
VIII.

THE LEGISLATIVE INITIATIVE, IN PARTICULAR

1. Introduction: Legislative Power and Competence

This issue is closely connected to the Basic Law — eg the legislative powers of the Members, the legislative initiative, the majorities required for deliberations, the area of matters reserved to the law and the primacy of law. It further interacts with other sources, besides the Basic Law, such as Law No. 13/2009, the law on forms and templates of legal enactments.

The Legislative Assembly of the MSAR is the *legislative body* of the MSAR, as stated in Article 67 of the Basic Law, thus the Legislative Assembly is competent to enact, amend, suspend, and repeal laws, pursuant to the Basic Law and in accordance with the established legal procedures, as provided for, in general terms, under Article 71, paragraph (1) of the Basic Law.

As stipulated in Article 5 of Law No. 13/2009, which establishes the legal framework of the internal sources of norms, under the terms of the Basic Law, the Legislative Assembly exercises the powers *provided for* in the Basic Law of the MSAR, being competent to enact, amend, suspend, and repeal laws, on any and all subject-matters falling within the scope of the MSAR's autonomy.

The above words curtly outline the legislative competence of the Legislative Assembly.

2. Legislative Competence *versus* Competence of Legislative Initiative

A different — but intimately intertwined — issue from the legislative competence, is that which concerns the legislative initiative,⁴⁰⁸ ie the legal-procedural aspects relative to the regulatory framework, the competence, and the limits to, the legislative impetus: who has the power to initiate the formal legislative procedure.

⁴⁰⁸ Manuel Aragón Reyes explains, “There are times when both capacities are exercised by the same organ and there are times when they do not. In short, these are different functions [...] it must be said that legislative initiative is distinct from legislative power.”: Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 640–41.

As JORGE MIRANDA affirms,

“The legislative initiative — depending on the adopted perspectives, the first stage of the procedure or the ability to kick-start one — is not to be confused with legislative competence. These are, evidently, different concepts: legislative initiative means proposing laws; competence means enacting/approving laws.”⁴⁰⁹

A preliminary observation to be made: the legislative initiative, which is the power to trigger the procedure, is not to be confused with legislative competence, which is the power to enact/approve laws.⁴¹⁰ As GUSTAVO GRAMAXO ROZEIRA warns, “It is therefore absolutely clear: entitling any entity or person with the right of parliamentary legislative initiative does not imply that such entity or person is called upon to participate... in the exercise of the legislative function.”⁴¹¹

In reality, the issues are so distinct⁴¹² that, from the outset, the respective protagonists are different. Legislative competence rests exclusively on the collegiate parliamentary body *Legislative Assembly*, whereas legislative initiative, under the system established by the Basic Law, is double-headed.⁴¹³

In pursuance of the foregoing:

- Legislative initiative is granted — and externalised — to the Chief Executive/Government adopting the form of a Government bill;⁴¹⁴ and
- Such power of initiative is internally de-concentrated, being distributed among the Members on an individual basis: any and all Members of the Legislative Assembly may introduce bills;⁴¹⁵ the initiative of lawmaking belongs to the Members.⁴¹⁶ Such power may be exercised as an exclusively individual initiative, or as a joint sponsorship of a bill by several Members individually considered,

⁴⁰⁹ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 264. He adduces that “The current trend, everywhere, is towards an increasingly clear separation between bodies with legislative competence and bodies and subjects with initiative; and, therefore, to substantially expand the number of entities with the power or right to trigger a procedure.”: *ibid*, 266.

⁴¹⁰ José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAF DL EDITORA 2015) 250.

⁴¹¹ Gustavo Gramaxo Rozeira, ‘A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 98.

⁴¹² Illustrating the radical difference between legislative competence and competence of legislative initiative, the former Organic Statute of Macau, after establishing large areas of matters absolutely and relatively reserved legislative competence in favour of the Legislative Assembly, established in Article 39 that “*The legislative initiative belongs, without distinction, to the Governor and, in the form regulated in the Rules of Procedure of the Assembly, to the Members thereof.*”

⁴¹³ As in most constitutional systems, speaking, for instance, of a “*pluralistic approach to the legislative initiative*”: Valerio di Porto and Luigi Gianniti, ‘L’iniziativa legislativa parlamentare’ (*federalismi.it*, 14 July 2017) <<https://www.federalismi.it/nv14/articolo-documento.cfm?artid=34383>>.

⁴¹⁴ Article 64, subparagraph 5) of the Basic Law, Article 101 of the Rules of Procedure; Article 102, paragraph 1 of said Rules.

⁴¹⁵ Article 75 of the Basic Law.

⁴¹⁶ Articles 1, subparagraph a, and 101 of the Rules of Procedure.

up to a maximum of nine Members.⁴¹⁷ Legislative initiatives by Members adopt the form of Members' bills.⁴¹⁸

There are different actors, ie holders, of this differentiated public power; there also exist a number of differences in the specific frameworks, as well as in the limitations, applicable to each of these two distinct avenues of the original legislative impetus, in addition to the mandatory areas containing matters reserved to the law.

3. Legislative Initiative: A Few Classifications

Legislative initiatives may be summarised into the following categories.⁴¹⁹

A first large divide, as previewed above, distinguishes between internal legislative initiative and external legislative initiative.⁴²⁰ It is internal, if the holders of the legislative initiative belong to the body endowed with the legislative competence in question — for example, a bill introduced by Members of the parliamentary body competent to enact such bill into law. It is external, if the holder of the legislative initiative does not belong to the body with legislative competence — for example, a Government bill before parliament; a citizens' legislative initiative (if accepted); or an initiative coming from other non-state bodies, eg regional ones.

A second classification of great relevance is based “*on the moment of intervention in the legislative procedure*”,⁴²¹ thereby distinguishing between original legislative initiative and supervening legislative initiative, the criterion being whether the legislative procedure is an *ab initio* or *ex novo* one, or whether the initiative takes place *during the course* of a duly initiated and ongoing legislative process. The applicable specific frameworks are — by the very nature of such initiatives and in alignment with consensual comparative law — quite different. I shall return to such distinction later.

A third classification, meriting further elaboration, is based on the existence of either areas of reserved matters, or unrestricted legislative initiative. Normally, in this context, legislative initiative may be of the first type — depending on the matters, exclusive to one organ or another — or may be shared, in which case the legislative initiative may be triggered by more than one entity, without any limitation or legal pre-

⁴¹⁷ Article 103, paragraph 1 of the Rules.

⁴¹⁸ Article 102, paragraph 1 of the Rules.

⁴¹⁹ Cf *inter alia*, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251.

⁴²⁰ See *inter alia*, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251, Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 99. Both, mindful of the subject to which they are addressed, are initiatives that qualify as parliamentary legislative initiatives, that is, by reference to the addressee, that is, the body with the legislative power to which they are addressed (in the case of Macau, the Legislative Assembly, always), as explained by Gustavo Gramaxo Roseira, ‘Iniciativa Legislativa Parlamentar’ in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *Enciclopédia da Constituição Portuguesa* (Quid Juris 2013) 208 et seq.

⁴²¹ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 100, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 251.

condition. In the MSAR, there is a third modality: the conditioned legislative initiative.

In terms of parliamentary legislative initiatives, one can also distinguish between individual initiatives — those introduced by a single Member,⁴²² and collective initiatives, when introduced by a plurality of Members,⁴²³ (and, in a few legal orders, legislative initiatives introduced by committees.)⁴²⁴

Another distinction, to be developed further below, relates to the difference between legislative initiative and lawmaking impetus, rooted in their respective legal effects. The legislative initiative creates the typical, necessary, and constitutive legal effect of opening⁴²⁵ a legislative procedure,⁴²⁶ whereas in a lawmaking impetus, either all

⁴²² As the manifestation of an individually entitled and unfettered power exercisable by any member of parliament, see Article 1 of the Legislative Assembly's Rules of Procedure. For example, a requirement that the introduction of bills depends on the sponsorship of a given minimum number of proponents would be illegal. See, moreover, with clarity, the provision of Article 75 of the Basic Law, which establishes bills introduced, individually or jointly, by Members of the Legislative Assembly.

⁴²³ In the case of Macau, up to a maximum of nine (9) Members, pursuant to Article 103, paragraph (1) of the Rules of Procedure.

⁴²⁴ See Article 124, paragraph (2), subparagraph a) of the Rules of Procedure.

⁴²⁵ Other than enacting the intended law. The legislative procedure shall be compulsorily open, but there is no requirement that it be concluded positively through the approval of a law. Or, as stated by Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004), “*The legislative initiative conditions [...] the exercise of the powers of the body with legislative competence, forcing it to act, even if the final result may be limited to the rejection of the bill.*”: page 97. As stated by Gustavo Gramaxo Rozeira, “*The question is to know what are the legally binding relations, if any, which condition the reaction of the parliamentary assembly to the legislative projects that are presented thereto. It is true that the exercise of the right of parliamentary legislative initiative, by of any of its holders, does not become an “obligation to legislate” by the parliamentary institution. That right is exercised in order to adopt a legislative act, in effect; but this aim, as pursued by the author or authors of a legislative project, is not to be confused with a lawmaking imposition upon the parliamentary assembly to which the project is addressed.*”: Gustavo Gramaxo Rozeira, ‘Reflexão em torno do instituto da “toma en consideración” do direito parlamentar espanhol’ (2016) 7 Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto 101, 102.

⁴²⁶ Cf *inter alia*, Manuel Aragón Reyes mentioning that “to understand the legislative initiative as the act by means of which the legislative procedure is obligatorily launched, more specifically, as the act by which the constitutive phase of that procedure is opened. [...] As Carré de Malberg said, once the initiative is introduced, Parliament is obliged, constrained, to enter into the discussion of the text [...] To exercise the legislative initiative [...] is [...] to initiate it, to put it irremissibly in motion”: Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 642.

See also, with important considerations, “the empowerment, by the constitutional order, of the right of parliamentary legislative initiative to a restricted set of holders has to impart relevant consequences. This right is a very restricted one, as an attribution by the constitutional order is normally associated with a particularly reinforced politico-constitutional status, either due to the performance of certain functions, in terms of the institutional architecture of the State, or due to the number of constitutional subjects involved. We are therefore talking about political actors to whom the legal-constitutional order has reserved a prominent role *vis-à-vis* the legislative procedure: a role that encompasses the possibility, granted by the constitutional order, through the exercise of the right of legislative initiative, to trigger the exercise of the state legislative function. This circumstance leads us, from the outset, to reject the hypothesis that the exercise of the right of parliamentary legislative initiative is absolutely harmless — that its effects are reduced to such a small extent that no obligation would result from such exercise”: and, further on, “It cannot therefore be accepted that the exercise of the right of legislative initiative entails legal consequences that are largely assimilable to the legal effects arising from the exercise of the right to petition. The mere blatant disproportion between the number of holders of the right of legislative initiative and those who may avail themselves of the right to petition would, if another argument did not exist, suffice to instinctively lead to the realisation that the structural and functional differences between both is broad enough to demonstrate that the first of such rights is, in relation to the second, a substantially more

or some legal effects are not produced, nor do they occur — ie there is no obligation or need for a direct and immediate triggering of a legislative procedure.

I believe that the issue of legislative initiative assumes enormous importance in the legal-constitutional system of the MSAR, especially when analysing, in detail, the field of legislative power and its practice.

In fact, as I had the opportunity to argue quite some time ago:

“even if the Assembly assigns to itself the monopolising role as legislator, it is also necessary to analyse the issue of competence of legislative initiative, on the one hand, and we must bide our time in order to assess the normative dimension of future government regulations, on the other hand⁴²⁷ [...]”

In other words, it is at the level of the legislative initiative, and not of the legislative competence — as one might perhaps be led to expect — that the Basic Law curtails claims pertaining to the effective lawmaking of the Assembly and its Members.”⁴²⁸

The following sections shall address the principles underlying the legislative initiative.

4. The Conformity of the Legislative Initiatives with the Constitutional Order — Respective Acceptance, Rejection and Reform

The need to ensure the conformity of legislative initiatives with the constitutional order is a *fait accompli* under the Rules of Procedure, for example, in Articles 101,⁴²⁹ 104,⁴³⁰ and 105,⁴³¹ culminating expressly in Article 107, subparagraph (a): “*The President of the Legislative Assembly shall summarily reject bills and amendment proposals, which: (a) Contravene the provisions of Articles 104 and 105.*”⁴³²

qualified one.”: Gustavo Gramaxo Rozeira, ‘Reflexão em torno do instituto da “toma en consideración” do direito parlamentar espanhol’ (2016) 7 Revista da Faculdade de Direito e Ciência Política da Universidade Lusófona do Porto 101, 109.

⁴²⁷ Paulo Cardinal, ‘O sistema político da Região Administrativa Especial de Macau: em busca do equilíbrio’ (2002) 14(6) Boletim da Faculdade de Direito da Universidade de Macau 75, 78.

⁴²⁸ *ibid* 84.

⁴²⁹ “Without prejudice to the provisions of Articles 104 and 105, the initiative of the law belongs to the Members and to the Government of the MSAR.”

⁴³⁰ “The initiative of the law is reserved exclusively for the Macao SAR Government in the following matters: a) Electoral Law of the Legislative Assembly; b) Public revenue and expenditure; c) Political structure; d) Operation of the Government.”

⁴³¹ “The written authorisation of the Chief Executive shall be required for the exercise of Members’ initiative in matters relating to Government policy.”

⁴³² An issue not explicitly clarified in the Rules of Procedure is the reserved initiative in view of the essential elements of the taxation framework. It appears that, in this case — and only in this case — as long as such

Does the need for constitutional conformity exist, even if not mentioned the Rules?

Should a Government bill be rejected if blatantly unconstitutional, outside the cases expressly provided for in the Rules?⁴³³ For instance, a bill proposing the abolition of local currency (MOP, better known as the “*Pataca*”? Or eliminating the Executive Council or the Permanent Council for Social Dialogue? Or violating a fundamental right explicitly laid down in the Basic Law?⁴³⁴ Or by going beyond the scope of the MSAR’s autonomy?

I submit that that the decision of acceptance, rejection and reform of a legislative initiative should be made immediately, in accordance with the procedural norms. However, if the Rules of Procedure are silent on certain matters — and such is at issue — a mere judgment of compliance with the Rules of Procedure may not suffice. It shall be

elements are at stake, and not any and all tax matters, Article 107, subparagraph a) of the Rules of Procedure should apply by analogy — consequently, with a rejection of such bills outright, since a reserved area of initiative already results directly, expressly and unequivocally from Article 71, paragraph 3) of Basic Law. The MSAR Budget constitutes the paradigm of the limitation in terms of “*public revenues and expenditure*” (in any case, the Rules of Procedure could have dedicated an autonomous subparagraph for these purposes). In any event, legal clarity and certainty underpinned Draft Resolution No. R1/I/1999-1, with the following text (not approved): “*Article 107 (Matters of reserved initiative) -- The initiative of the law is reserved exclusively for the Government of the MSAR in the following matters: a) Electoral Law of the Legislative Assembly; b) MSAR Budget; c) Essential elements of the taxation framework, establishing the taxed base and the rate of each tax, as well as the terms for granting tax exemptions; d) Authorisation for the Government to incur public debt; e) Public revenue and expenditure; f) Political structure; g) Operation of the Government.*”

⁴³³ “It is mandatory for the Legislative Assembly of the MSAR to verify a contravention of the Basic Law by laws, before taking the decision to suspend or repeal such laws. Upon assessing such a violation, under the terms of Articles 11 and 71 of the Basic Law, the Assembly may take the decision mentioned above. In this case, the appraisal carried out by the Assembly certainly includes an effective “judgment” regarding the compliance or non-compliance of the laws with the Basic Law. After all, it makes the necessary adaptations of the norms that have infringed upon the provisions of the Basic Law, or rather, such “judgment” itself constitutes a mechanism of controlling the conformity of the laws with the Basic Law. In my view, therefore, the Legislative Assembly of the MSAR exercises, within the limits of autonomy, the conditioned and limited power to scrutinise the violation of the Basic Law”: Chong Chan Chan, ‘Algumas Considerações sobre a Fiscalização da Violação da Lei Básica’ (2013) 3 Revista de Estudos de ‘Um País, Dois Sistemas’ 123, 126.

⁴³⁴ In order to avoid what happened, for example, in this case, which, in the end was well resolved in the Committee stage of examination on the specifics, but should not have even reached such stage altogether: “The members of the Committee understood, however, that even though they comprehended the importance of the historical arguments and the need for safeguarding the legitimate expectations of the Maritime and Fiscal Police staff, the truth is that the structuring of the base and the higher careers, into two distinct careers — the male and female ones — constituted discrimination on grounds of sex, not conforming to Article 25 of the Basic Law of the Macau Special Administrative Region [...] This constitutional provision embraces the principle of equality, assuming a structuring dimension for the entire legal order of the Region. In determining the equality of residents before the law, the Basic Law imposes legal equality (law in the sense of legal order) and prohibits the differentiation of residents into distinct legal classes according to nationality, birth, race, sex, etc. The establishment by the bill two parallel careers, male and female, in structuring and characterising the career of Customs’ staff represented a restriction to the principles and rights enshrined in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights, which precisely prohibit such discrimination; it is also not in conformity with the final part of the second paragraph of Article 40, since the rights and freedoms provided for in those instruments of international law may not be restricted.”: FSC, Report No. 1 II/2003, Government bill entitled “Framework of the careers, positions and remuneration of Customs staff.”

See also, discussing issues of constitutionality, or lack thereof, in matters of fundamental rights, TSC, Report No. 2/VI/2019, Amendment to Law No. 9/1999 — General Framework Law on the Judiciary Organisation.

necessary to *move up* in the legal order and complement such conformity directly with the Basic Law,⁴³⁵ and also with Law No. 13/2009.⁴³⁶

May bills that violate international treaties effective in the MSAR be accepted? Namely within the scope of the special protective mantle of Article 40 of the Basic Law? What about the international treaties outside the universe of the ICCPR, the ICESCR, and the ILO?

Another case arises concerning the renewal of the legislative initiative, which is a reason for rejecting a bill, under Article 109, paragraph (1) of the Rules. I shall pick up on this item later.

5. Freedom of Exercising Legislative Initiative

Legislative initiative is freely exercisable. Such is the general rule, with very few exceptions thereto.⁴³⁷ In other words, the decision to exercise a given legislative initiative, whether by the Executive or by Members, is not mandatory nor necessary within a certain timeframe.⁴³⁸

There are, nonetheless, exceptional situations in which the exercise of a given legislative initiative is mandatory. The typical example is the budget bill, which the Executive is obligated to introduce annually to the Legislative Assembly.⁴³⁹ Moreover, Law No. 15/2017, *Budgetary Framework Law*, stipulates in Article 25, paragraph (1), that the Government is obliged to introduce the budget proposal for the following year to the Legislative Assembly by 30 November each year, in the form of a Government bill. There is an obligation, binding upon a specified addressee holding legislative initiative with temporal requirements: a deadline and the frequency for exercise of such initiative.

I also consider to be mandatory legislative initiatives those which correspond to

⁴³⁵ “*The Basic Law is actually the constitutional law of Macau, and thus controls the direction of legal developments*”: Tong Io Cheng and Wu Yanni, ‘Legal Transplants and the On-Going Formation of Macau Legal Culture’ (2010) 2 *Isaidat Law Review*, 668.

⁴³⁶ As it is a law endowed with “borrowed” constitutionality and develops the legal framework on the internal sources of norms, under the terms of the Basic Law. For instance, Article 5 of this law: “*The Legislative Assembly exercises the competences provided for in the Basic Law of the MSAR, for enacting, amending, suspending and repealing laws on any and all matters within the scope of the autonomy of the MSAR.*” In other words, such a norm clarifies that only within the scope of the MSAR’s autonomy is any legislative power in the MSAR and consequent legislative competence by the Legislative Assembly. The violation of said norm, as stemming from the principles of the Basic Law, shall *per se* constitute a sufficient reason for the summary rejection of a bill.

⁴³⁷ Cf Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 277.

⁴³⁸ See, with interest, on difficult issues such as the self-binding of a legislative body to periodic laws or to laws subject to an annual cycle (other than the budget law), Francesco Rimoli, ‘Leggi a ciclo annuale e vincoli al legislatore futuro: un profilo teorico’ (*federalismi.it*, 1 February 2019), downloaded on <<https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38001>>, and Paolo Carnevale, ‘La parabola della legge periodica “per legge”: ascesa e tramonto di un modello?’ (*federalismi.it*, 1 February 2019), downloaded on <<https://www.federalismi.it/nv14/editoriale.cfm?eid=508>>.

⁴³⁹ See, referring precisely that the “budget proposal is annual”: João Albuquerque, ‘*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*’ (unpublished and archived with the Author, 2013).

constitutive lawmaking impetuses⁴⁴⁰ — for example, stemming from the Basic Law or from laws establishing general legal frameworks. The difference is that no *timeliness* constraints would be applicable,⁴⁴¹ nor would there be a duty to formally initiate a legislative process, except, naturally, in matters within the scope of areas reserved to legislative initiative. In the latter event, the obligation resulting from the lawmaking impetus shall only have a single and given addressee,⁴⁴² or may require prior authorisation.

6. Decisions of Acceptance, Rejection, and Reform

In the context of a legislative initiative, whoever the triggering entity may be, the President of the Legislative Assembly has the *duty*, under the Rules, *to issue decisions of acceptance, summary rejection or reform thereof*.

The decisions of acceptance, rejection, and reform⁴⁴³ are merely assessments of the organic, substantive, and formal propriety/limits⁴⁴⁴ of the bills, ie in a word, on their procedural regularity. Therefore, considerations on the opportunity, merit or political expediency of the legislative initiative shall be left out.⁴⁴⁵ Much less may such decisions be guided by a particular bias towards a given Member, in view of his or her general political position *vis-à-vis* a political standing or platform.

The President of the Legislative Assembly is the guardian of constitutionality — namely, of the Basic Law — and of the Rules. To such extent, he or she shall be totally impartial, under the beacon of the parametric norms to which he or she must obey.

The decisions of summary rejection (and the others?⁴⁴⁶) are, under Article 111

⁴⁴⁰ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 277.

⁴⁴¹ For instance, the legislation regulating Article 23 of the Basic Law, which was approved several years after such constitutional law came into force, or the legislation on fundamental labour rights (namely the rights to strike and to collective bargaining), which have still not known the light of day.

⁴⁴² For example, in matters pertaining to the essential elements of the taxation framework or electoral legislation relating to the Legislative Assembly, the Executive branch is the exclusive agent of the respective mandatory legislative initiative.

⁴⁴³ Article 108 of the Rules of Procedure, “The breach or omission of the formalities provided for in the preceding paragraph may be remedied, within the non-extendable deadline established by the President.”

⁴⁴⁴ Cf in the Italian case, for example, “The requirements are therefore minimal and easy to fulfil. In reality, the Presidents of the Houses exercise control [...] over the substance of the initiatives, especially when these may have an impact on their institutions and constitutional principles.”: Valerio di Porto and Luigi Gianniti, ‘L’iniziativa legislativa parlamentare’ (*federalismi.it*, 14 July 2017) <<https://www.federalismi.it/nv14/articolo-documento.cfm?artid=34383>>.

⁴⁴⁵ The appraisal of which falls to the Plenary of the Legislative Assembly. See, for example, “the body with the competence to adopt a legislative measure is not bound to approve it [...] but is obligated to appraise it; it may not ignore such measure nor refuse its acceptance for reasons of merit”: Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 97. See also: “This decision, however, is adopted following a control that has an exclusively legal nature, relative to the fulfilment of constitutional and procedural requirements; it is not a control on the merit or opportunity of the legislative projects, nor the normative solutions proposed therein.”: Gustavo Gramaxo Rozeira, ‘A origem da Lei — o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 161.

⁴⁴⁶ *De minimis*, one should allow for appeals against decisions of reform, in the event that the latter requires the improvement of bills in abusive and unnecessarily restrictive terms. An acceptance *per se* may also be

of the Rules of Procedure, subject to appeal to the Plenary; the latter's confirmatory deliberation of the President's decision is deemed to constitute the final, definitive rejection of the bill in question.⁴⁴⁷

Article 111 has been profoundly modified by the 2017 review of the Rules. In effect, the respective Explanatory Note laid out that:

“The wording of this Article has been profoundly changed, since the current norm is lacking in clarity, confusing the acceptance process with the rejection, in the context of appealing decisions of the President, as well as presenting little clarity regarding the procedural framework for appealing the President's decisions regarding legislative initiatives. In view of the above, the procedures for the acceptance and the rejection of bills by the President have been separately established. Appeals of the President's decisions shall be admissible only in the event of rejection of Members' bills, the scope of the appellants being confined to the respective proponents. The appeal shall, in the first instance, be brought to the Board of the Legislative Assembly; only subsequently, if such body maintains the President's decision, shall the appeal be submitted to the Plenary.”

While a measure of simplification was introduced, it is no less true that choices were made for solutions that are unclear, lack real justification and, worst of all, pose several questions.

Why is there no appellate procedure for decisions rejecting Government bills? I trust that such an omission would not imply an inability to reject bills, in cases, *inter alia*, where a Government bill blatantly violates the Basic Law. Such an interpretation, if it were to gain ascendancy, would deal a severe blow to the status and the functions of the Legislative Assembly and, certainly, represent a gross deviation from the fundamental rules and principles of a normal legislative procedure, integrated into a legal order

appealable to the Plenary, for example, if blatantly in violation of the Basic Law, although the interested party in this appellate procedure shall not be the accepted bill's proponent, but rather another Member or a group of Members.

⁴⁴⁷ Article 111 has been profoundly modified by the 2017 reform. In effect, the Explanatory Note reads: “The wording of this Article has been profoundly changed, since the current norm is lacking in clarity, confusing the acceptance process with the rejection, in the context of appealing decisions of the President, as well as presenting little clarity regarding the procedural framework for appealing the President's decisions regarding legislative initiatives. In view of the above, the procedures for the admission and the rejection of bills by the President have been established separately. Appeals of the President's decisions shall be admissible only in the event of rejection of Members' bills, the scope of the appellants being confined to the respective proponents. The appeal shall, in the first instance, be brought to the Board of the Legislative Assembly; only subsequently, if such body maintains the President's decision, shall the appeal be submitted to the Plenary.” While it is true that some simplification was achieved, it is no less true that choices were made for solutions that are unclear, lack real justification and, worst of all, pose several questions. Why is there no appellate procedure for decisions that reject Government bills? Such an omission will presumably not, I hope, induce or lead one to infer the impossibility of rejecting bills — nor could such be the case, *inter alia*, in relation to a Government bill evidently violating the Basic Law? Why is there no appellate procedure for decisions of acceptance?

aspiring to an effective *Rule of Law*.⁴⁴⁸ I must concede defeat in attempting to understand the *raison d'être* of this procedural option.

Why is there no appellate procedure for decisions that accept (any and all) bills?

I find it impossible to adhere to this policy choice by the parliamentary legislator.

In closing this interlude, I must reaffirm that a decision of acceptance is not tantamount to, nor does it presume, any concurrence with the merits of the legislative initiative in question.

7. The Original Legislative Initiative — Members' Bills and Government Bills

The Basic Law provides — and the Rules of Procedure thus confirm — that, in principle, the original legislative initiative may come from Members⁴⁴⁹ and the Government.⁴⁵⁰ Article 101 of the Rules of Procedure states, “*The initiative of the law belongs to the Members and to the Government of the MSAR.*” Thus in Article 102, the former are called Member’s bills and the latter Government bills: “*The original initiative of the law takes the form of a Member’s bill, when exercised by Members; when exercised by the Government, it takes the form of a Government bill.*”

Both types of legislative initiatives have equal dignity and are subject to the same full array of principles, with a certain degree of specialisation and a few applicable exceptions.⁴⁵¹

There is differentiation in the legal framework,⁴⁵² in some respects substantial — for example, a Government bill’s requires the prior consultation of the Executive Council, unlike Member’s legislative initiatives, which naturally do not. Similarly, this obligation does not extend to other consultative bodies exclusive to the Chief Executive, such as the Permanent Council for Social Dialogue.

Under the Basic Law, the framework provided for in Article 51 is only applicable

⁴⁴⁸ And not a dictatorial system, without any interwoven support based on legality, separation of powers, etc, wherein, perhaps, such a description would be more fitting

⁴⁴⁹ Members may exercise legislative initiative individually or jointly, Article 75, paragraph ((2) of the Basic Law; in the latter case, the number of proponents may not exceed nine, Article 103, paragraph (1) of the Rules of Procedure.

⁴⁵⁰ Not from other bodies, entities or persons: for example, the Executive Council, nor from the Courts, the Commission Against Corruption; also excluded are the popular initiatives, for instance, by means of a petition with a certain number of signatures.

⁴⁵¹ Which, however, in the case of Members’ bills, turn out to be huge. Apart from these exceptions, the initiative of the law, belonging to the Members, is full and untamed — they have the power to choose their own desired substantive solutions, therefore not being subject, or obligated, to introduce solutions and methods considered preferable, either by other Members, or by the Government, or which have been indicated in the Government Annual Policy Action Address.

⁴⁵² Another by-product of a political system based on a separation of powers (albeit with natural elements of co-operation and inter-dependence between the legislative body and the Executive).

to Members' bills and not to Government bills:

"If the Chief Executive considers that a Member's bill approved by the Legislative Assembly is not compatible with the overall interests of the Macau Special Administrative Region, he or she may return it to the Legislative Assembly within 90 days, for reconsideration, together with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the bill in question by not less than a two-thirds majority of all the Members, the Chief Executive must sign and order publication thereof within 30 days, or act in accordance with Article 52 of this Law."

As such, ANTÓNIO KATCHI explained that,

"In the case of a Member's bill, the Chief Executive may refuse signature and order of publication, returning it to the Legislative Assembly, within 90 days, with a written statement of the reasons for such refusal (Article 51, 1st part of the Basic Law). He or she thus exercises a right of veto. In the case of a Government bill, the Chief Executive may not refuse signature, nor the order of publication (Article 51, 1st part of the Basic Law, in reverse). This is understandable, given that the legislative initiative will have come from the Government itself. It is, however, important to point out that the Assembly may have approved the bill only in part, rejecting some of its provisions; in addition, if such bill deals with a matter not included in the Government's sphere of reserved matters of legislative initiative, the Assembly may have introduced amendments, regardless of any Government consent. In any of these events, the content of the approved law may no longer correspond to the Government's will/intent. Even so, it seems that the Chief Executive may not interpose his or her veto."⁴⁵³

The real differences are also made clear through the observation of the praxis. Hence the huge success rate — approval — of Government bills, contrasted to the relatively low success rate of Members' bills.

In this regard, one should proceed to demolish a myth: there are laws in the MSAR that have indeed resulted from Members' bills, ie from the Members' legislative initiative. These laws span various subject matters aside from the internal organisation of the Legislative Assembly. For example, laws on fundamental rights, such as data protection, and amendments to the law on the right of assembly and demonstration.

⁴⁵³ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483–84. The general debate (and voting in general) plays a fundamental role, deals with, and establishing/stabilising — I believe — the principles and system of each bill, as well its political, social and economic opportunity. See Articles 113 and 119, subparagraph a) of the Rules of Procedure.

8. Original Legislative Initiative versus Supervening Legislative Initiative — Amendment Proposals and Substitution Texts

It is never too much to recast the — at times forgotten and almost buried — fundamental distinction between original legislative initiatives and supervening legislative initiatives.⁴⁵⁴ Naturally, differences in nature, framework and pre-requisites are detected in each of these two modalities.

The evident dissimilitude — also seemingly overlooked — is expressed by ANTÓNIO KATCHI: “The legislative initiative may be original or supervening, depending on whether it aims to trigger a new legislative process or to intervene in an already ongoing process.”⁴⁵⁵

Or as JORGE MIRANDA and RUI MEDEIROS teaches,⁴⁵⁶ a bill embodies an original initiative or the start of a legislative process. There is also a supervening initiative, which is characterised by amendment proposals. It is not, properly speaking, a more or less extensive content that which distinguishes bills from amendment proposals. What separates them is the primary nature of the bills, which define the object of the legislative process and the secondary nature of the amendment proposals always linked to, and in light of, a previously introduced bill (or several, taken together).

Relevantly, JAIME VALLE opined that,

“The substantive division of the power of original legislative initiative may not be transported, *per se* and as a rule, to the domain of supervening legislative initiative⁴⁵⁷ [...]”

One reality is the power to choose the moment for exercising a legislative competence over a given subject-matter; another, quite different reality, is the possibility of determining the content of the act that shall result from the exercise of such legislative competence.”⁴⁵⁸

⁴⁵⁴ Also speaking of a synonymy in relation to secondary legislative initiative and derived legislative initiative, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 873.

⁴⁵⁵ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 476.

⁴⁵⁶ *ibid* 555.

⁴⁵⁷ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 111. The author further clarifies, “In fact, the foundation underlying the creation of areas reserved to original legislative initiative translates into the power [...] to determine the moment from which the Assembly of the Republic shall be able to legislate on the matters in question [...] This objective is achieved with the creation of reserved areas of original legislative initiative, which does not cover, nor extend to, the introduction of amendment proposals. A different understanding would drastically restrict the faculties of intervention in the procedure, both by the other bodies with the power of initiative and, above all, by the body with the competence to approve legislative acts, which would be constrained to simply accept or reject the introduced bills (which were subject to an external original legislative initiative).”

⁴⁵⁸ *ibid* 111–12. Adding: “The content of each of the areas of reserved initiative must be justified by a relevant interest”: which is why the *raison d’être* of an original legislative initiative may not be extended to the supervening legislative initiative, 112.

Furthermore, as observed by GUSTAVO GRAMAXO ROZEIRA,

“Our opinion, however, is that despite an indisputable affinity, both types of initiative have such a remarkable set of structural and functional differences that it does not seem possible to consider them as belonging to a conceptual unity”.⁴⁵⁹

The supervening legislative initiative has its own framework, differing from the original initiative in several aspects such as the range of protagonists, the timeliness of their submission or introduction,⁴⁶⁰ and even legal designation, as they are called “amendment proposals”. This distinction is explicitly highlighted in Articles 1, subparagraph (b) — wherein these two initiatives are distinguished in separate paragraphs — and 102, paragraph (2) of the Rules of Procedure, which expressly refer to the “supervening initiative”⁴⁶¹ adopting the form of “amendment proposals”.

Article 106 of the Rules of Procedure decodes the concept of “amendment proposals” and classifies them into four modalities:

“1. Amendment proposals may have the following nature:

*a) Modification;*⁴⁶²

*b) Substitution;*⁴⁶³

*c) Addendum;*⁴⁶⁴

*d) Suppression.”*⁴⁶⁵

These proposals are structured in a sequential order, with several prioritised concerning the text of the original legislative initiative for voting on the specifics, under the terms of Article 124, paragraph (1) of the Rules.

In addition, Article 124, paragraph (2) of the Rules sheds light on the legitimate

⁴⁵⁹ See Gustavo Gramaxo Rozeira, ‘A origem da Lei – o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) with considerable and convincing developments on the following pages, resulting in the unmistakable distinction between original and supervening initiatives (in the author’s language, *the initiating of modifications*), pointing out the different procedural moments in which they arise, the diversity of effects, the reflection of the duty to deliberate in the event of amendments (in the original initiative such duty is always present, ie parliament shall always be bound to appraise, debate and vote on an original initiative, whereas in the event of supervening initiatives these may not even be subject to consideration, if hampered by the fact of non-approval of the original initiative or by the prior approval of another, incompatible, supervening proposal), the non-coincidence of actors holding one and another type of initiative.

⁴⁶⁰ Naturally, an amendment proposal always requires a pre-existing duly accepted original *legislative initiative*, which shall be the object of such proposal.

⁴⁶¹ Underlining that the Rules refer expressly to the supervening initiative, José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 238.

⁴⁶² “Proposals to modify aim to restrict, expand or modify the meaning of the text under consideration.”

⁴⁶³ “Proposals to substitute contain provisions that are different from the ones originally introduced in the text.”

⁴⁶⁴ “Proposals to add contain the addendum of new subject-matters, while retaining the original text and the meaning thereof.”

⁴⁶⁵ “Proposals to suppress aim to delete the provision under consideration.”

actors authorised to introduce an amendment proposal, ie the Committee and the Members, and by reverse interpretation, who does not possess such legitimacy. Therefore, with respect to the supervening legislative initiative, which takes the form of amendment proposals, such initiative is not within the Government's purview, even with respect to bills whose ongoing legislative procedure was originally triggered by the Executive body.

See also Article 99, subparagraph (e), which calls upon an idea of amendment proposals, under the guise of committee reports on bills being accompanied by amendment texts. When linking this to the provisions in Article 124, paragraph (2), subparagraph (a), regarding proposed amendment proposals submitted by the committee, there seems to be an indication of a supervening initiative in the form of a substitution text,⁴⁶⁶ as a text materialising a supervening initiative by the competent committee or, under this terminology, an amending text.⁴⁶⁷ I use this terminology because it could precisely align with the concept of a substitution text, intended to entirely replace the originally introduced text of a bill.⁴⁶⁸

Article 127, paragraph (3) of the Rules clearly enunciates the following: "Any Member may introduce a proposal to amend the text, as approved on the specifics, in committee, until the period for final overall voting begins.", provided the unusual route of approval on the specifics, in committee, takes place.

The framework regulating amendment proposals is not flawed, nor does it appear to reveal any *lacunae*, much less require interpretative clarification. On the contrary, the Rules of Procedure attach great importance to it and, consequently, build a truly complete legal structure around the theme.

One is faced with two distinct legal typologies: the original legislative initiative *versus* the supervening legislative initiative; both are well demarcated and may not be confused with each other, nor be subject to any interference between them.

I would endeavour to raise an issue with the following segment of the norm in Article 107, subparagraph (a): "*the amendment proposals may not [...] contravene the provisions of Articles 104 and 105*" — the latter provisions refer to the initiatives reserved

⁴⁶⁶ In the Rules of Procedure previously in force, the substitution texts, under Article 131, had explicit legal-procedural standing.

⁴⁶⁷ Making express use of substitution texts, see TSC, Report No. 3/II/2005, "*In formal conclusion, having assessed and analysed the bill, the Committee renders its opinion that such bill, in the version contained in the text revised in substitution of the previous one, meets all the necessary requirements to be appraised and voted on (by the Plenary).*"; and FSC, Report No. 1/III/2009. See also, TSC, Report No. 2/III/2008, Committee on the Rules of Procedure and the Members' Mandates, Report No. 2/III/2009, Committee on the Rules of Procedure and the Members' Mandates, Report No. 2/III/2008. As examples of introducing sets of individual amendment proposals, without a global substitution text, see TSC, Report No. 1/2000; SSC, Report No. 3/2000; and TSC, Report No. 2/2001.

⁴⁶⁸ The similarities with the said second versions of Government bills, in current usage, but effectively without any legal-procedural standing, are several and evident.

to the Executive⁴⁶⁹ and to the conditioned initiative, the contravention of which entails summary rejection.

In other words, what the Basic Law refers to in Article 75 are the Members' bills,⁴⁷⁰ the original initiatives emerging within the scope of the Legislative Assembly.⁴⁷¹ Such is the scope and the intent of the constitutional norm. It does not cover Government bills. For example, the original initiative reserved in favour of the Executive is only revealed, not expressly but via a reversed interpretation of said norm of the Basic Law. "Our fundamental law only limits the original initiative of the Members in certain matters; it does not include the supervening legislative initiative."⁴⁷²

The Basic Law does not mention what the Rules of Procedure refer to as "*amendment proposals*", ie it is self-limited to deciding on the original legislative initiative and takes no notice of the supervening initiative. This raises a pivotal question

⁴⁶⁹ On the dubious issue of whether the initiative is formally the Government's or the Chief Executive's, see João Albuquerque, '*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*' (unpublished and archived with the Author, 2013).

⁴⁷⁰ Besides the resolutions, which shall not be discussed for now.

⁴⁷¹ On Article 74 of the HKSAR Basic Law, see *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J), Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 286, Benny Tai, 'The Chief Executive' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 236, affirming "*Proposing amendments to bills takes place after a bill has been brought to LegCo and is therefore outside the scope of article 74.*": Margaret Ng, 'The Legislature' in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 294 et seq, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–145, PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 446. Moreover, in the Committee on Rules of Procedure, Legislative Council of Hong Kong, 'Procedure in dealing with the introduction of Members' Bills as provided in Article 74 of the Basic Law and the interpretation of Article 48(10) of the Basic Law' LC Paper No CB(1) 45/98-99 (22 July 1998), the following is clearly defined: "Regarding the interpretation of Article 74 to cover Committee Stage amendments, the Committee is of the view that nothing is written in the Article which suggests that the Article is meant for anything other than bills introduced by Members. The Basic Law is very specific in making reference to bills, motions and Members' amendments to Government bills, as illustrated in the voting procedures provided in Annex II of the Basic Law. If Article 74 were intended to cover Members' amendments to Government bills, there is no reason why it was not stated in the Article in the first place. The Committee considers it inappropriate for the Department of Justice to extend the coverage of Article 74, which governs only Members' bills, to Members' amendments to Government bills. The Committee is aware of the concern of the Executive, as reflected in the Solicitor-General's opinions that proposals in relation to those areas mentioned in Article 74 should come from the Executive instead of from Members of the Legislative Council. This principle has been spelt out in Article 74 and is also reflected in the Rules of Procedure of the Council. The Basic Law has not specified a detailed procedure of the legislative process. Still, it is clear that amendments to Government bills moved by Members are anticipated, as shown in the bicameral voting procedure in Annex II of the Basic Law and references to the introduction, amendment and passage of bills in various provisions. The Committee considers it important to maintain a legislative process which allows every bill or motion before the Council to be fully debated and all aspects of the bill or motion thoroughly considered. The legislative process which the Council has now put in place is a three-reading process which has worked well in Hong Kong and which the people of Hong Kong are familiar with. This process provides a stage between the second and third readings, during which the Committee of the Whole Council discusses the detailed provisions of proposed amendments to a bill. A Member (including a public officer) in charge of a bill can withdraw the bill at the beginning of the proceedings for the second or third reading of the bill. If the Government finds it difficult to accept a Government bill in its amended form, the public officer in charge may withdraw it before the third reading stage."

⁴⁷² Luís Pessanha, '*A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada*' (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

about the procedural norm⁴⁷³ at hand: is it a norm *praeter* the Basic Law? If so, would it be legitimated by merely developing, implementing, executing, or detailing a norm or a principle of the Basic Law, or illegitimate because it erects an unlawful limitation to the Members' supervening initiative?

In my view, the Basic Law establishes a self-sufficient prohibition and restriction, which is clear, precise and unequivocal, on Members' bills,⁴⁷⁴ explicitly without requiring any interpretative or applicative operation aimed at its normative developing, implementing, executing, or detailing.⁴⁷⁵ Furthermore, the procedural norm in question goes way beyond the scope of the Basic Law and establishes a very deep limitation to the normal powers of the Members.

I suggest that this restriction may not be created *ex novo* by the Rules of Procedure, a normative act subordinate to the principle of conformity with the Basic Law.⁴⁷⁶ As LUÍS PESSANHA observed,

“The legitimacy for the Legislative Assembly's Rules of Procedure to condition the supervening initiative of the Members, within the scope of Tax Law — where the Basic Law does not so do, rather recognising the free supervening initiative of the Members in any and all cases, and only conditioning the original legislative initiative in certain typified matters — can be at issue. It may be conceived as a procedural restriction in non-conformity with the Basic Law, since it goes beyond that which the Basic Law allows and provides for, by introducing broader restrictions to the political rights of the Members. Moreover, it is not a solution that is easily reconcilable with the constitutional history of the Legislative Assembly of Macau, nor with the parliamentary tradition existing in Macau, at least prior to the transition of sovereignty, least of all with the examples from

⁴⁷³ Cf the following argument based on the concept of “advancement” or “step forward”: “The Rules of Procedure of the Legislative Assembly constitutes an advance in this issue, to the extent that they reserve exclusively to the Government the original legislative initiative and the supervening legislative initiative in matters relating to public revenue and expenditure.”: Sun Tongpeng, ‘A alocação de competências orçamentais em Macau – Algumas considerações jurídicas’ (2014) 27 Administração 103, 109.

⁴⁷⁴ In this case, there is no need to enact complementary norms, unlike what is required with many other norms contained in the constitutional text, namely Article 76 or Article 71, paragraph (1) of the Basic Law, where, moreover, the expression “*in accordance with legal procedures*” is used. This Article 75, like, for example, the first part of Article 77, due to the relevance of the respective subject-matters and the relative simplicity of the normative construction of the legal frameworks in question, attain full primary execution and applicability directly from the Basic Law.

⁴⁷⁵ An interpretative effort is certainly required in the breaking down of concepts such as political structure or operation of the Government — but not in the affirmation of such prohibition.

⁴⁷⁶ See *inter alia*, Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.ª Parte do Artigo 75.ª da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 188 et seq; PY Lo, *The Hong Kong Basic Law* (LexisNexis 2011) 451–46, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–45; Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press 1999) 252; and the Legislative Council Paper for the House Committee Meeting, Committee on Rules of Procedure, Procedure in Dealing with the Introduction of Members' Bills as Provided in Article 74 of the Basic Law and the Interpretation of Article 48.

comparative law, namely with the interpretation and application performed with the corresponding norm of the Hong Kong Basic Law, where it is consensually accepted that Government bills, once introduced into parliament, may undergo amendments or modifications, at the initiative of members of the parliamentary body.”⁴⁷⁷

As I have already had the opportunity to propound, it is necessary, at a bare minimum, to question the legitimacy of the Rules of Procedure in enshrining a new rule in this relevant domain, a rule that would be contrary to the rule expressed by the Basic Law, therefore in non-conformity therewith. This purported extension of an original area of reserved initiative to the entire supervening initiative does not, I believe, find support in the Basic Law; it would imply the introduction, by mere procedural fiat, of an inescapable factor in eroding the normal powers of Members, in contradiction with the constitutional history and with comparative law. In other words, even if the procedural normative intention had been to equate, in those typified matters,⁴⁷⁸ the area of supervening initiative to the constitutionally established area of original legislative initiative, it will be necessary to question whether such an equivalence passes the test of conformity with the Basic Law. I believe it does not.⁴⁷⁹

One may conclude that such procedural norms should be interpreted and applied correctively, in order to (re)conform them *vis-à-vis* the constitutionally applied norms in this matter. Those norms must be subject to an interpretation in conformity with the constitution (Basic Law), and, in the event that such norms cannot be salvaged through a corrective interpretation according to the Constitution, the solution shall have to be their disapplication.⁴⁸⁰

As I also mentioned before, a reserved area of original legislative initiative does not, *per se*, just throw its mantle of protection — and consequent exclusion of third parties — over the area of supervening initiatives. The constitutional rule in the granting of an area of reserved legislative initiative operates only for original legislative initiatives; otherwise, the constitutional legislator feels the need to expressly establish the extension of the area of reserved initiative to the supervening initiative. The Basic Law, as is well known, makes no express mention of an area of reserved supervening legislative initiative. To accept the opposite, ie to admit the existence of an absolute area of reserved initiative

⁴⁷⁷ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

⁴⁷⁸ The matters are: Electoral Law of the Legislative Assembly; public revenue and expenditure; political structure; operation of the Government; and Government policy.

⁴⁷⁹ Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.^a Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CREG-DM 2017) 192.

⁴⁸⁰ “In this context, it can be argued that the procedural norm, insofar as it does not comply with the Basic Law, may have to be disappplied, or interpreted in conformity with the Basic Law, thus functionally aiming to achieve the objective of not excessively restricting the supervening legislative initiative of the Members to the Legislative Assembly.”; Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

— original and supervening — would mean conceiving the Legislative Assembly not as the legislative body of the MSAR, with the competence to “enact” laws,⁴⁸¹ but rather as the MSAR body with the power to not approve laws. We would, hence, be facing a kind of negative power or counter-power.⁴⁸²

This additional and subsequent restriction to the normal powers of the Members is not foreseen in the Basic Law, nor does it derive any consent, authorisation, or general pre-determination from the MSAR constitution that could be deduced, induced, or inferred from this paramount law.⁴⁸³

I would supplement with another very relevant factor: the understanding that a constitutional order with a division of powers between organs, and with access *for all* to public and political positions, supports the power of members of parliament to introduce proposals to amend governmental bills. In fact, “The right to amend, recognised in all parliamentary rules of procedure, is therefore part of the *ius in officium* of the parliamentarian’s office.”⁴⁸⁴

The general principle set out by the Basic Law is that Members, in the context of legislative procedure, are fully entitled to all the powers — “*The Members of the Legislative Assembly of the Macau Special Administrative Region introduce bills*”⁴⁸⁵ — except for those on subject-matters expressly removed by the same Basic Law. Imagine, *ad absurdum*, a procedural norm adding an inhibition of supervening initiative regarding the Government bills listed in the Government Annual Policy Action Address. Naturally,

⁴⁸¹ Article 71, paragraph 1).

⁴⁸² Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.^a Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 188 et seq. with the indication and a partial verbatim transcript of the Plenary meeting debate on the Rules, adding “*There will be a political intention to leave to the Government the judgment on the convenience and opportunity of legislative initiatives in matters of greater interest or relevance. It would therefore be another element that embodies the primacy of the Executive within the scope of the political system of Macau. Furthermore, it would be devoid of any sense, be it legal or political, to prevent the Legislative Assembly from amending Government bills, such as those concerning the electoral methodology of the Members or, in an extreme interpretation, that the Assembly could not amend Government bills on matters included in the chapter on the Political Structure (IV), such as those relating to civil servants, the oath of allegiance, to the Commissions.*”

⁴⁸³ Such is so, in terms of legal science and theory, which are exempt from, and unaware of, any conjunctural political considerations or judgments of convenience or expediency, relative to the extent or degree of executive primacy, which fluctuates and at times denies, through the praxis on the ground, the effective separation of powers, dictated by events and concerns that have nothing to do whatsoever with lawmaking.

⁴⁸⁴ Ana Del Pino Carazo, ‘Del tránsito de un concepto formal a un concepto material de enmienda en el procedimiento legislativo — una cuestión zanjada?’ in Francisco Rubio Llorente and Javier Jiménez Campo and Juan José Solozábal and others (coords), *Echavarría La constitución política de España: estudios en homenaje a Manuel Aragón Reyes* (Centro de Estudios Políticos y Constitucionales 2016) 226.

⁴⁸⁵ Article 75 of the Basic Law. Also, Article 1 of the Rules of Procedure: “The Members have the following powers, within the scope of the legislative competence of the Legislative Assembly: a) To introduce bills and draft resolutions; b) To introduce proposals to amend the bills and draft resolutions referred to in the preceding paragraph, as well as the to Government bills.” Furthermore, Article 101 of the Rules is an expression of this general principle. On this matter, regarding the similar Hong Kong norm, Article 74 of its Basic Law, see Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 45 et seq. Herein is quoted a decision by the then President of LegCo (Rita Fan), who stated that Article 74 is “an enabling article which enables Members of the Legislative Council to introduce bills” and imposes, “conditions and restrictions on such introduction.”

such a norm would also be illegitimate, infringing upon the Basic Law.

Let's entertain the idea momentarily: Even if we were to accept the legitimacy of the procedural norm that prohibits the introduction of amendment proposals related to bills within the realm of the Government's reserved legislative initiative⁴⁸⁶ or those in conditioned matters⁴⁸⁷, it would nonetheless be true that such prohibition, even if not unconstitutional, could never be unconditionally extended to every bill introduced by the Government and in favor of itself, while outside the scope (depriving the scope of the conditioned area, as configured in the Basic Law),⁴⁸⁸ simply because the legislative initiative was triggered by the Executive.

The legislative procedure may not be disfigured by transforming it into an option reduced to a *yes/no alternative binomial* formality, ie either a Government bill is approved or not, but immune any amendments thereto.

Furthermore, the Rules of Procedure *per se* provide for them, outside of the alluded to cases of reserved areas: "The powers of the Members, within the scope of the legislative competence of the Legislative Assembly, are the following: To introduce amendment proposals relating to the bills and draft resolutions referred to in the preceding subparagraph, as well as to Government bills" — *as well as* Government bills, I must stress.⁴⁸⁹

As the CRPMM reported:

⁴⁸⁶ João Albuquerque, 'Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM' (unpublished and archived with the Author, 2013). João Albuquerque speaks, in these cases, of absolutely reserved original and supervening initiatives.

⁴⁸⁷ João Albuquerque considers, with my agreement, that these cases are of relatively reserved legislative initiative, ie only original in nature: *ibid*.

⁴⁸⁸ See João Albuquerque, 'Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM' (unpublished and archived with the Author, 2013). If I read him correctly, seems to add another layer of reserved legislative initiative in favour of the Government. His thesis starts with the idea that, in the matters falling under what the Basic Law designates as governmental policy and similar issues — "The Government defines [...] policies": in Article 64 — and provided that such matters concern fundamental rights and others subject to an area reserved to the law, it follows that, "as a rule": there would be an absolute legislative initiative reserved to the Government, thus impeding the exercise of supervening initiative by the Members. I cannot agree with this stance. Right from the start, and adopting a formal argument, if the expression "The Government defines policies" means the Government alone has the power to "decide": then a definition made by law immediately removes the formal authorship of policies. In effect, the Law, regardless of its origin, always belongs to the legislative body of the MSAR, the Legislative Assembly. Therefore, at least on a formal level, a definition may be made by a body other than the Government. In addition, the definition of policies does not always have to go through normative measures, nor do I believe that, in the relevant Articles of the Basic Law, what is at issue is primarily related to norms, but rather to typical governmental functions. If there is to be a repercussion in terms of triggering a legislative initiative, such would be translated, I believe, not in a reserved initiative, but in a conditioned initiative. Finally, if this enlargement is accepted — which the Rules of Procedure do not give assent to — the implications would be serious: a thick slice of the legislative pie would be removed from the Member's initiative, bringing the situation closer to what the same Author refers to as the "parody of the legislative power".

⁴⁸⁹ The aforementioned Article 127, paragraph 3) of the Rules of Procedure also affirms the power to introduce proposals for amending the text already approved on the specifics, while paragraph (1) refers, without distinction, to Members' and Government bills.

“The exercise of the legislative power conferred to this Legislative Assembly obviously includes the power to introduce specific amendments to both Government bills and Members’ bills; otherwise, it would be impossible to understand what constitutes the legislative power granted by the Basic Law to the Legislative Assembly, much less could one perceive, as a mere example, the *raison d’être* of Article 117⁴⁹⁰ of the Rules of Procedure of this Assembly Legislative.”⁴⁹¹

One must take due notice of the recent examples of clearly unlawful rejection of amendment proposals made by Members to Government bills, namely the following: rejections related to amendments to the bill resulting in Law No. 11/2018 — *Amendment to Law No. 2/93/M, of 17 May, on the Right of Assembly and Demonstration* — proposals thereof introduced and rejected at the Plenary meeting held on 30/07/2018; and to the bill resulting in Law No. 12/2018 — *Legal framework for guaranteeing the rights and interests of the elderly*, introduced and rejected by the Plenary meeting held on 07/08/2018.

These illegal decisions to reject amendment proposals reveal a stranger and more peculiar phenomenon, when one takes into account, in the first case, the fact that the matter in question was not within the sphere of the Government’s reserved legislative initiative, adding to which I would adduce the next argument: the previously enacted amendments to such law had resulted from a Members’ bill⁴⁹² (Law No. 16/2008) and, furthermore, such bill was subject to a set of amendment proposals initiated by the competent Committee.⁴⁹³ Neither the group of Members, as proponents of the original initiative, nor the Committee, in exercising supervening initiative, asked for or received, authorisation from the Chief Executive — it simply did not occur to anyone that the legislative subject-matter in hand could be regarded as Government policy. From 2008 to 2018, no constitutional or procedural norms on these issues were modified. Therefore, the applicable normative framework, then and now, has always been exactly the same.

In the second case, the decision by the President was unexpected and illegal, contravening not only several norms of the Basic Law and of the Rules of Procedure, but also the conclusions expressly contained in Report No. 5/VI/2018, of the FSC, entrusted with the examination stage of the legislative process:

“In effect, and very briefly, one must remember that — since this Government bill is not (nor could it be) included in the framework of limitations under Article 75 of the Basic Law and Article 107 of the Rules

⁴⁹⁰ Article 119 today.

⁴⁹¹ CRPMM, Report No. 1/III/2009.

⁴⁹² Bill dated 3 November 2008, introduced by Members Leonel Alves, Kou Hoi In, Philip Xavier, Chui Sai Cheong, Fong Chi Keong, Chan Meng Kam, Iong Weng Ian, Leong Lok Wa and Chan Chak Mo.

⁴⁹³ Cf TSC, Report No. 2 /III/2008, “To facilitate the voting, in the Plenary meeting, of the bill – with the amendments proposed by the Third Standing Committee, pursuant to Article 104, subparagraph c) of the Rules of Procedure of the Legislative Assembly — a new complete text (with the amendments duly indicated) is appended as an Annex to this Report.”

of Procedure of the Legislative Assembly, in the (dubious) enlargement of constitutional restrictions, the Committee and the Members *per se*, may introduce, as they see fit, proposals to amend the Government bill, pursuant to Article 106 of the Rules of Procedure [...]

In truth, the exercise of this power of supervening legislative initiative by the Members and/or the Committees, does effectively exist — it has historical grounding and is wholly appropriate and in full conformity with the Basic Law of Macau.”

Quoting a very relevant report by the CRPMM, to quell any possible doubts:

“Do recall that which is peremptorily affirmed in Report No. 1/III/2009 of the Committee on the Rules of Procedure and Members’ Mandates: ‘The exercise of the legislative power conferred to this Legislative Assembly obviously includes the power to introduce specific amendments to both Government bills and Members’ bills; otherwise, it would be impossible to understand what constitutes the legislative power granted by the Basic Law to the Legislative Assembly, much less could one perceive, as a mere example, the *raison d’être* of Article 117 (now 119) of the Rules of Procedure of this Assembly Legislative.’”

For all the above reasons, plus the recent positions of the holders of the office of President have differed from several committees’ advisory reports, the (non-)solution reached in Report No. 1/VI/2019, of the CRPMM, is beyond comprehension. The said report concludes by stating that the “Submitted challenge may not be considered, as such procedure could not possibly produce any useful effect.” Even though it might possibly be devoid of immediate usefulness — a mere hypothetical concession — the truth is that the utility and the relevance of the issue far exceed the specific case in hand, projecting itself undoubtedly into the future, in view of the aforementioned discrepancies over the years.

In Hong Kong, faced with an identical norm in its Basic Law, and despite governmental opposition, Members of the Legislative Council (LegCo) may introduce proposals to amend bills triggered by a Government original legislative initiative, even within the areas provided for in Article 74 of the Basic Law:⁴⁹⁴ “The Legislative Council considered it was inappropriate to extend the scope of Art 74 to include committee stage amendments introduced by members of the Legislative Council”, as PY LO refers.⁴⁹⁵ Or

⁴⁹⁴ Corresponding to our Article 75.

⁴⁹⁵ PY LO, *The Hong Kong Basic Law* (LexisNexis 2011) 451–46. “It was important to maintain a legislative process which allowed every bill or motion to be thoroughly considered”. See also, *inter alia*, Danny Gittings, *Introduction to the Hong Kong Basic Law* (Hong Kong University Press 2013) 144–45; and Committee on Rules of Procedure, Legislative Council of Hong Kong, ‘Procedure in dealing with the introduction of Members’ Bills as provided in Article 74 of the Basic Law and the interpretation of Article 48(10) of the Basic Law’ LC Paper No CB(1) 45/98-99 (22 July 1998).

in other no less clear terms, “Article 74 concerns the introduction of bills, rather than the enacting process, and thus does not embrace the proposal of amendments to bills by members of the Legislative Council.”⁴⁹⁶

As GU YU underlines, “Members’ power to amend government bills is of great significance, as their initiation power has been largely curbed by Article 74 of the Basic Law.”⁴⁹⁷

Such is how the *law in the books* is; and also how the *law in practice* — albeit under substantial constraints or challenges,⁴⁹⁸ contrary to the prevailing beliefs or statements. Members do introduce amendment proposals to Government bills within the realm reserved for the Government’s exclusive original legislative initiative, although a few, albeit very limited, receive approval.

Closing this sidebar on the neighbouring HKSAR and proceeding forthwith.

Finally, as GOMES CANOTILHO says, “The initiative is the impetus of the lawmaking procedure, but the legislative procedure is not limited to a simple approval or rejection, rather entailing a stage for debate and construction.”⁴⁹⁹

GUSTAVO GRAMAXO ROZEIRA clearly writes,

“In cases of reserved initiative, these naturally only cover the exercise of the right of legislative initiative in relation to the specific subject-matter of the introduced bill — but it no longer extends, naturally, to the faculty of proposing amendments. Unless an express constitutional provision establishes otherwise,⁵⁰⁰ matters withheld from the exercise of the right of parliamentary legislative initiative are not likewise removed from the exercise of the power to propose amendments. Such is so, naturally, because the parliamentary assembly, once called upon to legislate on a certain matter, may not be hampered in its freedom to conform/decide the content of the

⁴⁹⁶ Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn Sweet and Maxwell 2015) 286. See also *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI) (Hartmann J) on this norm: “therefore circumscribes the rights of members before anything has been brought within the purview of the LegCo while proposing amendments to bills is part of the process that takes place after bills have been brought within the purview of LegCo”. Agreeing with such admissibility, Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 66 et seq, with much data provided.

⁴⁹⁷ Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 87.

⁴⁹⁸ The problem, in the praxis, as reported by Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (2nd edn, Sweet & Maxwell 2015) 293, is that the Government, despite a judicial decision declaring the right of supervening initiative by Members, “took the stance of opposing all amendments introduced by members. As a result, hardly any member’s amendments were ever passed, although numerous were introduced.”

⁴⁹⁹ Adding: “After a bill is included in the agenda ... there will be a presentation thereof before the Plenary, and proposals for amendments thereto may be introduced by the Members”: Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Almedina 2003) 873.

⁵⁰⁰ Which does not exist under Article 75 of the Basic Law.

legislative act that it shall (possibly) adopt.”⁵⁰¹

One may reinforce this assessment — thus consolidating the principle that the existence of an area of reserved original legislative initiative shall not extend, necessarily and automatically, to a reserved supervening initiative in favour of the body to which the former reserved area has been granted — by alluding to the history of Macau’s constitutional law and comparative constitutional law, as tools to illustrate better the normative normalcy: an original reserved initiative does not imply a reserved supervening initiative.

9. The Issue in the History of Macau Constitutional Law

The history of Macau’s constitutional law prominently features the example of the Organic Statute of Macau, albeit with distinctive features.⁵⁰²

The competence to approve the Organic Statute of Macau and its amendments rested with the Assembly of the Portuguese Republic. In effect, Article 292, paragraph 3) of the Portuguese Constitution⁵⁰³ provided for the following: “*The Assembly of the Republic may review/amend the Statute or substitute thereof.*” This competence fell within the area of legislative matters absolutely reserved to the Portuguese parliament. However, at the level of the competence of legislative initiative, such power was exclusive to the Territory’s own governing bodies, the Legislative Assembly and the Governor: only “[u]pon a proposal of the Legislative Assembly of Macau or the Governor of Macau, in the latter case after hearing the Legislative Assembly of Macau, and in either case after an advisory opinion by the State Council”, the Assembly of the Republic could then exercise its reserved legislative competence.⁵⁰⁴

GOMES CANOTILHO and VITAL MOREIRA explain that, “Under the terms of Article 292 of the Constitution, the initiative of a review/amendment always rests with the Territory’s self-governing bodies.”⁵⁰⁵

Although dependent on a strongly limited external initiative, the Assembly of the Republic retained the authority to propose amendments once receiving the bill. In other words, the reserved original initiative was not extended into a reserved supervening

⁵⁰¹ Gustavo Gramaxo Rozeira, ‘A origem da Lei – o lugar da iniciativa legislativa no procedimento legislativo parlamentar’ (European University Institute 2009) 354.

⁵⁰² Due to, *inter alia*, its constitutional legal nature.

⁵⁰³ I refer to the version in force on the date of the transfer of sovereignty.

⁵⁰⁴ See also, in the Organic Statute of Macau, Article 30, paragraph 1, subparagraph (b): the Legislative Assembly is competent to “*To submit a proposal to amend this Statute or to substitute thereof, to the Assembly of the Republic; to be heard on a proposal, initiated by the Governor, to the same end; to render its opinion on the amendments that the Assembly of the Republic may introduce to the such proposal;*”; and Article 11, paragraph 1, subparagraph f): the Governor is competent “*To submit a proposal to amend this Statute or to substitute thereof, to the Assembly of the Republic, and to render his or her opinion on the amendments that the Assembly of the Republic may introduce to such proposal*”.

⁵⁰⁵ Gomes Canotilho and Vital Moreira, ‘A fiscalização da constitucionalidade das normas de Macau’ (O Direito Online 1992) <<https://odireitoonline.com/a-fiscalizacao-da-constitucionalidade-das-normas-de-macau.html>> accessed on 29 January 2025.

initiative, notwithstanding a few nuances: in the event of a bill approved with amendments, the President of the Republic could not promulgate the law passed by the Assembly of the Republic, without the concurrence, whichever applicable, of the Legislative Assembly of Macau or the Governor of Macau, pursuant to paragraph (4) of the said Article 292 of the Constitution.⁵⁰⁶

10. The Issue in Comparative Constitutional Law

In comparative constitutional law, one may commence by mentioning the cases revealed in the Portuguese legal order, wherein situations of reserved initiative granted to certain bodies “although only concerning the original initiative”⁵⁰⁷ are detected, ie the original initiative must be triggered by the Government or by the Regional Legislative Assemblies,⁵⁰⁸ while allowing Members of Parliament to introduce amendment proposals.⁵⁰⁹

“The reason why the reserved area of initiative is confined to the original initiative (except in a single case⁵¹⁰) is this: [although] the essential [content of a bill] is found in the latter, the collaboration of various bodies and subjects of parliamentary action in improving the original text can prove to be very useful; the very idea of rationality linked to parliamentary debate thus requires it to be so.”⁵¹¹

Another case of comparative law⁵¹² now located in this continent: The Philippines, where two houses of parliament operate.

Section 24, Article VI of the 1987 Philippine Constitution establishes that “All

⁵⁰⁶ Hence, the “The Organic Statute of Macau cannot therefore be conceived strictly as a “bestowed rule”: but rather as an agreed-upon structuring norm of the legal order”: Gomes Canotilho and Vital Moreira, ‘A fiscalização da constitucionalidade das normas de Macau’ (O Direito Online 1992) < <https://odireitoonline.com/a-fiscalizacao-da-constitucionalidade-das-normas-de-macau.html> > accessed on 29 January 2025.

⁵⁰⁷ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 275.

⁵⁰⁸ Portuguese Constitution: “Article 226 (Statutes and electoral laws) 1. The bills relative to politico-administrative statutes and the election of Members of the Legislative Assemblies of the autonomous regions are drafted by these organs and sent for debate and approval to the Assembly of the Republic.” and “Article 161 (Political and legislative competence) The Assembly of the Republic is competent to “b) To approve the politico-administrative Statutes and the laws relative to the election of Members of the Legislative Assemblies of the autonomous regions;”.

⁵⁰⁹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 275. Discussing the limits of the freedom of conformation, by the Assembly of the Republic, but without calling into question its competence to amend such bills, ie through amendment proposals, Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (7th edn, Almedina 2003) 775–776.

⁵¹⁰ Proposals to amend the Budget bill involving increased expenditure or decreased revenue — the so-called brake-rule.

⁵¹¹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011), 277.

⁵¹² In addition to the aforementioned Hong Kong case. We could mention many others, for example, the Spanish case, where in matters of reserved initiative originating from the Government, the “modifications” (amendment proposals) submitted by parliamentarians are allowed, except for amendments that propose an increase in expenditure or a decrease in revenue, José Luis Brey and Julio Enrile and Juan José González Rivas and others, *Derecho Constitucional de España* (Universitas 2006) 359.

appropriation, revenue or tariff bills, bills authorising increase of the public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.” As already mentioned, this only means that “the House alone can initiate the passage of a revenue bill [...] But [...] the Senate can completely overhaul it, by amendment of parts or by amendment by substitution, and come out with one completely different.”⁵¹³

The attribution of an area of absolute reserve of original legislative initiative does not preclude the exercise, by other actors, of a supervening legislative initiative.

11. The Issue under the Current Law, Scholarship and Praxis

The answer to the question of whether there may be, in the legal framework of the MSAR, supervening legislative initiatives from Members, directed at the Government’s original legislative initiatives, is a definite yes.⁵¹⁴

“It is normal — or should be so considered — that in any legislative procedure, the text of a bill is submitted for consideration/appraisal (on the whole and the specifics), including a legal-technical analysis, and subsequent voting. A simple inference leads one to conclude that, precisely as a result of such appraisal and analysis, the final text — as printed in the official journal/bulletin — shall not fully correspond to that which was originally drafted in the original bill. What may, and does, vary, is the depth and nature of the amendments made thereto. The opposite, ie the untouchability of the original text during the course of all the stages comprising the long, complex and participative legislative procedure would not be normal. Such an expectation would represent an unnatural pre-cognition of what a legislative procedure is (and of what it should be). These introductory statements, being true for legislative procedures in all democratic legal orders, based on a division or separation of powers (even if mitigated), are therefore also true and appropriate for Macau.”⁵¹⁵

There is, nonetheless, an apparent absence of supervening legislative initiatives by the Members, who prefer to let the Executive formally adopt and introduce, at its own initiative (when it agrees), amendment proposals that have either originated from or been suggested by an examining committee. It’s essential to note that this absence is only seemingly apparent, as there have been attempts to submit amendment proposals for

⁵¹³ Joaquin G Bernas, *The 1987 Philippine Constitution: A Comprehensive reviewer* (Rex Book Store 2011) 255, adding: “Textually, it is the ‘bill’ which must exclusively originate from the House; but the ‘law’ itself which is the product of the total bicameral legislative process”. See also, *inter alia*, Hector S De Leon and Hector M De Leon, *Textbook on the Philippine Constitution* (Rex Book Store 2011) 278.

⁵¹⁴ With the procedurally imposed exceptions relating to matters under Article 75 of the Basic Law and to the Legislative Assembly’s electoral law.

⁵¹⁵ Paulo Cardinal and Chan Wai Peng Bárbara, ‘Lei N.º 5/2016, Regime Jurídico do Erro Médico – da Proposta de Lei às Páginas do Boletim Oficial: Breve Crónica do Caminho das Diferenças’ (2017) 8 *Legisiuris* 11, 11–12.

voting. This situation raises the question: Is such behaviour a custom *contra* Rules of Procedure?⁵¹⁶ If so, does this custom, in contravention of a procedural norm, acceptable? Or is it a case of a mere usage?⁵¹⁷ In my opinion, the most appropriate classification is that of a simple non-binding practice.

A contribution from the MSAR's legislative memory is warranted:

“Although without an insurmountable legal content, and without constituting a precedent, it is necessary to introduce another argument, namely that the Legislative Assembly has already proceeded, through proposals submitted by Members, to amendments to the Executive's bills on matters subject to the reserved legislative initiative, such as, for example, the bill on the Commission of Audit (a matter that falls within the scope of the political structure), which was introduced in the pre-entry period prior to the establishment of the MSAR. It should be noted that during this period of functioning of the provisional Legislative Assembly, although there was a short set of rules of procedure,⁵¹⁸ differing, in several aspects, from the Rules now in force (and, in other aspects, lacunose), one should point out that the normative pyramid obeyed in lawmaking was the Basic Law — which, in this respect, remains unchanged.”⁵¹⁹

Indeed, Report No. 2/1999, of the TWC, on the bill entitled “Organic Law of the Commission of Audit” which is one of the fundamental laws issued upon the Establishment of the MSAR, says the following:

“Accordingly, the Committee has amended the bill, since the problems

⁵¹⁶ Which, as discussed above, I do not generally regard as acceptable in the constitutional domain.

⁵¹⁷ A disuse resulting from ingrained reservation or self-restraint in the exercise of procedural powers, perhaps based on judgments of opportunity or political convenience, given that the Executive has the support of an expressive majority of the Members; therefore, the Government's amendment proposals are expected to be well received by the Plenary.

⁵¹⁸ Entitled Provisional Rules of Procedure of the Legislative Assembly of the Macau Special Administrative Region; see also Article 226(1) of the Portuguese Constitution (n 508).

⁵¹⁹ Paulo Cardinal, ‘Iniciativa Legislativa Superveniente dos Deputados nos Casos Previstos na 2.ª Parte do Artigo 75.º da Lei Básica’, in *Direito, Transição e Continuidade: Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 195: “Once a Government bill is accepted, it is subject to a general debate and then to voting on the whole; the general debate “deals with the principles and the system” of the bill (Article 112 of the Rules of Procedure) and the voting on the whole “deals with each... bill” (Article 115, paragraph 1), with no room, at this stage, for the consideration of amendment proposals. In other words, in the case of approval, the bill is given assented by the Legislative Assembly with respect only to its principles and system (and to its opportunity), – again Article 112 of the Rules of Procedure – without entering into the specific solutions contained in the bill (Article 118 of the Rules of Procedure), which emerge only when the bill is subject to examination and voting on its specifics. If a Government bill is approved on the whole – for example, on the political structure – it follows that its principles and system are also thereby approved, but not so in respect of the specific substantive solutions; therefore, the introduction, by Members, of proposals for amending the bill on the specifics, provided that such proposals do not interfere with the principles and system already generally defined and approved as such, should be accepted. It should be stressed that the system contains escape routes in the event that the Chief Executive deems the proposed amendments to be unsuitable or inconvenient: the approved laws only enter into force after being signed and published by the Chief Executive (Article 78 of the Basic Law). And, of course, nothing prevents informal consultations between the Legislative Assembly and the Government, in order to reach a consensus – a value/outcome so precious in Macau.”

raised have ramifications *vis-à-vis* many Articles; in order to facilitate the reading of such amendments, the Committee attaches hereto the respective proposals.”

Also, in matters falling within the scope of Article 75 of the Basic Law,

“The Working Committee considered the possibility of including Articles in the text, referring to the independence of judges and to the limits of hierarchical subordination of public prosecutors, similar to Decree-Law No. 55/92/M, of 18 August. After hearing the Executive, the Committee proposes the inclusion of a new Article, to be inserted between Articles 3 and 4, with the following wording:”⁵²⁰

See also, following the same path, albeit with some differences the TWC’s Report No. 1/1999, Regulation on the Requirements relating to the Nationality of the Residents of the Macau Special Administrative Region; and the FWC’s Report No. 1/1999, Report on the examination on the specifics of the Government bill entitled “Publication, forms and templates of legal enactments”.

Special reference is drawn to the FWC’s Report No. 2/1999, Use and protection of the National Flag, Emblem and Anthem, stating that, “The Committee gives its favourable opinion to the approval of the bill, with the amendments suggested in the annex.”

This was followed by the respective proposals mentioned by the SWC in its Report No. 2, Use and protection of the regional flag and emblem, affirming: “On the specifics thereof, the bill does not raise particular doubts for the Working Committee. However, its text may be subject to a few improvements, which is why the Working Committee submits the following proposals:”

This issue does not end here. Within the scope of the present Rules of Procedure, it is observable that the Legislative Assembly, particularly through its Standing Committees, has exercised a supervening legislative initiative independently and formally when examining Government bills. This practice is embodied in an annex to the Committee Report entitled proposals for amending the text of the Government bill, submitted by the Committee (under the terms of, and pursuant to, paragraph 2) of Article 101, Article 105 and subparagraph [a] of paragraph [2], Article 123 of the Rules of Procedure), thus introducing proposals for modifying, substituting, suppressing and adding. Report No. 5/2001 of the SSC, on the Government bill entitled “Pre-contractual agreements on the disposal of, and on the liens and encumbrances on, immovable property”, points out bluntly in its conclusions, “The Plenary is advised to approve the text in question, with the amendments formally proposed by the Committee in Annex A herewith.”

⁵²⁰ SWC, Report No. 4, on the Legal Status of Magistrates.

In several more recent Reports, the committees — without making formal use of amendment proposals — still sought to underline their legal capacity and ability to do so, by expressly alluding to such power; the choice of not introducing such proposals is explained by reasons unrelated to any possible legal impediments.

For example, the following is contained in one of such formal reports:

“Indeed, and in a gist, the Committee presented the Government with six major suggestions for amending the bill, but only one was accepted by the proponent. [...]

This does not invalidate, on a strictly legal level, the introduction in these matters, on their own, by Members or the Committee, of proposals to amend Government bills, as provided for in the procedural norms — eg that, ‘The Members have the power, within the scope of the legislative competence of the Legislative Assembly, to: [...] (b) Introduce proposals to amend the bills referred to in the preceding paragraph, as well as the Government bills’;⁵²¹ and that ‘Any Member may introduce proposals for amending the text approved, on the specifics, in committee, until the final overall voting period begins.’⁵²² Furthermore, the Committee concluded that, from a political perspective, absent the proponent’s agreement, those eventual formal amendment proposals would be destined to fail.”⁵²³

In another Report, the issue is explained as follows:

“It should be stressed or remembered that, evidently, in this matter (as in so many others), the Committee and the Members have legal powers of supervening legislative initiative, ie to amend or modify an original legislative initiative, even if the latter is a Government bill — and without the need for any previous or subsequent agreement by the proponent. However, without denying these legal powers, it was understood that, in order to achieve a better result in terms of legislative policies, a mutual undertaking of the most solid and comprehensive kind, between the Government, on the one hand, and the Legislative Assembly, its Committee and Members, on the other, would be appropriate.”⁵²⁴

In a more recent Report from a different Committee:

“On the other hand, it is very important to seek a successful negotiation with the Government and, thus, to draft a better law for the MSAR and its society. Regardless of the eventual success of such negotiations, which actually took place — something laudable and perhaps preferable, in accordance with a

⁵²¹ Article 1, subparagraph (b).

⁵²² Article 99, subparagraph (e), Article 124, paragraph (2), Article 127, paragraph (3).

⁵²³ TSC, Report No. 4/V/2016, Law No. 10/2016, “Amendment to Law No. 17/2009 – Prohibition of the illicit production, trafficking and consumption of narcotics and psychotropic substances”.

⁵²⁴ TSC, Report No. 3/V/2016, Law No. 5/2016, “*Legal framework on medical malpractice*”.

certain tradition — the truth is that the Committee and the Members still enjoy a set of powers which they may exercise in order to improve the law and, if necessary, remove non-conformities *vis-à-vis* higher-level normative acts. There is nothing extraordinary, unconstitutional, illegal or contravening the Rules of Procedure, still less of total historical emptiness. [...] the Committee and the Members, *per se*, may introduce, if they so wish, proposals to amend the bill, pursuant to Article 106 of the Rules of Procedure.”⁵²⁵

The examples referred to above and the quoted statements, allow, without hesitation, for the following definitive conclusion: there is no custom⁵²⁶ whatsoever that may be revelatory or constitutive of any possible rule — which would be *contra legem*, *contra* Rules and also *contra constitutionem* — in this domain, ie forbidding, in general, the exercise of the supervening initiative in the legislative procedure of Government bills.

12. The Non-existence of Government Supervening Legislative Initiative

A glance at the Rules indicates that the Government may not formally introduce amendment proposals.

The Rules do not confer onto the Government the power to submit proposals for amending Members’ bills, nor do they mention the introduction of proposals to amend Government bills. In effect, such power of supervening legislative initiative is excluded — even on a shared basis with the Legislative Assembly — from the very bills or matters covered by the area of reserved Government original legislative initiative.

The praxis on the ground has compensated such a “predicament” with the phenomena of second, third, etc, *versions* of the (original) Government bills.

13. Restraints on Legislative Initiative vis-à-vis the Perimeter of Untouchability, Stabilised via Approval in General

A separate issue — not to be confused with the question of the areas of reserved legislative

⁵²⁵ FSC, Report No. 5/V/2018, Government bill entitled “*Legal framework for guaranteeing the rights and interests of the elderly*”.

⁵²⁶ As a clear sign of a refusal to recognise the subjective element of a custom — the conscience of a binding behaviour (or an obligation to act in accordance therewith), I would point out the challenge/claim for redress made by a Member to the President of the Legislative Assembly, because the latter refused to accept a proposal to amend a Government bill introduced by such Member. The said request for redress is addressed in Report No. 1/VI/2019, of the Committee of the Rules of Procedure and Members’ Mandates (it is not possible to understand the underlying logic of aggregating two very different issues, both in their nature and in their relevance, in a single advisory report; was it simply because the questions were raised by the same Member?). See also Joaquin G Bernas, *The 1987 Philippine Constitution: A Comprehensive reviewer* (Rex Book Store 2011) and Hector S De Leon and Hector M De Leon, *Textbook on the Philippine Constitution* (Rex Book Store 2011).

initiative, nor with the preceding question — is that of limiting or inhibiting the introduction of amendment proposals to bills, in view of their substantive content, considered specifically, ie whether such proposals might manifestly clash with the principles and system⁵²⁷ of a bill already approved in general.

In fact, the approval of a bill in general denotes a critical point, wherein certain fundamental aspects such as the bill's principles and structural framework attain a level of protection. These foundational elements, integral to the bill, justified its comprehensive endorsement by the Plenary.⁵²⁸

As LUÍS PESSANHA⁵²⁹ defended:

“It should be noted that the approval of the initial version of bill in general, by the Plenary of the Legislative Assembly, implies that the principles and the system of the legislative initiative are fixed (cf. Article 119, subparagraph [a] of the Rules of Procedure of the Legislative Assembly). Any amendments that may be introduced subsequently, during the appraisal on the specifics of the text, must respect the substantive options that were approved in general.”

One may not draw the inference of an absolute and intangible immutability of a bill's text from the above quote,

“Remember that the approval, on the whole, of a given bill does not entail — it cannot so entail and has never so entailed in the past — that the content of such bill is immutable; it does not mean that its solutions and norms are carved in stone. An approved bill on the whole does not receive a cloak of immunisation or crystallisation, extending to the appraisal and voting on the specifics thereof. We know that it does not work in such a way.”

To clarify further,

“The approval on the whole does draw a perimeter (of some untouchability), but the general debate is on the principles⁵³⁰ and the system of each bill, as well as its opportunity from the political, social and economic points of view, pursuant to Article 113 of the Rules of Procedure.”⁵³¹

⁵²⁷ Articles 113 and 119, subparagraph a) of the Rules of Procedure.

⁵²⁸ FSC, Report No. 5/VI/2018.

⁵²⁹ Luís Pessanha, ‘A Reserva de Lei Fiscal, o Orçamento e a Tributação Anualizada’ (The Basic Law, the Budget and the New Budgetary Framework Law of Macau, Macau, 2017).

⁵³⁰ For example, when analysing the principle that prior notice be given to a public entity or body for meetings, gatherings or demonstrations to be held using public roads, or in public places or areas open to the public, such requirement does not immutably freeze, within its normative scope, the pre-definition or stabilisation of public body or entity A or of public body or entity B.

⁵³¹ FSC, Report No. 5/VI/2018. Pointing to the areas of excellence of the supervening legislative initiative, “Whereas the examination in committee consists of the assessment of the specific solutions contained in each

More was said in a Report by the CRPMM:⁵³²

“When asserting that ‘the general debate deals with the principles and the system of each bill, as well as its political, social and economic opportunity’, it is clear that in case of approval of any bill on the whole, the ‘mandate’ of the committee to which the respective examination on the specifics has been assigned shall be based on the terms resulting from the general debate, precisely on the principles and the system of bill, as well as the evaluation of the criteria of opportunity pointed out in that norm”.

Then the Committee added, I believe with the dynamics of the praxis in mind,

“this means that the examination on the specifics is framed by the general debate, but such does not authorise the exclusion of other sources of influence in determining the course of the examination on the specifics of the bill — eg the legal-technical analysis that can hardly take place in a general debate, being reserved precisely for the stage of appraisal and debate on the specifics in committee.”⁵³³

bill, focussing, in particular, on: a) The adequacy of these solutions vis-à-vis the principles and system of the bill as approved on the whole; b) The search for the most appropriate legislative means for the proper execution of the bill; c) The repercussions of the bill on the legal principles and the legal order; d) The legal-technical perfection of the normative provisions, pursuant to Article 119 of the Rules of Procedure.”

⁵³² CRPMM, Report No. 1/III/2009.

⁵³³ The said Report by the CRPMM added: “The examination of the specifics is not solely guided by the general debate, and the latter cannot crystallise the legislative process. It is by examining the specifics that one can truly assess, in detail, the scope, as seen from various angles, of the norms contained in the bill, as well as the technical options therein conveyed; consequently, this is the timely stage allowing for an appraisal, in greater depth, of the legislative policies and the norms intended to serve them. The said stage is the appropriate one for raising issues which might lead to the adjustments and improvements deemed convenient, in order to submit the text of the Government bill to the Plenary, for debate and voting on the specifics.”