
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 co-ordinates”: 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.

