no public consultations are held during an urgency process.

However, I contend that mandatory consultations with third parties may not be dispensed with, merely on the pretext that an urgency process has been adopted.

The limit of limits on this issue should be thusly addressed: if the urgency is indeed really necessary, an exemption from consultation should merit a special and extraordinary requirement of grounding and rationale. A specific and urgent request, to that effect, should be submitted for the Plenary's decision, namely until the beginning of the meeting. In this fashion, compliance with the obligation to consult may go hand-in-hand with respecting the urgency of the legislative process.

This mechanism should not be confused with prioritising the agenda of a plenary meeting, which is the responsibility of the President of the Legislative Assembly, at the

⁸⁴⁹ SSC, Report No. 1/V/2015, “*Amendment to Law No. 7/2008 (Law on labour relations)*”.

⁸⁵⁰ Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 366.

⁸⁵¹ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 580.

request of the Chief Executive — both situations are cumulative.⁸⁵²

The praxis may be described as follows: “the Legislative Assembly has also been approving, in a timely manner, the bills submitted by the Executive, and with urgency in critical circumstances. Regarding the latter, one may recall the bills on temporary tax exemptions and benefits to mitigate the negative economic impact of atypical pneumonia, and the wealth partaking scheme, which were placed on the agenda’s priority list.”⁸⁵³

In recent practice, the Advisory Staff of the Legislative Assembly has been called upon to participate in the discussion and analysis of Government bills, being afforded the opportunity to suggest amendments, although often within a very short period of time; such role is an attempt to compensate or overcome the lack of examination on the specifics in committee.⁸⁵⁴

3. A Few Critical Observations of the *Praxis* — the *Taxes Fast-Track*

There has been a certain tendency, detected as of late, of using the fast-track granted by the urgency process in legislative procedures on tax issues, almost like a special legislative process aimed at tax law. In fact, the three most recent laws⁸⁵⁵ in this field have always followed a shortened path and, among the remainder, several more⁸⁵⁶ were

⁸⁵² As a mere example, the following deliberation is transcribed:

“Resolution No. 6/2009/Plenary

The Legislative Assembly deliberates, under the terms and for the purposes of Articles 154 to 156 of the Rules of Procedure, the following:

Article 1. The urgency process is adopted, at the request of the Chief Executive, in relation to the Government bill entitled “Authorisation for the Government of the Macau Special Administrative Region to incur debts”.

Article 2. The urgency procedure adopted under the terms of the previous article consists of the following:

a) Exemption from examination on the specifics in committee;

b) Inclusion, in item 2 of the present plenary meeting’s agenda, of the debate and voting on the specifics the Government bill entitled “Authorisation for the Government of the Macau Special Administrative Region to incur debts”;

c) Exemption of the approved texts from final drafting by the competent committee.

Article 3. The present deliberation enters into force immediately.

Approved on 14 May 2009.

The President of the Legislative Assembly, Susana Chou”

Official Bulletin of the Legislative Assembly, Series II, No. III-47, 14.

⁸⁵³ Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 20. See also, regarding the use of the urgency process and its possible correlation with the necessary preservation of the areas reserved to the law: SSC, Report No. 1/V/2015.

⁸⁵⁴ Taking into account a few laws previously approved under urgency processes, which were revealed to have been affected by several problems, namely of a formal nature. Naturally, the urgency process, by usually excluding the intervention of a committee (and its report) from the stage of examination on the specifics, reduces the chances for the legislative initiatives in question to be corrected and improved upon, and also inhibits Members from making an informed decision.

⁸⁵⁵ Law No. 14/2015, “Amendment to the Regulation on the Motor Vehicle Tax”; Law No. 9/2015, “Amendment to the schedule to the Regulation on Excise Tax”; Law No. 15/2012, “Amendment to Law No. 6/2011 (Special stamp duty on the transfer of residential immovable property) and to the Regulation on Stamp Duty”.

⁸⁵⁶ Law No. 11/2011, “Amendment to the schedule the Regulation on Excise Tax”; Law No. 6/2011, “Special stamp duty on the transfer of residential immovable property”; Law No. 8/2008, “Amendment to the Regulation on Excise Tax”.

also approved through this expeditious process.

To be fair, there have been a few exceptions.⁸⁵⁷

On the one hand, one must bear in mind that such issues are embedded in relations of citizenship, that is, of individuals with political power; on the other hand, such matters belong to the spheres not only of areas reserved to the law — at stake is the fundamental right to private property — but also, in some aspects, of reserved legislative initiative. It is a matter of minor importance. Even a single amendment to attached schedules of taxed items, rates or tariffs may have great impact.

The reality is that bills containing substantive modifications have also followed the path of the urgency process, which in principle seems unsuitable to the purposes of such process — what is required is the justification for urgency, and not the nature of the subject-matter covered by a bill.

A good example of an appropriate use of the urgency process, aimed at a truly urgent legislative intervention, was that of Law No. 15/2012, “*Amendment to Law No. 6/2011 (Special stamp duty on the transfer of residential immovable property) and to the Regulation on Stamp Duty*.”⁸⁵⁸

After stressing that “The very dynamics of the debate and voting of laws in the parliamentary body is conducive to adjustments, of varying degrees of magnitude, to the originally formulated options”, LUÍS PESSANHA makes the following observation:

“However, the record of legislative practice shows a certain tendency by the Government to submit bills on tax matters, accompanied by a request for the urgency process to be adopted. This phenomenon has occurred absent the need for an urgent intervention in the legal order. Such entails a limitation, by the very nature and framework of such abbreviated process, wherein voting, in general and on the specifics, takes place in the same Plenary, without the examination of the legislative initiative in committee. The legislative body is restricted in its power to intervene with respect to the text of the bill initially submitted to the Legislative Assembly.”⁸⁵⁹

⁸⁵⁷ Law No. 1/2012, “*Amendment to the Regulation on the Motor Vehicle Tax, Second Standing Committee, Report No. 1/IV/2012*”; Law No. 1/2011, “*Amendment to the Regulation on the Urban Land Tax, Second Standing Committee, Report No. 1/IV/2011*”; Law No. 4/2009, “*Amendment to the General Schedule to the Regulation on Stamp Duty, Third Standing Committee, Report No. 2/III/2009*”.

⁸⁵⁸ A truly urgent matter at the time, or rather, requiring very speedy approval, to counter the extreme levels of speculation in the real estate market. The designation of “Regulation” is not synonymous with administrative regulations, nor any other normative act placed beneath the law in the hierarchy of legal sources. Such formal designation is applied to several tax laws in the MSAR legal order, as a remnant from history and tradition.

⁸⁵⁹ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

PART 5
A FEW PRECEDING AND COMPLEMENTARY
ISSUES RELATIVE TO
THE LEGISLATIVE PROCEDURE

XVII.

THE LAWMAKING IMPETUS

1. Introductory Remarks

To complement the preceding chapter, it might be interesting to present a few brief words on other aspects related to, but outside the immediate gravitational orbit of, the legislative procedure *per se*, with the latter co-habiting both upstream and downstream.

These three aspects are grouped together only for convenience and do not possess any common thread or umbrella. The only unifying link shall be one of co-existence with, or proximity to, the legislative procedure.

2. The Notion of Lawmaking Impetus and Distinction from Legislative Initiative

The first issue to be addressed naturally precedes the legislative procedure — the lawmaking impetus and, in a certain sense, the decision to legislate.

At this moment, at issue is not the legislative initiative — discussed previously — but something conceptually and practically different:⁸⁶⁰ “The lawmaking impetus is, may be, or must be, at the origin of the process, but falls outside thereof;”.⁸⁶¹ The lawmaking impetus may be considered as one of the components — not the only one, I must emphasise — of the *occasio legis*.⁸⁶²

This determining or stimulating factor in jumpstarting the legislative procedure may be derived either directly and compulsorily from a legal norm — *eg*, the most common cases, from the realm of non-legislative normative procedures, are the complementary administrative regulations — be unleashed from legal impetuses devoid of a mandatory normative conformation — *eg* in the case of Macau, rulings and decisions within the framework of judicial activity — or indirectly from other diverse factors, also

⁸⁶⁰ This concept, distinct from that of the legislative initiative, was introduced in Portuguese-speaking legal scholarship by Gomes Canotilho. See, for example, Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 *Legislação* 15.

⁸⁶¹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268.

⁸⁶² *ibid* 270–271.

not normatively binding on the lawmaker,⁸⁶³ which may be called *political impetuses*,⁸⁶⁴ namely those arising from given public bodies or sprouting from the exercise of the fundamental right of petition.⁸⁶⁵

I shall also discuss diffuse or social impetuses, for example through the conveying of positions by associations or organised *vested interests*, and, from another perspective, the negative lawmaking impetuses and the *suspensive or deferring* lawmaking impetuses.

Two aspects should also be noted. First, as far as legal impetuses are concerned, in particular, the binding ones, one should bear in mind that, *de rigueur*, such impetuses germinate in norms, and not in legislative acts *per se*.⁸⁶⁶ in truth — and herewith comes the second aspect — a single law may contain norms giving rise to lawmaking impetuses *de facere*, together with other norms constituting negative impetuses. I shall examine examples of this situation.

Laws causally linked to lawmaking impetuses may also contain a specific timing for implementation,⁸⁶⁷ as were the legislative authorisations, or else, as is usually the case, there is no stipulation of the precise and determined timeframe for impetuses to bear fruit.

3. Sino-Portuguese Joint Declaration on the Question of Macau

Commencing the analysis of the lawmaking impetuses arising from legal norms, the Joint Declaration comes to the forefront.

A significant impetus, especially relevant in Macau's transitional framework⁸⁶⁸ of 50 years, under the aegis of “One Country, Two Systems” principle, finds expression in the Joint Declaration, which led to the formulation of the Basic Law:

“The fundamental policies mentioned above and the respective clarifications in Annex I to the present Joint Declaration shall be established in a Basic Law of the Macau Special Administrative Region of the People's

⁸⁶³ For a few classifications of lawmaking impetuses, see *inter alia*, Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268 et seq; Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 *Legislação* 15 et seq; Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2015) 486 et seq.

⁸⁶⁴ Cf Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 269.

⁸⁶⁵ I would also attempt the following categorisation: constitutive impetuses (creating an obligation to enact laws), and merely declarative impetuses (which declare, suggest, promise, or warn of, the appropriateness of enacting laws).

⁸⁶⁶ There could be an entanglement between norms and legislative acts, namely in laws governing general legal frameworks and, above all, in the cases — absent in contemporary Macau — of legislative authorisation laws.

⁸⁶⁷ Another example would be a negative political impetus, such as rejecting Government bills for laws beyond a certain moment, but before the end of a legislature. Such procedurally ungrounded practice has occurred in the past, under the guise of a statement of principle; it is a political impetus precisely because it has no legal backing.

⁸⁶⁸ Cf *inter alia*, Paulo Cardinal, ‘Determinantes e linhas de força das reformas legislativas em Macau’ (1998) 40 *Revista Administração* 385 et seq.

Republic of China by the National People's Congress of the People's Republic of China, and shall remain unchanged for fifty years.”⁸⁶⁹

Further positive lawmaking impetuses may be drawn therefrom.

In effect, this international treaty requires the existence of laws and, in the absence thereof, the respective enactment. For instance, “*The Macau Special Administrative Region [...] shall, in accordance with the law, protect the cultural heritage in Macau.*”⁸⁷⁰ it seems clear that such a law shall have to be in the books; or “*The interests of the inhabitants of Portuguese descent in Macau shall be protected in accordance with the law.*” Other examples are that the “*Macau Special Administrative Region may use its own regional flag and emblem.*”, “*The Macau Special Administrative Region shall protect foreign investment in accordance with the law*”, and

“The Macau Special Administrative Region shall recognise and protect, in accordance with the law, the land concession contracts⁸⁷¹ legally concluded, or approved, before the establishment of the Macau Special Administrative Region, which extend beyond 19 December 1999, and the rights arising therefrom.”

Most importantly, when the Joint Declaration proclaims that

“The Macau Special Administrative Region shall ensure, in accordance with the law, all the rights and freedoms of the inhabitants and other persons in Macau, namely the personal freedoms, the freedoms of expression, of the press, of assembly, of association, of movement and migration, to strike, to choose a profession, of academic research, of religion and belief, to communications, and the right to private property.”

Such impetuses are horizontally applicable to all these fundamental rights, which, if unregulated, must become the object of lawmaking.

4. Basic Law

The Basic Law, as Macau's Constitution — in a *broad* or functional sense — naturally contains lawmaking impetuses.

The constitutional text provides for several types of lawmaking impetuses with different.

On a first level, Article 23 states:

“The Macau Special Administrative Region shall enact laws, on its own, to prohibit any act of treason against the Motherland, secession, sedition,

⁸⁶⁹ Article 12 of the Joint Declaration.

⁸⁷⁰ Article 2.5 of the Joint Declaration.

⁸⁷¹ These “concessions” are leases of public land for private use.

subversion against the Central People's Government, and theft of state secrets, to prohibit foreign political organisations or associations from conducting political activities in the Macau Special Administrative Region, and to prohibit political organisations or associations of the Region from establishing ties with foreign political organisations or associations."

In other words, the Basic Law requires the MSAR, in the name of its profound autonomy, to enact laws on its own with a view to prohibiting certain acts which are harmful to national sovereignty, as well as prohibiting certain activities by political organisations. Accordingly, Law No. 2/2009, Law on the Defence of State Security, was approved.

Article 40 establishes that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions, as applicable to Macau, shall remain in force and shall be implemented through the laws of the Macau Special Administrative Region."

Putting aside the contentious issue surrounding this alleged and bizarre⁸⁷² dualism,⁸⁷³ in opposition to the monistic reception of international law, a characteristic of

⁸⁷² Expression used by Jorge Costa Oliveira, 'O efeito directo dos Pactos Internacionais sobre os Direitos do Homem e o artigo 40.º da Lei Básica da RAEM' (unpublished, 1998).

⁸⁷³ Which resulted from a blind replication of the counterpart norm contained in the Basic Law of Hong Kong, a legal system that undoubtedly follows a dualistic model of reception of international law. The letter and the history of the MSAR Basic Law norm make it difficult, but not impossible, to defend the maintenance of a monistic system of automatic reception — such may be achieved only by resorting to other norms and principles, for example, Article 138 of the Basic Law, the principle of continuity, ie by recourse to the legal system as a whole. On this issue, see eg Paulo Cardinal, 'A Tale of Two Cities — The Judicial Protection of Fundamental Rights in the Exceptional Autonomous Regions of Macau and Hong Kong of The PR of China and the Role and Influence of International Law Instruments on Human Rights', in Jónatas EM Machado, João Carlos Loureiro and Fernando Alves Correia (eds) *Estudos em Homenagem ao Prof. Doutor J.J. Gomes Canotilho*, vol III (Coimbra Editora 2010) 242–45 et seq; Yash Ghai, 'The Basic Law of the Special Administrative Region of Macau: Some Reflections' (2000) 49 ICLQ 183, 183 et seq; António Malheiro Magalhães, 'The Application of the International Covenants on Human Rights to the «Autonomous» Legal System of the Macau S.A.R. — Considerations on Article 40 of the Basic Law' in Paulo Cardinal and Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders — Perspectives of Evolution — Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer-Verlag 2009) 607 et seq; Cristina Ferreira, 'A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa' in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 221–22, "Legal scholarship in Macau is consensual on the hierarchical position of conventional international law within the sources of domestic law, based on the principle of continuity of the MSAR legal order. The same cannot be said on whether the MSAR retains a monistic system." and, in summary, "the verbatim introduction of this Article from the HKSAR Basic Law signifies the "importation" of dualistic elements into the legal order of the MSAR, as Hong Kong belongs to the Common Law Family, characterised for having a dualistic system. This constitutional provision reflects an insertion of a clause demanding the incorporation or transformation of international norms, typical of dualistic systems, when determining that ILO Pacts and Conventions shall only be applicable through the enactment of MSAR laws. For these authors, after 19 December 1999, two systems began to co-exist in the MSAR — a first one, dualistic, for ILO Pacts and

Macau's legal order — which, I submit, remains unchanged today — the important trait to realise is the following one: what is required, *de minimis* in reinforcing the system, is the existence of laws in such areas.

Many such laws precede the resumption of sovereignty over Macau;⁸⁷⁴ however, the idea of a lawmaking impetus arising from the constitutional norm is still valid if subject-matters in need of a proper regulation remain — not necessarily limited to non-self-executing international norms). Evidence of this rationale can be found in the lawmaking impetuses stemming from the conventions of the International Labour Organisation, such impetuses having been received and relayed by the quoted provision of the Basic Law, in matters such as the freedom to form trade unions, the rights to strike and to collective bargaining, and the duration of the maternity leave.

A second type of lawmaking impetus is directed from norms on fundamental rights with a *scarcer constitutional development* — being nonetheless directly applicable and self-executing. The paradigm case is Article 27, which brings together, in extreme simplicity, fundamental rights such as the freedom of expression of the press, publication, association, assembly and demonstration, along with the freedom to form and participate in trade unions and the right to strike. The idea of a normatively established lawmaking impetus⁸⁷⁵ is definitely enshrined, perhaps less assertively, and at times hand-in-hand with Article 40 of the same Basic Law.

Other cases may be briefly invoked under Articles 119, 121, and 128 of the Basic Law.⁸⁷⁶

5. Instruments of International Law

Another locus of lawmaking impetuses is that of instruments of public international law containing obligations to legislate and/or possessing non-self-executing provisions, thus requiring legislative implementation.

For example, see Article 4 of the Convention on the Rights of the Child, signed in New York on 26 January 1990, Article 14, paragraph (5), of the International Covenant on Civil and Political Rights, and the Convention relating to the Status of Refugees, of 28 July 1951, and its Additional Protocol, of 31 January 1967, which amended said

Conventions, and another one, monistic, for the other instruments of conventional international law. Inversely, other authors espouse the maintenance of a monistic system, despite the source of Article 40 being of a dualistic provenance. For such authors, this article should be interpreted in light of the principle of continuity of the MSAR legal order, which, on the one hand, imposes the maintenance of the characteristics of the Macau legal system and, on the other hand, recognises the type of obligations emerging from the ILO Pacts and Conventions, containing mostly norms of a programmatic nature (non-self-executing)."

⁸⁷⁴ José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 161.

⁸⁷⁵ Not merely from a legal perspective. This norm may obviously project lawmaking impetuses towards other levels, namely the strictly political one.

⁸⁷⁶ In relation to the Rules of Procedure of the Legislative Assembly, as the normative procedure in question is not a legislative one, the notion of norm-making impetuses may be applied.

convention and impelled the approval of Law No. 1/2004, Legal framework on the recognition and loss of refugee status.⁸⁷⁷

The Conventions of the International Labor Organization constitute an area rich of lawmaking impetuses. For example, Article 4 of Convention No. 167, on Safety and Health in Construction, adopted in Geneva on 20 June 1988, and, in general, Convention No. 87, on Freedom of Association and Protection of the Right to Organise, adopted in San Francisco on 9 July 1948, and Convention No. 98, on the Right to Organise and to Collective Bargaining, adopted in Geneva on 1 July 1949.

6. Laws Governing General Legal Frameworks

Continuing on the normative level, a reference is due to laws governing general legal frameworks — irrespective of considerations on their placement and grounding in Macau's legal order — implying lawmaking impetuses.

For example, Law No. 4/98/M, of 29 July 1998, General Framework Law on Employment and Labour Rights Policies, contains lawmaking impetuses, specifically decisions to legislate *a posteriori*. Examples of laws that may drive lawmaking impetus are Law No. 21/2009, Law on the hiring of non-resident workers, and Law No. 4/2010, Legal Framework on Social Security.

One more example is the regime found in Law No. 2/91/M of 11 March 1991, General Framework Law on the Environment (namely, Article 18 on noise control), and Law No. 8/2014, *Prevention and Control of environmental noise*.

7. Reunification Law

The Reunification Law, Law No. 1/1999, although not a law governing a general legal framework *per se*, does contain lawmaking impetuses. Article 3, paragraph (5) provides for the following:

“Legislation previously in force in Macau and adopted as legislation of the Macau Special Administrative Region, when applied after 20 December 1999, shall undergo the amendments, adaptations, limitations and exceptions as may be necessary, in order to bring them into conformity with the status of Macau after the resumption of the exercise of sovereignty by the People's Republic of China, and with the relevant provisions of the

⁸⁷⁷ See the Explanatory Note of the Government bill: “The purpose of the present bill is to ensure compliance with the norms of the Convention and the Protocol... which are not self-executing. In fact, although most of the norms contained in the Convention are self-executing, and, therefore, do not require any implementation, as is the case with the norms regarding the definition of refugee, respective legal status, the principle of non-expulsion, etc, there are other norms necessitating implementation through legislation.”; and FSC, Report No. 1/II/2004: “the Macau legal order lacks a normative instrument establishing the procedures that the MSAR must adopt for analysing applications for the granting of refugee status. This is a legal lacuna, which must urgently be filled, in view of the international obligations binding on the Central Government.”

Basic Law of the Macau Special Administrative Region.” And paragraph 3) establishes that “Legislation previously in force in Macau, as listed in Annex II of the present law, contravenes the Basic Law of the Special Administrative Region of Macau, and is not adopted as legislation of the Macau Special Administrative Region. However, until new legislation is enacted, the Macau Special Administrative Region may taking as reference the previously adopted practices, handle the matters regulated therein, in accordance with the principles contained in the Basic Law of the Macau Special Administrative Region.”

As both norms are primarily and functionally aimed at the interpretation and application of the law, they instil the idea of *a posteriori* lawmaking, especially emphasised by the command “*until new legislation is enacted*”.

8. Law No. 13/2009

Law No. 13/2009, *Legal framework governing the internal sources of norms*, a law with “borrowed constitutionality”,⁸⁷⁸ as afore-discussed, entails, under Articles 8 and 10,⁸⁷⁹ a lawmaking impetus whenever matters contained in administrative regulations have intruded into the sphere of areas reserved to the law.

9. Judicial Activity

Moving on to non-legally binding lawmaking impetuses, unsupported by legal norms,⁸⁸⁰ I shall limit this excursion to a few more significant or potentially richer modalities.

The first type is anchored in *judicial activity*.

While it is true that, in the MSAR, there is no properly regulated procedure for judicial review of constitutionality, it is no less true that, especially in more recent times,⁸⁸¹ the courts of Macau and, in particular, the Court Final Appeal (CFA), have ruled

⁸⁷⁸ Recalling Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade - Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 355.

⁸⁷⁹ “The administrative regulations published before the entry into force of the present law continue to be effective until such time of their amendment, suspension or repeal through legislation, including in the event of non-compliance with the legal framework herein established.” The said legislation (in the sense of normative acts) should be limited to the form of law, to ensure full compliance with Law No. 13/2009, and, indirectly, with the Basic Law, thereby emptying the space (for possible violations) opened by this transitional mechanism.

⁸⁸⁰ See the table in Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268–270.

⁸⁸¹ On this evolution, see *inter alia*, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 164 et seq; Paulo Cardinal, ‘Região de Direito — alguns tópicos sobre fiscalização da constitucionalidade e jurisdição da liberdade num Direito (também) em Língua Portuguesa’ in Jorge Bacelar Gouveia (org), *Congresso do Direito de Língua Portuguesa* (Almedina 2010) 271 et seq; Luís Pessanha, ‘O Direito à Saúde como Direito Fundamental e a Questão do Tabagismo’ (2011) 30 BFD 255, 264, “The MSAR courts, invited to assess the validity of ordinary norms, under the Basic

on the non-conformity of legislative norms with the Basic Law,⁸⁸² and have affirmed the power to decide on the non-application of norms found in contravention of that constitutional text.⁸⁸³ Case-law has shown that courts have “direct access” to the Basic Law, and the power to refuse the application of a norm in violation of the Basic Law, without the need for any prior request to such effect by the litigants.⁸⁸⁴

The courts have, on the other hand, not yet attained the desirable step of formally declaring the unconstitutionality of norms — or their reinforced or qualified illegality — with mandatory *erga omnes* effects. Naturally, such a declaration of unconstitutionality may have to lead to the enactment of new legislation. As shown above, the regional courts remain fearful: non-application of an unconstitutional norm, on a case-by-case basis and with *inter partes* effect, is the preferred course of action.

In comparative law and in the context of the theory of legislation, the control of the constitutionality of normative acts by the competent judicial bodies has been playing an increasingly relevant role. As GOMES CANOTILHO points out,⁸⁸⁵ the evolution of constitutional law (in the sense of its normative value) has been progressively enhanced by constitutional case law, “*either through the insistence on the principles of legislation (requirement of, and adherence to, the principles of determinability, clarity and development of laws), or through a duty to improve and adapt the laws.*” Such words should echo strongly in Macau, in juxtaposition with the legislative intent of Law No.

Law of the MSAR, in their decisions of the cases thereto submitted (see article 143 of the Basic Law of the MSAR), first came to consider, somewhat timidly, the Basic Law of the MSAR as a simple law of reinforced value (see Decision of the Court of Second Instance, of 1 February 2001 (Case No. 1153-A), but quickly came to recognise that it is truly a regional materially constitutional law (See, inter alia, Decision of the Court of Second Instance, of 16 June 2005 (Case No. 61/2005); Decision of the Court of Second Instance, of 24 November 2005 (Case No. 106/2004); Decision of the Court of Second Instance, of 27 April 2006 (Case No. 223/2005); Decision of the Court of Final Appeal, of 26 August 2001 (Case No. 7/2001); Decision of the Court of Final Appeal, of 25 October 2006 (Case No. 9/2006); Decision of the Court of Final Appeal, of 18 July 2007 (Case No. 28/2006); Decision of the Court of Final Appeal, of 12 May 2010 (Case No. 5/2010)).”

⁸⁸² “The Basic Law prevails over all Macau laws, so any legal enactment incompatible therewith is null and void.”: Wang Zhenmin, “*Um país, dois sistemas*” e a *Lei Básica de Macau* (Assembleia Legislativa, 2008). As Jorge Bacelar Gouveia pointed out, “there is no doubt that the constitutional function attributed to the Basic Law requires a mechanism to gauge the respect of the other laws of Macau to the former’s normative supremacy. The worst that could happen would be to conclude that the primacy of the Basic Law, within the Macau Legal Order, would not be aided by a procedural mechanism capable of imposing the constitutional effectiveness of Basic Law, on the ground, in the context of the legal universe of Macau.”: Jorge Bacelar Gouveia, ‘Macau no Direito Constitucional de Língua Portuguesa’ in *Direito Constitucional de Macau* (IDILP 2012) 193. See also Vitalino Canas, ‘The General Regime of Fundamental Rights in the Basic Law and in the International Instruments’ in Paulo Cardinal and Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution – Essays on Macau’s Autonomy after the Resumption of Sovereignty by China* (Springer-Verlag 2009) 674. The above does prejudice to the desirability of creating a true mechanism for the judicial review of the constitutional conformity of regional norms.

⁸⁸³ See *inter alia*, “In cases submitted to trial, courts may not apply norms, contained in laws or administrative regulations, which contravene the provisions of the Basic Law or the principles contained therein, even if no litigant raises the question of illegality, without prejudice to the provisions of Article 143 of that Law.”: Decision of the CFA, Case No. 29/2012; Decision of the CFA, Case No. 29/2012; Decision of the CFA, Case No. 33/2012.

⁸⁸⁴ As espoused, going back to 1997, by Fernando Alves Correia, ‘A Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional’ (1997) 4(3) *Revista Jurídica de Macau* 26, 26.

⁸⁸⁵ Gomes Canotilho, ‘Os impulsos modernos para uma teoria da legislação’ (1991) 1 *Legislação* 7, 9.

13/2009, the *Legal framework governing the internal sources of norms*, and the principle of sufficiency or completeness of the law.⁸⁸⁶

The CFA, in the Decision delivered in Case No. 5/2010, stated:

“Without prejudice to the legislative discretion that must be accorded to the lawmaking body, the existence of contradictory legal frameworks applicable to officials, without any reasonable justification, violates the principle of equality, leading to arbitrariness and unjustified differential treatment. [...]

[I]t is within the remit of these bodies to issue a “positive” judgment on the legal solution; in other words, a judgment whereby the scrutinising body starts by considering the situation as if it were the legislator, followed by an assessment on the rationality of the legislative solution infused with its very own idea of what the “reasonable”, “fair”, or “ideal” solution would be, or should have been. The control of constitutionality cannot go so far: the competent bodies may only render a “negative” judgment, hence setting aside those legal solutions found to be irrational [...] Therefore, either Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M, in conjunction with Article 98, paragraph 1) of the Statute of the Macau Civil Servants (SMCS), or Article 97, paragraph (6), of the SMCS, violate the principle of equality.”

Such was the specific background of the case.

In view of this double tack, the CFA added:

“Everything points towards Article 5, paragraph 2, subparagraph b), of Decree-Law No. 21/87/M, in conjunction with Article 98, paragraph 1), of the SMCS, violating Article 25 of the Basic Law [...] The challenged act must be annulled, because it applied Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M.”

Given this correct justification and decision by the supreme court, one may identify an obvious lawmaking impetus: the legislative body should modify the described discriminatory framework, namely by enacting a norm to repeal Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M.

Allow me to add, in the context of these more tenuous lawmaking impetuses, a

⁸⁸⁶ Recalling Article 4, paragraph (2): “The law shall have a determinate, precise and sufficient content that includes a clear prescription of the commands intended to create legal norms of conduct for the addressees, rules of action for the administration and standards of control for judicial decisions on disputes.” On this norm, once again, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 137–38.

few words on the “*dialogues between the legislative and the judiciary*”.⁸⁸⁷ In the relations between the legislative branch and the judiciary, the legislation clearly aimed at correcting judicial interpretations that were perceived as not ideal was approved twice in the field of fundamental rights: freedom of demonstration and access to justice.⁸⁸⁸

One may conjure up a couple of examples of Members’ bills on fundamental rights, which sought to respond to difficulties and limiting interpretations, doubts, and deviations, from *inter alia*, the judiciary. Although formally initiated by Members of the legislative body, the lawmaking impetus was dictated by judicial practice.

A first example is that of Law No. 16/2008, *Amendment to Law No. 2/93/M — “Right of Assembly and Demonstration”*: given that in the special procedure for protecting the rights of assembly and demonstration, under Law No. 2/93/M, there is a clear intention of procedural informality, not fully reflected in the letter Article 12 thereof, there seems to have a failure to adequately express the legislative intent, notwithstanding the fact that the *travaux préparatoires* demonstrate an evident legislative policy oriented both to the simplification of procedures and pre-conditions, and to waive the requirement of legal representation in filing the motion to seek judicial relief.⁸⁸⁹ The spirit of the law is precisely to open said special procedure to laypersons, bearing in mind the practical difficulties in finding advocates who might, in a timely manner, be available to represent complainants in politically sensitive litigation.

According to the relevant Report: “In any case, during these 20 years of enforcement of the law, there has been some hesitation on whether legal representation is required.”⁸⁹⁰ After recognising such “hesitation” as a lawmaking impetus, the path to solve the issue and reinforce this fundamental right is laid bare: “Through the addendum of new paragraph 3) to the aforementioned Article 12 of Law No. 2/93/M, to expressly inscribe the non-mandatory nature of a legal representation”.⁸⁹¹ Furthermore,

“Underpinning this legislative initiative is the need to improve a few specific aspects of the wording of Law No. 2/93/M, of 17 May, to prevent an overly literal approach to the norms from leading the interpreter astray,

⁸⁸⁷ Cf Jorge Godinho and Paulo Cardinal, ‘The Macau Court of Final Appeal – The First Decade’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 632. On Hong Kong, especially the issue of *constitutional review*, see Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press 2015).

⁸⁸⁸ Jorge Godinho and Paulo Cardinal, ‘The Macau Court of Final Appeal – The First Decade’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 632, “There have been problems in the past with the judicial review of administrative decisions that restricted the right to hold political rallies, and these issues must be decided swiftly to ensure that freedom of demonstration can be exercised. One problem was the uncertainty over the competence of courts to hear the case; another problem was whether judicial representation by a lawyer was mandatory or not. The other issue was reported denials of the right to have a lawyer present when investigated by public authorities, regardless of whether the person is a suspect or a witness.”

⁸⁸⁹ Ruling that there would be no dispensation of legal representation under this law, eg Decision of the CSI in Case No. 621/2006.

⁸⁹⁰ TSC, Report No. 2/III/2008.

⁸⁹¹ *ibid*; see also Articles 8 and 10 of the Law No. 13/2009, *Legal framework governing the internal sources of norms* (n 878).

to an understanding not in accordance with the spirit of the law and the will of the legislator.”⁸⁹²

This legislative process also took advantage of the opportunity to solve another doubt raised in judicial circles, which frequently resulted in the exercise of the right of assembly and demonstration being thwarted. The question was simple: which is the competent court? Would the CFA be competent, in its ultimate role as the guarantor of freedoms?⁸⁹³

Such uncertainty often resulted in the denial of due process and justice, and the consequent negation of the effective exercise of this fundamental right because, while the CFA would (wrongly) declare itself incompetent, and the procedure would be conducted by the CSI, often the administrative decision denying a demonstration would have already produced its desired effects before the (untimely) decision by the CSI was delivered. The legislator understood the problem, correctly interpreted the situation, and, for the avoidance of further doubts, introduced a legislative measure in order to give effective judicial relief to these fundamental rights. The results of this legislative change are well known, and deemed to be generally positive, as demonstrated by the vast case-law of the CFA in this matter.

A second example is that of Law No. 1/2009, *Addendum to Law No. 21/88/M — “Access to the Law and to the Courts”*, which purported, with the addendum of a new article, to develop several aspects, namely the general principles that everyone has the right to assistance by an advocate in any judicial procedure, as a witness, declarant or defendant, and that everyone has the right to be accompanied by an advocate, when appearing before any public authority, namely judicial and criminal investigation authorities, regardless of the person’s procedural status.

As the relevant Report explained:

“The proponents considered that, due to several difficulties, namely interpretative differences, the access to the Law, particularly in the very important hallmark of guaranteeing professional support and representation by advocates, has not been satisfactory in some cases, therefore the need for the present legislative initiative”, and, with special emphasis on the matter in hand, “The Committee is aware of the doubts and uncertainties felt in the

⁸⁹² TSC, Report No. 2/III/2008, “Although, at times, it may seem to the more informed lawyer that the current wording will already be sufficiently clear and explicit, provided that the legal norms are well interpreted, and in particular if the travaux préparatoires are taken into due and deserved consideration.”

⁸⁹³ Ruling itself to be incompetent, the CFA, in Case No. 43/2006 (not available on the website of the MSAR courts), invoked the following reasoning: under the provisions of the Reunification Law, approved by Law No. 1/1999, the expression “Superior Court of Justice” should be interpreted as referring to the CSI (Annex IV, paragraph 3). There are natural exceptions, however; for example, the same CFA has already recognised, in a decision on another matter, in Case No. 1/2001, that the countless references to the Superior Court of Justice, as contained in piecemeal legislation, should be understood in light of the distribution of competencies operated with the entry into force of the General Framework Law on the Judicial Organisation, approved by Law No. 9/1999. See also the distributions and adjustments to the competencies of the courts, as operated by the 2013 review of the Code of Criminal Procedure.

practical conforming of this fundamental right, and considers that the legislator is duty-bound to clarify such doubts and uncertainties, and to adequately fill the core protective scope, expected from such fundamental right, to the brim.”⁸⁹⁴

This quote illustrates the express acknowledgement of a lawmaking impetus for this legislative measure.

The decisions of the CSI⁸⁹⁵ (and those of the Administrative Court⁸⁹⁶) that ruled to be illegal certain administrative regulations found in breach of the areas reserved to the law — and, in parallel, refused to recognise an independent regulatory power by the Executive — constituted, despite the subsequent decision of the CFA on the issue,⁸⁹⁷ considerable lawmaking impetuses,⁸⁹⁸ which strongly contributed to achieving the approval of Law No. 13/2009.

I shall now proceed to the so-called *purely political* impetuses.

10. Commission Against Corruption

The Ombudsman’s role carried out by the Commission Against Corruption (CAC) takes on a potential importance in the context of lawmaking impetuses.⁸⁹⁹

Under Article 4 of Law No. 10/2000,⁹⁰⁰ Organic Law of the Commission Against Corruption of the Macau Special Administrative Region, the following powers are provided for:⁹⁰¹

“9) To make recommendations or suggestions on interpretation, amendment or repeal, in the event that deficiencies are detected in legal norms, namely those affecting persons’ rights, freedoms, guarantees or legitimate interests,

⁸⁹⁴ FSC, Report No. 1/II/2009, adding: “In conclusion, the Committee reaffirms its agreement with the bill and, in general, with the options therein, particularly with the underlying philosophy and the purpose of clarifying and guaranteeing a component of the fundamental right of access to the Law.”

⁸⁹⁵ For example, Case No. 223/2005.

⁸⁹⁶ For example, Case No. 38/05/EF.

⁸⁹⁷ Case No. 28/2006.

⁸⁹⁸ See the cryptic wording of the Explanatory Note of the Government bill leading to the approval of Law No. 13/2009: “the legal and judicial communities, as well as academics and civil society, have increased and diversified their knowledge of the MSAR legislative system, in particular in relation to the status, nature and effectiveness of administrative regulations; many different points of view have been recorded.” See also the competent report, which explicitly refers to a set of judicial decisions, by several courts, with “diversified meanings” and “important differences in opinion”.

⁸⁹⁹ See, in general, on this relevant role of recommending the adoption of legislative measures, Cristina Ferreira, ‘Em prol dos direitos fundamentais em Macau—a Provedoria de Justiça do CCAC e as demais instituições que promovem os direitos humanos’ (2010) 23(88) Administração 397, 397 et seq *passim*.

⁹⁰⁰ As amended by Law No. 4/2012, Amendment to Law No. 10/2000 “Commission Against Corruption of the Macau Special Administrative Region”.

⁹⁰¹ General competencies, as set out in Article 3: “(5) To exercise Ombudsman actions, promoting the protection of persons’ rights, freedoms, guarantees and legitimate interests, ensuring, through the means mentioned in the following article and other informal means, the legality in the exercise of public powers, as well as justice and efficiency of public administration.”

or on the enactment of new legal norms; however, when the subject-matters fall within the competence of the Legislative Assembly, such positions shall be contained solely in written information delivered to the Chief Executive.”

And, moreover,

“10) To propose to the Chief Executive the enactment of normative acts aimed at improving the functioning of departments and services, and at respecting administrative legality, namely for the purpose of eliminating factors that may facilitate corruption and illicit or ethically objectionable behaviours;”.

The first provision is very clear regarding the recommendatory function⁹⁰² *apropos* the adoption of new legislation. The second one, even though referring to the enactment of norms by the Chief Executive, should be read, in areas reserved to the law, as also signifying the presence of a lawmaking impetus, and not merely a *norm-making* impetus.

The role of the Ombudsman *vis-à-vis* lawmaking impetus is well recognised in comparative law,⁹⁰³ with varying degrees or different modulations, going as far as a “*para-legislative activity by the Ombudsman*”.⁹⁰⁴

The CAC, according to its annual Activity Reports, has exercised these competencies,⁹⁰⁵ which are naturally exhausted in the suggestions and recommendations made, not extending to any possible legislative results.

Another aspect concerning paragraph 9) is worth mentioning. Indeed,

“there were those, within the Committee, who opined on the inadequacy, and perhaps inefficiency, of the solution under which, in matters falling within the competence of the Legislative Assembly, the CAC would limit itself to informing the Chief Executive in writing of its position [...] without prejudice to the CAC reporting to the Chief Executive under the terms of the Basic Law, when possible deficiencies in legal norms are detected, namely those affecting persons’ rights, freedoms, guarantees or legitimate interests, the CAC should be able make recommendations or suggestions to the Legislative Assembly for the amendment or repeal of such norms, or for the enactment of new ones.”⁹⁰⁶

⁹⁰² Which is not a function pertaining to, nor a competence for, legislative initiative.

⁹⁰³ For developments, see Luís Silveira, ‘O Provedor de Justiça e a feita das leis’, (1995) 12 Legislação 51.

⁹⁰⁴ Marcelo Rebelo De Sousa, ‘O Provedor de Justiça e o procedimento legislativo’ (Provedor de Justiça – Sessão comemorativa 1996).

⁹⁰⁵ See, for example, 2012 Activity Report of the Commissioner Against Corruption of Macau, Annex I, 2011 Activity Report of the Commissioner Against Corruption of Macau, Annex I, and the Research Report: Some considerations on the prosecutorial procedure and the application of sanctions for administrative offences, 2005.

⁹⁰⁶ FSC, Report No. 1/IV/2012, “Amendment to Law No. 10/2000 (Commission Against Corruption of the Macau Special Administrative Region)”.

I fully subscribe to this view. On the one hand, the circumstance of the CAC being accountable to the Chief Executive, in addition to being a different issue, cannot, obviously, prevent the CAC from addressing, without any intermediation, other institutions and entities — as, in fact, such occurs in other cases.⁹⁰⁷ On the other hand, whenever fundamental rights are at stake — a material domain reserved to the law, wherein the Government is not entitled to exclusive legislative initiative — the CAC should be allowed to address legislative recommendations directly to the local parliament.⁹⁰⁸

11. Monitoring Committees of the Legislative Assembly

The Monitoring Committees of the Legislative Assembly constitute driving forces behind lawmaking impetuses but not legislative initiatives *per se*.

Under Article 30 of the Rules of Procedure, such Committees are tasked, *inter alia*, with monitoring the matters relative to the area of governance for which they were created, as well as the application of the laws approved by the Legislative Assembly for such an area; these tasks are finally complemented by the competence to propose the measures deemed necessary or appropriate, in accordance with the results of said monitoring function.

Naturally, such measures may include legislative ones — as a declaration of suitability, or a recommendation to this effect; that which is proposed is the set of measures to be (under)taken, and not a formal legislative initiative.⁹⁰⁹ It is always possible for the proposed measures to be contained in a bill co-sponsored by committee Members; however, other aspects would come into play, such as the strict requirement of Article 75 of the Basic Law, and the reality of the dynamics on the ground, which has shown a poor level of success in respect of Members' *exercise and practice* of their own powers, namely that of legislative initiative.

12. Ad Hoc Committees of the Legislative Assembly

The Ad Hoc Committees of the Legislative Assembly may also be a source of lawmaking impetuses. In effect, while ad hoc committees may indeed *replace* standing committees

⁹⁰⁷ Cf Article 4, “(12) To address recommendations directly to the competent bodies, with a view to correcting illegal or unjust administrative acts or procedures, or to the performance of the required acts”.

⁹⁰⁸ For a historical reference, see, “The High Commissioner is competent: j) To propose to the Legislative Assembly and to the Governor the adoption of legislative measures aimed at improving the functioning of departments and services, and at respecting administrative legality, namely for the purpose of eliminating factors that may facilitate corruption and illicit or ethically objectionable behaviours;”: Article 4 (Competencies), Law No. 11/90/M, of 10 September 1990, on the High Commission Against Corruption and Administrative Illegality.

⁹⁰⁹ Eg Monitoring Committee for Public Administration Affairs, Report No. 1/V/2017, regarding a suggested amendment to Law No. 8/2014.

within the framework of the legislative process (the case of the Gaming Law⁹¹⁰), there have been other ad committees resembling the above-mentioned monitoring committees.

This was the situation experienced with the Ad Hoc Committee for the Analysis and Improvement of Legislation for the Protection of Minors. In its working Report, the committee concluded:

“After analysing the legislation on the protection of minors, the committee considers that the solution to the issue in hand must be approached from two perspectives: the legislative and the executive. At the legislative level, the existing legal framework must be improved, and the existing lacunae filled, in order to obtain a scientifically sound system, a natural aim for any legislator.”

As referred to in relation to the monitoring committees, it is always possible for the proposed measures to be contained in a bill co-sponsored by ad hoc committee Members; however, other aspects would come into play, such as the strict requirement of Article 75 of the Basic Law, and the reality of the dynamics on the ground, which has shown a poor level of success in respect of Members’ *exercise and practice* of their own powers, namely that of legislative initiative.

13. Consultative and Collaborative Bodies

A few lines *en passant* relating to consultative bodies and *collaborative* bodies. In addition to a generally passive role — as previously discussed — of intervention only upon request from third parties, a few of such bodies may, on their own initiative, make legislative recommendations.

The Macau Civil Aviation Authority, in accordance with its Article 5, paragraph a), of its Statute, approved by Decree-Law No. 10/91/M, of 4 February 1991, is competent to “*study and propose laws, regulations and administrative measures aimed at guaranteeing the safety of air navigation, and to guide and co-ordinate the exercise of civil aviation activities*,”.

The Consultative Council for Public Administration Reform, under the terms of Administrative Regulation No. 18/2007, is competent, within its scope, to promote studies and submit proposals on, for example, the legal framework of the Civil Service.

The Consultative Council for Legal Reform, pursuant to Chief Executive Order No. 59/2005, may consult the opinions of civil society and respective professionals, depending on the matters under scope, on the need to regulate legislative matters, and

⁹¹⁰ Also, the AHC for the Analysis of Legislative Initiatives Relating to the Civil Service, which exercised *full legislative procedural functions* relating to three laws: Report No. 1/ III/2009, Government bill entitled “Fundamental Provisions of the Statute of the Civil Service Management and Leadership Staff”: Report No. 2/III/2009, Government bill entitled “Framework of the civil service careers”: and Report No. 3/III/ 2009, Government bill entitled “Framework of the nursing staff’s career”.

issue suggestions based on the consultations and the reflection carried out, aimed at the development of the legal order and the adaptation thereof to the evolution of the social environment.

The Council of Judicial Magistrates is competent to study and propose the adoption of legislative measures aimed at the efficiency and the improvement of the judicial system.⁹¹¹

Likewise, the Council of Magistrates of the Public Prosecution Service is competent to study and propose the adoption of legislative measures aimed at the efficiency and the improvement of the judicial system.⁹¹²

14. Government Annual Policy Action Address

A short reference herein to the purely political nature of the Government Annual Policy Action Address, as a repository of a programme containing legislative promises.⁹¹³

15. Public Consultations

Deemed mentionable is the launching of public consultations by the Executive,⁹¹⁴ which, *per se*, already demonstrate a possible desire to legislate — the results of such consultations may sustain or justify a legislative initiative.

These cases equally constitute factors of a lawmaking impetus.

One must take into account that the results of public consultations *per se* do not remove from the lawmaking body its untouched legislative power, nor its capacity to decide how to conform the normative solutions.⁹¹⁵

On the issue of the scope of public consultations, a critical comment: the ease with which the “population” is summoned, and is invoked, is at times plainly inadequate. There are matters which, owing to their well-defined object and clear-cut scope, or to their technical complexity, should not be subject to consultation by the population in general,

⁹¹¹ Article 95, paragraphs 15) and 16), of Law No. 10/1999.

⁹¹² Article 107, paragraphs 9) and 10), of Law No. 10/1999.

⁹¹³ Which do not bind the Legislative Assembly, nor preclude the exercise of legislative initiative by Members. The content of the Policy Action Address does not entail an extension of reserved legislative initiative in favour of the Government.

⁹¹⁴ See the Norms on *Consultation on Public Policies*, approved by the Chief Executive Order No. 224/2011. Under the principle of separation of powers, these norms, by their very nature and form, do not bind the Legislative Assembly, nor the Members. Those Norms establish the carrying out of public consultations in the area of public policies, including decision-making and related measures and legislation. The wording thereof is, at times, haphazard and even inappropriate for an act with normative content. See also, in general, on this topic, Pan Guanjin, ‘Uma Análise do desenvolvimento do sistema consultivo da RAEM do ponto de vista da democratização das políticas’ (2010) 89 *Administração* 719.

⁹¹⁵ Paulo Cardinal, ‘Tópicos Soltos Sobre Liberdade de Imprensa, Direitos e Deveres dos Jornalistas e Reforma Legislativa no Âmbito da Lei Básica de Macau e do Princípio «Um País, Dois Sistemas»’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 653.

but preferably by persons and entities relevant to the issues.⁹¹⁶

16. Right of Petition

Finally, the Right of Petition, the legal framework of which is established, fundamentally, in the Basic Law, in Law No. 5/94/M, of 1 August 1994, *Exercise of the Right to Petition*, and in the Rules of Procedure of the Legislative Assembly.⁹¹⁷

This fundamental right may be explained, in short, as a right to protect other rights, both as a guarantee for non-contentious redress — as opposed to a guarantee for administrative or judicial challenge, action or impugning proceeding — and also as a right to political participation. The former allows for drawing the attention of the competent addressed bodies to situations of illegal or unjust acts; the latter is aimed at raising problems of general interest, with ultimately corrective or prospective purposes.⁹¹⁸

In Macau, the fundamental right of petition⁹¹⁹ is conceived as a non-judicial instrument for the protection of persons' rights, of legality, or of community interests, by means of submitting petitions (in a strict sense) to political bodies or any public authorities, along with representations, claims or complaints, under the terms of Article 1 of Law No. 5/94/M, of 1 August 1994.

On the one hand, it is a right to guarantee other rights, ie it plays a role in defending and preventing violations of certain fundamental rights, by safeguarding private interests. On the other hand, it is a political right, as it may be configured as an

⁹¹⁶ Which is not a function pertaining to, nor a competence for, legislative initiative. In addition, see eg the MLA's *Opinion on the Government bill entitled "Elimination of bearer shares and amendments to the Commercial Code"*, 2015, wherein the addressed audience of the public consultation is questioned, both qualitatively and quantitatively.

⁹¹⁷ On the process for petitions, Articles 144 et seq.

⁹¹⁸ Jorge Miranda, 'Notas sobre o Direito de Petição' in Paula Costa e Silva and Pedro Pais de Vasconcelos and António Menezes Cordeiro (eds), *Estudos em Honra do Professor Doutor José de Oliveira Ascensão*, vol I (Almedina 2008) 470. See also "*The right of petition [...] simultaneously contains two essential purposes: – On the one hand, it is a right to guarantee other rights, performing a function to defend and prevent violations of certain fundamental rights, thus ranking alongside other such rights (eg the right to special relief and the right to resist); – On the other hand, there is an aspect of political law, as said right may be an instrument for the participation of persons in the exercise of political life, an example of which is the submission of suggestions regarding the general interest.*": Explanatory Note of Members' Bill No. No. 9/V/ 94.

⁹¹⁹ The petition is widely accepted as a fundamental right in the MSAR: "For the avoidance any possibly remaining doubts that may be raised about this autonomous process, it seems useful to provide a few brief references to characterise this right of petition. This is a fundamental right to be exercised by any citizen or legal entity.": CRPMM, Report No. 1/IV/2011. See also TSC, Report No. 1/III/2005, "The right of petition is one of the oldest fundamental rights in force in Macau": and, "At the level of ordinary legislation, the exercise of this fundamental right is consolidated and regulated by Law No. 5/94/M, of 1 August.": and Report No. 1/III/2008 of the FSC, mentioning "competent legal norms that command the exercise of this fundamental right, both at the constitutional level – paragraph 18) of article 50, and paragraph 6) of article 71, of the Basic Law — and at the level of ordinary legislation — Law No. 5/94/M, of 1 August — and also under procedural norms, Articles 143 to 145 of the Rules of Procedure of this Legislative Assembly." See furthermore, *inter alia*, Paulo Cardinal, 'O Direito de Petição em Macau: Breves Notas' in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 661 et. seq, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 166.

instrument for the participation in the exercise of political life, such as the submission of suggestions regarding the interests of the community, or the defence of legality. In this regard, the right of petition can therefore also be a process of political oversight or control, when addressed to the Legislative Assembly — distinct and autonomous from others.⁹²⁰

Legally speaking, once a petition is submitted, a duty of examination by the petitioned body is established, and the right to due procedure and communication is enshrined:⁹²¹

“The exercise of the right obliges the addressee to receive and examine petitions, representations, claims and complaints, and to communicate the decisions that might be taken.”⁹²²

Having fulfilled the duty of examination, the addressed entity may, or may not, make a decision or take an action. In the case of the Legislative Assembly, such action may be purely political — for example, signalling a desire, or an option in a Descriptive Report — or, depending on the case, may result in a legislative act.

As such, the duty of examination may be a driver of a lawmaking impetus,⁹²³ either taken up by the Government, or within the Legislative Assembly, in light of Article 14 of Law No. 5/94/M:

“The committee’s examination of petitions and of the respective preparatory elements may result, namely, in the following:

a) The appraisal by the plenary of the Legislative Assembly, under the terms of Article 18; [...]

c) The drafting, for future sponsorship by any Member, of a legislative

⁹²⁰ CRPMM, Report No. 1/IV/2011.

⁹²¹ Good examples of compliance with the duty of examination can be found, *inter alia*: Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 2/VI/98, Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 5/VI/98: a petition was accepted, the duty of examination was fulfilled by the committee, and only after such analysis, in view of the object of the petitions, the decision was taken to close the proceedings. See TSC, Report No. 1/IV/2009, Petition on the review of the legislation on prevention and limitation of smoking, Law No. 21/96/M, of 19 August, “*The Committee understands the state of mind of the petitioner with regard to accelerating the pace for the enactment of said legislation, ... on 7 December 2009, the MSAR Government honoured its commitment by submitting, during the analysis of the petition by the Committee, the bill entitled “Framework for the Prevention and Control of Smoking”: which has already been accepted by the President of the Legislative Assembly. This means that the matter is already being appraised. Therefore, the Committee closed the proceedings, as the petitioned object was rendered moot upon submission of said bill. The Committee’s descriptive report concludes as follows: 1) To close the proceedings on the petition, on the grounds that the object thereof become extinct.*”

⁹²² Article 8, paragraph (1).

⁹²³ Paulo Cardinal, ‘O Direito de Petição em Macau: Breves Notas’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 686. Adding, “[i]n effect, the examination of petitions and the respective preparatory elements, as carried out by the Legislative Assembly committee, may, in particular, result in the drafting, for future sponsorship by any Member, of a legislative measure deemed to be justified. The subject-matter contained in the petition is not put to a vote; however, based thereon, any Member may exercise the right of initiative, under the terms of the Rules of Procedure. This applies both to the areas of original legislative initiative, and to those of supervening legislative initiative.”

measure deemed to be justified;

d) A proposal to the Governor for a possible legislative or administrative measure”.

Article 18, paragraph 3) of the same law establishes that the matter contained in the petition shall not be put to a vote; however, any Member may exercise the right of initiative under the Rules of Procedure.⁹²⁴ Such applies both to areas of original legislative initiative and to those encapsulated by supervening legislative initiative.

The exercise of the right to petition may undoubtedly operate as a lawmaking impetus,⁹²⁵ as envisaged under the applicable law, by laying down one of the typical effects under Article 14. As a means for *defending legality or the interests of the community*, the exercise of the right to petition can substantiate the idea of *more typical petitions*, the purpose of which is the “exercise, in general, of the legislative competence; de rigueur, a diffuse impetus for potential legislative initiatives.”⁹²⁶

A final note on the link between the law regulating the right to petition, and the Rules of Procedure.

The right to petition is fundamentally regulated by law, but there is a set of provisions on such matters included in the Rules of Procedure of the Legislative Assembly. A couple of issues require attention: the reserved areas of the law versus the reserved area of the Rules of Procedure, and the harmonisation between both normative acts.

The right to petition, as a fundamental right, is safeguarded under the reserved areas of the law.⁹²⁷ This means that other normative sources would be denied access to the regulation of this fundamental right. On the other hand, reserved areas for parliamentary procedural rules also exist. Thus, from the outset, only the law would be able to establish the legal framework for the right of petition, especially with regard to restrictions thereto. Such would also entail, from the outset, that the Rules of Procedure

⁹²⁴ Article 18, paragraph 3. See petitions expressly requesting the introduction of legislative measures and consequent descriptive reports: eg, TSC, Report No. 1/III /2005, Petitions concerning the execution and improvement of legislation on the prevention and limitation of smoking, Law No. 21/96/M, of 19 August; Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 6/VI/98, Petition on “Request for the urgent and adequate guarantee of rights not covered, or insufficiently provided for, by Law No. 5/98/M, of 3 August”; and “Suggestion for an urgent amendment to articles of the such law”: presented by Free Association of Conscientious Objectors. While it is true that no bill has so far directly resulted from petitions, it is no less true that several reports have analysed the respective requests and, either by virtue of the announcement of legislative initiatives by the Executive in the near future, or for reasons of political convenience or opportunity, have not triggered the adoption of Members’ bills. Cf Paulo Cardinal, ‘O Direito de Petição em Macau: Breves Notas’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 686.

⁹²⁵ For instance, “Another very important driver, which has long been claimed in several fora, was the setting of deadlines for the conclusion of cases investigated by the CAC. In effect, this issue has been subject to warnings and criticisms from the most varied sectors, including this Legislative Assembly”: FSC, Report No. 1/IV/2012, “Amendment to Law No. 10/2000 (Commission Against Corruption of the Macau Special Administrative Region)”.

⁹²⁶ Luís Barbosa Rodrigues, ‘O Direito de Petição perante a Assembleia da República’ in Jorge Miranda (org), *Perspectivas Constitucionais*, vol II (Coimbra Editora 1997) 656.

⁹²⁷ Per the Basic Law and Law No. 13/2009.

would not be able to contain norms on the framework of that fundamental right.⁹²⁸

During the legislative procedure of Law No. 5/94/M, this question was glimpsed at, together with the issue of harmonisation.⁹²⁹

“The Committee, although recognising that the procedural rules — articles 167 to 173 — do involve provisions from the text of the present Members’ bill, but in a harmonised manner, considers that the Legislative Assembly, in a possible future review of the Rules of Procedure, should therein include all the principles that may be contained in the law (if approved), and which might pertain to this Assembly.”⁹³⁰

Strictly speaking, there should be no procedural rules on this matter,⁹³¹ or, alternatively, the Rules of Procedure should be reduced in their scope and breadth,⁹³² being limited to an indispensable minimum,⁹³³ with norms solely related to the principle of parliamentary self-organisation. For example, such as reduced scope would only encompass issues such as the President’s competence to determine the classification by subject-matter, and the mentioning of the petitions in the first plenary meeting following their admittance, *inter alia*. In any case, these internal organisational rules may not interfere with the exercise of the right to petition beyond that which is set out in the law.

A few smaller sub-issues need to be attended to. For instance, Article 145, paragraph (1), of the Rules of Procedure requires the proper identification of the petitioners, with the indication of their name, marital status, address and profession. Under Article 9, the correct identification of the petitioner shall contain his or her domicile. The inference is that marital status and profession are unnecessary elements of identification.

In other words, the irrelevance of all this personal information for the purposes

⁹²⁸ Maria Luísa Duarte, in a context of analogy, affirms that the areas reserved to parliamentary law should be interpreted in order to exclude the insertion, in the rules of procedure of the autonomous regions, of norms on the development of the fundamental right to petition, emphasising a refusal to accept the establishment of additional or qualifying requirements in relation to the law regulating said fundamental right; such measures would be unconstitutional: Maria Luísa Duarte, *O Direito de Petição* (Coimbra Editora 2008) 93–94.

⁹²⁹ Particularly to the issue of normative harmonisation: “It should be noted that the necessary conformation of the procedural framework with the law, and the articulation between both, is not always exempt from difficulties, nor, at times, from contradictions.”: TSC, Report No. 1/ III/2005.

⁹³⁰ Committee on Public Administration and Finance, Report No. 7/94. The Explanatory Note of the Members’ bill also anticipated the issue: “*In fact, only the Rules of Procedure of the Legislative Assembly dedicate some norms (Articles 167 to 173) to the matter under consideration, such norms naturally having an almost bureaucratic character.*”

⁹³¹ I believe that the Rules of Procedure of the Legislative Assembly maintain a set of rules on the petition process because, in the past, a lacuna in the legal order did exist; in one way or another, it was important to proceed to the elimination thereof.

⁹³² In this sense, focussing precisely on a positive normative conflict between legal norms and procedural norms, “*Nor may one argue, in this case, on the basis of a possible invasion of the sphere of “procedurally reserved areas”*”; ie requirements contained in the Rules of Procedure, but absent from the law, were set aside, Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 3/VI/98.

⁹³³ For example, the Rules of Procedure of the Assembly of the Republic, in Portugal, while maintaining a section on the matter, contains but a single and meagre article.

of exercising the fundamental right of petition, but, above all, as a practical corollary of the principles of reserved areas of the law, and of the minimum procedural intervention (circumscribed to matters of internal self-organisation), I submit that those additional elements of identification may not be demanded of petitioners, due to the partial inapplicability of the procedural norm.⁹³⁴

17. Diffuse or Social Impetuses

According to an author, “diffuse impetuses, or impetuses from pressure groups, associations, public opinion, the media...” are those that may “influence legislative production in any way, with more or less intensity.”⁹³⁵

It is no secret, nor surprising, that these diffuse or social impetuses are particularly relevant in a small place such as Macau.

Seldom does an item in a newspaper avoid being treated as a possible driver of a legislative intention to regulate a given matter in an allegedly lacunose situation, which is later revealed to be untrue and hastily denounced. Frequent pressures are also felt to enact laws in response to tunnelled visions or wishes by vested interests, unconcerned with the general and legitimate interests of the community,⁹³⁶ and jeopardising that which is accepted as “good legislation”; at times, such interests have gone to the extreme of desiring the introduction of unfair rules, thus challenging the cherished principles of lawmaking.⁹³⁷

⁹³⁴ In agreement, see *inter alia*, “Indeed, and contrary to what the Rules of Procedure require — paragraph (2) of Article 167 — the lack of indication of the “marital status” or “profession”: may not, under Law No. 5/94/M (in much greater conformity with the applicable constitutional norm), constitute a reason for rejecting a petition.”: Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 3/VI/98.

⁹³⁵ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 270.

⁹³⁶ Cf “The influences on legislation of lobbies, pressure groups and, in general, of organisations or persons from the so-called civil society, should also be highlighted, reinforces the complex nature of the norms and the difficulties in structuring a coherent and unitary legal system.”: José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 232. Also “Macau’s own legal substratum is not solid and its political system is Executive-led, to which is added growing pressure from the gaming sector and from other social and political groups.”: Feng Bangyan He Xiaojing, ‘Características Básicas e Tendência de Desenvolvimento da Ecologia Política de Macau após o seu Retorno à RPC’, (2012) 1 *Revista de Estudos de “Um País, Dois Sistemas”* 146, 153.

⁹³⁷ FSC, Report No. 2/V/2014.

XVIII.

NEGATIVE LAWMAKING IMPETUSES AND SUSPENSIVE IMPETUSES

I shall explore⁹³⁸ two final types of lawmaking impetuses, namely, negative impulses, and — for lack of a better designation — suspensive or deferring impetuses.

1. Negative Impetuses

Negative impetuses, also qualified as *counter-lawmaking impetuses*,⁹³⁹ are impulses, pressures, oppositions, all aimed at preventing, impeding, or inhibiting the enactment of legislation.

A first class of negative impetuses is provided by two legal instruments belonging to the MSAR constitutional order: the Joint Declaration and the Basic Law. “And these counter-impetuses or negative impetuses may also be constitutional in nature — the Constitution is a brake on legislating on certain matters, or in a certain manner; this means that enacting laws would be tantamount to legislating unconstitutionally;”.⁹⁴⁰

Both of these cases are mandatory negative impetuses.

1.1 Joint Declaration

The Joint Declaration determines that, during its period of effectiveness (the half century from 20 December 1999), the basket of twelve fundamental policies⁹⁴¹ shall apply to Macau — eg the current social and economic systems, and the way of life, shall remain unchanged; the Macau Special Administrative Region shall be granted independent executive, legislative and judicial powers, including that of final adjudication; the Central People’s Government shall not levy any taxes in the Macau Special Administrative Region.

Irrespective of whether these policies are properly included in the Basic Law, and of whether they are interpreted as material limitations to amendments thereto, such fundamental policies are valid *per se*, and irradiate real negative lawmaking impetuses,

⁹³⁸ Although with a few lingering doubts.

⁹³⁹ See Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 Legislação 15, 16.

⁹⁴⁰ Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 Legislação 15, 20.

⁹⁴¹ “2. The Government of the People’s Republic of China declares that, in accordance with the principle of “one country, two systems”, the People’s Republic of China shall apply, regarding Macau, the following fundamental policies”.

preventing the enactment laws in contravention of said fundamental policies.

1.2 Basic Law

That which was expounded on the fundamental policies applies equally to the Basic Law. This instrument also establishes several negative lawmaking impetuses. For example, the Basic Law inhibits the regional legislator from initiating and enacting laws in violation of those policies. Imagine, *ad absurdum*, a law providing that final judicial adjudication is transferred to a court outside the Region.

The negative impetuses extend beyond the scope of the twelve fundamental policies. As a constitutional text, with a parametric function for all regional normative acts, — eg under the terms of Article 11 — none of the legal frameworks therein established, however diminutive, may be affected by any law. Imagine, again *ad absurdum*, a Government bill to the effect that the Rules of Procedure of the Legislative Assembly are enacted by administrative regulation, or by a law with legislative initiative reserved to the Executive. In other words, several negative lawmaking impetuses emerge throughout the provisions and the principles contained in the constitutional text. The principle of autonomy, for instance, carries the weight of a negative lawmaking impetus in relation to laws intended to stray beyond the limits of such autonomy.

The aforesaid is rooted in Article 5 of Law No. 13/2009:

“The Legislative Assembly exercises the competences provided for in the Basic Law of the MSAR, including the competence to enact, amend, suspend and repeal laws on any matters within the scope of the MSAR’s autonomy.”

1.3 Political Impetuses

As for other negative impetuses — now of a legally non-binding nature — two cases of political ones come to mind.

In the first scenario, the Chief Executive issues a publicly states that leasing or renting of real estate falls strictly within the domain of commerce and should be left to market forces without legislative intervention. In the second scenario, the President of the Legislative Assembly declares publicly that, after a given date, as the end of the legislative term approaches, no further Government bills will be accepted due to insufficient time for thorough evaluation. These hypothetical or actual statements represent counter-lawmaking impetuses, each with a distinct foci — one specific and the other general.

2. Suspensive or Deferring Impetuses

I equate suspensive or deferring impulses with the drivers triggering the suspension, stoppage, or postponement of the legislative process to a more appropriate later moment,

albeit such impetuses do not substantively oppose the enactment of a given legislative measure.

A possible example of this situation would be the following:

“Without calling into question the legislative power and the legislative initiative of the Legislative Assembly, having publicly announced a review of the CAC Law, it seems that the Chief Executive should be made aware of this petition, for possible consideration of the suggested amendments, within the scope of the announced review (subject to the Chief Executive’s initiative), as it is more appropriate and convenient, for reasons of normative-systematic unity, to insert such possible amendments (apropos the deadlines for conclusion of the investigative phase) as part of the aforementioned global review of the CAC framework.”⁹⁴²

⁹⁴² TSC, Report No. 1/III/2008, *Petition submitted by João Miguel Barros, dated 13 December 2007 – repeal of provisions of Law No. 10/2000*. Or, see eg, less assertively, TSC, Report No. 2/III/2008: “*Having analysed the petition, the Committee: [...] 2) Proposes that the petition be delivered to the Chief Executive, accompanied by the present Descriptive Report, in order to taken into account for the drafting of the special legislation on part-time employment.*”

XIX.

RECTIFICATION AND REPUBLICATION

Proceeding with the analysis of a few issues that precede or complement the legislative procedure, a prior warning must be jotted down: in the case of lawmaking impetuses, such issues are upstream of the legislative procedure; the two cases to be addressed below emerge downstream thereof.

1. Rectification of Laws

Another issue, residing outside the legislative procedure, but relating thereto, is the rectification of laws.⁹⁴³

The act of rectifying a law is not a step or stage in the legislative procedure, imaginable as an atypical act in the legislative process,⁹⁴⁴ — it is external and distinct, though not necessarily from an organic point of view.

The question of rectifying laws has been described as “*One of the more obscure and even discomfoting issues*”.⁹⁴⁵

Notwithstanding the due diligence that must be employed in a legislative procedure, the occurrence of errors, typos and inaccuracies in the final text published in the OG — by reference to the approved original text — is always a possibility.⁹⁴⁶

The legal order must not only offer a solution to these “minor” problems, but also establish limits, otherwise the intended function and purpose of rectifications risk being subverted.

Article 9 of the Law on Forms and Templates of Legal Enactments provides the framework of, and the limits — organic, material and temporal — to, rectifications.

A rectification of any dissimilarity between the original text and the text printed in the OG shall be initiated and performed by the Government Printing Bureau; in addition, the entity that enacted the original text may correct errors and omissions, and request that

⁹⁴³ For the purposes herein, rectifications may be viewed as errata or corrigenda.

⁹⁴⁴ Refusing this view and pointing out the problematic consequences of its adoption, Carlos Blanco de Morais, ‘Problemas relativos à rectificação de actos legislativos dos órgãos de soberania’ (1994) 11 *Legislação* 35, 40 et seq. The author speaks of a declarative administrative act. See also José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 250.

⁹⁴⁵ Carlos Blanco de Morais, ‘Problemas relativos à rectificação de actos legislativos dos órgãos de soberania’ (1994) 11 *Legislação* 35.

⁹⁴⁶ On this topic, see *inter alia*, David Duarte and Alexandre Sousa Pinheiro and Miguel Lopes Romão and others, *Legística: perspectivas sobre a concepção e redacção de actos normativos* (Almedina 2002) 275 et seq.

said Bureau publish the rectification, provided that the latter does not entail a substantial modification of the respective text.

Rectifications are published in the same Series as the original text: the rectifications of laws are necessarily published in Series I, being admissible until sixty days after the original text's date of publication. If difficulties arise from the rectification process that affect the readability of the corrected text, the entity responsible for the rectification shall promote the republication of the entire text.

Rectifications are effective from the date of entry into force of the original text of the law, without prejudice to the rights acquired until their date of publication.

This very precise and duly regulated scope of the rectifications' framework may not lend itself to correct errors related to the legislative procedure finalised with the enactment of the law. Such errors may be remedied solely under a new procedure.⁹⁴⁷

This period of 60 days for rectification⁹⁴⁸ must be considered an absolute cut-off deadline and not merely an indicative timeframe. "From the letter of the legal provision, one may surmise the existence of an eminently prohibitive meaning: overdue rectifications are therefore not admissible."⁹⁴⁹

2. Republication

A final aspect to consider is republication. A republication necessarily presupposes the existence of a first law, together with a second law (or laws) containing amendments thereto. When dealing with a republication, one should also be mindful of general and abstract amendments with direct, indirect or reflexive repercussions on certain laws or norms. In the MSAR, the evident case is Law No. 1/1999, the Reunification Law — Article 4, paragraph (2), and Annex IV.

In other words, there is no republication of unamended laws.⁹⁵⁰ A republication may not be confused with a rectification.

A law in effect may undergo various types of amendments — partial repeal, addenda of articles and paragraphs, modifications to the normative content of provisions, creation of new chapters, etc — which, due to their relevance and quantity, and in compliance with the principles of clarity, certainty and access to the Law,⁹⁵¹ require a new

⁹⁴⁷ As affirmed by José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 250.

⁹⁴⁸ Article 9, paragraph (4), of Law No. 3/1999, Publication, forms, and templates of legal enactments.

⁹⁴⁹ Carlos Blanco de Moraes, 'Problemas relativos à rectificação de actos legislativos dos órgãos de soberania' (1994) 11 *Legislação* 35, 55.

⁹⁵⁰ Except in the event discussed above, of a rectification giving rise to difficulties in understanding the full text.

⁹⁵¹ A fundamental right in the MSAR legal order — see Article 36 of the Basic Law.

consolidated or restated version to be so published.⁹⁵² Naturally, such consolidation and restatement bring into existence the text which, inclusive of the amendments, is to be in force.⁹⁵³

Under certain circumstances, and in a step further than that of a mere clarification, one may speak of consolidating laws.⁹⁵⁴

A refusal to republish may create interpretative doubts and confusion in the addressees and society, thus generating an obstacle to the implementation of the fundamental right of access to the Law.

A republication basically consists of “the publication of the updated version of a legal enactment subject to amendments”⁹⁵⁵ and “has always been used to facilitate the access of citizens and companies to the Law”.⁹⁵⁶

A republication does not innovate the normative fabric, but rather arranges it in a comprehensive and accessible way; it should insert the amendments in the proper place and, if need be, renumber the articles. The republication shall be expressly provided for in the law amending a previous one.

The decision to republish is within the remit of the body competent for the approval of the amending law; it is a facet of the exercise of a common legislative power.⁹⁵⁷ Such power alone shall be able to provide republication with the intended force of law.⁹⁵⁸

⁹⁵² On legislative consolidation and similar notions, Carlos Blanco de Morais, *Manual de Legística* (Verbo 2007) 612 et seq.

⁹⁵³ Stressing the desirability of republications when amending certain Codes, “it should be noted that amendments to the Great Codes should, as a rule, be accompanied by republication. In fact, the legal certainty that is required in the interpretation and application of a Code is not compatible with the existence of a vast number of amendments to a given legal enactment, nor with the latter remaining on the books without an official consolidated version – the legal system needs stability and certainty.”: José Miguel Figueiredo, ‘Alterações aos Códigos: Questões de Técnica Legislativa a Partir do Enquadramento Normativo da Região Administrativa Especial de Macau’ [2017] *Administração* 118, 176, especially 177.

⁹⁵⁴ On this issue, see from Portugal, Article 11-A (Consolidating laws) added by Law No. 43/2014, of 11 July 2014, to Law No. 74/98, of 11 November 1998, on the publication, identification, form and templates of legal enactments:

“1. These consolidating laws bring together, in a single legislative act, the norms relating to a given area of the legal order previously regulated by different legislation.

2. The consolidating laws do not affect the material content of the consolidated legislation, except in the event of a need to, namely: a) Update and standardise normative language and legal concepts; b) Standardise identical factual realities.

3. The consolidating laws: a) May contain a different internal systematic organisation and numbering from that of the consolidated legislation; b) Shall maintain the repealing norms contained in the consolidated laws, and also indicate the norms repealed as a result of the consolidating law; c) Shall safeguard the regulations approved under the repealed consolidated legislation, unless otherwise expressly provided for.”

⁹⁵⁵ Maria Cristina Coelho, ‘Regras e boas práticas de Republicação’ (2010) 53 *Legislação* 5.

⁹⁵⁶ *ibid.*

⁹⁵⁷ Carlos Blanco de Morais, *Manual de Legística* (Verbo 2007) 615.

⁹⁵⁸ I am referring to laws; *mutatis mutandis*, in a republication of an administrative regulation, the legal force of administrative regulation. Otherwise, any consolidated publication will be nothing more than an instrument to facilitate reading or consultation but shall certainly not be endowed with the force of law and may never prevail over the legal text (including the *unconsolidated* one).

Ideally, the consolidated and restated version should be immediately contained in a schedule to the amending law,⁹⁵⁹ and published therewith in the OG.

⁹⁵⁹ Mainly due to difficulties caused by the possibly immense volume of suppressions, addenda, plus the reordering and renumbering, a republication may, in practice, not be carried out as a schedule to the amending legislative act; the republication may thus occur at a later date. However, this circumstance does not contradict my argument that the amending legislative act should normatively provide for such republication, even if the execution thereof may come at a deferred moment.

PART 6

RECENT DYNAMICS, DEVELOPMENTS AND REFORM

XX.

THE DYNAMICS ON THE GROUND

1. Introduction and Background

Throughout this course, both in terms of the present written Handbook and, especially, in the discussions held in class, an evident conclusion may be drawn on this following theme: the dynamics on the ground — or, maybe less suitably, the *law in action* — are effectively conforming, moulding, conditioning the landscape of the legislative procedure.⁹⁶⁰

As seen above, in addition to the written sources of the legislative procedure — the Rules of Procedure with their centrality, the Basic Law with its primacy, and a set of ordinary laws with their own scope — unwritten sources, such as usages and customs, do exist, however limited they may be. I have outlined, in general terms, their nature, vocation and admissibility as normative sources, and discussed the relations thereof *vis-à-vis* the written sources; it is time to detect possible examples and apply my arguments thereto.

In Macau, several usages and customs penetrate the legislative procedural practice, to a perhaps unseemly degree. The facts on the ground reveal instances of particular aspects of the lawmaking process being subordinated to a primacy of operational reality over rules-based behaviour, of facticity over normativity, which is an *a priori* illegitimate phenomenon.

Hence, there is need to *shed the light* of facticity (the dominant practices) *on* the legally established framework, in order to better understand the legislative procedure as it operates on the ground — what actually happens, in opposition to what should happen.⁹⁶¹

There are, fundamentally, two large areas of *praxis, customs, usages, etc.*, that require analysis: the “*praeter* Rules of Procedure” ones, and those that may be “*contra* Rules of Procedure”.

Two preliminary notes in this regard: firstly, the boundary between those two areas is fluid; secondly, the value — or the legal invalidity — of each area will, in principle, be quite different.

⁹⁶⁰ As in many others and within many legal systems.

⁹⁶¹ I am not expressing, in any way, assent to such solutions as dictated by the praxis; on the contrary, in some cases.

2. *Praxis, Usages and Customs praeter Rules of Procedure*

Function, value, and admissibility — We may attempt to grasp this type of practice or usage as measures that the dynamics on the ground progressively sought out, as a way to fill lacunae, and as a means to “create” new dimensions within the scope of the regularly established rules-based legislative procedure.

Are these practices endowed with legal value? Could they, for example, be considered customs and, to that extent, sources of law in the context of legislative procedure? And, if so, how do they stand *vis-à-vis* the regular written norms of the Rules? For example, if there is a lacuna to be filled, the solution found by the practices shall have to be rooted in the *raison d'être* of the lacuna, and in accordance with the spirit of the missing procedural norms.⁹⁶²

A note worth remembering in the present chapter: Article 26 of the Rules of Procedure provides that the Committee on the Rules of Procedure and Members' Mandates is competent to “*suggest to the Plenary the modifications that the practice may advise*”. In other words, it expressly alludes — with a certain touch of novelty⁹⁶³ — to practices. Their existence is thus recognised; but how and with what value?

Is such a norm intended to accept the existence of procedural practices and recognise their intrinsic value while recommending, whenever possible, their incorporation into the procedural normative text? Or is its normative intent focussed on recognising that such practices may only attain legal value through their insertion in the Rules?⁹⁶⁴ This second option is the one that deserves my adherence, as previously propounded. Moreover, said practices may not be construed, nor applied, contra the Rules of Procedure.

A few examples come to the fore:

The *formal* second, third, fourth, etc versions of Government bills: these are nowhere to be seen throughout the long text of the Rules. It is even less feasible to include them in the very precise and circumscribed concept of amendment proposals. The practice tied to such versions of texts is absolutely overwhelming, notwithstanding the unsustainable weight of the Rules' silence on this issue. I confess my hesitation in

⁹⁶² However, there is a place for Article 159 of the Rules of Procedure: “(Interpretation and solving of omitted cases) 1. The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members' Mandates. 2. The deliberations of the Board taken under the previous paragraph, when written, are published in the Series II of the Legislative Assembly's Official Bulletin.” What is at stake under this provision are deliberations of the Board, as manifestations of intra-parliamentary case-law — even if unwritten and unpublished — and not practices, the formation thereof not requiring a deliberation.

⁹⁶³ In terms of comparative law; for example, there is no similar norm in the Rules of Procedure of the Assembly of the Republic of Portugal; however, there was a parallel norm in the previous Rules of Procedure (subparagraph [g] of Article 39).

⁹⁶⁴ Or is it simply intended to signal that, in the event of problems, inadequacies and insufficiencies being detected in the course of procedural practice, the CRPMM has the power and the duty to identify such cases, and to initiate modifications accordingly?

subsuming this praxis either under the heading “*praeter* Rules of Procedure”, or beneath the label “*contra* Rules of Procedure”. If singly viewed in isolation, one may consider them to be *praeter* Rules; if, contrariwise, they are intended to reveal a prohibition of submitting Members’ amendment proposals in relation to all Government bills, then one could not avoid qualifying such practices as *contra* Rules and *contra constitutionem*.⁹⁶⁵

Negotiations with the Executive: they are inevitable in the normal preparatory and examination stage of any legislative process. They could possibly be received, in a more explicit fashion, within the Rules.

The profound material and formal modifications proclaimed by the Legislative Assembly/specialised Committees, albeit formally adopted by the proponent in the case of Government bills: this issue is closely related to the previous one *apropos* the second and third versions, and is massively present in practice.

I have shown ad nauseam that, in many cases, no doubts whatsoever exist as to the power of the Members and the Committees to submit amendment proposals relative to Government bills. Such cases could possibly fit into the next category, although as an inherently strange self-refraction of parliamentary legislative powers. The question in hand is one of free political choice or option: Members may wish not to submit amendment proposals, which is entirely different from contending that such proposals may not be accepted at all, otherwise this situation would fall fully into the *contra legem* category.

Preliminary appraisals:⁹⁶⁶ they are not provided for in the Rules of Procedure, nor are they apparently alluded to, or subject to a presupposed relevance, unless, under Articles 103 et seq, one entertains the possibility, or the requirement, of decisions based on judgments of legality or procedural conformity, thus presumably warranting the issuance of a preliminary informational document, such as a technical note. In any case, its implementation shall always be covered by the normal powers of the President of the

⁹⁶⁵ Irrespective, on this point, of the issue of constitutionality of the procedural norm which expressly precludes the submission of amendment proposals to Government bills reserved to the latter body’s original legislative initiative.

⁹⁶⁶ Cf for example, “Technical note – 1. The Assembly’s support services shall prepare a technical note for each bill. 2. Whenever possible, the technical note shall contain, namely: a) An analysis of the conformity with the established formal, constitutional and procedural requirements; b) A legal and scholarship-based framework of the topic, including at the European and international levels; c) An indication of other national and European pending initiatives on identical matters; d) The compliance with the Law on publication, forms and templates of legal enactments; e) A succinct analysis of the facts, situations and realities to be regulated; f) A historical outline of the raised problems; g) An appraisal of the consequences of approval, and a prediction of the expenditure arising from the respective application; h) References to contributions from interested entities, namely the opinions issued therefrom. 3. The Assembly’s support services shall deliver the technical note to the competent parliamentary committee, within 15 days from the date of acceptance of the respective bill. 4. The technical note shall be appended to the report issued by the parliamentary committee and accompany the legislative initiative throughout the entire legislative process.”: Article 131 of the Rules of Procedure of the Assembly of the Republic of Portugal. About this note, introduced in 2007, and its importance, especially in terms of increased quality of legislation, see Fernando Bento Ribeiro and Anna Ciammariconi, ‘The influence of comparative law on the Portuguese Parliament and the Legislative Process’ in Nicola Lupo and Lucia Scaffardi (eds), *Comparative Law in Legislative Drafting* (Eleven International Publishing 2014) 39 et seq.

Legislative Assembly.

Other issues, of a more political nature, could be raised at this juncture.⁹⁶⁷

3. “Distortions”, Practices, Usages, and Customs *contra* Rules of Procedure

I reiterate that the border between these two areas is not always easily demarcated, the opposite occurring in some instances.

Consider function, value, and admissibility. In the case of practices or usages in contravention of procedural norms, I cannot uncover any legitimate function (or one which may be expected to be legitimised). This rationale is extensive to customs, unless the procedural norms under attack are unrelated to the norms or principles of the Basic Law⁹⁶⁸ — I am inclined to accept, in the latter situation, customs *contra* Rules of Procedure.

In the area under scope, I hold the view that, in principle, such practices must be rejected and stripped of any value — possibly with the sole exception of legitimately formed and constitutionally compliant *contra* Rules customs (and here, I must admit, with strong reservations).

When looking more deeply into procedural customs — in the *proper* sense of customs as a normative source — a few questions arise, such as the relation thereof with written norms, the hierarchy or equivalence between both types of norms, if a succeeding norm derogates a preceding one, etc

I take the liberty of recalling the considerations above, regarding Article 26 of the Rules of Procedure.

Naming a few possible examples:

The extension of the role of the Executive Council until the closure of the process, and not merely *ex ante*: it is illegitimate, infringing upon the norms and principles of the Basic Law and of the Rules of Procedure.

In addition, from the observable behaviour of the Legislative Assembly, a custom based on such practice may not be ascribed to this body, which has not assented thereto peaceably and without reservation; furthermore, the durability of said practice is not *immemorial*.⁹⁶⁹

Such custom, even if duly formed as a source of norms, would necessarily have

⁹⁶⁷ The habit of not formally, or expressly, rejecting (through a vote of non-approval) Government bills, which are preferentially withdrawn by the proponent: this issue is strictly political and falls outside the Rules of Procedure. This practice may not enter the scope of the aforementioned Article 26 of the Rules.

⁹⁶⁸ And in general, of the constitutional order of Macau.

⁹⁶⁹ Even though that which is considered to be immemorial may, nowadays, be more compressed.

to be constitutional and not merely procedural in nature; otherwise, it may not legitimately set aside a written procedural norm. In any event, the Basic Law, the unavoidable limit of limits, may never be contradicted.

The rejection⁹⁷⁰ of supervening initiatives *vis-à-vis* Government bills, if deemed allowed — purportedly because not under purview of Articles 104 and 105 of the Rules of Procedure: such a custom,⁹⁷¹ would I believe, directly violate several express procedural norms, rendering the inadmissibility thereof; moreover, said alleged custom would be tainted by constitutional illegitimacy, by contravening the Basic Law's norms and principles. On the other hand, if relegated to the position of a mere usage,⁹⁷² the practice of Members' refraining from submitting supervening initiatives would, as a usage *per se*, be correctly devoid of legal value as a normative source.

It is important to highlight, once again, that said custom would be *contra constitutionem* and therefore disallowed,⁹⁷³ as intending to modify, or be inconsistent with, “a whole series of norms”,⁹⁷⁴ a situation rejected outright by the best legal scholarship, including that which accepts the existence of *contra constitutionem* custom,⁹⁷⁵ if limited to a single norm.

The *tyranny* of “public consultations”: these have increasingly gained the lustre of compulsoriness, even in situations of compliance with international obligations, and in highly technical and specialised subject matters.

The first case, a veritable *obsession* with holding public consultations for the fulfilment of international legal obligations, represents an unwise option; the potential for embarrassment in the event of possibly negative feedback from such public consultations is worrisome. See the following:

“despite being a legislative initiative aimed at meeting international obligations, the MSAR Government decided to submit its bill to public consultation between October and November 2014. Compliance with obligations under international law rarely allows for a significant margin for deviation; as such, holding a public consultation on the implementing

⁹⁷⁰ Different from the non-submission; and in violation of the Basic Law, the Rules of Procedure and contrary to precedents — as in the case of the Law on the Right of Assembly and Demonstration, previously amended by a Members' bill, which in turn was subject to amendment proposals by the Committee, without any — unnecessary — authorisation by the Chief Executive, and Reports by the competent Committee, for instance on the Law relating to the “Legal framework for guaranteeing the rights and interests of the elderly”.

⁹⁷¹ Which does not exist. There are several cases of acceptance of supervening initiatives and of formal committee reports reaffirming this legal power, to which both the Members and the committees are entitled.

⁹⁷² Recall the formal challenge filed against the President of the Legislative Assembly, for having rejected an amendment proposal to the Government's bill to amend the Law on the Right of Assembly and Demonstration — this suggests the *prima facie* absence of a conviction of mandatory behaviour, an element required for the creation of a custom.

⁹⁷³ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Almedina 2003) 862.

⁹⁷⁴ Jorge Miranda, ‘Parecer’ in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 100.

⁹⁷⁵ *ibid.*

measures thereof is, in principle unjustified, especially in highly complex technical matters. However, this Committee believes that hearing the population is justified, insofar as it would require the legislative policy options be put to the test, thus benefitting the legislative processes.”⁹⁷⁶

However, contrariwise, see:

“According to the Government, the present bill aims to comply with a provision of the Convention, and not to create a legal framework for policy in this area; taking into account that the subjects and objects of the criminal offence are already regulated in the Convention, and that policy shall remain unchanged with respect to the definition of the sanctions, in view of the proper standardisation with the Penal Code, public consultation on said bill was waived.”⁹⁷⁷

Open public consultations — going beyond the participation of experts — in areas of great technical complexity⁹⁷⁸ are not only less useful, but may render decision-making on a given proposed solution to be imperative and inflexible — the law could take on a quasi-referendum feature.⁹⁷⁹

I submit that it is absolutely unacceptable for a bill to be left unchanged on the basis of results of prior public consultations.⁹⁸⁰

Similar arguments have been taken up, but none have led to my conclusion. An example thereof is the idea of a deliberative survey on a possible review of the Press Law, which has been going on for several years, and with no end in sight.⁹⁸¹

As I wrote elsewhere:

⁹⁷⁶ FSC, Report No. 1/V/2015, Government bill entitled “Elimination of bearer shares and amendments to the Commercial Code”.

⁹⁷⁷ FSC, Report No. 6/IV/2014, Government bill entitled “Framework for the prevention and repression of acts of corruption in foreign trade”.

⁹⁷⁸ “[...] the perplexity arising from the use of this mechanism in the context of this very sensitive and highly technical legislative reform. Quite specific and detailed questions shall be asked. Apparently, the desire to import this state-of-the-art methodology would make much more sense for purely executive processes – for example, a deliberative survey on whether, and where, a new Macau-Taipa bridge should be built, at what time the border post to the Mainland should be opened or closed, or if, how much and where, more affordable housing should be built.”: Paulo Cardinal, ‘Tópicos Soltos Sobre Liberdade de Imprensa, Direitos e Deveres dos Jornalistas e Reforma Legislativa no Âmbito da Lei Básica de Macau e do Princípio «Um País, Dois Sistemas»’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 653.

⁹⁷⁹ See *inter alia*, the Macau Lawyers Association Opinion on the Government bill entitled “Elimination of bearer shares and amendments to the Commercial Code”: 2015.

⁹⁸⁰ Not only because the law-making body does not necessarily have to legislate in direct response to a position perceived to have greater popular acceptance, but also because of the evident dearth of quality and reliability of a large segment of the public consultations so far carried out.

⁹⁸¹ Which is becoming a very strong trait of legislative processes initiated by the Government. Other examples: the legislation regarding medical malpractice, protection of animals, and the freezing of assets. All relevant — and, in some cases, very urgent — subject-matters, reaching the Legislative Assembly labelled as urgent, after an extremely long period of maturation in the corridors of government, and in studies and public consultations.

“A few words about the innovative methodology in progress, the so-called deliberative survey. One should not fear something just because it constitutes a novelty. The idea is captivating and challenging. No doubt. However, in this specific case, I hold two reservations: one is that of legitimation; the other, that of suitability and timeliness. As for legitimation, my reservation relates precisely to the issue a posteriori, ie when a proposal with the contents, as pre-defined by such survey, is finalised, will the Government be prevented from altering said contents when the legislative process is formally initiated (presumably by the Executive)? And, later on, will the local parliament — with a majority of elected Members — be delegitimised from introducing amendments, or be constricted by the fundamental options resulting from said survey?”⁹⁸²

The interpretation, the solution to omitted cases, and the filling of lacunae *contra* Rules of Procedure: I discussed these situations above and set the limits thereto. For example, if there is no omission, there is no lacuna to fill; possible lacunae must be filled within the scope of the system, in light of the Rules and the norms and principles of the Basic Law.

The failure to mention the prior consultation of the Executive Council in Government bills: it was an irritating and reiterated praxis, in frontal contravention of the Rules of Procedure and, indirectly, of the Basic Law. Such practice has apparently been discontinued.

4. Other Considerations

One may not assert that all such distortions and practices are politically motivated. I contend that other reasons may be pure ignorance or simple inertia, without untoward intentions.

There are often practical difficulties arising from the complexity and technical difficulty attached to certain matters, as well as insufficient numbers of qualified or specialised staff, be it in the Legislative Assembly or in the Government.⁹⁸³

Another aspect is the lack of quality or publicity⁹⁸⁴ of the preparatory and comparative studies carried out by the proponents, especially the Government, thus risking a loss in legislative quality during highly specialised legislative processes, with a

⁹⁸² Paulo Cardinal, ‘Tópicos Soltos Sobre Liberdade de Imprensa, Direitos e Deveres dos Jornalistas e Reforma Legislativa no Âmbito da Lei Básica de Macau e do Princípio «Um País, Dois Sistemas»’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 653.

⁹⁸³ For instance, it is not conceivable that Government bills be drafted by laypersons (non-lawyers); similarly, in discussions of a legal-technical nature, the Government should be represented by lawyers.

⁹⁸⁴ Cases of unkept and continued promises (even in the final stage of the legislative process) have been witnessed and also instances when information and documentation were not provided to the Committee, although later found to be freely accessible on a Government website.

frequent and unnecessary duplication of efforts.

A further remark is directed at the cyclical *swamping* of the Legislative Assembly as legislatures draw to a close, through the late and massive submission of complex Government bills.

In effect, as the then President of the Legislative Assembly complained,

“a frequent scenario as the end of each legislative session approaches is the Executive’s penchant — after not presenting legislative initiatives for a prolonged period of time — for submitting bills at a fast pace, simultaneously or massively, in a very short timeframe. [...]”

In this context, the Legislative Assembly is compelled to either work half-heartedly, to wait for the Government, or to work hastily at full steam and under great tension, to the point of exceeding its capacity.”⁹⁸⁵

Finally, it is not acceptable that the Government spend year after year, if not decades, studying a certain subject-matter — with the involvement of different departments, with studies, reports, consultations, seminars, study missions — and, after submitting the relevant bill, expect that the Legislative Assembly be able to study, analyse, amend, debate, vote and approve such initiative just in a hurry.

⁹⁸⁵ Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 24. See also, “the Committee reaffirms that, in this matter, there should be no haste; it would not be legitimate or reasonable to require the Legislative Assembly to quickly approve a Government bill without due consideration and study, after the Government has spent over a decade carrying out studies, seminars and consultations. Indeed, the population in general, the medical and nursing staff, health care providers, legal operators, and possibly the local insurance companies, would not comprehend how the Legislative Assembly could rush into passing a law in a careless and untimely manner. Undue speed is the enemy of conscientious timeliness.”: TSC, Report No. 1/IV/2012; and, “when submitting legislative proposals, the Government must take into account the availability of the Legislative Assembly; it is not convenient to do everything at the same time, as such may cause the Legislative Assembly to be unable to make its assessment for lack of time.”: Jiang Hua, ‘Mútuo controlo e articulação entre o Executivo e o Legislativo na RAEM’ (2001) 99 *Administração* 163. On this issue one can, with benefit, bring here the following words: “Over speed lawmaking caused legislative inflation and imprudent legislation; bureaucratic lawmaking ignored common people’s participation in the lawmaking procedure; [...] although did not necessarily mean low quality of law, the over speed lawmaking caused that some laws, regulations, decrees and rules were in conflicts with each other”: Peng He, *Chinese Lawmaking: From Non-communicative to Communicative* (Springer-Verlag 2014) 21–22.

XXI.

BRIEF NOTES ON RECENT DEVELOPMENTS AND PARLIAMENTARY AUTOPHAGY

Much of the previous chapter may already be subsumed into this new one regarding recent developments and parliamentary dysfunction. The aforesaid would not, however, suffice or be properly highlighted in view of the growing relevance of the problem under scope.

In effect, the recent evolution of the Legislative Assembly's work, with respect to the subject-matter of this Handbook (and to other correlated issues), be it at the level of normative production — eg the modifications to the Rules of Procedure — or at the level of other factors — eg committee reports, President's decisions to reject amendment proposals and Members' bills, Board decisions — unfortunately instils and reinforces such ideas of parliamentary dysfunction — a veritable self-maiming by the Legislative Assembly — or of a progressive retraction of the powers granted to the MSAR's legislative body.

The said phenomena contradict the system outlined in the Basic Law, with a strongly negative impact on the competences and status of both the Legislative Assembly, as an institution, and the Members thereof.

Below, I shall discuss such involutions, which do warrant legitimate concern.

1. Normative Involutions

I shall delve into the two most recent amendments to the Rules of Procedure of the Legislative Assembly — the reviews of 2015 and 2017.

In both reviews, one may clearly detect an involution, an erosion of Members' powers and rights, a belittling of their functions and acts — eg the typology of Members' bills, as affected by reinforcement or aggrandisement of acts originating from the Executive, the supreme example of which are Government bills.

This predicament has unfolded into a *de facto* questioning of the principle of equally formal dignity between both types of bills.

One must recall that the Rules of Procedure — an enactment comprised of truly binding legal norms, and endowed with the force of law on the basis of its constitutional legitimacy — are also protected by the general principle of continuity established in the

Joint Declaration and in the Law Basic.⁹⁸⁶ In other words, the key idea of essential inalterability, of maintaining the mould of the previous legal system and legal order, is reflected in the Rules, except, under the terms of the Basic Law, insofar as it may "*contravene this Law*",⁹⁸⁷ ie unless in case of non-conformity with the Supreme Law of Macau.

Nothing in the Basic Law allows for the assumption that the Rules of Procedure to which it refers, especially under Article 77, are radically different from the Rules in force before the establishment of the MSAR. In fact, a cursory reading of the current Rules confirms that the Legislative Assembly conceived its Rules of Procedure in a way which is, structurally and fundamentally, a continuation of the previous one, with the natural exception of a few differences, either directly dictated by the Basic Law, or by new lawmaking options (for example, the stage of approval in general, prior to the report by the Committee, and not after issuance thereof, as was the procedure in the past).

Beginning with an analysis of Resolution No. 1/2015, Amendment to the Rules of Procedure of the Legislative Assembly.

This Resolution amended Articles 2 (Powers of supervision), 53 (Subject-matters for the period before the agenda), 60 (Right to take the floor for presentation of bills and proposals), 72 (Duration of addresses when taking the floor), 109 (Renewal of initiative), and 142 (Subject-matter of hearings) of the Rules of Procedure of the Legislative Assembly, and also repealed Article 54 (Extension of the period before the agenda) thereof.

In addition to curtailing Members' speaking time, Article 109 (on the renewal of the legislative initiative) underwent major modifications.

The respective Explanatory Note sought to present and justify the reasons for this profound change, in a manner which I deem unsatisfactory: it invokes irrelevant reasoning; hints at the risk of — undemonstrated — non-conformities with the Basic Law; uses elements from the pre-1999 framework in a somewhat misleading way; presents a need for clarification that did not exist; concurred with certain arguments from comparative law and the history of Law, but did not shy away from making the changes, etc

The said Note reads as follows:

"Thus, and with regard to Article 109, more specifically the scope of paragraph (1), many Members have sent opinions to the Committee, as well

⁹⁸⁶ See *inter alia*, Paulo Cardinal, 'Fragmentos em torno da constituição processual penal de Macau — do princípio da continuidade ao princípio da dignidade humana' in Manuel da Costa Andrade and Susana Aires de Sousa and Maria João Antunes (eds), *Estudos em Homenagem ao Prof. Doutor Jorge de Figueiredo Dias*, vol III (Coimbra Editora, 2010) 753 et seq.

⁹⁸⁷ Article 8 of the Basic Law establishes that the laws, decree-laws, administrative regulations "and other normative acts previously in force in Macau shall be maintained". The residuary category of other normative acts includes the Rules of Procedure.

as suggestions for alterations to its wording, with a view to clarifying the scope of this norm and its relationship with the Government's powers in matters of legislative initiative. At the same time, the Committee undertook an analysis of the subject-matter — both of scholarship and of comparative law — concluding that there are norms similar to that of Article 109, paragraph (1) in the vast majority of the studied parliamentary rules of procedure, with the purpose of preserving procedural economy and dignity in the carrying out of parliamentary activity. However, the Committee considered that, in spite of the appropriateness of the principles underlying the norm of Article 109, paragraph (1), it is necessary to ponder its conformity with several norms of the Basic Law, namely, with Article 64, subparagraph (5) and with of Article 71, paragraph (1), according to which the Legislative Assembly is the sole body to 'Enact, amend, suspend and repeal laws', contrary to the Organic Statute of Macau, which enshrined, in its Article 5 that 'the legislative function shall be exercised by the Legislative Assembly and the Governor' [...] Thus, the limits to the renewal of legislative initiatives are now restricted to the respective proponents, Members or Government. Therefore, when a Member's bill on a given subject is not approved or is definitively rejected in a legislative session, it cannot be introduced again during the same legislative session. The same principle applies to the Government's bills; in other words, if a Government bill is not approved or is definitively rejected in a legislative session, the Government cannot resubmit it to the Legislative Assembly during the same legislative session, without prejudice to the exceptional cases set out in Article 52, subparagraph (2) of Basic Law. The Committee believes that the new text of Article 109, paragraph 1) now proposed [...] respects the powers of the legislative initiative of both the Members and the Government."

I cannot fail to warn that this modification is indeed profound and disregards both Macau's constitutional history and the teachings of comparative law.

What, in my view, did not occur, upon approval of Resolution No. 1/2015, was the continuation of the symbolic status of parity among all bills, at least *prima facie*, by establishing an apparent differentiation depending on the type of initiative and by specifying such distinction through the use of separate subparagraphs for Members' bills and Government bills — ie it is lamentable that such differentiation of frameworks, based on the type of legislative initiative, was introduced, thus turning the equal formal parity between both types of bills on its head.

In view of this new procedural understanding, doubts may be stirred — taking into account the *praxis* of little success in approving Members' bills and a high rate of approval of Government bills — if this path will not lead down a road of further degradation of the status of Members' bills. These may become more *freely* rejected, even if substantively worthy of being approved, for if the matter really needs to be regulated

under the law, the Government may always, at any time, introduce a bill on the same subject-matter.

On the other hand, the reference to Article 64, subparagraph (5), of the Basic Law⁹⁸⁸ is useless, as the general power of the Government to introduce bills may not be interpreted as being absolutely unrestricted, namely for the purposes of renewing initiative legislatures *vis-à-vis* certain timeframes, as has been occurring in Macau (and as is often the case in comparative law). Equally improper is the reference that nowadays, and, unlike the Organic Statute of Macau, under which “*the legislative function shall be exercised by the Legislative Assembly and the Governor*”, the legislative competence in the MSAR lies only with the Legislative Assembly.⁹⁸⁹ What were the legal effects intended to be adduced from such a statement? That the Government may introduce bills, repeatedly and successively, until they are finally approved? That, after all is said and done, the Legislative Assembly only has the power to approve Government bills, but not the power to not approve them?

Resolution No. 2/2017 amended Articles 11, 17, 31, 34, 42, 49, 52, 58, 59, 81, 98, 110, 111, 112, 135, 136, 139, 141, 146, 149, 154 and 161, and repealed Article 11, subparagraph (d), and Article 110, paragraph (2), of the Rules of Procedure of Legislative Assembly.⁹⁹⁰

With this in-depth review, the tendency to diminish Members’ powers and, concurrently, those of the parliamentary institution, is deepened, in contrast to the reinforced powers of the Executive within the legislative procedure.

A first comment to stress that the traditionally established possibility of adoption of an initiative was expunged, without any convincing reason, from the Rules of Procedure, upon repeal of Article 110, paragraph (2).⁹⁹¹ This mechanism, as is easily discernable, conferred more efficiency and rationality to the legislative procedure, and pertained to a vision of the legislative procedure that accepts the switch of the dominant role in the legislative process after the submission of initiatives.

The aforementioned Resolution No. 2/2017 made further significant changes to Article 110.

⁹⁸⁸ “(5) Introduce bills and draft resolutions, and enact administrative regulations;”.

⁹⁸⁹ Furthermore, the politico-legislative framework established by the Organic Statute of Macau, in force until 19 December 1999, is not properly characterised. As mentioned by the same Committee in a Report of 2014, “*since the Governor had legislative competence, limiting the power to renew a rejected legislative initiative would not cause the Governor political and legislative problems, namely a deadlock in the approval of a given legislative act, since the Governor could always, on his/her own, enact Decree-Laws on the matters that were subject to a negative deliberation by the Assembly.*” I must clarify that such was not the exactly the case. In fact, the Report of 2014 by the same CRPMM shows some awareness thereof in a footnote: “*The Governor could always, ie in matters not reserved to the Legislative Assembly.*”

⁹⁹⁰ In addition to amending the Chinese language version of Article 17, subparagraph (d).

⁹⁹¹ It established that “If another Member adopts, as his or her own, any and all bills intended to be withdrawn, the initiative shall continue as the bill or bills of the adopting Member.” Adoption of any type of initiative as one’s own meant that a Member could go ahead with the legislative procedure even when a Government bill was withdrawn.

Henceforth, “the proponents of a bill may withdraw it until the debate on the specifics thereof begins.” The respective Explanatory Note lays out the following:

“The current rule in paragraph (1) of this Article allows legislative initiatives to be withdrawn until the end of the general debate, in the case of original initiatives, or until the end of voting on the specifics, in the case of supervening initiatives. It appears, however, that, for various reasons, it has been necessary to withdraw some legislative initiatives after its approval in general; therefore, this norm has to be amended in accordance with the Legislative Assembly’s operating practice. Thus, several Members suggested that such rule be changed insofar as to enshrine the following: any bill may be withdrawn by its proponents until the final stage of its appraisal, ie until the beginning of the debate on the bill’s specifics. The Committee considers that, in this matter, the primacy of will/intent of the proponent (Members and Government) should be respected, which explains the suggested amendment to the norm, in harmony with the opinions received in the two hearings carried out by the Committee.”

This formal text of the Legislative Assembly alleges “that, for several reasons, there has been already a need to withdraw some legislative initiatives after their approval on the whole”, after accepting what was obvious under the then applicable framework, ie that original legislative initiatives could only be withdrawn until the end of the general debate — why did the Committee not draw the logical conclusions and, instead, muddle the waters? It is one thing to amend and adapt the Rules to a sustained praxis; a wholly different matter is a praxis that was (repeatedly) violating applicable procedural norms, thus generating an obvious non-conformity with the Rules, by means of invalidating deficiencies or mere irregularities. In other words, by incorporating into the Rules a previously created praxis — unsupported by the procedural normative corpus and unsolicited by an absence of lacunae — not even the text subject to amendment permitted the solutions adopted by the praxis. Such was the practice at times: a disagreement with the Rules resulted in an amendment thereto, without pondering the negative conclusions to be reached nor signalling the practices to be avoided. Could this sanitised approach open the gates for non-compliance with the Rules?

Article 111, governing the first stage of the legislative procedure — acceptance and rejection of bills, especially *vis-à-vis* Government bills, and challenges to decisions thereon — was also substantially modified. In effect, the respective Explanatory Note mentions that:

“The wording of this Article has been profoundly changed, since the current norm is lacking in clarity, confusing the acceptance process with the rejection, in the context of appealing decisions of the President, as well as presenting little clarity regarding the procedural framework for appealing the President’s decisions regarding legislative initiatives. In view of the above, the procedures for the acceptance and the rejection of bills by the

President have been separately established. Appeals of the President's decisions shall be admissible only in the event of rejection of Members' bills, the scope of the appellants being confined to the respective proponents. The appeal shall, in the first instance, be brought to the Board of the Legislative Assembly; only subsequently, if such body maintains the President's decision, shall the appeal be submitted to the Plenary."

Why is there no appellate procedure for challenging decisions that reject Government bills? Such an omission will presumably not, I hope, induce or lead one to infer the impossibility of rejecting bills, nor could such be the case — *inter alia*, in relation to a Government bill in clear violation of the Basic Law. Such an interpretation, if it were to gain ascendancy, would deal a severe blow to the status and to the functions of the Legislative Assembly and, certainly, represent a gross deviation from the fundamental rules and principles of a normal legislative procedure, integrated in a legal order aspiring to an effective *Rule of Law*.⁹⁹² I must concede defeat in attempting to understand the *raison d'être* of this procedural option.

And why is there no appellate procedure for challenging decisions that accept (any and all) bills?

A final note on a perfectly useless addendum, which reminds one of 'La Palisse's *dictum*' — pursuant to Resolution No. 2/2017, a paragraph (4) was inserted into Article 81, wherein the following was made unnecessarily and inadequately explicit: "*approval by simple majority entails that the deliberations in question obtain more votes in favour than against.*"

2. Other Features of Involution

In this section, I have grouped together several non-normative features, which nevertheless have a profound impact, perhaps even larger, on the legislative procedure and on the erosion of the powers and rights of Members, thereby leading to a loss in their status. Such features occur both through action and by omission.

On the one hand, there are the Reports of the CRPMM, a committee specialised precisely in these matters and, as such, whence one legitimately expects an increased value attached to the reports rendered in this scope. And also, whence the formulation of opinions — and not a furtive, abstaining attitude of "deciding not to decide" — is warranted.

On the other hand, there are decisions to reject amendment proposals to Government bills and decisions to reject Members' bills.

Other features could be mentioned, namely, the summoning/convening notices

⁹⁹² And not a dictatorial system, without any interwoven support based on legality, separation of powers, etc, wherein, perhaps, such a description would be more fitting.

(and requirements thereof) of formal committee meetings, the usurpation of the committee or Plenary functions by the Board, and the transparency and respect *vis-à-vis* the media; I believe, however, that the above-mentioned two main areas shall prove more than sufficient in illustrating the risky dysfunctional drift affecting our parliament.

Report No. 1/VI/2017 by the CRPMM focuses on a process for suspension of mandate and not focusing, *prima facie*, on the legislative procedure. Nonetheless, its importance *per se*, added to the indirect repercussions in several legislative processes and to a possible desire to create a precedent, justify addressing the content thereof in this section.

The said Committee did not issue a true advisory report, as procedurally required, but rather a kind of descriptive report. Furthermore, not only did it not express an opinion on the issue in hand but it rather opined on another one: uncovering, groundlessly without the slightest attempt to provide any reasoning, a manifestly non-existent conflict of interests.⁹⁹³ This was an alleged situation occurring within the Committee and, through an illegal decision by the Board, effectively projected to the Plenary until the end of the suspension process. The same Committee also took upon itself to prepare a ballot form wherein the possibility of abstention was not even included...

The CSI, in Case No. 20/2018, ruled that “The Committee, which had met twice, drew up a document which it called a ‘Report’”, ie that document did not contain a legally relevant opinion or advice, resembling a mere narrative or descriptive report.

Among other shortcomings, the Committee did not examine or procedurally prepare,⁹⁹⁴ — as it should have — a formal suspension process. It did not allow the affected Member to exercise his right of defence to be heard in Committee, and therefore the so-called “Report” did not include such a Member’s stance; coupled with the impossibility of the latter taking the floor to address the Plenary, this meant that his peers did not — nor could have the opportunity to — know the arguments in his defence!

What transpired countermanded applicable procedural norms and was contrary to the only precedent in Macau’s parliamentary History. In 1997, a process to suspend a mandate was triggered and procedurally followed through, with due examination, and ended with the decision not to suspend the Member in question. The Member exercised his right of defence before the Committee on the Rules of Procedure and Members’ Mandates, the essential content of his defence was reproduced in a Report (a true advisory opinion), and the committee also alerted the remaining Members to a given fact that

⁹⁹³ As noted above. I recall the wording of said Report: “the suspension of the mandate is relevant not only to the Member concerned, but also, and essentially, to the Legislative Assembly as an institution.”

⁹⁹⁴ Cf subparagraph (b) of Article 26: “The Committee on the Rules of Procedure and Members’ Mandates is competent to: (...) Conduct the enquiry proceedings relating to the processes of disqualification and suspension of mandates and to issue the respective reports, under the terms provided for in the Legal Status of Members;”.

potentially could be decisive for the Plenary's deliberation.⁹⁹⁵

Report No. 1/VI/2019 of the CRPMM addresses two distinct issues; I find it impossible to understand the underlying logic of aggregating two very different subject-matters, both in their nature and in their relevance, in a single report; was such treatment permitted simply because the questions were raised by the same Member?

This Report contains several far-fetched arguments, some of which do merit deep concern. For example, in relation to an important issue, with obvious implications, both in the present and in the future, the Committee once again decided not to decide, in one case affirming peremptorily that where the law does not distinguish, the interpreter should not distinguish; in another case — under the same report — where the law does not distinguish, the Committee introduced deep distinctions in a legal framework, thus severely restricting Members' right to lodge protests.

Report No. 1/VI/2019 of the CRPMM sets out several considerations on the procedural right to lodge protests and points out "new rules". I disagree, on several fronts, with the contents of the said report.

The Committee admitted that, since there is no provision for the publication of written protests in the Legislative Assembly's Bulletin, there may be written protests and not only oral ones!

However, such protests, in a tortuous interpretation, would only be admissible if and when, at the end of the plenary meeting, it had not been possible to present them orally, in such a manner as to achieve the desired non-publication thereof in the Bulletin.⁹⁹⁶

The same Report accepts the existence of counter-protests, despite the complete silence thereon in the Rules. So where there is an express provision on written protests, the committee interprets this power in a highly restrictive way, whereas here, despite being absent from the normative provisions of the Rules of Procedure, the committee interprets very broadly and generously, granting such prerogative. Why such disparities in approach? Why these winding paths? Why the absence of an interpretative compass?

Furthermore, I am surprised by this attitude when, in such a Report — which operates a highly restrictive interpretation by distinguishing (and re-creating) where the legislator/norm-maker did not distinguish (stating that there can only be written protests in special cases, such as the end of the plenary meeting) — furthermore candidly and

⁹⁹⁵ See CRPMM, Report No. 2/97. This report expressly mentioned the right of the affected Member to be heard, the documentary evidence produced at the hearing, the existence of a certain matter of relevance for the final position to be taken on the issue. Such Committee complied, in a short and lean report, with the applicable requirements and effectuated the guarantees to be accorded to the Member's defence.

⁹⁹⁶ It should also be noted that the protest — as in the case of the challenge on the other issue — was not even appended to the Report. Only the decision on its rejection was so appended... When it came to the mandatory formal publication of parliamentary acts, such a decision was the only one to be published, the lodged protest having been left out...

rightly affirms, on another issue, “where the legislator does not distinguish, the interpreter should not distinguish”. This is precisely the error repeated in that very same Report.

I cannot fathom what motivated the core opinion given in Report No. 1/VI/2019, which stated that once “the legislative procedure has been concluded”, it is impossible to produce legal effects upon such approved law. Such a conclusion was delivered on the other issue under scope, a challenge to a decision to reject an amendment proposal to a Government bill.

It is known that any law is always subject to the possible scrutiny of its constitutional conformity — in the MSAR, with the Basic Law, as demanded by its Article 11 — in the context of successive or a posteriori judicial control or review and, on the other hand, the opinion by the Committee completely ignores the balancing of the possible deficiencies detected, pointing to an undifferentiated handling between a mere “irregularity”, and an evident breach of a procedural or constitutional norm, be it substantive or formal in nature. Invalidating and non-invalidating deficiencies are not distinguished. Perhaps the wording of the opinion did not reflect the true intent of the Committee; otherwise, such understanding intolerably undermines the Rules, its function and legal value, and may possibly represent an attempt towards an illegitimate functional interpretation to meet a pre-ordained result. GOMES CANOTILHO thus warns of the “*control of deficiencies relative to the formation of the lawmaking body’s will/intent, which determine the very existence of the law.*”⁹⁹⁷

See also the Decision of the CFA in Case No. 61/2018, pointing to the need for a weighting of values. In short, one might even pose the question of whether said opinion, as expressed, does not generate some sort of “invitation” to contravene the Rules.

Therefore, I cannot adhere to the position taken in Report No. 1/VI/2019 of the CRPMM, that “*when the legislative procedure is concluded*”, it is impossible to produce legal effects on the approved law and, therefore, the “[s]ubmitted challenge may not be considered, as such procedure could not possibly produce any useful effect.”⁹⁹⁸

I am also dumbfounded by how the Committee chose not to deliver an opinion on the substance of the main issue: a challenge to the President’s decision to reject a proposed amendment to a Government bill. In a period of about a week, in two different legislative processes, two Members presented two amendment proposals to Government bills; both proposals were rejected by the President, despite the Rules of Procedure and the Basic Law both requiring their acceptance — in one case, in the opposite direction to that which was expressed in the Report of the standing committee and, in the other, in contrast to the precedent that occurred previously in view of the same law object of the amending bill in question.

⁹⁹⁷ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Almedina 2003) 857.

⁹⁹⁸ I recall the CFA Decision on Case No. 61/2018, with interest to the broader issue of the mentioned closure of the legislative process and to the possible subsistence of useful effects.

A very relevant, controversial and potentially recurring issue was therefore left unanswered. In this instance, the Committee abdicated its role of interpretative clarification, as provided for in Article 26 of the Rules of Procedure.

Another non-normative feature of involution is the *usurpation of functions* by the Board of the Legislative Assembly, detected on a couple of occasions and resulting in unfavourable consequences for Members.

One such case is that of Board Deliberation No. 35/2017, dated 22/11/2017, by which it was determined, namely, that the Member in question was in a situation of conflict of interests, being thus prohibited from participating in the debate and voting in the plenary meeting to be held on the suspension of his mandate. This Deliberation is illegal because this body is devoid of competence to deliberate on conflict of interests, as Article 35, paragraph (4) of the Legal Status of the Members undoubtedly lays down — the Plenary of the Legislative Assembly is the competent decision-making body. The letter and the spirit of the law are perfectly clear, doubt-free, and there is, obviously, no omitted case or procedural lacuna, contrary to what the Board tried to argue, in self-contradicting terms. See, moreover, the Decision of the CSI in Case No. 20/2018, where the Court ruled that “It is not for the Court to ascertain (for judicial procedural reasons) whether it (the Board) did so legitimately, or if whoever could have deliberated was the Plenary of the Legislative Assembly as the author of the decision to suspend the Member’s mandate.”

It is beyond comprehension how the Board of the Legislative Assembly declared, pursuant to an unreasoned report by the CRPMM, that a conflict of interests existed in relation to a Member *vis-à-vis* a process in which such Member was the subject of a possible suspension of his very own mandate.

The Board’s decision was lacking, both organically — as it was not the competent body— and substantively, as the whole dynamics of the conflict of interests framework is rendered worthless whenever the intended protective scope is the public interest, namely parliamentary representation, both with regard to the exercise of the mandate by the Member in question, and also, essentially, in relation to the Legislative Assembly as an institution. A contrary viewpoint would be tantamount to a gross undermining — and a possible reorientation to other types of objectives — of such a framework.

A further example of a Board *ultra vires* deliberation is that of the *Report on the assessment of the bill presented by Member Tong Io Cheng*, of 28 March 2017.⁹⁹⁹ One must underline that this is a type of Board report unheard of, both before and since. It has

⁹⁹⁹ This very long report suffers from several shortcomings, in addition to what is referred to in the body of this text: it is unconvincing with respect to the fundamental issue; it winds through unexpected paths; it ignores relevant issues; it is verbose in some passages, whereas in others the discourse is curbed, namely with quotes from reports of the Legislative Assembly; it cites unworthy sources for a report of this nature, such as Wikipedia, even more so strange as it occurs in an absolute focal point of the subject-matter; it invokes wholly irrelevant norms, etc

serious flaws both from an organic-formal stance, and in terms of substance since it greatly reduces the sphere of the power of Members of the parliament to freely introduce bills in a way that makes it almost impossible to do so, virtually considering everything as a matter pertaining to government policies.¹⁰⁰⁰

The Board opined in favour of rejecting such a bill on the grounds that Government policy was at stake, thus suggesting to the President the issuance of a decision of summary rejection. Here, the procedural roles were reversed: on this type of issue — acceptance or rejection of bills — the first to decide, in his/her own right, is always the President. Only afterwards may the Board intervene, on appeal, per the provisions of Article 111 of the Rules of Procedure.

In truth, there is no provision in the Rules of Procedure for the Board to issue such reports — see Articles 17 and 18 thereof. The allusion to subparagraph (f) of Article 18, “*To exercise the other powers conferred thereto by the present Rules of Procedure*”, necessarily means that, somewhere in the Rules, this competence — which I am unable to discover — actually exists or is declared to exist.

Nor may one say that the Board acted under Article 159, paragraph (1) of the Rules (Interpretation and solving of omitted cases) — “The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members’ Mandates” — as this norm is not invoked, nor referred to, in said report.

Turning my attention to the issue underlying the report (and the consequent decision to reject the Member’s bill), one must pose the following question: may a bill, purposively and substantively of a mere interpretative, or clarifying, nature, *vis-à-vis* a single provision of the Land Law (Article 104, paragraph (5)), be rejected because Government policy is allegedly at stake?

I cannot countenance such a rationale, as it would be construed as an overly generous interpretation of procedural norms in favour of the Government, and deeply restrictive to the Members of parliament itself, encapsulating an inadmissible and undesired compression under the Basic Law. In other words, this rejection did serious harm to the Basic Law, the Rules and the status and dignity of the Legislative Assembly and its Members. I hope that this was an unfortunate — but isolated — incident, and not a signal or indication of a new *policy*. A really new policy or attitude is that which would be the outcome: one need only go through the list of Members’ bills which have been accepted — albeit not necessarily approved — in the past; indeed, several of them were much more impactful and structural than a simple interpretative law, and addressed subject-matters adjacent to the object of the bill in question.

The impact of the use, and abuse, of this Board *ultra vires* deliberation in the rejection of bills presented by Macau parliament Members is obvious and more and more

¹⁰⁰⁰ See Chapter IX of this book.

felt. Similar bills previously always accepted (albeit later on not meriting approval in Plenary) by the President of the Legislative Assembly, are now being simply preliminarily rejected on the grounds of the above-said Deliberation, even when the content is totally similar to previously accepted bills¹⁰⁰¹ — all this in the face of exactly the same unchanged applicable norms.

Perhaps this hints to new informal and politically based ways of changing the legal system while keeping appearances of unchanged, thus continued, norms, instead of following the pre-established legitimate, normal, and adequate patterns and procedures; thus posing very important issues of legitimacy, constitutionality, legality, normative certainty and security, trust, and so on.¹⁰⁰²

Obviously, a different issue would be for the Plenary, in exercising its competence, to evaluate the opportunity, convenience, justice, etc, of the bill, and, accordingly, to decide whether to approve or reject it. However, the Plenary's decision-making power was unduly withheld therefrom.

This discourse on non-normative involutions with potentially even greater damaging effects cannot be complete without mentioning two decisions by the President, which rejected two amendment proposals, submitted by different Members, in the period

¹⁰⁰¹ For a single example, one can bring in here the Bill entitled *Action to challenge the confidentiality of information or to refuse to provide it or to carry out consultations*, regulating some aspects of fundamental rights connected to workers and privacy, presented by Member Pereira Coutinho, was introduced in 2013 and in 2015 and, at both instances, accepted and then followed the normal procedure; however, in 2021, an extremely similar content bill was preliminarily rejected by the President of the Legislative Assembly, alleging that it needed the Chief Executive's consent per reason of the above-said Report from the Board. Again, the applicable norms are exactly the same, in this respect, since 2013.

¹⁰⁰² This worrisome tendency can be seen to gain traction lately namely on potentially sensitive areas such as freedom of demonstrations or electoral issues where, even in the face of exactly the same rules, and despite common and unchanged previous praxis, the decisions of late — Police, Electoral committees and even courts — portray a very different kind of decision (sometimes the clear opposite of the previous standard and easily anticipated ones) from prior ones and, usually if not always, entailing a direction and an effect of restricting rights, mostly fundamental ones, namely its practical use and enjoyment. Again, I underline that this is so in spite of the formal valid norms being the same and unchanged and, of course, still in force. This *attitude* may be somehow normal in other historic legal and political systems, maybe even current ones, but it does not present itself as proper, adequate, legitimate, or constitutional in the face of the system designed by the Joint Declaration and the Basic Law.

À propos, I remember here the following words:

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't — till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master — that's all." Lewis Carroll, *Through the Looking-Glass, And What Alice Found There* (The Project Gutenberg eBook 1991) Chapter VI.

In systems where the Rule of Law is imperative, as is the case of Macau, there is no place for Humpty Dumpties. One can add that the once famous and practised aphorism in idle times *Si veut le Roi, si veut la Loi* does not have a place in a legal and political system such as those of the SARs, regardless of who the *Roi* might be in concrete.

of around a week, to two Government bills.¹⁰⁰³ One such decision, as seen above, was challenged.

One should take heed of the very clear and recent examples of illegal rejection — due to infringement of the norms contained in the Basic Law and in the Rules, as previously discussed — of amendment proposals, submitted by Members, to Government bills.

The following rejected amendment proposals are relevant:

- Regarding the Government bill resulting in Law No. 11/2018 — *Amendment to Law No. 2/93/M, of 17 May — Right of Assembly and Demonstration*, submitted to, and rejected by, the Plenary held on 30/07/2018; and
- Regarding the Government bill resulting in Law No. 12/2018 — *Legal framework for guaranteeing the rights and interests of the elderly*, submitted to, and rejected by, the Plenary held on 07/08/2018.

The invalid decision to reject such amendment proposals is stranger and more peculiar if one takes into account, in the first case, that there was clearly no legislative initiative reserved to the Government, especially because the immediately preceding amendment to the law (Law No. 16/2008) had, in fact, resulted from a Members' bill; in addition, the bill was subject to a set of amendment proposals drawn up by the Committee.¹⁰⁰⁴

Neither the original initiative by a group of Members, nor the supervening initiative by the Committee, requested or received authorisation from the Chief Executive — it did not occur to anyone that the subject-matters would be deemed as Government policy. From 2008 to 2018, no norm of the Basic Law or the procedural law on such issues was modified. The normative framework in force, then and today, is exactly the same *apropos* this theme.

In the second case, the decision is so unexpected and illegal that it contradicts the position expressed in writing by the Standing Committee entrusted with the legislative process.

Report No. 5/VI/2018, of the FSC, reads as follows:

“In effect, and very briefly, one must remember that — since this Government bill is not (nor could it be) included in the framework of limitations under Article 75 of the Basic Law and Article 107 of the Rules

¹⁰⁰³ These are worrisome and, at times, even bizarre situations. For example: a Member at the plenary meeting defending his competence to submit an amendment proposal — the admissibility of which had the express backing of the competent committee in that legislative process — the high representative of the Government *consenting* to such proposal, and the President of the Legislative Assembly maintaining the decision to reject the proposed amendment...

¹⁰⁰⁴ Cf Report No. 2/III/2008 of the TSC.

of Procedure of the Legislative Assembly, in the (dubious) enlargement of constitutional restrictions — the Committee and the Members *per se*, may introduce, as they see fit, proposals to amend the Government bill, pursuant to Article 106 of the Rules of Procedure ... In truth, the exercise of this power of supervening legislative initiative by the Members and/or the Committees, does effectively exist — it has historical grounding and is wholly appropriate and in full conformity with the Basic Law of Macau.”

Quoting a very relevant report by the CRPMM, to quell any possible doubts:

“Do recall that which is peremptorily affirmed in Report No. 1/III/2009 of the Committee on the Rules of Procedure and Members’ Mandates: ‘The exercise of the legislative power conferred to this Legislative Assembly obviously includes the power to introduce specific amendments to both Government bills and Members’ bills; otherwise, it would be impossible to understand what constitutes the legislative power granted by the Basic Law to the Legislative Assembly, much less could one perceive, as a mere example, the *raison d’être* of Article 117 [now 119] of the Rules of Procedure of this Legislative Assembly.’”

For all of the above reasons, and because the recent positions of the holders of the office of President have differed from several committees’ advisory reports, the (non-)solution reached in Report No. 1/VI/2019, of the CRPMM, is utterly beyond comprehension. The said report concludes by stating that the “Submitted challenge may not be considered, as such procedure could not possibly produce any useful effect.” Even though it might possibly be devoid of immediate usefulness — a mere hypothetical concession — the truth is that the utility and the relevance of the issue far exceed the specific case in hand, projecting itself undoubtedly into the future, in view of the aforementioned discrepancies over the years.

I could catalogue other features of involution, but I shall end with just one more unique example: Deliberation No. 21/2017/Plenary,¹⁰⁰⁵ as published in the OG, contains two Articles, only the first one having been voted on in the Plenary itself... and not the second Article, relative to such deliberation’s entry into force...

Such, in gist, is the regressive scenario of late.

It remains for one to kindle the belief in a return to a healthy evolution, guided by the *rule of law*, and respectful of the powers and rights of Members, thus conferring greater institutional dignity to the Legislative Assembly, namely, but not only, in what respects to its supreme role of enacting laws and the corresponding legislative

¹⁰⁰⁵ “Article 1 (Suspension of a Member’s mandate) The Plenary of the Legislative Assembly deliberates the suspension of Member Sou Ka Hou’s mandate.

Article 2 (Entry into force) The present deliberation shall enter into force immediately upon approval thereof.”

procedure.¹⁰⁰⁶ Ultimately, one desires an evolutionary path towards the fullest respect for the importance and primary functions of both the legislative procedure and the Rules of Procedure. The Basic Law and the Principle of “One Country, Two Systems” so require.

¹⁰⁰⁶ *À propos*, one can bring in here the following contextualisation: “‘Discontent with parliaments’ legislative process seems to be pervasive. The perception that there is something seriously broken in the contemporary legislative process is shared by legislative scholars, the public, and legislators themselves. This view is shared, moreover, across a wide range of legal systems — from the U.S. Congress to ‘the mother of Parliaments’ in England to China, with many stops in between. The task of mending the contemporary legislative process is daunting. In some political systems, the challenge may seem herculean. The problems are many and their roots are varied and deep. Hence, any hope to find a panacea or a ‘magic bullet’ would be foolish. Yet, the quest to improve the legislative process is by no means quixotic and is too important for us to have the luxury of giving up. There are many promising ideas that can make a real, even if incremental, change.’”, Ittai Bar-Siman-Tov, ‘Mending the Legislative Process – The Preliminaries’ (2015) 3(3) *Theory and Practice of Legislation* 245.

XXII.

CONTRIBUTIONS TO A REFORM OF THE LEGISLATIVE PROCEDURE

In this closing chapter, I intend only to provide the reader with clues for possible reflection on a review — or possibly a genuine reform — of the Rules of Procedure. As such, the following paragraphs are mainly presented under several topics.

Once more, I would like to restate that the thoughts below are of a strictly personal nature, expressed under the umbrella of both legal science and scholarship on the one hand, and my own professional experience on the other. The said elements for legal reform do not reflect any political opinions whatsoever.

Throughout these pages and my Lessons, I have left suggestions on each legal framework or problem. Therefore, the task now is simply to lay out a repertoire of ideas, without further comments, unless the complexity of the issue demands otherwise.

A first suggestion is to place the stage of approval in general after the phase of examination and delivery of the respective report by a Committee.¹⁰⁰⁷ Much has been written and adduced above on this matter; I personally believe that introducing this profound change to the legislative procedure would prove to be most useful and adequate, reinforcing the legitimacy of the procedure itself.

A second suggestion is the elimination of the framework that renders the limits placed on the original legislative initiative applicable to the members' supervening initiative. In other words, one should return to the *status quo ante* the "leap" performed by the Rules of Procedure *vis-à-vis* Article 75 of the Basic Law, thus eliminating a procedural norm which does not conform with Macau's Constitution *in a broad sense*. In order to achieve this aim, it would suffice to remove the expression "*and the amendment proposals*" from Article 107 of the Rules of Procedure.

A third issue: should real special processes be created?

¹⁰⁰⁷ Cf, "However, I have reservations regarding the submission of a text to the Plenary, for approval on the whole, without a prior assessment by a Committee.": Member Victor Ng, during the debate on the Rules of Procedure, *Colectânea de Legislação Regulamentadora da Assembleia Legislativa*, Vol II, *Regimento da Assembleia Legislativa da RAEM*. See also, "However, legislative practice over more than a decade after reunification demonstrates that the appraisal carried out during the general debate is not sufficiently rigorous. The debate on legislative policies and the possible socio-economic consequences thereof is not sufficiently deepened: some problems that must be raised or resolved in the stage of general debate appraisal were postponed to the stage of examination on the specifics, which makes the latter proceedings more difficult.": Liu Dexue, "Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio "um país, dois sistemas"" (2014) 102 *Administração* 997, 1021.

For example, a special process for the confirmation of bills provided for in Article 51 of the Basic Law?

Another example entails a special process governing the following scenario: the Legislative Assembly refuses to approve the Budget bill, or refuses to approve a Government bill, which, in the opinion of the Chief Executive, affects the general interest of the MSAR. A special process could be established to implement a formal procedure for consultations to attain consensus as outlined in Article 52 of the Basic Law.¹⁰⁰⁸

For instance, a special process governing the application of national legislation?¹⁰⁰⁹

Or a special process governing legislative participation in the application of international law instruments to the MSAR, especially on subject-matters found within the areas reserved to the law?

This is a very complex issue embedded with doubts and uncertainties, specifically concerning the competence — and its respective contours and limits — of the Legislative Assembly; and a topic on which the Basic Law is normatively parsimonious or silent.¹⁰¹⁰ A glance at some relevant reports¹⁰¹¹ of the Legislative Assembly issued after the establishment of the MSAR allows one to immediately perceive how muddled the waters are.

Under a comparative perspective, the following words may shed some light on the possibilities:

¹⁰⁰⁸ Clarity and predictability would be augmented, and there would be no need to introduce changes which jeopardise the principle of formal equality between bills, as occurred with the 2015 amendment to Article 109 of the Rules of Procedure.

¹⁰⁰⁹ One of the modalities for the application of national legislation in the MSAR entails the participation of the Legislative Assembly, since national laws “*are applied locally by way of publication or legislative act of the Macau Special Administrative Region*.”: Article 18 of the Basic Law.

¹⁰¹⁰ See *inter alia*, Patrícia Ferreira, ‘Algumas questões acerca da aplicação do direito internacional na Região Administrativa Especial de Macau’ (2006) 1 CFJJ 148. See also, Liu Gaolong, ‘Aplicação e efeito do direito internacional em Macau’ (2009) 28 BFD 50; Fong Man Chong, ‘Alguns Aspectos em Torno da Vigência da Lei Básica na Fase Inicial (II) — Reflexões Sobre a Aplicação do Direito Internacional na Raem’ (2003) 62 Administração 1272; Jorge Bacelar Gouveia, ‘Fontes do Direito e Direitos Fundamentais em Macau’ in *Direito Constitucional de Macau* (IDILP 2012) 49, 94–95; Cristina Ferreira, ‘A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 209 et seq. It would be very useful to consider a law specifically relating to the method and to the form for conclusion of international law instruments by the MSAR, while simultaneously amending the Law on forms and templates of legal enactments in accordance. On these issues, see Patrícia Ferreira, above, 157 et seq.

¹⁰¹¹ TSC, Report No. 2/II/2002, Examination on the specifics of the Government bill entitled “Law on the compliance with certain acts of International Law”; SSC, Report No. 1/2002, Government bill entitled “Procedure for the notification of requests within the scope of judicial co-operation”; SSC, Report No. 1/II/2003, Government bill entitled “Taxation framework in case of regional or international double taxation”; SSC, Report No. 2/II/2005, Government bill entitled “Addendum to Law No. 2/2003”; FSC, Report No. 1/II/2004, Government bill entitled “Law on the Status of Refugees”; FSC, Report No. 2/II/2004, Government bill entitled “Law on the Status of Refugees”; FSC, Report No. 2/III/2006, Government bill entitled “Law on Judicial Co-operation in Criminal Matters”.

“Looking at Parliament’s intervention in particular, there are different solutions in comparative law, on an increasing scale: exclusion; purely consultative competence; deliberative competence, concurrent with other bodies, on all or a few matters; division of competence with the approval of certain treaties reserved to Parliament; competence of approval by Parliament depending on referenda; exclusive parliamentary competence.”¹⁰¹²

Note the absence of any reference in the Basic Law to a role to be played by the Legislative Assembly in this context. Contrariwise, one encounters the competence of the Chief Executive to “conduct, on behalf of the Government of the Macau Special Administrative Region, external affairs [...] as authorised by the Central Authorities”;¹⁰¹³ and the provision to the effect that the MSAR Government may “make appropriate arrangements for the application to the Macau Special Administrative Region of other relevant international agreements.”¹⁰¹⁴

On the other hand, it is necessary to recognise the existence of a wide range of matters within the areas reserved to the law and enacted by the Legislative Assembly, as it is common for many instruments of international law to regulate those very same issues. Examples that quickly come to mind include fundamental rights, taxation¹⁰¹⁵ and criminal law. In the MSAR, this question is actually of greater significance because international

¹⁰¹² Jorge Miranda, *Direito Internacional Público* (Lisboa 1995) 93–94. In the Territory of Macau, and according to the specific situation of each international convention, the role played by the Legislative Assembly oscillated between exclusion and a mere consultative competence, ie during the phase of “prior consultation of the bodies of territorial self-government”: Article 3, paragraph (3) of the Organic Statute. See Paulo Cardinal, ‘A Transição e o sistema político de Macau: continuidade ou convergência?’ (1997) 4 *Revista Jurídica de Macau* 27, et seq.

¹⁰¹³ Article 50, subparagraph (13) of the Basic Law.

¹⁰¹⁴ See Article 138 of the Basic Law, which refers to international law instruments to which the PRC is not a party.

¹⁰¹⁵ On this topic, see eg “In the MSAR, it is normally understood that international or interregional tax agreements, entered into by the Chief Executive, under the terms of Law No. 2/2003, as amended by Law No. 3/2005, do not require further approval by the Legislative Assembly (by way of a resolution) and subsequent ratification by the Chief Executive (declaring that the MSAR is bound by the provisions of the conventions, as duly authorised by the Legislative Assembly). On this point, explaining that the competence for the Chief Executive arises from his competences to represent the MSAR externally, and to conclude international agreements, pursuant to the Basic Law, in terms that are not entirely conclusive, see Report No. 1/II/2003 of the SSC, dated 29 January 2003, on the Government bill entitled “Taxation framework in case of regional or international double taxation”, especially 3–7; and Report No. 2/II/2005 of the SSC, dated 30 June 2005, regarding the Government bill entitled “Amendment to Law No. 2/2003”: 3–4. I believe that this perspective, being essentially correct, does not rule out the need for subsequent approval, by the Legislative Assembly, of the tax conventions, signed by the Executive representing the MSAR, which focus on the core aspects of the taxation framework. This corresponds to international practice and it seems to me that such approval by the regional parliament must occur, at least when it comes to matters of the exclusive competence of the Legislative Assembly, as is the case in the field of taxation, under the terms of Article 71, paragraph 3), of the Basic Law, due to the fact that these conventions introduce new regulation to the tax system. Such has not been the constitutional practice in Macau, and the Legislative Assembly does not proceed to approve international or interregional agreements – on any and all matters, whether these be within or without the scope of the areas reserved to the law – signed by the Executive, nor does the subsequent ratification by the Chief Executive – in order for the convention in hand to enter into force in the MSAR legal order – likewise occur.”: Luís Pessanha, ‘Algumas Notas sobre o Acordo contra a Dupla Tributação entre Macau e Moçambique’ (*Questões Jurídicas Contemporâneas relativas ao Comércio e Investimento China-África*, Macau, 2014).

conventions occupy a higher stratum in the hierarchy of legal norms *vis-à-vis* domestic laws, under the principle of primacy of international law.¹⁰¹⁶

If the Legislative Assembly is excluded from any intervention in these processes, such omissions do nothing but skirt the legislative competence reserved through international legal instruments.

The Legislative Assembly of the Territory of Macau, in the pre-handover era, was called upon to render its opinion on a certain type of instrument of international law.¹⁰¹⁷ The role was a purely consultative one to be sure, but nonetheless one that empowered, and moreover, enabled the legislative body to disseminate the content and relevance of each international treaty.¹⁰¹⁸

What is the current legal position in the MSAR?

A first and possible answer, which I sensed before the handover, is the demotion of the Legislative Assembly from a secondary acting role to that of a complete non-actor, ie to the exclusion thereof.¹⁰¹⁹ The praxis has, however, provided a few examples of the opposite tendency — in other words, a modicum of inclusion of the Legislative Assembly in processes related to international law instruments, albeit in an inconsistent and inconstant manner. There is no reason why, in relation to other international law instruments, namely when the respective regulated matters fall within the areas reserved to the law, the Legislative Assembly should not equally be called upon to intervene.

The situation remains fluid, as the following words demonstrate:

¹⁰¹⁶ In addition to the quote in the preceding footnote, see, “The principle of the prevalence of international law over domestic law seems to me to be reasonably established in the legal order of Macau, as outlined in Article 1, paragraph 2) of the Civil Code, and uncontested by the Macau courts, which recognise the full validity of said principle under the fundamental framework of the Basic Law (in particular, see the CFA Decision in Case No. 2/2004”): Luís Pessanha, ‘Algumas Notas sobre o Acordo contra a Dupla Tributação entre Macau e Moçambique’ (Questões Jurídicas Contemporâneas relativas ao Comércio e Investimento China-África, Macau, 2014). See also Cristina Ferreira, ‘A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 217, “The MSAR courts recognise the supra-legal value of conventional international law within the sources of Macau Law. However, judicial decisions have diverged as to the normative foundations supporting this conclusion”: Cristina Ferreira, ‘Comentário ao Acórdão do TUI n.º 2/2004 sobre a posição do direito internacional convencional na hierarquia das fontes de Direito na RAEM’ (2015) 6 *Legisuris* 55 et seq.

¹⁰¹⁷ Paulo Cardinal, ‘A Transição e o sistema político de Macau: continuidade ou convergência?’ (1997) 4 *Revista Jurídica de Macau* 27, 46.

¹⁰¹⁸ For instance, see CCARFG, Report No. 8/VI/98, *Extension to Macau of the Convention on the Rights of the Child*; CSAEC, Report No. 8/99, *Extension to Macau of Conventions No. 22, No. 23 and No. 158 of the International Labour Organisation (ILO)*; CCARFG, Report No. 19/VI/98, *Extension to Macau of the 1979 International Convention Against the Taking of Hostages*; or CCARFG, Report No. 11/VI/99, *Extension to Macau of the Charter of United Nations*: “The competence attributed to the Legislative Assembly is of a mandatory but consultative nature — as is clear from the Organic Statute and reaffirmed by the repeated legal understanding and reports of this Assembly — to be exercised prior to the application and/or extension of an instrument of international law; the President of the Republic is not bound by the opinion of this (or the other) body of territorial self-government.”

¹⁰¹⁹ Paulo Cardinal, ‘A Transição e o sistema político de Macau: continuidade ou convergência?’ (1997) 4 *Revista Jurídica de Macau* 27, 56.

“The present Government bill is materially similar to a legislative authorisation law — a typology of legislative act not in existence in the current legal order of the MSAR. The bill submitted to the Legislative Assembly is intended to authorise the Government of the MSAR, more specifically the Chief Executive, to enter into regional and international agreements with a view to avoiding double taxation. Thus, it appears that the Legislative Assembly, with the approval of the present bill, is legitimising Government intervention in subject-matters within the former body’s exclusive competence, eg the essential elements of the taxation framework — Article 71, paragraph (3) of the Basic Law. This is a somewhat delicate issue, falling within the competence of the Legislative Assembly, and an issue which, with the approval of this bill, shall become the focus of Government intervention. The Committee analysed the matter under the provisions of the Basic Law on the competences of both bodies, and concluded that, although the Legislative Assembly does have the exclusive competence to legislate on the taxation framework, it is no less true that the exclusive competence to represent the Region externally is attributed to the Government.”¹⁰²⁰

The above example is a positive, at least prospective, step towards a more appropriate legal solution, notwithstanding the route thereto being far from clear-cut.¹⁰²¹

Proceeding to further suggestions for, or elements of, a reform of the Rules of Procedure of the Legislative Assembly:

— Expressly recognising other requirements for the acceptance or rejection of legislative initiatives, especially where the norms and principles of the Basic Law have been violated? I say yes, vehemently. And what about violations of the Sino-Portuguese Joint Declaration on the Question of Macau? An identical solution seems justly appropriate to me.

And violation of Law No. 13/2009? I answered in the affirmative above; let me just recall the concept of “borrowed constitutionality” carried by this law.

¹⁰²⁰ SSC, Report No. 1/II/2003, Government bill entitled “Taxation framework in the case of regional or international double taxation”, “The Basic Law does not, therefore, provide for any other MSAR body, other than its executive body, to be able to conduct external affairs. Nonetheless, it is also the responsibility of the Legislative Assembly, under the terms of [The Basic Law], to define the taxation framework of Macau. In view of this legal architecture, it will be up to the Government to negotiate agreements with external entities within the limits of the competence reserved to the Legislative Assembly. However, as the Legislative Assembly lacks the competence to represent the MSAR externally and does not grant authorisations to the Government for the purposes of concluding agreements in matters reserved thereto, it would be an impasse if legislation were not approved to authorise the Government to conclude agreements with other countries and regions in fiscal matters. It is, therefore, the division of competences provided for in the Basic Law which necessitates that the Legislative Assembly, in matters of its exclusive competence, approve a law enabling the Government to conclude agreements with a view to avoid double taxation and tax evasion.”

¹⁰²¹ See *inter alia*, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 432 et seq.

And what about requirements for compliance with international treaties? I also deem such to be appropriate, especially though not exclusively for international law instruments provided for in Article 40 of the Basic Law: the ICCPR, the ICESCR, and the ILO Conventions.

— Creating specialised committees based on subject-matter? It seems to be a valid option, already made evident by the dynamics of the monitoring committees.

— Transforming the Legislative Assembly from a merely supporting body for the legal-technical improvement of legislation, into a true and proper legislative body? Yes, definitely. One should entertain the introduction of a few procedural norms to reflect such a purpose.

— Formalising the above identified issues of practices, usages and customs *praeter* Rules, via Article 26 of the Rules of Procedure.

— Enlarging the power of legislative initiative (both original and supervening) of the Committees? I believe so. This development could also compensate for the shortfall of such initiative being exercised by individual Members.

In this context, I support the implementation of a truly complete framework for the submission of substitution or replacement texts drafted by the competent committee, with obvious advantages in terms of formalisation, presentation and integration of the new solutions recommended by such a body.

— Expressly recognising areas of legislative initiative reserved to the Legislative Assembly, its Members and Committees, especially in matters pertaining to the Legal Status of the Members and to the Organic Law of the Legislative Assembly. This measure could easily follow the legislative technique adopted in the Rules of Procedure: by linking rejection decisions to the specific bills and proposals which fail to comply with certain organic, material and formal requirements.

— Clarifying the conjoining or merger of bills, ie the joint appraisal of bills on identical subject-matter, with an evident streamlining of the legislative process.

— Expressly recognising the principle of equal formal dignity between Members' and Government bills? Certainly, not only because this principle does exist as described above, but also because such measure would, above all, serve as a yardstick — charged with symbolism and imagery in the eyes of the population — befitting and benefitting the Legislative Assembly.

— Formally establishing the acceptability of second and third versions of Government bills as submitted time and again by the Executive? I believe so, first of all as a means of ensuring transparency and recognising the existing *factuality*. This would involve a few important modifications to the Rules of Procedure — the mere introduction of an article would not suffice, but the clarification of various aspects is required. Such a change should not render it absolutely impossible for Members and Committees to submit

amendment proposals to any and all Government bills.

— Related but distinctive to the previous suggestion is the issue of allowing amendment proposals (other than substitution or replacement texts as mentioned in the previous paragraph) submitted by the Government. Should such also encompass Members' bills? Yes, I am inclined to accept this possibility as long as it does not equate to an invasion of the legislative initiative reserved to Members.

— Establishing the proponent's obligation, especially in the case of Government bills, to provide all available additional information (studies, comparative law, etc).¹⁰²²

— Establishing mandatory consultations and hearings during the stage of examination on the specifics in Committee, for example, ones held by the MLA. Such a measure should be supplemented by the non-mandatory consultation of associations, entities, etc, pertinent to the matter under appraisal, especially when very relevant. I must underline that the latter case corresponds to the current practice of the Legislative Assembly.

— Formally inserting into the Rules of Procedure the idea expressed on the Legislative Assembly's official website: "*Residents may send their opinions on bills to the Legislative Assembly by post or via e-mail.*", in such a formulation or perhaps one more refined and open-ended which includes any and all local inhabitants and legal persons.

Here concludes this journey through the legislative procedure of Macau.

¹⁰²² For example, Article 124, paragraph (3) of the Rules of Procedure of the Assembly of the Republic of Portugal: "Government bills shall be accompanied by the studies, documents and reports on which they are grounded."

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