
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 en consideración” 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/CREC-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.