
VII.

NATURE, SCOPE, FUNCTION AND FEATURES OF THE RULES OF PROCEDURE OF THE LEGISLATIVE ASSEMBLY

1. Introduction: The Five Pillars

Within the autonomous legal order of the MSAR, the Rules of Procedure of the Legislative Assembly are affirmed through several defining features, underpinned by five pillars, which I shall seek to identify in this chapter.

The said Rules have substantive constitutional legitimacy and also a constitutionally endorsed formal identity,³¹⁰ they epitomise:

1. The principle of self-organisation and self-regulation of the regional parliament, to the fullest possible extent;
2. The principle of a procedurally reserved set of matters, either expressly conferred or inferred, in relation to which the Legislative Assembly enjoys exclusivity in norm-making;
3. The principle of its legal substantive force equivalent to a law, ie by being a normative act, other than a law in a formal sense, it has the value of law.³¹¹ This is because it is externalised and binding, not only on the Legislative Assembly, its organs, and Members, but also on all those who interact therewith, inside the scope of the functions regulated by the Rules of Procedure, namely the legislative procedure.

The Rules are, therefore, “*a statute law*”, in the words of GOMES

³¹⁰ The references made to the Rules in Article 77 and Article 74 of the Basic Law, not going as far as other constitutional texts, still give such Rules a formal identity. The Rules may not be confused with the laws; they do not need the signature of the Chief Executive, nor are they confused with the resolutions. Cf Pedro Alfaro Velez, ‘O Regimento da Assembleia da República como fonte de Direito’ in *Estudos de Direito Público* (Âncora 2006) 677.

³¹¹ One may speak of the force of law or value of law. See Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 697–98: “The theoretical/jurisprudential category of force of law appeals to three fundamental ideas: (1) primary and first position of the law, in the sense of having a normative standard immediately below that of the Constitution; (2) the power of legal innovation within the legal order (active force); (3) resistance to repeal or derogation by other hierarchically inferior norms (passive force).”

CANOTILHO.³¹²

Besides these five pillars, other features may be added or derived therefrom: freedom of the Rules, conditioned to its constitutionality³¹³ and also limited by law; the Rules as the standard for lawmaking; and the Rules as an inescapable norm for a *norm-creation-process*.

The following pages shall address these issues. However, references will be made in more than a single instance or in a *crisscrossed* fashion, in relation to several topics mentioned in the title of this chapter. Inevitably, not all such topics shall merit their own respective sections.

2. Constitutional Legitimation and Formal Identity

Although distinct, I shall approach these two pillars under a common section, as warranted by the umbilical cord that links such concepts.

A first reminder: the Rules of Procedure of the Legislative Assembly have constitutional legitimacy. It is from a norm of the Basic Law, as the constitution *in a broad sense* of the MSAR, that the Rules of Procedure are directly and immediately grounded on and sourced from. Parliamentary rules of procedure “are directly incarnated in the Constitution, and their content is the regulation of their own organisation and functioning, as determined by the Constitution itself.”³¹⁴

The Rules are not a trivial creation within the legal order of Macau. Much less may they be described as a cyst or a foreign body, perversely or surreptitiously attached “to the normal tissues” of the legal order.³¹⁵

It is worth recalling the normative narrative of the Basic Law on the Rules of Procedure of the Legislative Assembly: “The Legislative Assembly shall make, on its own, its rules of procedure, which may not contravene this Law.”³¹⁶

Such is the key norm, from which flows, into the legal order of the MSAR, the irrepressible founding source of the normative act designated as Rules of Procedure of

³¹² Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855.

³¹³ And consequent justiciability in assessing its constitutional conformity. See, for instance, Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 673.

³¹⁴ José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 128, citing parts of a Decision from the Spanish Constitutional Court. See also, stressing the express constitutional provision, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 33.

³¹⁵ It is not unimportant to point out, even if off-handedly, that the only committee the existence of which is pre-determined, either in the Rules of Procedure, or in Law No. 3/2000 (On the Legislature and on the Legal Status of the Members of the Legislative Assembly), is the Committee on the Rules of Procedure and Members’ Mandates.

³¹⁶ Cf a similar norm in Article 75 of the HKSAR Basic Law.

the Legislative Assembly.

Simultaneously, said constitutional norm contains two explicit corollaries:

- The independence and self-regulation of the Legislative Assembly in the making of the Rules³¹⁷ (*make, on its own, its rules of procedure*); and
- The express limitation to the autonomy of the Rules, in view of the principle of constitutionality³¹⁸ (*which may not contravene this Law*).

A third — implicit and consequent — corollary might be perceived: the principle of autonomy of the Rules, ie in the substantive conformation of the Rules, insofar as no solution shall be prohibited thereto, as long as it is a matter to be regulated under such Rules and provided that it does infringe upon the Basic Law.

Finally, I would like to add a further corollary: the Basic Law establishes the Rules as a *must* — an act of inescapable and mandatory norm-making.³¹⁹ The Basic Law does not concede a privilege, a right or a faculty to the Legislative Assembly: it demands that the Legislative Assembly effectively adopts its own Rules of Procedure, not only to accomplish its self-organisation but also as a necessary norm to develop and implement other provisions of the Basic Law, namely in the scope of the legislative procedure and in the allocation of other powers and functions to the President of the Legislative Assembly.

The constitutional reference to the Rules of Procedure in the Basic Law also extends to Article 74:

“The President of the Legislative Assembly of the Macau Special Administrative Region has the following competences: [...] Exercise other powers and functions, as conferred by Rules of Procedure of the Legislative Assembly.”

It is imperative to note that various articles within the Basic Law either explicitly

³¹⁷ Underlining or creating a space of independent norm-making reflecting the principle of self-regulation by the legislative body.

³¹⁸ This was an issue discussed in several legal orders. The Basic Law straightforwardly resolves the potential doubt: the norms of the Rules of Procedure may not contravene the Basic Law, due to the principle already established in Article 11, “*No law, decree-law, administrative regulation or normative act of the Macau Special Administrative Region may contravene this Law.*”; since the Rules of Procedure can easily be inserted into the residuary category of normative act of the Region, the truth is that Article 77 is rightly guided, in this area, by clarity and directness. Contrary to other legal orders, in the MSAR the Rules must necessarily obey the commands of constitutional law. From here, one may also extract the principle of interpretation of the procedural rules in accordance with the norms and principles of the Basic Law and, naturally, the scrutiny/control — eg through judicial review — of their constitutional conformity with the Basic Law, under the same terms which might be applicable to laws *vis-à-vis* the Basic Law.

³¹⁹ Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 666. The author further states that there is parliamentary autonomy to make the rules of procedure, but there is no autonomy not to do so.

reference or implicitly allude to³²⁰ procedural rules.³²¹ For instance, terms in Article 71 “enact, amend, suspend and repeal laws, under the terms of this Law and in accordance with legal procedures.” Similarly, Article 75 mentions “in accordance with legal procedures” with respect to the initiative of the law. Article 8 highlights the need for “amendments” to legislation to be done “in conformity with legal procedures.” In Article 145, the framework regime for the modification or termination of laws is discussed.³²² Other matters are, *inter alia*, those contained in Article 77 paragraph (1), and those rooted in the constitutionally conferred functions exercised by the Legislative Assembly.³²³

In other words, the legitimacy of the Rules of Procedure is unquestionable, being solemnly proclaimed in Article 77 of the Basic Law, with a standing that is equalled by the constitutionally recognised and inescapable formal identity of said Rules.

XIAO WEIYUN describes the reasoning behind Article 77 of the Basic Law: “In addition to the working procedures provided for in the Macau Basic Law, there are also procedural rules on deliberations, so that the former procedures may become more specific and standardised.”³²⁴ Therefore, the Basic Law further stipulates the following transcribed words of IEONG WAN CHONG: “the procedures relating to the meetings must be specified by the Legislative Assembly on its own, in the rules of procedure, to be drafted.”³²⁵

This legal-constitutional option of the MSAR (and of the HKSAR) is far from being innovative or isolated. On the contrary, it not only respects the local constitutional memory, but also embraces the general or universal trend of legal orders, guided by values and principles (albeit with naturally different hues and foci), such as democracy, separation of powers, parliamentary self-organisation, the existence of an effective *house/chamber(s) of laws*, and legitimisation of public normative acts, namely laws, etc

There is, in a gist, an unyielding constant in modern comparative constitutional

³²⁰ In parallel with the Spanish case, where the Constitution apparently dedicates a single provision to parliamentary rules of procedure, says Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 667: “*The appearance is deceiving*” and, “*The Constitution defines in detail the parliamentary matters, circumscribing in this way the scope*” of the Rules.

³²¹ And other legal norms that affect the *legislative procedure*, such as the Law on forms and templates of legal enactments, for example, as previously seen.

³²² As well as in other Articles that refer to matters other than the legislative procedure, for example, “Article 76. Members of the Legislative Assembly of the Macau Special Administrative Region have the right to question the actions of the Government, in accordance with legal procedures.”

³²³ Not constituting matters reserved to the law. As stated by José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 127: “*There are a series of matters, included in the Constitution, which are characterised as being specific to the parliamentary organisation*”.

³²⁴ Xiao Weiyun, *Conferência sobre a Lei Básica de Macau* (Associação Promotora da Lei Básica de Macau, Macau, undated) 189.

³²⁵ Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 150.

law: the expression of the principle of parliamentary self-organisation.³²⁶

A *very quick tour* of a few examples seems worth the effort.

3. The Constitutional History of Macau

First, a curt nod to Macau's constitutional history.

The Organic Statute of Macau corresponded, *mutatis mutandis* — but without the charter of fundamental rights — to our Basic Law.

Such Statute established that “The Legislative Assembly is competent: [...] to make its own rules of procedure”: Article 30, paragraph (1).

This guiding norm-principle was further developed, as follows, in Article 42:³²⁷

“The Rules of Procedure of the Legislative Assembly shall contain:

- a) The composition and competences of the Board;*
- b) The organisation of the committees considered necessary;*
- c) The form of voting;*
- d) The advance subject to which the matters to be addressed in the period before the agenda shall be announced;*
- e) The conditions for the introduction of bills for territorial laws and the deadline to be observed for appraisal thereof;*
- f) The procedural protocols to be followed for the final drafting of laws approved by the Assembly;*
- g) The deadlines for submission of proposals and reports;*
- h) The regulation of the powers, rights, immunities and privileges of the Members of the Assembly;*
- i) Other rules contained in this Statute and also those considered necessary for the functioning of the Assembly.”*

4. Comparative Law

In this section, I shall gather lessons from comparative law on the aforementioned

³²⁶ Cf *inter alia*, the following studies in comparative law: Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 408 et seq; Héctor Fix-Zamudio and Salvador Valencia Carmona, *Derecho Constitucional Mexicano e Comparado* (Porrúa 2005) 690 et seq; Giuseppe Morbidelli and Lucio Pegoraro and Antonio Reposo and others, *Diritto Pubblico Comparato* (Giappichelli 2009) 384 et seq.

³²⁷ In addition to other norms that mentioned the Rules of Procedure, for example, Article 39 of the Organic Statute of Macau, which provided that “*The legislative initiative belongs, without distinction, to the Governor and, in the form regulated in the Rules of Procedure of the Assembly, to the Members thereof.*”

constant.

Beginning in **Hong Kong**, Article 75, paragraph (2), of the Hong Kong Basic Law states that “The rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law.”

In this regard, it was ruled that “Article 75 (2) enables the Legislative Council to regulate as it sees fit, its role in the enacting process, including motions for amendment. Subject to conflict with the Basic Law, as interpreted and enforced by the courts, The Legislative Council, in exercising Article 75 (2), is answerable to no outside authority.”³²⁸

In **Portugal**, Article 175(a)³²⁹ of the Constitution establishes: “The Assembly of the Republic is competent to [make] and approve its own Rules of Procedure, under the terms of the Constitution.”

Article 232, paragraph (3) further provides that “The Legislative Assembly of the autonomous region is competent to make and approve its own rules of procedure, under the terms of the Constitution and the respective politico-administrative Statute.” See, accordingly, Article 42, paragraph 3 of the Politico-Administrative Statute of the Autonomous Region of the Azores and Article 49, subparagraph (a) of the Politico-Administrative Statute of the Autonomous Region of Madeira.

In **Mozambique**, the Assembly of the Republic is competent to “*approve the Rules of Procedure of the Assembly of the Republic*”, under the terms stipulated in Article 179, paragraph (4) of the Constitution.

In the Constitution of **Cape Verde**, “In relation to its own organisation and functioning, the [...] National Assembly is competent to: a) Make and approve its own Rules of Procedure; [...] c) Exercise the other powers that are conferred thereon by its Rules of Procedure.”

In **Brazil**, it is constitutionally guaranteed that “The Chamber of Representatives has exclusive competence: to make its internal rules of procedure” and, “The Federal Senate has competence: to make its internal rules of procedure”, Articles 51 and 52. Furthermore, “The Legislative Assemblies (of the federal States) are competent to

³²⁸ *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) 399–400 (Hartmann J). Reaffirming these principles of independence and constitutional conformity, the court in *Cheng Kar Shun v Honorable Li Fung-ying* [2011] 2 HKLRD 555 (CFI) held that, “It therefore requires a particularly strong case to justify interpreting the Basic Law in such a way as to impose a straitjacket on the Legislative Council as to how it may go about its business.” See also, Albert Chen, ‘Constitutional Developments in Autumn’ (2009) 39 Hong Kong Law Journal 751, Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn, Sweet and Maxwell 2015) 287. Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 308 et seq. It should also be noted that, in Hong Kong, resolutions approving or amending the Rules of Procedure are considered *Resolutions with legislative effect passed by LegCo*.

³²⁹ In addition to several other provisions that expressly refer to the Rules of Procedure of the Assembly of the Republic, such as the principle of publication in the official journal bulletin (*Diário da República*), the principle of the establishment of the powers of the Members and the pre-definition of the parliamentary committees.

regulate on their internal rules of procedure.”, Article 25.

In **Italy**, Article 64 of the Constitution establishes that “Each House adopts its own rules of procedure by an absolute majority of its Members.”

In **Spain**, the Constitution establishes, in Article 72, “1. The Houses establish their own Rules of Procedure, autonomously approve their budgets and, by common agreement, regulate the Legal Status of the Staff of the Cortes Generales (Parliament). The Rules of Procedure and their amendments shall be subject to a final overall voting, which requires an absolute majority.”

In **South Korea**, Article 64 provides for the following: “(1) The National Assembly may establish the rules of its proceedings and internal regulations, provided that they are not in conflict with law.”

In **Japan**, Article 58 of the Constitution states: “Each House shall establish its rules pertaining to meetings, proceedings and internal discipline”.

In **Singapore**, Article 52 of the Constitution declares: “Subject to the provisions of this Constitution, Parliament may, from time to time, make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business.”

In **Costa Rica**, Article 121 of the Constitution: “It is the exclusive competence of the Legislative Assembly [...] to enact its internal rules of procedure, which, once adopted, may not be modified except by a vote of not less than two-thirds of the total number of its Members.”

In **Argentina**, under the terms of Article 66 of the national Constitution, “*Each House shall make its own rules of procedure.*” For example, in the Constitution of the Province of San Juan: “*The House of Representatives decides on its own Rules of Procedure.*”

In **Paraguay**, Article 190 of the Constitution: “On the Rules of Procedure — Each House shall make its own Rules of Procedure.”

In **Peru**, Article 94 of the Constitution: “The Congress makes and approves its Rules of Procedure, which have the force of law.”

In **Bolivia**, Article 159 of the Constitution: “The powers of the Legislative Assembly are [...] 1. To make and approve its Rules of Procedure. 2. To elect the Board, determine its internal organisation and functioning.”

In **The Philippines**, Article VI of the Constitution, Section 16, 3: “*Each House may determine the rules of its proceedings.*”

After this short, hopscotched view (in truth, an almost random³³⁰ one) of comparative law and of local constitutional history, one may gain a more solid and compelling understanding of the constant in question, which occurs everywhere — in Constitutions of unitary States, Federations, and in the Statutes governing non-sovereign autonomous regions. This constancy may, naturally, encounter occasional exceptions.³³¹

Now, it is time to dive into the issue of *why* the MSAR constitution attaches such an express and explicit importance to the Rules of Procedure and to these structuring principles.

5. Expression of Parliamentary Self-Organisation

The Rules of Procedure are the expression of parliamentary self-organisation and the Legislative Assembly's internal normative autonomy.³³² They constitute the genuine representation of parliamentary autonomy³³³ and are the best guarantee for defending parliament's own functionality from interference by other powers.³³⁴ The procedural norms “depend on the freedom of action of the Members [...], on the effectuation of the principle of representation (publicity of meetings and deliberations, for example), and on the possibility of Parliament manifesting/expressing its power in relation to others organs [...]. Complete autonomy in the making of the rules of procedure is therefore essential.”³³⁵

In other words,

“the rules of procedure are believed to be an expression of parliamentary autonomy — either constitutionally foreseen or implicitly deriving therefrom [...] — an autonomy which inevitably entails a wide margin of

³³⁰ Not wholly random, given the presence of legal orders *close* to that of the MSAR, either because they belong to the same Continental/Roman-Germanic family, or due to geographical proximity.

³³¹ In the legal order of Mainland China, such power is exercised through laws.

³³² “For the MSAR Legislative Assembly, its Rules of Procedure, Legal Status of the Members and Organic Law constitute the impermeable and irreducible core of said body's autonomy, being necessary for the performance of its superiorly established functions.”: as was written in the explanatory note of the Bill “Amendment to the Organic Law of the Legislative Assembly of the Macau Special Administrative Region”: dated 2008.

³³³ Which represents “*a proper or self-referential constant*”: incorporating a very large internal parliamentary organisational power, in the words of Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010) 762–763. For developments on this autonomy, namely normative and functional, *ibid*, 773 et seq. See also, with interest, J. Alonso Antonio and A. Alonso Antonio, *Derecho Constitucional Español* (Editorial Universitas, S.A. 2015) 528 et seq. Referring to parliamentary autonomy as comprising “*regulatory/procedural*”: “*budgetary*”: administrative and pertaining to staff/personnel.

³³⁴ J. Alonso Antonio and A. Alonso Antonio, *Introducción al Derecho Parlamentario* (Editorial Dykinson 2002) 25–26, adding a function of defending the procedural rights of parliamentary minorities, in the face of “*a wrong interpretation of the game of majorities and parliamentary minorities*.” Also, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 33, speaking of a *condition of parliamentary guarantee*.

³³⁵ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 595.

discretionary power in deciding parliament's own internal organisation.”³³⁶

And JAVIER PEREZ ROYO also tells us,

“The autonomous regulatory competence of the houses of parliament is recognised in Article 72, paragraph (1) [of the Constitution]. [...]”

The Rules of Procedure are norms enacted autonomously by each House without [...] the intervention of any other constitutional organ, neither in their drafting, nor in their approval [because they] are norms that execute the Constitution.”³³⁷

As such, “parliamentary self-organisation is expressed, above all, through the competence to adopt regulatory norms.”³³⁸

The historical origin of this principle is well known and is traceable to the traditional independence maintained by parliaments *vis-à-vis* the Executives in certain legal orders during the era of Absolutism in Europe. After the French Revolution, it has, in the words of GIUSEPPE DE VERGOTTINI, “been linked to the preferential position taken up by Parliament”.³³⁹ Within the Common Law family,³⁴⁰ one may say that “Parliament's privileges are historically unique and egocentric but essential to its functions and authority.”³⁴¹

In summation, the express establishment in the Basic Law, granting the Legislative Assembly the competence to establish its Rules of Procedure, not only empowers this body to enact such rules but also bestows upon them a definite constitutional identity.³⁴² The constitutional intent is the fulfilment of the principle of self-organisation and internal self-regulation, a common principle in the panorama of modern constitutional law.

³³⁶ Giuseppe De Vergottini, *Diritto Costituzionale* (10th edn, Cedam 2023) 241. See also, *inter alia*, Mauro Volpi, ‘L’organizzazione costituzionale dello Stato’ in L Pegoraro and A Reposo (eds) *Diritto Costituzionale and Pubblico* (Giapichelli 2005) 311.

³³⁷ Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 666 et seq. For example, see Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 19 et seq.

³³⁸ Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 409. For example, as stated by J.P. Schneider, the Bundestag “within the framework of this faculty (organisational autonomy) endows itself with Rules of Procedure, which are entrenched in the tradition of German parliamentary Law.”: ‘El régimen parlamentario’ in Benda and Maihofer and Vogel and others, *Manual de Derecho Constitucional* (Marcial Pons 2001) 353.

³³⁹ Giuseppe De Vergottini, *Derecho Constitucional Comparado* (UNAM 2004) 409.

³⁴⁰ A tradition that even today, due to the very characteristics of the British strain — based on the Westminster model — of constitutionalism *made in common law*, does not recognise or resist the application of a principle of constitutionality, or of constitutional conformity, with submission of such rules of procedure to judicial control/review.

³⁴¹ Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (Brookers 2001) 386. See also in this context, John Alder, *Constitutional and Administrative Law* (Palgrave 2007) 198 et seq; O Hood Phillips and Paul Jackson, *O Hood Phillips Constitutional and Administrative Law* (Sweet & Maxwell 1987) 243 et seq; Robert Blackburn and Andrew Kennon and Michael Wheeler-booth, *Griffith & Ryle on Parliament — Functions, Practice and Procedure* (Sweet & Maxwell 2003) 3 et seq.

³⁴² Unlike the Executive Council's Rules of Procedure.

This principle of self-regulation carries a significant consequence in this context: the Rules of Procedure are enacted in the form of a Resolution,³⁴³ and not of a law, thus precluding the intervention of the Chief Executive, whose responsibilities, as seen above, include the signing and vetoing of laws, as well as ordering their publication. As the normative acts regulating the internal affairs of the Legislative Assembly adopt the formal legal typology of resolutions, they are immune from the post-approval procedures that the laws undergo, with the participation of the Chief Executive. Furthermore, under the Basic Law, such normative acts are not subject to reporting, for record, to the Standing Committee of the National People's Congress.

My discourse is obviously laid upon an idea of respect for the Legislative Assembly and its functions,³⁴⁴ within a system of separation of the legislative body from the executive and judicial powers.

From such conclusion one can jump to the issue of the matters reserved to the Rules of Procedure.

6. Rules of Procedure (Regimento) Reserved Matters

In the MSAR, as in comparative constitutional law, there is a substantive zone or area of matters reserved to the parliamentary rules of procedure.³⁴⁵

A matter immediately reserved by the Basic Law is found in Article 74, which

³⁴³ One could envisage an act bearing a distinctive formal enactment or a qualified external sign, ie the form of the act of approval of the Rules of Procedure (and possibly other matters closely related thereto), as an act of normative content and as an expression of the separation of powers and of the Legislative Assembly's power of self-regulation, might take a different form relative to the acts that serve purely political purposes, without any normative content. In any case, it would always be an act not subject to signature, nor possible veto by the Chief Executive. It would be sent for publication by the President of the Legislative Assembly and would not be subject to reporting for record in Beijing. It would still be an act with the force of law but not a law.

³⁴⁴ As for Hong Kong, for example, in case law, *Rediffusion (Hong Kong) Limited v Attorney General* [1970] AC 1136 (PC); *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J); *Cheng Kar Shun v Honorable Li Fung-ying* [2011] 2 HKLRD 555 (CFI); *Cheung Tak Wing v Director of Administration* [2018] 5 HKLRD 740, [2018] HKCFI 2557; *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906, [2020] HKCA 124; among others. For a more complete listing of court decisions addressing this issue in Hong Kong, Lo Pui Yin (PY Lo), *The Judicial Construction of Hong Kong's Basic Law: Courts, Politics and Society after 1997* (HKUP 2014) 272. See also in the legal scholarship, Albert Chen, 'Constitutional Developments in Autumn' (2009) 39 HKLJ 751, "The judge's view that the court will only in exceptional circumstances interfere with the internal working of the legislature was based on case law on the court's disinclination to intervene in the legislative process.": p 762. See also PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 451, "The Basic Law of the HKSAR, in giving full legislative powers to the Legislative Council of the HKSAR, has in clear terms given it the power to regulate as it (and it alone) deems best, the manner in which it discharges the process of enacting laws".

³⁴⁵ Cf *inter alia*, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855, Javier Perez Royo, *Curso de Derecho Constitucional* (Marcial Pons 2007) 668, Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 45; Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), *passim*, especially 33 et seq; Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)' (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 285, who speaks of a "regulatory monopoly". The matters reserved to parliamentary rules of procedure, alongside the matters reserved to law, together constitute the core of the area reserved to parliament. About such concept, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 245 et seq.

establishes the conferral, by the Rules of Procedure, of other powers and functions to the President of the Legislative Assembly. This idea of reserved matters is implicit in Article 77 and other norms, such as references to legislative procedures,³⁴⁶ under the formula “*in accordance with legal procedures*”. The history of constitutional law, in general, and of parliamentary law, in particular, allows one to consolidate the areas of norm-making under the Rules of Procedure of the MSAR regional parliament.

I do assert the existence of pre-determined procedurally reserved matters, as set out above, by the Basic Law.³⁴⁷

The opposite scenario would not make the least sense. What effectiveness would the principle of self-regulation and self-organisation have? What would be the purpose of allowing the President of the Legislative Assembly to exercise powers and functions conferred to him or her by the Rules of Procedure? What would be the normative utility of conjoining the establishment of the principle of the Rules of Procedure’s legitimacy with the creation of rules for the legislative procedure, if, in practice, the ultimate conclusion was to be cognate to: “such may be done in accordance with — or via — the Rules of Procedure, but may also be performed by some other means”?

7. Rules of Procedure versus Law: Division of Powers, Not Hierarchy

“Just as there are matters reserved to the Constitution, to international convention or to law, there are also matters reserved to parliamentary rules of procedure.”³⁴⁸ I should emphasise that, consequently, regulatory matters reserved to parliamentary procedural rules are excluded from the normative spheres of laws and administrative regulations. An invasion of the parliamentary area of reserves matters, as guaranteed by the Basic Law, shall taint the alien and intruding normative act with unconstitutionality.

The inverse situation and its consequences, namely, by the Rules of Procedure into an area of matters reserved to the law, holds true as well. Examples: a norm in an administrative regulation establishes the deletion of Explanatory Notes from Government bills, or a norm in a law that eradicates voting on the specifics of a bill and imposes a single vote on the whole bill, shall both be in non-conformity with the Basic Law. From

³⁴⁶ Regarding the importance of this area reserved for parliamentary *legislative procedure*, and its relationship with the area reserved to the law, as traditionally understood, and with the idea of representation and pluralism, one can summon the following words: “*This is, above all, the reserved area for a certain type of procedure for normative enactment (the parliamentary legislative procedure), endowed with the characteristics of opposition, publicity and free deliberation that is unique to such body, substantially differentiating it from the governmental normative procedure.*”: Manuel Aragón Reyes, ‘Las fuentes del derecho parlamentario (ponencia general)’ in *Estudios de Derecho Constitucional* (CEPC 2009) 593.

³⁴⁷ There is also a reserved area of procedural initiative *vis-à-vis* the Rules, in favour of the Members and the Committee on the Rules of Procedure and Members’ Mandates. It would not make sense, from any angle, for a solution other than the absolute reserve of initiative regarding the Rules of Procedure.

³⁴⁸ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 597. See also Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), *passim*.

a different perspective, a norm in the Rules of Procedure establishing a crime, a tax or a restriction on a given fundamental right, shall also be in non-compliance with the Basic Law, as such issues fall under the domain of matters reserved to the law.

If one thus realises that the Rules may not invade the space reserved to the law, nor vice versa, one may correctly conclude that the relationship between both legal acts is one of demarcated neighbourhoods, ie an *allocation of normative competences*, rather than a hierarchy between Law and the Rules.³⁴⁹

Thus, for this purpose it is unproductive to discuss which type of legal enactment has primacy in the normative pyramid of the sources of norms, viewed as multileveled and distinct vertical strata, with the superior norms flowing from the apex. In other words, this is not a case of solving normative conflicts based on hierarchy (a criterion sometimes used in potential positive normative conflicts),³⁵⁰ nor other criteria such as the chronological one.³⁵¹

8. Rules of Procedure as a Proper Juridical Norm

It has been amply established that the Rules of Procedure have constitutional protection and are, furthermore, enabled and required by the Basic Law. However, it is also true that said Rules are not Law, in the strict and formal sense determined by the Basic Law.

In effect, the Rules and the Laws are enacted by the same body, subject to the same general requirements for majority approval, and go through a normative procedure with many similarities,³⁵² although with specific differences³⁵³ (which are indeed relevant,

³⁴⁹ “The relationship between the law and the rules of procedure is less transparent, since, in principle, there must be a boundary between legislative and procedural matters. The relationships between them are, in principle, a relationship of sharing or allocating competences and not of hierarchy. In case of conflict, the law must make way when it has invaded the procedural space, or the latter must cede to the law when it has gone into the scope of the latter.” Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 383. See also Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 749.

³⁵⁰ Neither of a negative nature, due to an absence of a norm, ie a *lacuna*.

³⁵¹ On this topic, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 298 et seq.

³⁵² On the deliberative process of the resolutions in the Rules: “Article 134 (Applicable framework) “To the resolutions shall apply, with the necessary adaptations, the provisions of the preceding Section, with the exception of Subsection VIII.”

³⁵³ Article 160: “(Amendments to the Rules of Procedure) 1. The present Rules of Procedure may be amended at the initiative of the Committee on the Rules of Procedure and Members’ Mandates, or of at least nine Members. 2. The proposed amendments to the Rules of Procedure follow the deliberative process of resolutions, with the specialties set out in the following paragraphs. 3. After accepting a proposal for an amendment introduced by Members, the President sends the text to the Committee on the Rules of Procedure and Members’ Mandates for appraisal and issuance of an advisory report. 4. After such report is received by the President, he or she shall schedule, for a plenary meeting to be held within the period of twenty days, the debate and voting, on the whole and the specific, on the proposed amendment.”; Article 161: “(Form, publication and entry into force) 1. The approved amendments take the form of a resolution. 2. Whenever justified, the Rules of Procedure may, by decision of the President, be subject to a new publication, with the modifications inserted into the proper place. 3. The publication of the amending resolution and, in the case provided for in the preceding paragraph,

as in the context of initiative).³⁵⁴

Leaving aside those particular features, I must underscore, yet again, that the Rules of Procedure are not subject to the signature of the Chief Executive³⁵⁵ and are sent for publication in the OG by the President of the Legislative Assembly.³⁵⁶

As GOMES CANOTILHO says,

“Only the weight of a tradition that relegated the so-called administrative regulations [...] to the purely internal sphere and did not recognise the legal nature of organisational norms can justify that, even today, the statute of a sovereign body be classified as an internal regulation.”³⁵⁷

Or, in the words of JORGE MIRANDA and RUI MEDEIROS, “The procedural norms are true legal norms, mandatory and sanctioning in nature.”³⁵⁸

Although the Rules do not fit the formal definition of “law” as established by the Basic Law, the legal reality dictates that they do indeed constitute a norm: a veritable normative act.³⁵⁹ Regardless of their distinction from laws, it is undeniable that the Rules has — decidedly and irreducibly, *de minimis* in vast segments, maybe in its entirety — the force of law.³⁶⁰

of the new text of the amended Rules of Procedure, is made in the Official Gazette of the Macau Special Administrative Region. 4. Amendments to the Rules of Procedure shall enter into force on the day following publication.”; Article 26, subparagraph e): the Committee on the Rules of Procedure and Members’ Mandates is competent to suggest to the Plenary the modifications to the Rules of Procedure “that the practice may advise”.

³⁵⁴ For example, per the Basic Law, and a natural implementation of the Rules, the initiative to approve and to amend said Rules is exclusively reserved to the Legislative Assembly and its Members, under the terms, respectively, of Articles 77 of the constitutional law and 160, paragraph (1) of the Rules of Procedure.

³⁵⁵ Again, the Rules of Procedure of the Legislative Assembly: “Article 134 (Applicable framework) “*The provisions of the previous Section shall apply, with the necessary adaptations, with the exception of Subsection VIII.*” This subsection focusses precisely on the signature of the Chief Executive. Also, bear in mind a correct interpretation of Article 50, paragraph (3). Emphasising this aspect, with respect to the Rules of Procedure of the Assembly of the Republic, in Portugal, and with clear points of contact and even identity, Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 382.

³⁵⁶ Article 100 “(Publication in the Official Gazette) 1. The acts of the Legislative Assembly which, under the terms of the law, shall be published in the Official Gazette of the Macau Special Administrative Region, are sent by the President, as soon as possible, to the Official Press,”: in conjunction with Article 161, paragraph (3), both of the Rules. See also Article 6, paragraph (2), of the Law on the forms and templates of legal enactments.

³⁵⁷ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 855. For a historical-comparative glimpse, and an identification of the achieved evolution, see, Francisco Zúñiga Urbina, ‘Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)’ (1997) 18 *Revista de Derecho de la Universidad Católica de Valparaíso* 277, 285 281 et seq; Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (*federalismi.it*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>. This Author contends the following: “Once the internalist theory was overcome, the problems that arose with respect to parliamentary regulations and rules of procedure became refocussed on reconstructing their position in the system of sources, their scope of competence and the qualification of the acts possessing the force of law.”

³⁵⁸ Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006).

³⁵⁹ As such, it necessarily shall respect the Basic Law — Article 77 — as discussed above.

³⁶⁰ Or, in another expression, *legislative value*. In fact, it should be noted that the Rules of Procedure is not

The next section shall develop this issue.

9. Value or Force of Law³⁶¹

The Rules of Procedure shall have the force of law,³⁶² as derived, *prima facie*, from their constitutional enabling and legitimation. It is not a typology of normative act “*invented*” in the Rules, ie by itself. On the contrary: it receives legitimation from the Basic Law.³⁶³

“With respect to legal effectiveness, it is difficult to exclude an external scope thereof from the Rules of Procedure [...].”³⁶⁴ The point is to determine the extent and scope of this external effect, not to discuss whether such an effect exists. Or, as another Author teaches, “Parliamentary rules of procedure may be classified as acts equivalent to — but not fungible with — ordinary law, which belongs to the primary level of the sources of legal norms.”³⁶⁵

One of the essential functions of the rules is to regulate the legislative procedure — see, for example, the insertion of the norm in the second paragraph of Article 77,

the only case of an internal normative act with the force of law or equivalent legislative value: in addition to other normative resolutions of the Legislative Assembly, especially those that complement the Rules (for example, Resolution No. 3/2000 and, with interest in this point, Report No. 1/2001, by the CRPMM, *Process of questioning Government action*, therein alluding to the connection between this resolution and certain Articles of the Rules of Procedure), within the strict scope of the MSAR’s legal order, another act with a normative nature, endowed with the necessary legislative value (or equivalent) is the act (an executive order?) that decrees measures to restrict the exercise of rights, freedoms and guarantees — considered reasonable, adequate and proportional to the maintenance of public order and tranquillity — in the event of an emergency due to a serious threat of disruption to internal public security, as provided for in Article 8 of Law No. 9/2002, *General Framework Law on Internal Security of the Macau Special Administrative Region*. In effect, there are capabilities that derogate laws, from the outset those enshrining fundamental rights. See, on these issues, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 635 et seq. In order to better grasp said Article 8, see Report No. 4/II/2002 of the SSC, on “General Framework Law on Internal Security of the Macau Special Administrative Region”.

³⁶¹ A gentle reminder on the aforementioned discussion *apropos* the force of law and the value of law; cf. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 697.

³⁶² Thus, for example, signalling that “they are subordinated only to the norms of constitutional rank and endowed with a substantive sphere of exclusive competence”: Vezio Crisafulli, *Lezioni di diritto costituzionale*, vol II (Padova 1984) 160; Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (federalismi.It, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129, Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 635 et seq; and Gomes Canotilho defends the existence of a reinforced law value of the Regimento, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857.

³⁶³ Being distinguished from the generic references that the Basic Law makes to resolutions.

³⁶⁴ Miguel Galvão Teles, ‘Parecer’ in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 147.

³⁶⁵ Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (federalismi.It, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>>.

specifying rules on the quorum and the necessary majority for the approval of laws — to which one should add that said Rules, in general, reveal, in the most privileged manner, the untouchable internal normative autonomy of the Legislative Assembly.

Its scope of action is self-demarcated and developed, but not in a foreign fashion, nor without parameters. Such scope results directly — and reflexively — from the Basic Law, the historical constitutional background, and the principle of continuity, projected in several norms of the Basic Law,³⁶⁶ besides Article 77. My argument may also find succour in comparative law.³⁶⁷

It is believed, moreover, that there have been virtually no criticisms or denials of the matters regulated in the Rules, primarily with respect to the legislative procedure — one could argue that such a substantive demarcation is widely accepted. To reiterate for clarity, the existence of matters reserved to regulation by the Rules results from the Basic Law.³⁶⁸

One could say that the Rules may traditionally have been looked upon simply as *interna corporis* or in-house rules, similar to by-laws, effective and binding inwardly, dealing with aspects of purely internal arrangements or management.³⁶⁹ Nevertheless, the truth is that the Rules are also naturally externalised and do “*project external legal effects*”,³⁷⁰ *vis-à-vis* all bodies that formally participate in the legislative process³⁷¹ both before and within the Legislative Assembly. From the outset, we may name the Government/Chief Executive, and their representatives, but also other bodies and entities.³⁷² At least in these cases, we have *externa corporis* norms, or norms which have legal effects beyond the Legislative Assembly.

These public bodies,³⁷³ as parliamentary agents within the scope of the

³⁶⁶ Albeit with the springiness that is a feature thereof.

³⁶⁷ Starting off with the parallel and close case of Hong Kong. The Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended to 31 October 2014), embrace, with great similarity, the following matters: Members and Officers of the Council, Sessions, Meetings and Adjournments of the Council, Arrangement of Business, Petitions and Papers, Questions to the Government, Statements and Personal Explanations, Motions, Rules of Speaking, Rules of Order, Procedures for Particular Motions, Reports of House Committee on Subsidiary Legislation and Other Instruments and Related Motions, Procedure on Bills, Financial Procedure, Committees, Miscellaneous Matters.

³⁶⁸ An area of reserved matters that is not expressly determined and identified — but is determinable and identifiable in the Basic Law and, also, by applying the principle of continuity.

³⁶⁹ Of a substantively administrative nature, one might say; I would clarify that such is only true in matters that do not constitute either replications of higher norms, nor developments or implementations of constitutional rules.

³⁷⁰ Carlos Blanco Morais, *Curso de Direito Constitucional, I* (Coimbra Editora 2012) 96–97.

³⁷¹ Jorge Miranda and Rui Medeiros guarantee that: “The procedural norms are addressed, first of all, to Parliament and parliamentarians. However, they also address — and, in this sense, obligate — other bodies insofar as these may, under the Constitution, be in a relationship with Parliament.”: Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 596.

³⁷² Such as the Commission against Corruption or the Monetary Authority. In addition, for example, when individuals are heard in committee.

³⁷³ Persons or organs.

legislative process,³⁷⁴ are, to that extent, legally bound by the Rules of Procedure.

It is also true that, even in classical legal scholarship, the traditional internal nature of parliamentary rules of procedure was lamented:

“This is regrettable, because these are important norms relative to the legislative procedure, ie constitutional determinations that are only partially contained in constitutional laws, as the Constitution regulates the basic principles of organisation and of parliamentary procedure.”³⁷⁵

Such conception has nowadays been surpassed.³⁷⁶

To prove that said conception is truly outdated, one only needs to peek at the Rules and verify that many of the norms therein replicate constitutional norms (for example, at the level of the legislative initiative, respective limits, and the rules on the required majority for approval, or even when they develop and implement norms of the Basic Law).

Or when the Rules of Procedure impose the indication that the Executive Council has been consulted before the introduction of a Government bill, or the requirement of an explanatory note, or that bills shall be introduced in writing and drafted by articles, or when it establishes a double vote, in general and on the specifics, or when it decides to entrust a Committee with the task of reporting during the stage of examination in committee on the specifics of a bill, etc

The totality of the regulatory norms of the legislative procedure may easily be understood as immediate or mediating developments or implementations of the Basic Law, all encapsulated under the preordained umbrella idea of the legislative procedure contained in the Basic Law, which, naturally, cannot delve into specifics.³⁷⁷

The external effects of the Rules have a greater reach. For instance, the *policing* powers, given that the President is also competent to “*Maintain order and discipline, as well as the security of the Legislative Assembly, taking the measures deemed convenient, including ordering the vacating of the plenary room of persons who cause*

³⁷⁴ Also in other areas, for example, in supervisory processes. Article 65 of the Basic Law “The Government of the Macao Special Administrative Region must abide by the law and be accountable to the Legislative Assembly of the Region, by: enforcing the laws approved by the Legislative Assembly and already in force, periodically submit reports to the Legislative Assembly regarding the execution of Government policy action and shall answer questions raised by Members of the Legislative Assembly.” Or, for example, Article 50, subparagraph (15), Article 71, subparagraphs (4), (5), (6) and (7) and, paradigmatically, paragraph (8) “To summon, as required when exercising the powers mentioned above and functions, persons concerned to testify or give evidence.” Note that several of such functions are directly regulated in the Rules of Procedure.

³⁷⁵ Hans Kelsen, *Teoría General del Estado* (Ed Nacional 1965) 446.

³⁷⁶ Inter alia, Elisabetta Frontoni, ‘Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell’ evoluzione della giurisprudenza costituzionale’ (*federalismi.It*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>.

³⁷⁷ Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 150.

disturbance;³⁷⁸ or when dealing with the procedural protocols of aspects pertaining to the exercise of the right of petition.

The Rules of Procedure are subject to mandatory official publication³⁷⁹ in the OG, with a formal means of publicity identical to that of the laws and other *erga omnes* binding legal norms.

The reader may wonder if the Rules, taken as a set — bringing together the norms replicating those of the Basic Law, the norms that develop and implement the Basic Law, with the remaining norms, the *new* norms, including those of mere internal arrangements, of an administrative and organisational nature — is endowed with *erga omnes* effectiveness and bindingness?

In other words, should all its norms — and not just those resulting from the Basic Law, namely anyone regulating the legislative procedure — be externally binding?³⁸⁰

It is indeed an interesting and complex question, which shall not be answered herein in absolute terms.

Be it as it may, as a partial conclusion, for the intents of this course, one need only conclude that (at least) the Rules' norms governing the legislative procedure have external effectiveness and a binding nature. They do possess "*legislative value (equivalent thereto)*".³⁸¹

In summary, the Rules of Procedure, typologically, contain a triad of norms.³⁸²

- a) Norms that replicate the Basic Law;
- b) Norms that develop, implement and interpret principles and norms of the Basic Law;
- c) *New* norms.³⁸³

³⁷⁸ Article 9, subparagraph (h) of the Rules.

³⁷⁹ Which "indicates its external relevance": Miguel Galvão Teles, 'Parecer' in O Presidente da República e o Parlamento: *O procedimento legislativo* (Lisboa 2004) 148. Underscoring this point, see also, Elisabetta Frontoni, 'Lo statuto giuridico dei regolamenti parlamentari nel sistema delle fonti del diritto alla luce di recenti modifiche e dell'evoluzione della giurisprudenza costituzionale' (*federalismi.It*, 23 July 2018), downloaded on <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=36850&content=&content_author=>.

³⁸⁰ Cf *inter alia*, Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 381 et seq; Pedro Alfaro Velez, 'O Regimento da Assembleia da República como fonte de Direito' in *Estudos de Direito Público* (Âncora 2006), Giuseppe de Vergottini, *Diritto Costituzionale* (Cedam 2022) 242 et seq. With a divergent standpoint, see Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 596.

³⁸¹ Joaquim Freitas Da Rocha, *Constituição, ordenamento e conflitos normativos, esboço de uma teoria analítica da ordenação normativa* (Coimbra Editora 2008) 749.

³⁸² Cf Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento Parlamentario)' (1997) 18 *Revista de Derecho de la Universidad Católica de Valparaíso* 277 285, Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 47.

³⁸³ *Ie* norms in the Rules of Procedure that "regulate legal concepts or categories not contained in the Constitution": Francisco Zúñiga Urbina, 'Fuentes del Derecho Parlamentario (Apuntes acerca del Reglamento

For the first and second categories, there is no doubt as to their legality, *legal value equivalent to a legislative act* or force of law, with consequent external effectiveness, namely *vis-à-vis* the entities and people who interact with the Legislative Assembly in the exercise of the latter's functions. The question remains regarding the third type of norms.

In reality, all of these norms are, coherently, sheltered under the same normative act. As such, if some norms have a normative character with the features described above, it follows that this normative mantle shall cover the totality of the norms contained in the Rules. In other words, normative implications extend to all procedural norms:³⁸⁴

“This implies that its normativity affects its own totality, the totality of its norms [...] and, therefore, the relationship between law and parliamentary rules of procedure is not one of hierarchy, but rather one of differentiation of areas of competences, within the same normative level, the law.”³⁸⁵

The Rules of Procedure, in their entirety, in their completeness or fullness, constitute a norm with the value of law. Such is my opinion. A different issue, as seen below, is the legal consequence for the non-compliance with certain procedural norms, which may result in mere non-invalidating irregularities.

It should be noted that the allocation or division of areas of normative competence between the law and the Rules of Procedure does not mean, nor is it equivalent, to admitting that lawmaking is not subject to the Rules. The laws, to be enacted, go through a compulsory legislative procedure, which basically rests on procedural norms contained in said Rules. The procedural norms pertaining to the legislative procedure are norms for norm-making³⁸⁶ (and, if only for this reason alone, necessary norms). They are, therefore, standard norms governing an ordered lawmaking process. They establish and regulate the *assembly line* of laws.

These norms, relative to the *proper sequential* ordering of the legislative procedure, are applied to all processes of enacting future laws.³⁸⁷ They are, at that moment,

Parlamentario’ (1997) 18 Revista de Derecho de la Universidad Católica de Valparaíso 277, 285. See also, Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010), who introduces the following typology of norms: “*applicative of the Constitution*”: “*in addition to the Constitution*” and “*extracted from the Constitution*”: 775.

³⁸⁴ Inter alia, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129, and the constitutional case-law therein referred to.

³⁸⁵ José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 129. Cf *inter alia*, Fabio Pascua Mateo, *Fuentes y control del Derecho Parlamentario y de la Administración Parlamentaria* (Centro de Estudios Políticos y Constitucionales 2014), 35 et seq; who employs the term “rank of law”.

³⁸⁶ In other words, the application of such norms is precisely intended to create other norms or, as Hans Kelsen conceived: “*A norm regulating the creation of another norm is, per se, applied in said creation.*”: Hans Kelsen, *Teoria Pura do Direito* (Arménio Amado Editora 1984) 325.

³⁸⁷ The principle that the rules of procedure may not be derogated is present here, ie they may not be “*unapplied to a specific case*”: Rubén Hernández Valle, *El Derecho de la Constitución II* (Juricentro 2008) 50. Jorge Miranda and Rui Medeiros submit that the Rules of Procedure are self-binding: “*Enacted by parliament,*

endowed with a parametric value that derive from their function, and the area of matters reserved to the Rules. They do not depend on the existence of a typical rule for the stratification of sources based on a general hierarchy of normative acts.³⁸⁸

In this regard, it has been said that

“The Rules Procedure of Congress are a type of unique norm in the legal order. It is not a norm like any other. The Rules are procedural parameters for the very legality of the laws [...] the laws are procedurally subordinated [...] to the normative hierarchy of the Rules [...] Faced with this normative hierarchy, from the point of view of its content, the laws that Congress approves, or the norms that the government approves by delegation from Congress, are at least passively subordinated to the Rules, as these are parameters or measures of legality [...] In any case, all legislation is procedurally subject to the norm under which such legislation is created.”³⁸⁹

What is the legal solution or outcome if there is a violation of a given norm of the Rules, during a legislative procedure? I am addressing specific non-compliance with provisions of the Rules of Procedure in the lawmaking process, and not with the invasion of the area of matters reserved to the Rules of Procedure by a pre-existing legal norm. In brief, what happens with acts committed in contravention of the legislative procedure, as regulated in the Rules?

In breach with the theory of *interna corporis* irregularities, which goes back to English parliamentary law, one may contend that

“Taken to the extreme, this thesis would exclude the possibility of controlling the defects relative to the formation of the legitimate will/intent, which determines the very existence of the law. This is the reason why, today, the trend is to admit that, after the unconstitutionality of a law, due to a violation of the parliamentary rules of procedure, has been judicially invoked, the body responsible for control can verify the regularity of the process of formation of the legislative will/intent, in accordance with the rules of procedure, in order to, simultaneously, be able to certify the existence, or not, of a violation of the Constitution itself.”³⁹⁰

this body must observe all of its rules while in force, and may only modify them for the future, and not under the guise of a given debate or a separate/piecemeal vote.”: Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 595.

³⁸⁸ When the Basic Law refers to lawmaking norms — “*based on/in accordance with legal procedures*” — is it not, in a way, pointing towards this direction? I believe that the intention of the Basic Law is to subordinate lawmaking to such procedures, based on the specific nature and function of the Rules of Procedure (and other legal procedural norms) and not in view of a general principle of hierarchy. The practical consequences of opting for either thesis would be, I concede, fundamentally identical.

³⁸⁹ César Delgado-Guembes, *Teoría de las Fuentes del Derecho Parlamentario* (PERU 2009), 68–69.

³⁹⁰ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857. See also, for a lengthy discussion, Paloma Biglino Campos, *Los Vicios En El Procedimiento Legislativo* (UNAM IJ 2020).

If the violated norm is a rule directly executing or replicating a norm or principle of the Basic Law,³⁹¹ for example, at the level of the rules of the legislative initiative, I submit that the President of the Legislative Assembly shall issue a decision of rejection. Failing to do so would contaminate the entire process, and ultimately, the law in question would be deemed unconstitutional,³⁹² resembling a scenario akin to fruit from a poisoned tree.

There are some scholars who consider that, in the event of a contravened procedural norm merely replicating a constitutional norm, the violation of the procedural one shall not even merit any autonomy.³⁹³ Instead, sole relevance should be given to the direct violation of the constitutional norm. In the MSAR, Article 11 of the Basic Law would be applied, allowing for the exclusion of the non-conforming legal norm.

What if the case is a violation of a procedural norm, which, while grounded on the Basic Law, proceeds to develop, implement, or extend its provisions? I believe that, as a rule, such a violation should have the same fate as the previous situation. There still persists a nexus with the norms of the Basic Law, therefore the procedural norms' autonomy is always limited, rather than being the result of genuine norm-making discretionary powers to freely adopt normative solutions.

What if the situation is an infringement of an *original* procedural norm without any constitutional basis? I admit that, in such a case, a mere irregularity may occur: for example, a deficient counting of a given procedural deadline,³⁹⁴ which is the solution

³⁹¹ On procedural norms rules directly executing constitutional norms, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857, debates whether, for this purpose, and in the Portuguese context, the Rules of Procedure should not be given the status of a “reinforced law”.

³⁹² Taken together with other possible unconstitutionality of any and all laws (substantive, formal or organic in nature), the conclusion in the body of the text seems to be self-evident. Therefore, I cannot fathom what motivated the opinion given in Report No. 1/VI/2019 of the CRPMM, which stated once “*the legislative procedure has been concluded*”: it is impossible to produce legal effects upon such approved law. It is known that any law is always subject to the possible scrutiny of its constitutional conformity — in the MSAR, with the Basic Law, as demanded by its Article 11 — in the context of “*successive or a posteriori judicial control or review*” and, on the other hand, the opinion by the Committee completely ignores the balancing of the possible deficiencies detected, pointing to undifferentiated handling between a mere “irregularity”: and an evident breach of a procedural or constitutional norm, be it substantive or formal in nature. Invalidating and non-invalidating deficiencies are not distinguished. Perhaps the wording of the opinion did not reflect the true intent of the Committee; otherwise, such understanding intolerably undermines the Rules, its function and legal value, and may possibly represent an attempt towards an illegitimate functional interpretation to meet a pre-ordained result. Cf Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 857, on the “*control of deficiencies relative to the formation of the lawmaking body's will/intent, which determine the very existence of the law*.” See also Decision of the CFA in Case No. 61/2018, pointing to the need for a weighting of values. In short, one might even pose the question of whether said opinion, as expressed, does not generate some sort of “invitation” to contravene the Rules.

³⁹³ Gomes Canotilho and Vital Moreira, *Constituição República Portuguesa Anotada II* (Coimbra Editora 2014) 383.

³⁹⁴ Which has been occurring with some frequency; the issue does not attain gravity, provided that Members are not prevented from having effective knowledge of the bills, as warns Alexandre Sousa Pinheiro, ‘Artigo 112.º’ in Alexandre Sousa Pinheiro and Pedro Lomba (eds), *Comentário à constituição portuguesa III volume - 1.º tomo* (Centro de Investigação da Faculdade de Direito da Universidade de Lisboa 2008) 155.

given in administrative procedure³⁹⁵ (similar, in many aspects, to the legislative procedure), wherein the rule is that not every act found to be in non-compliance with the law is invalidated, ie there are deficiencies or imperfections that only generate a non-invalidating irregularity.³⁹⁶ “This is what happens with the non-essential formalities, ie formalities required by law, the non-performance of which does not entail the invalidity of the act.”³⁹⁷

As VIEIRA DE ANDRADE teaches, after giving us an account of “Invalidating deficiencies (‘illegalities’ that potentially affect the effectiveness of the act) and non-invalidating deficiencies (‘irregularities’)”, he explains that, within the category of deficiencies relative to norm-making, there are formal defects, in which are included

“procedural defects: in general, they are the cause of annulment, but they may generate nullity (violation of fundamental rights of a procedural nature, for example) or constitute mere irregularities — not to be confused with the defects in the acts of the procedure that may influence the decision, projecting thereon and thereby causing defects in the content.”³⁹⁸

³⁹⁵ The legislative procedure is analogous, in important aspects, to the administrative procedure, *inter alia*: Aljs Vignudelli, *Diritto Costituzionale* (Giappichelli 2010) 791.

³⁹⁶ Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. See, regarding a different issue, but within the parliamentary procedure, the Decision of the CFA in Case No. 61/2018 alludes to a principle of proof of resistance when the vote is not essential to the existence of the necessary majority, but also refers to the undue exclusion of a person in the voting process or the lack of summoning of a Member to the meeting — the majority of scholarship and case-law are inclined towards the invalidity of the deliberation, even if the vote in question did not change the outcome of the voting. The Decision reads, “*If there is an evident public interest in the preservation of deliberations that were passed, in many cases constituting the approval of laws, it seems that a principle of proportionality shall have to be asserted, which entails a weighting of values between the importance of the (possible) deficiency and the importance of preserving the deliberation, in terms of protecting said interest. [...] given that the appellant’s vote would not have been decisive in any deliberation taken by the Legislative Assembly during the mentioned period, it seems to us that the possible deficiency — if it exists — must be considered to have been remedied.*” Evidently, this path is more reasonable and balanced than Report No. 1/VI/2019, of the CRPMM, which dealt with a proximate issue. This debate does not end here, in my view. In fact, the mere unlawful absence of a Member, although necessarily limited to 1 vote (his or her own), still leaves ample space to question if his or her presence — peppered with addresses, interventions, arguments — could, perhaps, sway other Members when it came time to voting. A case in point is the processes of disqualification from office and suspension of the mandate: the affording of means for the Member’s adequate defence — not disguised as mere answers to questions addressed to him or her — maybe a very relevant factor in the formation of the outcome of the voting by the peers.

³⁹⁷ Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. Exemplifying with, among other cases, formalities the omission of which does not prevent the achievement of the objective envisaged by the law requiring such formalities, and also merely bureaucratic formalities, 599.

³⁹⁸ Vieira De Andrade, ‘As Formas Principais da Actividade Administrativa: Regulamento, Acto e Contrato Administrativo’ in *Sumários das Lições de Direito Administrativo II, Academic Year 2009/2010* (Coimbra 2010), archived with the Author, 53, 59. “The traditional judicial stance of “degradation of essential formalities into non-essential ones”: when they do not affect the substantial validity of the act (for reasons of legal certainty and, above all, of the procedural economy), and the critical response by segments of academia, based on the revaluation of the “law of forms”. One should, however, accept, when handling cases of annulment: i) the irrelevance of the procedural or formal deficiency, in the event that such deficiency has not resulted in effective harm to the values and interests protected by the violated norm, if such values or interests have been sufficiently

Allow me to add that, if one is faced with a non-compliance with a norm that incorporates an essential element in the legitimization of the legislative procedure, which, realistically, may refer to procedural norms only *apparently* devoid of constitutional linkage but, in reality, reflect essential elements or principles of the legislative framework described above, then one is dealing with a consequence that would entail more than a mere irregularity.

In short, the fact that non-performance or violation of a particular type of procedural norm may be regarded as a mere irregularity, without projecting consequences onto the validity of the normative act approved with such a deficiency or a lesser one, does not diminish the normative and parametric value of the Rules of Procedure in the context of lawmaking.

10. Other Issues

Upon reaching the end of this long chapter, I propose to jot down short remarks on a few other points regarding the characterisation of the Rules of Procedure of the Legislative Assembly.

10.1 The Formal Typology of Resolution

The Rules of Procedure are created under a formal legal enactment: a Resolution of the Legislative Assembly. The same applies to the amendments to said Rules.

One could ponder if the Rules of Procedure, namely in view of their formal identity, should not be approved, and amended, by means of a legal form other than the *general* resolution.³⁹⁹ It is conceivable that a special modality of resolution could be adopted for this purpose.

Revising or amending the Rules of Procedure follows the common process, but with some specific differences — for instance, the competence for such initiative is granted to the Committee on the Rules of Procedure and Members' Mandates, under the terms of Article 160 of the Rules, without prejudice to an original initiative by a minimum

protected via another route; ii) the conservation of the act, ie its non-annulment by the judge, despite its invalidity, when the content of the act cannot be any different, and there is no relevant interest in the annulment (thusly the Italian Law expressly provides for today – L. 241 / 1990, article 21 – octies). I would also tend to admit the irrelevance of the deficiency or the conservation of the act when it is evidenced, beyond any doubt, that a formal deficiency had no influence on the decision (namely, in electoral acts but, in general, §46 of the German procedural law — VwVfG [*Verwaltungsverfahrensgesetz*]). It should be noted that formal deficiencies are less relevant in the context of subjectivist-based administrative litigation, namely of actions containing requests or applications brought against public bodies – insofar as the infringed formal norms aim to ensure public interests and not the rights and interests of individuals.”: *ibid*, 59–60.

³⁹⁹ Regarding this issue, in light of the Portuguese legal-constitutional order, wherein the groundwork for differentiated Rules of Procedure-Resolution panorama is stronger, when compared with the text of the Basic Law, for example, Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada II* (Coimbra Editora 2006) 548–49.

of nine Members.⁴⁰⁰

The majority required for approval, as in most cases, is the absolute majority (votes in favour cast by more than half of the total number of Members).⁴⁰¹

10.2 Official Publication

The Rules of Procedure are, under its own terms, subject to official publication: “The publication of the resolution of amendments and, in the case provided for in the previous paragraph, of the new text of the amended Rules of Procedure, are made in the Official Gazette of the Macau Special Administrative Region.”⁴⁰² Nor could it otherwise, given that the Rules contain true legal norms.

The order for publication — unlike what happens with the laws — is a competence exercised by the President of the Legislative Assembly, thus aligning one more element in reinforcing the idea of parliamentary self-regulation.

Regrettably, the Law on forms and templates of legal enactments overlooks and undervalues the Rules of Procedure.⁴⁰³ This law fails to mention the Rules *per se* explicitly, despite the formal-constitutional identity bestowed upon them by the Basic Law.

On the other hand, the same law does mention the typology of resolutions — and the resolution is the Legislative Assembly’s self-chosen legal form through which the Rules of Procedure are enacted — and thus the idea that, *malgré tout*, the Rules end up being, indirectly, provided for in said law. The truth, however, is that one can barely understand, or not understand at all, the ordering that is made therein with respect to the templates of the various normative acts, with the resolutions placed in the lowest and last position (Article 17 of Law No. 3/1999), after the laws, administrative regulations, executive orders, decisions by the Chief Executive and even decisions from the principal officials! This apparent arrangement is therefore useless.

10.3 The Suggestion of Modifications Based on Praxis

Note the rule set out in Article 26, subparagraph (e) of the Rules of Procedure (in parallel with that Article 160?), on the competence of the Committee on the Rules of Procedure

⁴⁰⁰ A very high number indeed, even after the increase in the total number of Members. Perhaps it is intended to provide a special stability to the procedural-normative fabric.

⁴⁰¹ Cf Article 77 of the Basic Law, as the Rules of Procedure are approved by the formal legal enactment designated Resolution.

⁴⁰² Article 161, paragraph (3) of the Rules.

⁴⁰³ For a mere example, on another level, “However, Law No. 3/1999 suffers from some handicaps, especially the absence of a formal enabling act for the publication of international agreements and respective notifications.”: Cristina Ferreira, ‘A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 212–13.

and Members' Mandates to suggest to the Plenary the amendments to the Rules of Procedure that the practice may advise. Does this mean that the idea of procedural custom is being rejected?

For a practice to be considered effectively binding, should it be documented and formally integrated into the Rules of Procedure? ⁴⁰⁴ In any event, one has to investigate whether a given practice, or custom, in a broad sense, is revealed to be in accordance with the Rules, notwithstanding whether *praeter* the Rules, or conversely, contradicts them. I submit that such practices — and maybe possible customs, which I doubt really exist⁴⁰⁵ — may never prevail over an express contrary procedural norm, *de minimis* if such norm replicates a constitutional norm or stems from the constitutional order. The consequence for such procedural misconduct would be to illegitimately disqualify the Rules from its function and its nature as a set of legal parameters.⁴⁰⁶

10.4 Interpretation and Filling of *Lacunae*

What about the interpretation, solving of omitted cases and filling of *lacunae* under the Rules of Procedure? Article 159 of the Rules of Procedure provides that

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

2. The Board's decisions taken under the terms of the previous paragraph, when written, are published in Series II of the Legislative Assembly's Bulletin."

On the other hand, under the terms of Article 26, the Committee on the Rules of Procedure and Members' Mandates is competent *"To issue an advisory opinion on questions of interpretation and filling of lacunae of the Rules of Procedure, submitted thereto by the President, the Board or the Plenary"*.⁴⁰⁷

In the letter of the norms, beyond the specific and strict question of the interpretation — which will follow the normal canons of the interpretation of legal norms, eg contained in the Civil Code — at times, the language points to solving omitted cases and, at others, of filling of *lacunae*. Regardless of this lack of identity in the wording, it seems clear to me that this power may only be exercised if and when there is an effective legal *lacuna* (thus excluding minor gaps, loopholes and difficulties in interpretation or

⁴⁰⁴ For instance, the current practice or usage of resorting to second or third versions of the Government bills, which are not covered by the Rules, or, as the previously mentioned amendment of 2017 left unsolved, the deadline for cancellation of the legislative initiative.

⁴⁰⁵ Such customs duly meeting all the requirements to come into existence.

⁴⁰⁶ Furthermore, in a legal order belonging to the Continental/Roman-Germanic family.

⁴⁰⁷ One should not forget that this interpretation — and filling of *lacunae* — must be performed in accordance with the Major Law of Macau, respecting the core options contained in the Basic Law. It is an interpretation moulded by constitutional conformity, in accordance with the Basic Law, to which I add a principle *in dubio pro Parliament/Legislative Assembly*.

application).

In other words, the door is not opened for the derogation of existing norms, nor for the creation of new norms, unless such norms emerge to fill a real *lacuna* that has actually been duly verified — and insofar as needed to fill such carefully checked *lacuna*.

If there is no *lacuna*, ie if there already is a procedural norm, applicable to a given case provided for therein, the Board may not create a different norm, nor give a different meaning to an existing one, by way of a merely apparent filling of a *lacuna*. In such an event, the issue shall have to be raised in the context of amending the Rules, if the currently effective norm is considered inadequate, but always in accordance with the norms and principles of the Basic Law.