
XIV.

THE COMMON LEGISLATIVE PROCESS — THE STAGES OF THE LEGISLATIVE PROCEDURE IN MACAU’S PARLIAMENTARY LAW

It is paramount to keep in mind the specific — and atypical — legislative procedure in the MSAR.

Although there might be natural approximations or adjustments in the procedural phases, or in other phases as classified by different authors, the truth is that, in the case of the MSAR, the option of placing the voting in general — a typically constitutive moment — before the appraisal in committee — a clearly examining moment — which, in turn, emerges “sandwiched” between voting in general and voting on the specifics (both are constitutive moments), makes such grouping of acts or moments difficult or useless, as the very notion of a group or set entails homogeneity and a proximity of acts.⁶⁶¹

I shall therefore undertake a guided tour of the different moments of the legislative procedure of the MSAR,⁶⁶² without pit-stops to assemble such moments into groupings. The provisions hereinafter invoked, without further reference, shall pertain to the Rules of Procedure of the Legislative Assembly.

1. On the Legislative Initiative

This is the first step in the legislative procedure: its impetus.⁶⁶³

To avoid being overly repetitive, in view of what I have already written above, I shall only recapitulate by way of replicating the applicable norms.

The initiative of the law belongs to the Members and the Government of the MSAR, without prejudice to the provisions of Articles 104 and 105. The original legislative initiative takes the form of a Member’s bill, when exercised by the Members;

⁶⁶¹ This is why I disagree with the grouping Preparatory phase (legislative initiative and examination)/Main constitutive phase (debate and voting), since the examination stage, if I am seeing correctly, interposes itself between two moments of the constitutive phase, ie the voting in general and the voting on the specifics.

⁶⁶² For an overview, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 480 et seq; João Albuquerque, ‘*Curso sobre a Lei Básica da Região Administrativa Especial de Macau da República Popular da China: I – Da reunificação da China à organização político-administrativa da RAEM*’ (unpublished and archived with the Author, 2013) 187 et seq.

⁶⁶³ Legislative initiative is not to be confused with lawmaking impetus. See, for example, Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268 et seq. A few considerations on this issue shall be made below.

and a Government bill, when exercised by the Government. The supervening legislative initiative reserved for intra-parliamentary actors (Members and committees) takes the form of an amendment proposal, pursuant to Article 106.

Members' initiatives may be introduced by a single Member, or collectively, by a maximum of nine Members.

Government initiatives shall be signed by the Chief Executive and shall mention that the MSAR Executive Council has been consulted thereon — thus, there is a formal *ex ante* moment *vis-à-vis* the legislative procedure itself. In a broader sense, and only in the case of Government bills, the legislative procedure may not be triggered with the introduction of the initiative to the Legislative Assembly, but only after consultation with the Executive Council.

There are initiatives in a vast shared area (most cases), conditioned initiatives (Article 105), initiatives reserved to the Government (Article 104, complemented by provisions of the Basic Law), as well as initiatives reserved to Members (notwithstanding the latter's omission in the Rules, such reserved initiatives result from the structuring principles of the political system and are confirmed by the praxis). There is also a temporal limit to legislative initiatives, reflected in the renewability (or not) thereof.

At this juncture, I shall not discuss the supervening legislative initiatives, as their relevance comes at a later moment.

Next, the President of the Legislative Assembly exercises his or her duty as the guardian or gatekeeper of constitutionality and legality. Having received a bill, he or she decides on the acceptance or rejection thereof — based on the substantive, organic and formal limits⁶⁶⁴ established in the Rules of Procedure, but also, and necessarily, on the indispensable issue of constitutional conformity.⁶⁶⁵ He or she may not decide on the opportunity or political convenience of a bill. The Presidents's decision is subject to notification to all Members, who also receive a copy of the (accepted) bill, with a deadline for appraisal thereof, pursuant to Article 111.

In the meantime, an informal moment of technical assistance may occur, consisting of a prior assessment conducted by an adviser or an advisory team, to screen the bill's conformity with the Basic Law, with the Rules of Procedure and with Law No. 13/2009.

The President's decision to reject, accept or order the reform of a bill is appealable to the Plenary, under the terms of Article 111. The legislative procedure shall terminate here, in case the rejection is confirmed and thus rendered definitive.

⁶⁶⁴ “(a) Be introduced in writing; (b) Be drafted in Articles; [...] (c) Contain a designation that succinctly identifies its main object; (d) Be accompanied by an explanatory note.”: Article 108.

⁶⁶⁵ The Rules omit, as detected above, a general norm on the rejection of a bill in non-conformity with the Basic Law (including, I would venture to say, the Joint Declaration and maybe the international treaties, de minimis the ones provided for in Article 40 of the Basic Law).

1.1 Cancellation

The aforementioned Resolution No. 2/2017 introduced significant modifications in this matter. Henceforth: “*The proponents of a bill may withdraw it until the debate on the specifics thereof begins.*”

The Explanatory Note of this Draft resolution to amend the Rules of Procedure of the Legislative Assembly reads as follows:

“The current rule in paragraph (1) of this Article allows legislative initiatives to be withdrawn until the end of the general debate, in the case of original initiatives, or until the end of voting on the specifics, in the case of supervening initiatives. It appears, however, that for various reasons, its has been necessary to withdraw some legislative initiatives after its approval in general;⁶⁶⁶ therefore, this norm has to be amended in accordance with the Legislative Assembly’s operating practice. Thus, several Members suggested that such rule be changed insofar as to enshrine the following: any bill may be withdrawn by its proponents until the final stage of its appraisal, ie until the beginning of the debate on the bill’s specifics. The Committee considers that, in this matter, the primacy of will/intent of the proponent (Members and Government) should be respected, which explains the suggested amendment to the norm, in harmony with the opinions received in the two hearings carried out by the Committee.”

The legislative procedure may terminate at this stage (or in the immediately following one), ie also in the event of acceptance of a bill. Before, such an eventuality depended on the respective proponents — and only these actors, naturally — withdrawing such bills until the end of the general debate.⁶⁶⁷ Nowadays, such an outcome has been deferred until the beginning of the debate on the specifics. In any case, a proponent has

⁶⁶⁶ This formal text of the Legislative Assembly alleges “that, for several reasons, there has been already a need to withdraw some legislative initiatives after their approval on the whole”: after accepting what was obvious under the then applicable framework, ie that original legislative initiatives could only be withdrawn until the end of the general debate — why did the Committee not draw the logical conclusions and, instead, muddle the waters? It is one thing to amend and adapt the Rules to a sustained praxis; a wholly different matter is a praxis that was (repeatedly) violating applicable procedural norms, thus generating an obvious non-conformity with the Rules — by means of invalidating deficiencies or mere irregularities. This was the adopted practice at times: a disagreement with the Rules resulted in an amendment thereto, without pondering the negative conclusions to be reached, nor signalling the practices to be avoided. Could this sanitised approach open the gates for non-compliance with the Rules?

⁶⁶⁷ Article 110, paragraph (1). This was the last moment when such could happen. The withdrawal until the end of the debate on the specifics, a *later moment* in the legislative procedure, applied only to amendment proposals, as is clear from the procedural norm. In other words, this is a properly integrated situation and should not raise any interpretative doubts. With a different conclusion, and of doubtful compliance with the above, see Deliberation No. 5/2009/Board, available at <https://www.al.gov.mo/uploads/attachment/diarioTwo34/918375862082078a2a.pdf>, in which it is argued that there is an “omitted case” requiring such gap to be filled; also, that a bill may still be withdrawn until the end of voting on the specifics by the plenary. I would like to bring forth the above note regarding the amendment introduced by the 2017 Amendment to the Rules of Procedure: this new framework has, at least, the merit of duly regulating the behaviour or practice already set in motion, which were hitherto of dubious procedural conformity.

the power to cancel his or her legislative initiative.⁶⁶⁸

One must underline that there are deadlines and exclusionary moments for the exercise of this prerogative, as a factor that both asserts the principle of the separation of powers, and also expresses the Legislative Assembly as the (formal) preserve of the legislative procedure from a certain procedural moment onwards.⁶⁶⁹ After the general debate concluded, under the previous procedural framework, and until the beginning of the debate on the specifics, under the current framework, the proponent of a bill is “dispossessed” thereof. Its fate is now entrusted to the Plenary of the Legislative Assembly.⁶⁷⁰

With the cancellation of an initiative (as well as, for example, the renewal thereof), the rationale is identical and without distinction as to the proponents, be it the Government or the Members, ie all bills are treated under the same rules, with equal dignity. Such is the procedural framework, which is neither lacunose, nor doubtful.

From that moment onwards, the Legislative Assembly, as a body, has the preserve of the process, removing the initiatives from the proponent Members or Government. The focus swings — a natural and common feature in comparative law — from the entities competent to exercise legislative initiative, to the competent legislative body, ie the lawmaking entity with the power to approve the initiative.

The procedural framework underwent modifications under the 2017 review of the Rules, as alluded to above. One other change was the suppression of the possibility to adopt an initiative, as I shall demonstrate in a while.

In cases of mandatory legislative initiatives, such as the budget bill, the cancellation of the initiative should not be considered acceptable.

1.2 Adoption of an Initiative

This traditional mechanism was expelled from the Rules by the 2017 review. However, it’s worth mentioning for several reasons: its significance, the efficiency and rationality it brought to the legislative procedure, its alignment with a vision of the legislative procedure that stressed the switch of domain or the preserve of the process after the introduction of initiatives, and finally, the potential consideration for its future reinsertion into the Rules, as should reasonably be envisaged.

Proceeding with the analysis of the framework applied in the MSAR for nearly

⁶⁶⁸ An amendment proposal (modification, substitution, addendum, suppression) that is accepted may also be withdrawn by the respective proponent until the end of the debate on the specifics.

⁶⁶⁹ Until such moment, the holder of the specific legislative initiative has the capacity to “*freely dispose of the text*”: as stated by Manuel Aragón Reyes, ‘La Iniciativa Legislativa’ in *Estudios de Derecho Constitucional* (CEPC 2009) 641. Afterwards — a moment that is variable in comparative law — “*Once this fact has occurred [...] there is volition in the House and withdrawal is no longer possible*.”: *ibid*.

⁶⁷⁰ Without prejudice to the admissible exceptional cases of veto and the framework provided for in Article 17 of the Basic Law for returning the law by the Standing Committee of the National People’s Congress.

two decades: a legislative procedure could survive, even against the will/intent of its proponents, be these Members or the Government, “*If another Member adopts, as his or her own, any and all bills intended to be withdrawn, the initiative shall continue as the bill or bills of the adopting Member*”, Article 110, paragraph (2) — ie the adoption of an initiative.

The power to cancel a legislative initiative was curtailed⁶⁷¹ by the possibility of adoption. The reasons for the latter were the efficiency and rationalisation of parliamentary work, by being able to conserve others’ initiatives — “if this initiative by substitution were not admissible, the other holders of the power of initiative could always introduce a bill with the same content as the withdrawn one; such an event would, in principle, lead to a useless repetition of the procedural phases already undergone.”⁶⁷²

A complex question is whether the adoption of an initiative in matters reserved to the Government’s legislative initiative is acceptable. That a Member could, in general, adopt a legislative initiative by the Government was clearly established in the Rules — *adopts, as his or her own, any and all bills*. The problem will only surface if the Government bill regulates matters within the scope of its reserved original legislative initiative,⁶⁷³ for example, on the political structure. I am convinced, *de minimis* by the literal or textual element of interpretation of the procedural norm — *any and all bills* — that the legal order of Macau does not impede the acceptance of adopted bills, even in such cases of reserved legislative initiative. The grounds for exercising such reserved initiative, the political reasons, the issue of timeliness, etc, shall already have blurred since the original bill was introduced to the Legislative Assembly.

The Explanatory Note of the Draft resolution to amend the Rules of Procedure of the Legislative Assembly, 2017, simply refers to this subject thusly: “The repeal of paragraph (2) of this Article was deliberated, since the adoption, by other Members, of a withdrawn legislative initiative, does not correspond to the legislative practice of the Legislative Assembly.” Nothing else was mentioned.

Such norm was not inapplicable through lapse thereof: it performed a traditional function (at least potentially), it was intended to boost the efficiency and rationality of the legislative procedure — such function reinforced with the advancing of the permissible moment for cancellation of the initiative, as operated by the same review of the Rules, ie bills already approved in general and with examination concluded in committee, may be withdrawn — and, finally, there are many procedural norms, which, being of little or no practical utility, have not been — nor should they be — suppressed. For example, norms designed for exceptional or special situations, as is precisely the case of adopting a

⁶⁷¹ Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 98.

⁶⁷² *ibid.*

⁶⁷³ Not agreeing with adoption in matters of reserved original legislative initiative, Jaime Valle, *A participação do Governo no exercício da função legislativa* (Coimbra Editora 2004) 98, mentioning a frustration of such reserved initiative.

legislative initiative.

2. On the General Debate

At this phase, but not only herein, the principle of prior knowledge of the texts comes into full effect: “No documents, including bills, reports, advisory opinions and memoranda of the committees, may be debated or voted on, either on the whole, or on the specifics, without having previously been published in the Legislative Assembly Bulletin or distributed to the Members, at least five days in advance.”, according to Article 112.

Resolution No. 2/2017 amended this norm, by establishing: “2. The preceding paragraph shall not apply to: a) Documents relating to urgent meetings, which are distributed with the respective written summons;”.⁶⁷⁴

The general debate focuses on the principles and the system of each bill, as well as its opportunity from the political, social and economic points of view.

The general debate is divided into two phases.

In the first phase, the first proponent or signatory, in the case of Members’ bills, or a Government representative, in the case of Government bills, takes the floor to address the Plenary. In accordance with Resolution No. 1/2015, which amended the Rules of Procedure of the Legislative Assembly, Article 60 (Right to take the floor for presenting bills and proposals) was replaced by the following text: “*The right to take the floor for the purpose of presenting bills is limited to the brief indication of the object thereof and may not exceed twenty minutes.*”,⁶⁷⁵ followed by the clarifications that may be requested from the addressors.

The second phase, which may take place during a different plenary meeting, is exclusively dedicated to the debate, and the Plenary may deliberate that such debate be narrowed down to divisions of a bill, whenever such autonomy is justified.

The debate ends when there are no more scheduled speakers, and after the debate

⁶⁷⁴ In the respective Explanatory Note, one may read: “In view of the regulation of urgent Plenary meetings and the issuance of votes, there is a need to change this Article, in order to provide that documents related to these two matters shall not abide by the five-day advance deadline applicable for the remaining documents to be debated and voted on at the plenary meetings.” In effect, as referred to in the same document, “The Basic Law, in Article 74, paragraph (5) stipulates that “the President of the Legislative Assembly is competent to call urgent meetings on his or her own initiative or at the request of the Chief Executive”. However, the Rules of Procedure do not specifically regulate these meetings, namely the deadline for calling them and the respective distribution of documents. Following up on the opinions expressed in the consultation carried out during the current legislative session, the Committee is now proposing a period of 24 hours for summoning urgent meetings, as well as for the simultaneous distribution of documents related thereto.”

⁶⁷⁵ The Explanatory Note of the draft Resolution mentions the following: “Article 60 of the Rules of Procedure makes a substantive delimitation of the issue, determining that taking the floor for this purpose should be limited to the brief indication of the object. However, there have been difficulties in its application, so several Members have sent their opinion to the Committee that a maximum time for speaking be introduced. Having debated the matter within the Committee, taking as a reference said opinions, it was possible to reach a consensus on this matter, so the Committee is now proposing 20 minutes as the maximum limit for the presentation of bills.”

is over, the voting in general takes place. The President may postpone voting to a new plenary meeting. In other words, this constitutive moment may, or may not, temporally coincide with voting in general. In practice, there have been examples of both situations.

2.1 Incidental Procedural Issue: On the Conflict of Interests

At this stage,⁶⁷⁶ an incidental procedural issue may arise due to the existence of a conflict of interests.⁶⁷⁷ In other words, the framework governing the conflict of interests, as a preventive regulatory mechanism in terms of transparency and smooth procedures, always has the potential to lead to a specific procedural incident.⁶⁷⁸

The Legal Status of the Members establishes that Members may not participate in the debate and voting on matters in relation to which they have an interest, whether pecuniary or not, provided that such interest is direct, personal and immediate.⁶⁷⁹ The existence of such interests shall be declared by Members until the beginning of the debate on the matter in question. The declaration must be in writing⁶⁸⁰ and addressed to the President of the Legislative Assembly or to the President of the committee wherein the matter is to be debated or voted on. Such a declaration is communicated to the Plenary or to the other members of the committee, whichever is applicable. In such a scenario, therefore, there is no place for deliberation on the existence of the conflict of interests — the Members recognise and declare such fact.

This framework applies indistinctly to the legislative procedure, resolutions and other procedures.

Any Member may — by stating sound reasons, but not necessarily in writing —

⁶⁷⁶ Apparently, this incident may also be actionable during the examination of the specifics in the Committee. See Article 35, paragraph (2) of Law No. 3/2000, *On the Legislature and the Legal Status of the Members of the Legislative Assembly*. At least one case is known to have thus occurred. Consider the following hypothesis: during the presentation, debate and voting on the whole, the Member concerned was absent; at the first meeting of the competent committee entrusted with the examination of a bill on the specifics, the Member both belongs to said committee and is present at such meeting.

⁶⁷⁷ Law No. 3/2000, *On the Legislature and on the Legal Status of the Members of the Legislative Assembly*, Articles 34 et seq. Note that, unlike other systems, there is no broad set of guarantees accompanied by impediments. As a matter of fact, it has already been mentioned that the legal framework of the conflict of interests is still insufficiently addressed, Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 403. There is also no provision for an Ethics Committee, nor for registration or deposit of Members' interests with the regional Parliament. In Hong Kong, the registration of interests is regulated under Article 83, *Registration of Interests, Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended to 31 October 2014)*.

⁶⁷⁸ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 407. However, in cases of possible or potential conflict of interest, its activation should occur even if there is a mere appearance of such conflict, as the author emphasises, on page 408.

⁶⁷⁹ Article 34, paragraph (1), further adding, in paragraph (2): "For the purposes of the preceding paragraph, also included are interests of the same nature held by persons who have family or kinship relationships with Members." I shall not develop the complex concept of direct, personal and immediate interest.

⁶⁸⁰ I believe that, if it proves de facto impossible to declare, in writing, with any anticipation (for example, an issue raised unexpectedly) and a plenary (or committee) meeting is taking place, the conflict of interest may (and should) be declared verbally, with the principle of orality of the plenary (or committee) prevailing.

invoke⁶⁸¹ the existence of the interest *vis-à-vis* another Member, without prejudice to the latter's own declaration.

In this situation — and unlike what happens in the event of a declaration, which does not require deliberation — the Plenary or the committee, whichever applicable,⁶⁸² shall deliberate on the existence of the invoked interests, provided that no declaration to that effect is forthcoming from the Member potentially in a situation of conflict of interests. The Member concerned must be heard on the Colleague's allegations, in order not only to objectively assess the existence of the invoked interest, but also to ensure the right to an adversarial defence and the protection of his or her honour.⁶⁸³

The formal recognition of a conflict of interest does not preclude the right of the Member, or Members, to attend plenary or committee meetings, nor the right to provide requested information and clarifications. The declaration or deliberation, in the sense that the interest under Article 34, paragraph (1) of the Legal Status of the Members, does, if in fact, exist, has the effect of preventing the concerned Member(s) from addressing the issue and from exercising the right to vote thereon.⁶⁸⁴

The willful failure to declare the existence of a conflicting interest by Members, until the beginning of the debate of the matter in question, is censured by the Plenary or by the committee, whichever applicable, with the issuance of a vote to that effect, which is published in the OG.⁶⁸⁵ There are no other legally applicable penalties, namely disciplinary ones.

This is what the current law establishes. For reasons that are easily understandable, such as transparency and ethics in the conduct of public affairs, a procedural incident is opened, reflected, albeit timidly, in the normal course of the legislative procedure, especially by preventing the exercise of the right to vote. Such right would have been harmed or contaminated due to interests alien to the exercise of the parliamentary function, thus being able to illegitimately distort the true exercise of the function for which the Member was elected or appointed.⁶⁸⁶ In other words, the idea is to “reinforce the guarantee of neutrality, impartiality and independence in the exercise of

⁶⁸¹ Which is understandable. Think of a situation whereby a Member is made cognisant of a possible conflict of interest affecting another Member. It makes no sense to compel the former to write (and translate?) such invocation as the Assembly's work proceeds.

⁶⁸² Therefore, under the current procedural norms, the *decision* on the existence of a conflict of interest affecting Member Mr. Sou Ka Hou, taken by an act of the Board, defies comprehension.

⁶⁸³ Only thus will the *due process* be respected, allowing for the Member concerned to formally defend him or herself, in a procedurally established manner, before the competent body.

⁶⁸⁴ Under Article 36, paragraph (2): “Failure to exercise the right to vote, under the terms of the preceding paragraph, does not count as an abstention.”

⁶⁸⁵ Article 37 of the Legal Status of the Members.

⁶⁸⁶ “All Members, whether elected or appointed, represent the interests of the Macau Special Administrative Region, [...] and of the respective population”: Article 7, paragraph (2) of Law No. 3/2000, On the Legislature and the Legal Status of the Members of the Legislative Assembly.

the Member's mandate."⁶⁸⁷

A comparative law note on a pair of systems: Portugal and Hong Kong.

In Portugal, Members must declare a conflict of interest when they introduce a bill or intervene in any parliamentary work, whether in committee or in the Plenary. To this end, situations of conflict of interest are considered to be those in which Members *per se* or certain family members are the legal holders of rights or parties to transactions the existence, validity or effects of which may be modified as a direct consequence of the law intended to be approved; also included are situations where Members belong to corporate bodies or are representatives, proxies, employees or permanent collaborators of partnerships, companies or legal persons with a disinterested purpose, the situation of which may, directly or indirectly, be modified by the law to be approved by the Assembly of the Republic.

In the neighbouring HKSAR, LegCo Members may not vote on any matter in which they have a direct monetary interest, unless such interest is common to the rest of the population of Hong Kong, to a certain sector, or the matter in question is related to a Government policy.⁶⁸⁸

“Underlying the conflict of interest issue is tension or, better still, the conflict between the protection of the public interest (as a general interest), on the one hand, and the fundamental rights of property, of private initiative and passive suffrage, on the other. Truly, values such as equality and competitive pluralism are also at stake.”⁶⁸⁹

Consequently, in addition to moral and ethical boundaries, politico-institutional⁶⁹⁰ and legal criteria, values and objectives are, inevitably, at the forefront of this theme.

This mechanism of guarantee and political marketing (in the sense that it places Members who declare conflicts of interests on the pedestal of probity, transparency and righteousness — “*when in doubt, I favour the public interest*”) serves to increase and

⁶⁸⁷ Cristina Máximo dos Santos, *Incompatibilidades e impedimentos dos Deputados à Assembleia da República e às Assembleias Legislativas Regionais dos Açores e da Madeira* (Coimbra Editora 2007) 897.

⁶⁸⁸ Cf “84. Voting or Withdrawal in case of Direct Pecuniary Interest (1) In the Council or any committee or subcommittee, a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy. (1A) In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.”: Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended on 31 October 2014).”

⁶⁸⁹ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 401.

⁶⁹⁰ Maria Benedita Urbano, *Representação Política e Parlamento - Contributo para uma Teoria Político-Constitucional dos Principais Mecanismos de Protecção do Mandato Parlamentar* (Almedina 2009) 404.

guard neutrality, impartiality and independence in the exercise of a Member's mandate.⁶⁹¹

The maxim is to exclude a Member's participation in, and voting on, issues wherein, or from which, a personal benefit — or pertaining to someone close to him or her — namely pecuniary, or a conflicting extra-parliamentary issue, may arise.

Differently, a Member is not excluded from *benefitting from the duties of his or her office*, because he or she is acting solely *as such* and as a representative of public interests.

For example, a Member may, of course, vote for himself, in any *intra-parliamentary* election, whether in a plenary meeting or in committee.

Naturally too, any parliamentarian may exercise his or her procedural right to defend one's own honour and dignity — as a Member, I should point out.⁶⁹²

Similarly, the challenges for redress and appeals, namely in Article 91 (Internal appellate proceedings),⁶⁹³ could not be adequately understood, when the matter in hand impacts the exercise of a Member's functions. If, for example, a Member challenges the rejection of a bill, will he or she also be in a situation of conflict of interest? (The bill was introduced by that very same Member and not by another Colleague.) Or a challenge to a rejection of an amendment proposal? I surmise that, evidently, it would be absurd to claim a conflict of interests in these situations.

Finally, a Member may also take the floor and address parliament to lodge a protest, as provided for in the Rules,⁶⁹⁴ when the issue in hand is precisely the exercise of the mandate.

⁶⁹¹ Cristina Máximo dos Santos, *Incompatibilidades e impedimentos dos Deputados à Assembleia da República e às Assembleias Legislativas Regionais dos Açores e da Madeira* (Coimbra Editora 2007) 897.

⁶⁹² See Article 64 (Explanations): "Any Member may address to request explanations for the purpose of defending his or her honour and dignity."

⁶⁹³ "1. The acts by the President and the Members of the Board, enacted in the exercise of the powers provided for in the present Rules of Procedure, are subject to challenge for redress thereto and to appeal to the Board. 2. The Board's deliberations, in the exercise of the powers provided for in the present Rules of Procedure, are subject to challenge for redress thereto and to appeal to the Plenary."

⁶⁹⁴ On protests, under the procedural framework, see Report No 1/VI/2019, of the CRPMM. I should start off by stating my disagreement, on several points, with the content of said Report. The Committee — a specialised one, in these matters — admitted, in accordance with plainly evident factuality, that, since there is no provision for the publication of written protests in the Legislative Assembly's Bulletin, there may be written protests and not only oral ones; however, such protests, in a tortuous interpretation, would only be admissible if and when, at the end of the plenary meeting, it had not been possible to present them orally(!). The same Report accepts the existence of counter-protests, despite the complete silence thereon in the Rules. So: where there is an express provision on written protests, the committee interprets this power in a highly restrictive way, whereas here, despite being absent from the normative provisions of the Rules of Procedure, the committee interprets very broadly and generously, granting such prerogative. Why such disparities in approach? Why these winding paths? Why the absence of an interpretative compass? Furthermore, I am surprised by this attitude when, in such a Report — which operates a highly restrictive interpretation by distinguishing (and re-creating) where the legislator/norm-maker did not distinguish (stating that there can only be written protests in special cases, such as the end of the plenary meeting) — furthermore candidly and rightly affirms, on another issue, "*where the legislator does not distinguish, the interpreter should not distinguish*". This is precisely the error repeated in that very same Report...

2.2 On the Conflict of Interests continued — The Praxis in a Process of Suspending a Member’s Mandate

It is beyond comprehension how the Board of the Legislative Assembly⁶⁹⁵ declared, pursuant to an unreasoned advisory opinion by the CRPMM, that a conflict of interest existed in relation to Member Sou Ka Hou *vis-à-vis* a process in which said Member was the subject of a possible suspension of his own mandate.

In these cases — of suspension of mandate and of disqualification from office — the whole dynamics of the conflict of interest framework is worthless, when the intended protective scope is the public interest, namely parliamentary representation, both with regard to the exercise of the mandate by the Member in question, and also, essentially, in relation to the Legislative Assembly as an institution.⁶⁹⁶ A contrary viewpoint would be tantamount to a gross undermining — and a possible reorientation to other types of objectives — of such framework.

This case of suspension of mandate, the only one so far in the History of MSAR and the second one in Macau, deserves some extra reflections, considering the number of legal mistakes which occurred.

2.3 The Political Act or Acts Performed in the Exercise of the Political Function — A Few Considerations

A first and unavoidable point — the decisive point in the ensuing judicial dispute — is whether the decision to suspend a Member is, in the legal order of the MSAR and the adopted legal terminology,⁶⁹⁷ a political act or an act performed in the exercise of political function. Secondly, if it is a political act, is it justiciable?⁶⁹⁸ If such an act is not, in

⁶⁹⁵ Deliberation No. 35/2017, dated 22/11/2017, in which it was determined, namely, that the Member in question was in a situation of conflict of interests, being thus prohibited from participating in the debate and voting. Furthermore, this Deliberation is illegal, because this body is devoid of competence to deliberate on conflict of interests (cf. Article 35, paragraph 4) of the Legal Status of the Members) — the Legislative Assembly, meeting in plenary is the competent decision-making body. The letter and the spirit of the law are perfectly clear, and doubt-free, and there is, obviously, no omitted case or procedural lacuna, contrary to what the Board tried to argue in self-contradicting terms. See, moreover, the Decision of the CSI in Case No. 20/2018, where the Court ruled that “*It is not for the Court to ascertain (for judicial procedural reasons) whether it (the Board) did so legitimately, or if whoever could have deliberated was the Plenary of the Legislative Assembly as the author of the decision to suspend the Member’s mandate.*” Moreover, this same Decision emphasises several irregularities or illegalities, for instance: “*The Committee, which had met twice, drew up a document which it called “Report”: not a true advisory opinion, but rather something approaching a mere narrative or descriptive report; or when, referring to the single or implicit objective of the deliberation to suspend the mandate, the following transpires: “We are not saying whether such was well or badly executed.”*”

⁶⁹⁶ As mentioned in Report No. 1/VI/2017, CRPMM, “the suspension of the mandate is relevant not only to the Member concerned, but also, and essentially, to the Legislative Assembly as an institution.”

⁶⁹⁷ Article 19, subparagraph (1) of Law No. 9/1999, *General Framework Law on the Judiciary Organisation* (GFLJO).

⁶⁹⁸ Article 19, subparagraph (1) of Law No. 9/1999: “The following are excluded from administrative, fiscal and customs jurisdiction and litigation: 1) Acts practised in the exercise of the political function and liability for

principle, justiciable, are there exceptions? In other words, may a political act that may not be, in principle, justiciable, be legally challenged, especially when the impugned act infringes upon fundamental rights?

This is not the most suitable place to comment — in detail and in depth — on such a complex issue,⁶⁹⁹ but I would like to jot down the following considerations.

The concept of a political act,⁷⁰⁰ mainly for the purposes of its immunity from judicial control, is a concept in crisis and has, therefore, been gradually reduced. Indeed, in the words of VIEIRA DE ANDRADE, “However, the concept of political act must be the object of a restrictive interpretation.”⁷⁰¹

As emphasised, “the concept of political act must be interpreted restrictively, otherwise the Rule of Law shall be frustrated, as it requires that such a category of acts be reduced to a minimum”.⁷⁰² Or, in a work related to the Law of Macau, “In no case may we say that (political) acts are outside and above the legal order.”⁷⁰³

This is the “point of arrival of a long and distressing path in the struggle against the possibility of invoking political motivations to limit the powers of control of the legality of the Administration by the administrative courts.”⁷⁰⁴

Or, in the words of another Author,

“It is thus necessary to adopt a restricted concept of political acts [...]”

On the other hand, the hypothesis of an extension of the scope of the non-justiciability of acts, which could be linked to letter of that Article 4⁷⁰⁵ has

damages emerging from such exercise, either by commission or by omission.” The function of this norm is to limit the sphere of administrative litigation, and not of any other area of competence or jurisdiction of the courts of Macau. *À propos*, Marcelo Rebelo de Sousa, *Lições de Direito administrativo*, vol I (Lex 1999) 87–88, saying that it is “immediately evident” that political acts do not pertain to administrative activity. Afonso Queiró, «Actos de Governo» e contencioso de anulação (BFDC 1969) 24–25, contends that this type of norms is “totally superfluous”: because the administrative courts would, by their very own nature, be incompetent to hear cases on political acts; other courts, however, might have such competence.

⁶⁹⁹ “The conceptualisation of so-called political acts has challenged the astuteness of public law experts, without reaching a consensual and satisfactory definition.”: Hely Lopes Meirelles, *Direito administrativo Brasileiro* (19th edn, Malheiros 1994) 609, or “The concept of political act – and in general that of political activity – has been one of the most arduous problems posed by public law theory; its breadth and importance is easily imaginable if one thinks of its repercussions on the principle of legality of state action and the very concept of the Rule of Law.”: José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 *Revista de Administración Pública* 73, 73–74.

⁷⁰⁰ A creation mainly of French law, or, more remotely, as a precedent to political acts, according to some, derived in particular from the ancient (Persian) Satraps, “*wrongly designated as tyrants, whose acts were not controlled and whose measures were cruel and unjust*”: Paula Eguizabal Cerna and Jose Humberto Aguilar and Ruben Adolfo Márquez, *El control jurisdiccional de los actos políticos* (Universidad de El Salvador 2011) 6.

⁷⁰¹ Vieira de Andrade, *A Justiça Administrativa* (Almedina 2009) 59.

⁷⁰² Diogo Freitas do Amaral, *Direito Administrativo, IV*, (Lisboa 1988) 164.

⁷⁰³ Jorge Bruxo and Luciano De Almeida, *Manual de direito processual administrativo contencioso* (IPM 2014) 24.

⁷⁰⁴ Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 186.

⁷⁰⁵ Referring to the legislation of the Portuguese legal order, very proximate in this particular question to the

to be put aside, as it would be contrary to the general evolutionary direction of administrative litigation, which clearly favours the expanding control over the acts of public authorities, [...] granting greater protection of citizens' legitimate rights and interests.”⁷⁰⁶

A possible approximation to a political act, just for the purposes of a better understanding by the reading, is that of acts practiced by high organs of the State — or by the Region — in the exercise of primary political functions, which do not lead to legislative nor judicial acts. This is not a definition or notion, but only an initial conceptualisation useful for the discussion ahead.

Regarding relevant legal theory on the issue, FERNANDO ALVES CORREIA opined that political acts “represent the exercise of faculties directly conferred by the Constitution, without being subject to ordinary law”.⁷⁰⁷ According to AFONSO QUEIRÓ, “Those acts the practice of which is provided for in the Constitution, with a content that is determined or circumscribed by ordinary laws, are not political acts.”⁷⁰⁸ Alternatively in addition to acts related to foreign policy, if one prefers, and according to the same Author, the so-called “auxiliary acts of constitutional law” are acts “aimed at setting the constitution in motion and at providing for its functioning.”⁷⁰⁹

A primal criterion is erected, based on the superior normative source on which the exercise of a political act finds its fountainhead, ie the constitutional level. If one accepts the transplantation of this doctrine to the MSAR, then it would be irrefutable to deny that the act of suspending a Member has the nature of a political act, since nothing in the Basic Law even contains or hints at the suspension of the mandate.⁷¹⁰ Therefore, in this case, the act of suspension would never be a political act or an act practiced in the

aforementioned Article 19.º, paragraph (1) of the GFLJO, Article 4 of the Portuguese “counterpart” law establishes: “*Administrative and fiscal jurisdiction to adjudicate on litigation is excluded, when the object thereof is, namely, the challenging of: (a) Acts practised in exercising the political function.*”

⁷⁰⁶ Jorge De Sousa, ‘Poderes de Cognição dos Tribunais Administrativos Relativamente a Actos Praticados no Exercício da Função Política’ (2007) 3 Revista Julgar 134. Cristina Queiroz says: “*the progressive affirmation of the Rule of Law in the form of a “State of jurisdictions” entails a substantial reduction in the category of political acts as non-justiciable acts.*”: Cristina Queiroz, *Os Actos Políticos no Estado de Direito: O Problema do Controle Jurídico do Poder* (Coimbra 1990) 216. See also eg Fernando Condesso, who speaks about the “*substantive reduction of the non-justiciability (of political acts)*”: Fernando Condesso, *Lições de Direito Administrativo Geral* (2016) passim; Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 184; Alexandre Dos Santos Priess and José Everton Da Silva and Guilherme Thomé de Melo, ‘O controle jurisdicional dos atos políticos: uma força entre a tirania e a judiciocracia’ (2016) 35 Revista Da Faculdade De Direito Da UFRGS 98, et seq.

⁷⁰⁷ Fernando Alves Correia, *Justiça Constitucional* (Almedina 2016) 187. See also, *inter alia*, Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 Revista Jurídica UDABOL 83, 121.

⁷⁰⁸ Afonso Queiró, *Lições de Direito Administrativo* (Coimbra Editora 1976) 75.

⁷⁰⁹ Afonso Queiró, ‘*Actos de Governo*’ e *contencioso de anulação* (BFDC 1969) 22–24. See also Mário Aroso de Almeida, *Manual de Processo Administrativo* (2nd edn, Almedina 2016) 184–185, who highlights that “most auxiliary acts of constitutional law are practised by the President of the Republic or by the Assembly of the da Republic.”: 185.

⁷¹⁰ What is foreseen, for sure, is the disqualification from office under Article 81 of the Basic Law and, on the other hand, Article 80 does not touch on the issue of suspension. This is a creation of ordinary law.

exercise of political function, in accordance with the above adopted legal terminology, and would not benefit from the protective cloak of non-justiciability referred to in Article 19 of the General Framework Law on the Judiciary Organisation (GFLJO). A different question would be to examine which is the competent jurisdiction — the administrative one or another.

However, in view of the inherent nature of the act in question, I am not opposed to its qualification as a political act or an act practiced in the exercise of political function — this conclusion cannot, if the contradiction is to be avoided, be supported in the legal scholarship previously quoted.⁷¹¹

What I submit, without hesitation, is that any and all acts by a public power (including a political act) which conflict with or violate fundamental rights — and constitutional norms, it must be added as a matter of course — shall always be subject to judicial scrutiny. Always. Regardless of jurisdiction, competencies of courts, and types of judicial procedure or proceedings. Some remedial paths shall always be available, and in the case of Macau, the more so through a generous application of the *Principle of formal adjustment* established in Article 7 of the Code of Civil Procedure⁷¹², in order thereby to comply with the constitutional commands of the Basic Law — Articles 4, 11, 36, *inter alia*.

Exempting an act from judicial control would, among other things, be unnatural under the Rule of Law. It would constitute a reversion to other types of state organisation of past eras, at least to the French tendency, until a few decades ago, of an exaggerated protection of governmental acts.⁷¹³

My position is in uniform alignment with the growing doctrine in several legal orders, defending the jurisdiction of the courts — at least in the strictest or *de minimis* extent that such is necessary to protect fundamental rights — even when there is, or has

⁷¹¹ Fernando Alves Correia, *Justiça Constitucional* (Almedina 2016); Afonso Queiró, *Lições de Direito Administrativo* (Coimbra Editora 1976); Afonso Queiró, «*Actos de Governo*» e *contencioso de anulação* (BFDC 1969).

⁷¹² On this principle, namely its potential and relevance see eg Armando Isaac, ‘O princípio da adequação formal: ensaio de algumas nótulas e dúvidas’ (2001) 10 Boletim da Faculdade de Direito 59, 59 et seq.

⁷¹³ An altered panorama, above all “*since the creation of the Constitutional Council and after the 2009 constitutional reforms*”: as reported, for example, by Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 Revista Jurídica UDABOL 83. On the French contribution to the maximisation of the non-justiciability of these acts, and on the respective historical context, see eg José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 Revista de Administración Pública 73, 74 et seq; Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquímides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 35 et seq.

been a norm similar to that of Article 19 of the GFLJO,^{714 715} either under principles such as the effective judicial protection, constitutionality, or simply based on the root fundamentals of the Idea of the *Rule of Law*.

As HELY LOPES MEIRELLES states,

“But, as no one can contradict the Constitution [...] it follows that no act of the Public Power shall cease to be examined by the Judicial Power, if unconstitutional or harmful to a subjective right. The simple claim that an act is political act is not enough to limit judicial control, as it shall always be necessary for the Justice Power itself to verify the nature of such act and its consequences before the individual right of the applicant.”⁷¹⁶

⁷¹⁴ A good example is the Spanish Law of 1956, the *Ley de la Jurisdicción Contencioso-Administrativa*, which, in a similar legislative technique, exempted “political acts of the government” from administrative jurisdiction. Spanish scholarship, due to the entry into force of the new constitution and the establishment of principles “*immanent to the Rule of Law*”: considered this legal norm to have been derogated by the Constitution, Eladio Escusol Barra and Jorge Pérez, *Derecho Procesal Administrativo* (1st edn, Editorial Tecnos 1995) 301. Further informing that jurisprudence also chose to consider it necessary to interpret the norm in accordance with the Constitution, stating *inter alia*, that “*The doctrine of the political act cannot be invoked as a basis for the inadmissibility of administrative litigation, since the judge will be obliged to become acquainted with the act in order to determine if there are regulated contents of the act which may be justiciable*”: page 302. See also Eduardo García de Enterría and Tomás Ramón Fernández, *Curso de Derecho Administrativo*, vol II (CIVITAS 2004) 612–13, pointing to the derogation of such norm with the entry into force of the 1978 Constitution. This fundamental law provides for the following: “*Article 9: 1. Citizens and public powers are subject to the Constitution and the rest of the legal order. 2. Public powers shall promote the conditions for the liberty and equality of individuals and groups to be real and effective, by removing the obstacles that prevent or hinder their complete enjoyment, thus facilitating the participation of all citizens in political, economic, cultural and social life. 3. The Constitution guarantees the principle of legality, normative hierarchy, the publicity of the norms, the non-retroactivity of unfavourable norms on punishment and of norms restrictive of individual rights, legal certainty, and the accountability and the interdiction of arbitrariness by the public powers.*”: And also Articles 24, paragraph (1), “*All persons have the right to obtain effective protection from judges and courts in the exercise of their rights and legitimate interests, without, in any case, the right to defence being denied.*”: and 103, paragraph (1): “*The Public Administration serves the general interests with objectivity and acts in accordance with the principles of effectiveness, hierarchy, decentralisation, de-concentration and co-ordination, being fully subject to the laws and to the Law.*” (the latter, capitalised, in the sense of the legal order/system *per se*). By simply reading these norms, it is not difficult to find a correspondence between them and the norms and principles of the Basic Law of Macau.

⁷¹⁵ The aforementioned 1956 law was subsequently replaced by Ley reguladora 29/1998 de la Jurisdicción Contencioso-Administrativa: “Article 2 – The courts with administrative jurisdiction shall adjudicate on cases that arise in relation to a) The judicial protection of fundamental rights and the contents regulated in, and the quantification of damages/compensation to be paid or awarded, all of which pertaining to acts of the Government and to the Councils of Government of the Autonomous Communities, whatever the nature of such acts [...].” This new law, in addition to normatively establishing in ordinary law what legal scholarship and jurisprudence had been defending since the 1978 Constitution, had a recognised catalytic effect across borders, serving as a paradigm for other legal orders and systems. For example, “In our country, and with a strong influence from Spanish law [...] we adhere to the theory that acts of government are under the control of the Courts of Justice, without prejudice to certain requirements, which are: a) a violation of fundamental rights; b) a substantive content for the act to be justiciable; c) a resulting compensation for damages.”: Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquimides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 156 et seq citing various doctrine and jurisprudence from that country.

⁷¹⁶ Hely Lopes Meirelles, *Direito administrativo Brasileiro* (19th edn, Malheiros 1994) 609. Vide ainda, por exemplo, Alexandre Dos Santos Priess and José Everton Da Silva and Guilherme Thomé de Melo, ‘O controle

On the other hand, “the possibility of pointing to an ideal content — positively demonstrated — of a separation of powers, as an acceptable reason for violating fundamental rights, is unthinkable.”⁷¹⁷ Or, using a different terminology — which, in this specific domain, equates with a wholly different set of *concepts* — WANG KAI states thus:

“we understand that the scope of state acts exempt from the scrutiny of administrative action is very reduced; in some countries, the acts of the state are not administrative acts, which is the reason why they cannot fall within the scope of the administrative action. On the other hand, the political nature of the acts, as a reason invoked to reject scrutiny via administrative action is less marked; if that reason is used, in view of the people’s right to judicial action, this will leave an impression of denial of justice.”⁷¹⁸

CARLOS BLANCO DE MORAIS alludes to an anachronistic *lacuna* and an unexplainable blank area:

“Nonetheless, there are organic-formal and temporal requirements of an objective nature that constitute constitutional impositions on political acts, being incomprehensible that their omission be non-justiciable, since their occurrence may be arbitrary and potentially create grave institutional crises”⁷¹⁹

JOSÉ FERNÁNDEZ-VALMAYOR, in a classic text, teaches:

“The immunity of certain acts (especially in the international field) is perfectly explained without a necessary reference to the theory of political acts; immunity, moreover, derived from the non-existence, in particular, of a right against those types of acts, which cannot directly affect the sphere of private rights.”

jurisdicional dos atos políticos: uma força entre a tirania e a judiciocracia’ (2016) 35 Revista Da Faculdade De Direito Da UFRGS 98, 110–11, “one may conclude that judicial control over political acts is possible, since every act practiced by the State is linked to the constitutional norm. In addition, the Judicial Power can assess any threat or violation of individual or collective rights, even if it arises from the exercise of a political act, due to the principle of non-exclusion of judicial control.” See also Marco Caldeira, *Actos Políticos, Direitos Fundamentais e Constituição* (AAFDL 2014), *passim*.

⁷¹⁷ Pedro Fernández Sánchez, *Lei e Sentença, Separação dos Poderes Legislativo e Judicial na Constituição Portuguesa*, vol II (AAFDL 2017) 789.

⁷¹⁸ Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 86.

⁷¹⁹ Carlos Blanco de Moraes, *Justiça Constitucional: Tomo I* (Coimbra Editora 2002) 530–31. See, in this context, Jorge Miranda, ‘Juizes constitucionais e Parlamentos - A experiência de Portugal’ (2019) 74 Revista do Ministério Público do Estado do Rio de Janeiro 119 “the Constitution confers jurisdiction on the Constitutional Court to judge, at the request of Members, the appeals relating to the disqualification from office and to the elections held in the Assembly of the Republic, as well as in regional legislative assemblies [art. 223, paragraph 2, subparagraph (g)]. It is progress towards strengthening the Rule of Law, which means that political acts that may affect Parliament’s democratic guarantees are subordinated to judicial control. The process is regulated in the organic law of the Court (Articles 91^a-A and 102^a-D). The doctrine of internal deficiencies is in crisis vis-à-vis the demands of the rule of law.” I repeat: when fundamental rights are at stake, the door to judicial protection should always be opened, regardless of the political nature of the offending act.

Underlining immediately,

“And precisely when these acts, through their application, come into direct relationship with the rights of individuals, then — as we have observed in the international arena — they will be perfectly justiciable by the common judge.”⁷²⁰

In the context of another legal order,

“Colombian constitutional jurisprudence, before and after the 1991 Constitution, has recognised the existence of political acts, namely by the President of the Republic; although it recognises a sphere of greater freedom in their issuance, such at no time represents an endorsement of arbitrariness by the Executive, since it has established clear parameters for the control of said acts.”⁷²¹

And in another,

“The other acts of political direction enacted by the Government, which generate legal effects, violating subjective rights and legitimate interests, shall be subject to legal challenge before the administrative jurisdiction, which may control the regulated content. Faced with the position of those who defended the inadmissibility of the appeals against the acts considered “of government”, by denying their administrative nature, jurisprudence — and also most of scholarship — has ended up recognising the possibility of judicially controlling said acts, just like discretionary administrative acts. The recognition of the right to effective judicial protection requires it. Consequently, the general rule is that the acts of political direction of the Government, insofar as they do not have the rank of law and generate legal effects, will be open to challenge as to their regulated content before the

⁷²⁰ José Fernández-Valmayor, ‘La doctrina del acto político: especial referencia al derecho italiano’ (1967) 53 *Revista de Administración Pública* 73, 129–30.

⁷²¹ Andrés Pizón Manzanera, *Acto político una visión desde las Constituciones colombianas 1821-1991* (Universidad del Rosario 2014) 62. And “the other acts of political direction by the Government generating legal effects, violating subjective rights and legitimate interests, will be open to challenge at the level of administrative jurisdiction, which may control its regulated contents. Faced with the position of those who defended the inadmissibility of the appeal against acts considered “of government”: by denying their administrative nature, jurisprudence — and also most of legal scholarship — has finally recognised the possibility of such acts being justiciable, just like discretionary administrative acts. The recognition of the right to effective judicial protection requires it. Consequently, the general rule is that the acts of the political direction of the Government, insofar as they do not have the rank of law and generate legal effects, will be open to administrative litigation on their regulated content; the courts, however, may not replace the individual decision on the merits of the case. The acts of political direction of the Government, which are not legislative in nature, may be challenged in the same way as discretionary administrative acts.”: Víctor Sebastián Oneto, ‘Los actos de Gobierno en el Derecho peruano’ (2008) 1 *Ita ius esto* 142. See also, with several comparative law references, Mariana Antonia Garay Sims and Castro Fuenzalida and Boris Arquímides, ‘Los actos de gobierno políticos y su control jurisdiccional en el derecho público chileno’ (Universidad de Chile 2018) 35 et seq with elements of comparative law, of legal history and even pre-history, Paula Eguizabal Cerna and Jose Humberto Aguilar and Ruben Adolfo Márquez, *El control jurisdiccional de los actos políticos* (Universidad de El Salvador 2011) 1, 18 et seq.

administrative jurisdiction, which, however, may not replace the decision on the merits of the case. In other words, the acts of political direction issued by the Government, which are not legislative in nature, will be open to challenge according to the rules of discretionary administrative acts.”

The above quoted arguments are applicable to other legal orders — Portugal, Brazil, Spain, Peru, Chile, Argentina, and even France,⁷²² *inter alia* — with regards to constitutional norms and principles that firmly ground the justiciability of political acts, at least in certain cases, such as the violation of fundamental rights. I contend that they are equally applicable to the MSAR legal order.

As a matter of fact, Article 4⁷²³ of the Basic Law establishes the principle of protection and safeguarding of fundamental rights, operating as a general duty of the MSAR, and of any and all of its organs and institutions, which are commanded to protect and not violate fundamental rights — as I have been openly espousing, for many years and in various fora.⁷²⁴

On the other hand, the intertwining principle of effective judicial protection prevails in Macau — Article 36 of the Basic Law. The following words by LINO RIBEIRO, referring to this Article, is clear:

“While the first paragraph establishes a general principle of effective judicial protection, which guarantees to all citizens the judicial route to protect all subjective legal positions, the second one ensconces a special principle of effective protection, which guarantees access to administrative justice to protect legitimate rights and interests.”⁷²⁵

Dismissing any possibly remaining doubts, JOSÉ MELO ALEXANDRINO states:

“The Basic Law does not expressly refer to ‘effective judicial protection’

⁷²² Cf however, “there still exists the doctrine of exempting “acts of government” from administrative judicial control, which has traditionally created an area immune to the control of legality, albeit increasingly reduced.”: informs Allan Brewer-Carías, ‘El control de constitucionalidad de los actos del Poder Ejecutivo dictados en ejecución directa e inmediata de la Constitución y el principio de la formación del derecho por grados en Venezuela’ (2012) 1 *Revista Jurídica UDABOL* 83.

⁷²³ “The Macau Special Administrative Region shall safeguard, in accordance with the law, the rights and freedoms of the residents of the Macau Special Administrative Region and of other persons in the Region.”

⁷²⁴ Cf Paulo Cardinal, *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CREDM, 2015), *passim*.

⁷²⁵ Lino Ribeiro, ‘A justiça administrativa no contexto da Lei Básica de Macau’ (2002) 13 *BFD* 223, 225. In agreement with the idea that the principle of effective judicial protection is directly present in the Basic Law,, Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 135, José Cândido de Pinho, *Notas e Comentários ao Código de Processo Administrativo Contencioso*, vol 1 (CFJJ 2018) 10 et seq; Paulo Cardinal, ‘The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region’ in *Estudos de Direitos Fundamentais no contexto da JusMacau* (Fundação Rui Cunha/CREDM, 2015) 497–98, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013) 126 et seq; Luís Pessanha, ‘Contributo para uma tutela jurisdicional cautelar efectiva no contencioso administrativo de Macau — por mares nunca antes navegados’ (UMAC 2008) 297 et seq; *inter alia*.

but the courts of Macau have not stopped referring to it often. [...] In accepting the developments registered at the level of international law [...] in my view, this attitude in favour of guaranteeing freedom and improving the Rule of Law makes perfect sense [...] in addition, the idea is expressly included in Article 2⁷²⁶ of the Administrative Litigation Proceedings Code.”⁷²⁷

Whenever a violation of a fundamental right is in question, it is insufficient to preclude judicial control by invoking the political nature of the harmful act. The framework outlined in Article 19 of the GFLJO comes into play, should it be regarded as an absolute negative jurisdictional limit for the courts of Macau.⁷²⁸ By virtue of the principles set out in Articles 4 and 36 of the Basic Law, allied with Article 11 (which mandates that all legislation must comply with the Basic Law), Article 19 shall be either set aside or interpreted in conformity with the Basic Law. Such a conclusion would only be rendered incorrect if the Basic Law itself, or another norm of the current constitutional order, directly excluded the justiciability of political acts, which, as is well known, is not the case at all.

Article 19 of the Basic Law excludes from the jurisdiction of the local courts only one category of acts expressly identified in the Basic Law, which are the acts of the

⁷²⁶ Establishing the following: “(Principle of effective judicial protection) To every subjective right or legally protected interest corresponds one or more procedural means aimed at the effective judicial protection thereof, including the precautionary and anticipatory procedures necessary to safeguard the usefulness of such means.” On this norm, for example, José Cândido De Pinho, *Notas e Comentários ao Código de Processo Administrativo Contencioso*, vol I (CFJJ 2018) 9 et seq.

⁷²⁷ José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 127–128. In agreement with the idea that the principle of effective judicial protection is directly present in the Basic Law, see Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 135; Paulo Cardinal, ‘The Constitutional Layer of Protection of Fundamental Rights in the Macau Special Administrative Region’ in *Estudos de Direitos Fundamentais no contexto da JusMacau* (Fundação Rui Cunha/CREDDM, 2015) 497–98; Luís Pessanha, ‘Contributo para uma tutela jurisdicional cautelar efectiva no contencioso administrativo de Macau — por mares nunca antes navegados’ (UMAC 2008) 297 et seq.

⁷²⁸ The CSI ruled on the “incompetence of the Macau Courts to accept the case”: although the CFA concluded the following: “In view of the position taken, it seems that the detected deficiency should generate not a lack of competence, but rather a lack of jurisdiction of the courts of Macau, since the term “competence” is generally used to mean the fractioning of the powers of each Court in particular, ie “the measure of jurisdiction assigned to each court.”: Case No. 61/2018.

State.⁷²⁹ Only such typology of acts⁷³⁰ may, therefore, escape the judicial scrutiny of the courts of the Region, precisely due to an express constitutional norm. Moreover, such entails the establishment of a general principle of full and complete jurisdiction for the courts of Macau.⁷³¹

WANG KAI notes that, in effect:

“The courts of the Macau Special Administrative Region shall have jurisdiction over all cases in the Region, except for the restrictions on their jurisdiction that shall be maintained, imposed by the legal order and by the principles previously in force in Macau. [...]

The courts of the Macau Special Administrative Region shall have no jurisdiction over acts of the State, such as defence and foreign affairs.” All of this looks, and is, crystal clear.⁷³²

My conviction is that the courts of Macau should therefore have ruled on the case that was brought to them, in the name of, and by implementing, the above-mentioned constitutional principles effective in our legal order, which override any possible legal norm that apparently removed their competence or jurisdiction to decide on a given act, even though it was considered to be a political one.⁷³³ It was alleged by the applicant that there was a violation of fundamental rights and also of the norms and principles of the Basic Law — the courts could not have issued what was, in essence, a ruling of quasi-

⁷²⁹ “The notion of Acts of State first appeared in the Code of Administrative Procedure (CAP) of China, Article 12 (1), which provides: people’s courts do not admit charges brought by citizens, legal persons, or other organisations, in relation to the following issues: national defence, external relations, among other acts of the State. Article 2, “Interpretations on various issues regarding the application of the Administrative Procedure Code by the Supreme People’s Court” (hereinafter referred to as “Interpretations”), of 2000, gives an interpretation of Article 12, paragraph (1) of CAP, saying that acts of the State are acts related to national defence and external relations, practised on behalf of the State, by the State Council, Military Commission of the Central Government, Ministry of National Defence and Ministry of External Relations, with the power delegated by Constitutional Law and by the laws, and acts of declaration of the state of emergency, declaration of the state of siege, general mobilisation, *inter alia*, practised by the organs of the State, with the power delegated by the Constitutional Law and by the laws.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81.

⁷³⁰ See, delimiting the acts originating, precisely from the State: “Acts of the State in the Basic Laws of the Special Administrative Regions — to define acts of the State? In the first place, we shall determine who are subject s or authors of the acts of the State. According to the “Interpretations”: it appears that such authors are all the State organs of the state.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 91.

⁷³¹ “The reason for the enjoyment of such a wide jurisdiction by the courts of the Special Administrative Regions is due to the provisions of Articles 158, paragraphs (2) and (3), and 143 of the Basic Laws of Hong Kong and Macau, respectively.”: Wang Kai, ‘Actos do Estado nas Leis Básicas das Regiões Administrativas Especiais’ (2012) 1 Revista de Estudos de ‘Um País, Dois Sistemas’ 81, 92.

⁷³² *ibid.*

⁷³³ Again, Eladio Escusol Barra and Jorge Pérez, *Derecho Procesal Administrativo* (1st edn, Editorial Tecnos 1995) 302, “The doctrine of the political act cannot be invoked as a basis for the inadmissibility of administrative litigation, since the judge will be obliged to have cognisance of the act, in order to determine whether there are regulated contents therein of a justiciable nature.”

non liquet, instead, they should have had enacted a decision⁷³⁴.

We therefore reaffirm, without compunction, that any act by public power in Macau, including a political act, that violates fundamental rights — and/or constitutional norms — shall be justiciable. This holds true at all times.⁷³⁵ In the case of Macau, this is particularly applicable through a generous application of the *Principle of formal adjustment* as outlined in Article 7 of the Code of Civil Procedure, in compliance with the constitutional commands of the Basic Law — Articles 4, 11 and 36, *inter alia*.

Perhaps if Article 19 of the GFLJO were a true obstacle, then either such norm should be considered derogated by the local *bloc de constitutionnalité*, starting with the Basic Law, or else one would proceed to its corrective interpretation in light of the applicable constitutional norms and principles.⁷³⁶

2.4 A Few Other Issues

The Committee on the Rules of Procedure and Members' Mandates did not issue a true opinion under the procedurally devised normative framework, but rather a kind of mere record of proceedings.⁷³⁷ It did not express an opinion on the matter in hand.⁷³⁸

Among various deficiencies, the Committee failed to scrutinise or prepare procedurally for a formal suspension process, an obligation it should have fulfilled.⁷³⁹ It denied the affected Member the right to present a defence or be heard before the Committee. Consequently, the so-called "Report" lacked such Member's defence. Furthermore, coupled with the impossibility of such Member addressing his peers at any plenary meeting, no Member of Legislative Assembly had the opportunity to know the arguments in defence of the affected Colleague! The Plenary deliberation, published in the OG, Deliberation No. 21/2017/Plenary,⁷⁴⁰ contains two Articles. However, only the first article was subjected to a vote in the Plenary, while the second article, pertaining to the effectiveness of the deliberation, was not voted upon.

⁷³⁴ Regardless of whether, in the course of such assessment, they concluded that these rights, principles and norms were violated, or not.

⁷³⁵ Except for the constitutionally established exception regarding the acts of the State.

⁷³⁶ As was the Spanish case, in relation to the norm contained in the 1956 law. This tendency has been a hallmark in many legal orders, hand in hand with a necessarily restrictive concept of what political acts should constitute, as the majority of modern legal scholarship now supports.

⁷³⁷ Different documents — see "Article 88 (Acts of the committees) 1. The acts of the committees take the form of reports, opinions, memoranda or deliberations, as the case may be."

⁷³⁸ On the other hand, the Committee saw fit to render an opinion on a different issue: it groundlessly detected a situation of conflict of interests; it also deemed proper to draw up a ballot form excluding the option of abstention...

⁷³⁹ Cf subparagraph (b) of Article 26: "The Committee on the Rules of Procedure and Members' Mandates is competent to: (...) Conduct the enquiry proceedings relating to the processes of disqualification and suspension of mandates and to issue the respective reports, under the terms provided for in the Legal Status of the Members".

⁷⁴⁰ "Article 1 (Suspension of a Member's mandate) The Plenary of the Legislative Assembly deliberates the suspension of Member Sou Ka Hou's mandate. Article 2 (Entry into force) The present deliberation shall enter into force immediately upon approval thereof."

As mentioned above, there was a precedent in this matter before the advent of the MSAR. In 1997, a process to suspend a mandate was triggered and procedurally followed through, with due examination. The affected Member exercised his right of defence before the Committee on the Rules of Procedure and Members' Mandates, the essential content of his defence was reproduced in a Report (this time a true advisory opinion) and the committee also alerted the remaining Members to a given fact that potentially could be decisive for the Plenary's deliberation — the process ended with the decision to not suspend the Member.⁷⁴¹

This sidebar on a recent history exemplifies how legality is overshadowed, in several moments and aspects.

2.5 Consequences for the Legislative Procedure — Notes on the Issue

A few issues — not answered directly and expressly in the law — may be raised here.

What is the legal solution or outcome if a particular conflict of interest was not declared nor invoked? A Member, who should have been prevented from voting, did vote. Does this non-compliance affect the perfection of the act, ie does it affect the approval of a given law? Imagine, for instance, that a certain bill was passed into law with the minimum number of votes required by the Basic Law, insofar that, in case the Member prevented from voting had not voted, the law would not have been approved (one should remember that the failure to exercise an impeded vote only carries the effect of not counting as an abstention) — should such law be invalidated due to the *subsequent* discovery of conflicts of interest? The MSAR legal framework, including the Legal Status of the Members, omits this possible situation.

A sanction exists, consisting in the issuance of a vote of censure published in the OG. In some legal orders, sanctions of the same or similar nature are applicable. For example, in Hong Kong:

“Any Member who fails to comply with Rule 83 (Registration of Interests), 83A (Personal Pecuniary Interest to be Disclosed), 83AA (Claims for Reimbursement of Operating Expenses or Applications for Advance of Operating Funds) or 84 (1) or (1A) (Voting or Withdrawal in case of Direct Pecuniary Interest) may be admonished, reprimanded or suspended by the Council on a motion to that effect.”⁷⁴²

VIEIRA DE ANDRADE's teachings may be of assistance as a first line of approach, with his distinction between invalidating (procedural) deficiencies (“*illegalities*”

⁷⁴¹ CRPMM, Report No. 2/97 — the right to be heard is expressly mentioned; in addition, during such hearing, the Member in question shall be allowed to produce evidence. The Committee underlined, in this short and lean report, the requirements and the guarantees to be accorded to the Member's defence. Any final position by the Committee shall take all of the above into account.

⁷⁴² 85. Sanctions relating to Interests, Operating Expenses or Operating Funds, the Rules of Procedure of the Legislative Council of the Hong Kong Special Administrative Region (Amended as of 31 October 2014).

that potentially affect the effectiveness of the act”) and non-invalidating (procedural) deficiencies (“irregularities”).⁷⁴³ In the event that the vote cast by a Member in a conflict of interest does not alter the general vote, such situation should be classified as a mere irregularity, as a non-invalidating deficiency of the final act, ie the approved law.

What should the answer be if the vote (or votes) cast, despite a conflict of interest, could alter the final result of the voting? In order to provide an answer, one shall have to analyse the history of this legal framework.

Members’ Bill No. 12/I/2000-1, which resulted in Law No. 3/2000, *On the Legislature and the Legal Status of the Members of the Legislative Assembly*, contained, in the original text of Article 37 (corresponding to the current Article 36), the following norm in paragraph (3) thereof: “*The vote cast by a Member in relation to whom the existence of the interest provided for in Article 35, paragraph (1), is verified in a supervening manner, is deemed to be null and void.*” This provision, if retained, might have offered a resolution — albeit with potential adequacy concerns, given Macau’s small size and intricate network of local interests — by introducing a procedural sanction and legal consequence. This could have resulted in the subsequent invalidation of a law if the nullified vote (or votes) had a decisive impact on reaching the required majority.

Alas, this norm was the object of deeply felt hesitations when debated in the Plenary.

In the plenary meeting in question, one of the bill’s proponents argued the following:

“In principle, I think that, in the event of nullified votes, as referred to in the preceding paragraph, if such nullity influences the result of that voting, my contention is that there are only 11 votes. If the deliberation has not yet entered into force, in fact, regardless of its publication, such deliberation provides for a date for its effectiveness and if it is still pending, the Madam President of the Legislative Assembly should submit the matter of said deliberation to be considered and put to a new vote in the Plenary of the Legislative Assembly [...]. If the deliberation does not influence the result of voting, there is no need to debate it again at the Plenary. If the deliberation

⁷⁴³ Vieira De Andrade, *As Formas Principais da Actividade Administrativa: Regulamento, Acto e Contrato Administrativo - Sumários das Lições de Direito Administrativo II, Academic Year 2009/2010* (archived with the Author, Coimbra 2010) 53, 59. Allow me to recall the following words from the Author, “i) the irrelevance of the procedural or formal deficiency, in the event that such deficiency has not resulted in an effective harm to the values and interests protected by the violated norm, if such values or interests have been sufficiently protected via another route; ii) the conservation of the act, ie its non-annulment by the judge, despite its invalidity, when the content of the act cannot be any different and there is no relevant interest in the annulment [...] I would also tend to admit the irrelevance of the deficiency or the conservation of the act when it is evidenced, beyond any doubt, that a formal deficiency had no influence on the decision.” See also Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 695. Although in a different setting, with evident and interesting connecting points, the various texts in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004).

has already entered into force, it could not be returned again to the Plenary.”⁷⁴⁴

The explanation generated many doubts in the Plenary. Several Members spoke out for the norm on the nullification,⁷⁴⁵ while others, on the contrary, noted that “even if the voting of the Member were null and void, it shall not influence the result of voting [...]”, therefore, “It is not necessary to add that the voting is null and void.”

In view of these misgivings and a lack of consensus on how to resolve the situation, such draft norm was suppressed from the text of the bill, thus leaving this important issue unregulated.

There was, I would submit, a refusal by the Plenary to consider the nullity of votes cast in violation of a conflict of interest, when verified subsequent to the result of voting being declared.⁷⁴⁶

One could reference several principles that might aid in salvaging this flawed element of the legislative procedure: the principles of conservation of (procedural) acts,

⁷⁴⁴ Colectânea de legislação regulamentadora da Assembleia Legislativa, 1.º volume, da Legislatura e do Estatuto dos Deputados (Partial transcript of the Plenary meeting held on 23 February 2000), 497 et seq. “There is still an issue: in the legal sense, the individual act of the Member, ie such act is not in accordance with the act provided for in paragraph 1) of Article 35, which leads to the Member’s voting to be, this time, null and void, whether it be on the bill or on on the deliberation approved by the Legislative Assembly. In case the result is influenced, the Member’s voting is null and void. However, it seems that some Members have said that this situation rarely exists, and the procedural protocol is also very complicated. Our Rules of Procedure do not provide for such situations, neither did the old Organic Statute; moreover, one cannot take as a reference neither the preceding background, nor the new example. Therefore, after reflection, since this issue is very complicated, I shall directly simplify it, as the plenary of the Legislative Assembly is supreme. In short, by adding paragraph (4) after paragraph (3). The vote of the Member referred to in the preceding paragraph in paragraph (3), is null and void, and shall have no bearing on the result of that voting. My proposal is that if we agree that the voting is not retroactive, we may continuously proceed with other procedures; however, such act has already violated Article 35, paragraph (1). According to Article 38, such acts must be censured. A censure is the simplest and most direct way moving forward. Otherwise, the problem cannot be solved, and our time is very limited.”

⁷⁴⁵ Having affirmed, for example, that “I believe that the nullity of the votes of the respective Members will influence the retroactive effectiveness of the result of the voting; however, the degree of such influence depends, at this moment, on the progress of the procedures relating to the approved draft resolution or bill.”: Colectânea de legislação regulamentadora da Assembleia Legislativa, 1.º volume, da Legislatura e do Estatuto dos Deputados (Partial transcript of the Plenary meeting held on 23 February 2000), 497 et seq.

⁷⁴⁶ For Hong Kong: “Rule 84(4) of RoP provides that any Member may move without notice a motion to disallow the vote of a Member on the ground of his direct pecuniary interest in a question immediately before the result of the voting is declared.”: LC Paper No. FC78/13-14/01 — Disclosure of pecuniary interest under Rule 83A and Restriction against voting in case of direct pecuniary interest under Rule 84 of the Rules of Procedure. “Under Rule 84(6), If the motion to disallow a vote is agreed to, the result will be altered accordingly. [...] Based on the principle that it is a Member’s responsibility to disclose his pecuniary interest in a matter being considered to enable other people to judge if his views on the matter have been influenced by his interest, it has been the view of [Committee on Members’ Interests] of the previous term of LegCo that a Member should disclose his pecuniary interest at the beginning of his speech on the matter. For [Finance Committee] proceedings, since the consideration of an agenda item as defined in paragraph 22 of the [Finance Committee] Procedure involves members expressing views or asking questions of the Administration on that agenda item, it has been the practice of [the Finance Committee] for members to disclose their pecuniary interest at the beginning of their speech or question on a proposal being considered by the Committee. The Chairman will, at the start of each meeting, remind members that if they have any direct or indirect pecuniary interest in any matter being dealt with at the meeting, they should disclose the nature of such interest before they speak on the matter in accordance with Rule 83A of RoP.”

procedural economy, stability of the legal system, and the protection of confidence and legal certainty. These principles come into play primarily, if not exclusively, concerning a law that has already been published — not before this point.

There may, nonetheless, be extreme situations in which the vote cast by a Member in an undeclared or uninvoked conflict of interest may, in the end, constitute an invalidating deficiency — in other words, affecting the validity of the law, even though the latter might already have been published in the OG, reported for record to the Standing Committee of the National People's Congress, and the *vacatio legis* period elapsed.⁷⁴⁷

Examples of such situations would be: when such deficiency violates norms or principles of the Basic Law, such as the rules requiring certain qualified majorities, provided that such thresholds could not have been reached without the impeded votes;⁷⁴⁸ and when a law approved irregularly — meaning that the impeded vote was decisive in the respective deliberation — results in a violation of a fundamental right, namely, but not solely, a fundamental right directly established in the Basic Law.

In the first case, it will be very difficult to verify an autonomous violation *per se* of the Basic Law (apart from the question of achieving the required majorities). In the second example, one might imagine the third parties' fundamental rights being affected by the approval of a law by virtue of a vote or votes in a situation of conflict of interest; perhaps such situation may occur and a supervening verification may not be impossible — I am referring to possible manifest and gross violations of the conflict of interest framework that negatively impact on the fundamental rights of others.

⁷⁴⁷ Therefore, I cannot agree with the position taken in Report No. 1/VI/2019, of the CRPMM, that “*when the legislative procedure is concluded*”: it is impossible to produce legal effects on this law and, therefore, the “*Submitted challenge may not be considered, as such procedure could not possibly produce any useful effect.*” Confront and remember the CFA Decision in Case No. 61/2018, alluding to a principle of proof of resistance, when the vote is not essential to the existence of the necessary majority, but also referring to the undue exclusion of a person in the voting process or the lack of summoning of a Member to the meeting — the majority of scholarship and case-law are inclined towards the invalidity of the deliberation, even if the vote in question did not change the outcome of the voting. The Decision reads, “*If there is an evident public interest in the preservation of deliberations that were passed, in many cases constituting the approval of laws, it seems that a principle of proportionality shall have to be asserted, which entails a weighting of values between the importance of the (possible) deficiency and the importance of preserving the deliberation, in terms of protecting said interest. [...] given that the appellant's vote would not have been decisive in any deliberation taken by the Legislative Assembly, during the mentioned period, it seems to us that the possible deficiency — if it exists — must be considered to have been remedied.*” Evidently, this path is more reasonable and balanced than Report No. 1/VI/2019, of the CRPMM, which dealt with a proximate issue. This debate does not end here, in my view. In fact, the mere unlawful absence of a Member, although necessarily limited to 1 vote (his/her own) still leaves ample space to question if his or her presence — peppered with addresses, interventions, arguments — could, perhaps, sway other Members when it came time to voting.

⁷⁴⁸ Consider, for example, the super-qualified majority required by Article 51 and the potentially cataclysmic outcome, if the Chief Executive considers that a Member's bill approved by the Legislative Assembly is not compatible with the overall interests of the MSAR, thus returning it to the Legislative Assembly for reconsideration, within 90 days, with a written statement of the reasons for refusal of signature. If the Legislative Assembly confirms the bill in dispute by not less than a two-thirds majority of all the Members, the Chief Executive must sign and publish it within 30 days, or proceed in accordance with Article 52 of the Basic Law. In the legislative process, nothing is approved, as is known, without normally qualified majorities — Article 77 of the Basic Law.

In such cases, higher values and principles must prevail — the principle of constitutionality and the principle of protection and safeguarding of Fundamental Rights are always at the summit of the legal order.⁷⁴⁹

Consider, from a different perspective yet with evident parallels, the situation in Hong Kong. The doctrine, articulated in the work of KEMAL BOKHARY, allows exceptions to the general principle of non-judicial intervention in LegCo processes. These exceptions could arise “where the Legislative Council has conducted its business in such a way as to infringe the constitutionally protected right of an individual which is intended by the Basic Law to be enforceable in a court of law.”⁷⁵⁰

It is indeed a very complex issue. In the absence of a solution expressed in the letter of the law, it should be solved on a case-by-case basis, guided by the presiding principles in question.

3. Voting on the Bill in General

The voting in general is on each bill.⁷⁵¹ Such a voting is circumscribed to the principles and system of each bill, as well as on the political, social, and economic opportunity thereof. In other words, there is an interconnectedness between the general debate and the voting of a bill in general, although the Rules of Procedure do not expressly say so.⁷⁵²

Failure to approve a bill in general is deemed to be a definitive rejection thereof; such bill may not be renewed during the same legislative session, thus terminating the respective legislative procedure.

The approval of a bill in general means the continuation of the procedural *itinerary* but does not guarantee the final approval, ie it is not synonymous with the future existence of a law. As CARLOS BLANCO DE MORAIS warns: “it is true that a favourable vote only guarantees that the legislative initiative shall be subject to voting on its specifics and does not suggest approval thereof in such subsequent phase.”⁷⁵³

After a bill is approved in general, the respective text is sent by the President to a committee, for examination on its specifics, taking into consideration the volume of work distributed and the specialisation of the committee by subject-matters — if such committees exist, which today do not, given that, in practice, legislative initiatives have

⁷⁴⁹ Articles 11 and 4 of the Basic Law, respectively.

⁷⁵⁰ Michael Ramsden and Stuart Hargreaves, *Hong Kong Basic Law Handbook* (1st edn, Sweet and Maxwell 2015) 281. See also, Margaret Ng, ‘The Legislature’ in Johannes Chan and C L Lim (eds), *Law of the Hong Kong Constitution* (Sweet & Maxwell 2015) 310 et seq. However, “the court refused to regard compliance with procedural regularity in the law-making processes of a legislature as a condition of the validity of an enacted law”: Gu Yu, *Hong Kong’s Legislature under China’s Sovereignty 1998–2013* (Brill 2015) 26, referring to *Leung Kwok Hung v President of Legislative Council* [2007] 1 HKLRD 387 (CFI).

⁷⁵¹ Cf “as globally considered”: José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 243.

⁷⁵² See, moreover, Article 119, subparagraph (a).

⁷⁵³ Carlos Blanco de Morais, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 410.

not been distributed to any *specialised committees* under the modality of monitoring committees on certain matters.⁷⁵⁴

How is a bill approved? A simple majority is not sufficient. The approval of a bill requires the favourable vote of more than half of the total number of Members, under the terms of Article 81, paragraph 2, except in cases where a qualified majority of not less than two-thirds is imposed. In this respect, Article 77, paragraph (1) of the Basic Law mentions only (at least in the Portuguese language version) Members' bills; the Rules of Procedure, however, cover all legislative initiatives (Members' and Government's bills). What is the legal solution or outcome? Is it just a question of poor translation?⁷⁵⁵ Maybe yes, maybe not.

It should also be noted that the Plenary may immediately deliberate that the debate and voting on the specifics take place in a standing committee, or an ad hoc committee⁷⁵⁶ for such purpose created. This last option, which is not applied in practice, entails a procedural path divergent from the most common one, as described below.

4. Examination on the Specifics in Committee

The examination in committee consists, per Article 119, of an assessment of the specific solutions contained in each bill, focussing, in particular, on:

- “(a) The adequacy of these solutions vis-à-vis the principles and system of the bill as approved in general;*
- (b) The search for the most appropriate legislative means for the proper execution of the bill;*
- (c) The repercussions of the bill on the legal principles and the legal order;*
- (d) The legal-technical perfection of the normative provisions.”*

⁷⁵⁴ There are no real specialised committees, as in the past; in the meantime, monitoring committees were created for certain matters and, given that the composition of such committees is exactly the same as that of the standing committees (the only variance being the president and vice-president of each), one might think that, in this fashion, one would, in practice, achieve potential specialisation. However, such is not the case, with one possible exception: the duality formed by the FSC and the Monitoring Committee on Land Affairs and Public Concessions.

⁷⁵⁵ António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483, states: “The Basic Law’s provision, certainly by error/mistake, only mentions Members’ bills and draft resolution, omitting the Government’s initiatives.”

⁷⁵⁶ The following are examples of ad hoc committees: one of “mere” monitoring, the AHC for Monitoring and Participating in the Drafting of the Legislative Texts Relating to the Civil Code, the Code of Civil Procedure and the Commercial Code, having issued Report No. 1/99, *Draft Commercial Code of Macau*, Report No. 2/99, *Draft Civil Code of Macau*, and Report No. 3/99, *Appraisal of the Project relating to the new Code of Civil Procedure of Macau*, and two other ad hoc committees with an intervention resembling standing committees: the AHC for the Consideration of the Government Bill on the Legal Framework for the Operation of Games of Chance, the object of which was the bill entitled “*Legal framework for the operation of games of chance*”. This committee was created by Deliberation No. 7/2001/Plenary, “*in order examine the bill on the specifics and to perform the respective final drafting*”; and the AHC for the Analysis of Legislative Initiatives Relating to the Civil Service, which intervened in three legislative processes.

The express reference in subparagraph (a) reinforces the principle that, under this system, the final approved text, as the end-result of the legislative procedure, may not challenge the principles and the system of the bill as approved in general.⁷⁵⁷

Once again, a Report by the CRPMM is worth quoting:⁷⁵⁸

“The procedural provision whereby ‘the general debate concerns the principles and the system of each bill, as well as the political, social and economic opportunity thereof’, clearly entails that, in case of approval in general of any Government Bill, the committee entrusted with the respective examination on the specifics is “mandated” to follow the terms under which the general debate was undertaken, more precisely *vis-à-vis* the principles and the system of the bill, as well as to evaluate the criteria of opportunity laid down by said provision.”

While adding — I believe against the dynamic backdrop of praxis, to be discussed below:

“This means that the examination on the specifics is framed by the general debate, but it does not authorise the assertion that such debate alone may influence and determine the course of said examination. One need only think of the legal-technical analysis, which can hardly take place during a general debate and is thusly reserved for the stage of the specifics.”

The same Report goes on:

“The general debate is not the sole route map of the examination on the specifics, nor can the former stage crystallise the legislative process. It is during the stage of the examination on the specifics that one may truly assess, in detail, the scope of the proposed norms, as viewed from several perspectives, the technical options through which such norms are construed and, consequently, such stage is the correct locus and moment to understand the legislative policies in greater depth and the norms intended to serve them.

⁷⁵⁷ See Report No. 1/III/2009 of the CRPMM, Issue of violation (or not) of procedural rules when the text of the alternative version of the Government Bill entitled “Amendment to the Stamp Duty General Schedule” differed, during the stage of examination on the specifics, from the initial Bill as approved on the whole. One may read in said report: “the question arose as to whether the modifications to the text of the aforementioned Bill, introduced during the examination of the specifics thereof by the Third Standing Committee of this Legislative Assembly, may or may not constitute a violation of the Rules of Procedure, insofar as the alternative version of such Bill submitted for said examination was different, in varying degrees of intensity and merit, as understood by several Members, from the original version, as approved on whole on 15 January 2009. Such Members raised the issue and supported the opportunity for an intervention by the CRPMM. The President of the Legislative Assembly considered, as afforded by her procedural powers, to suspend the debate on the specifics and to request that this Committee issue a Report [...]”.

⁷⁵⁸ Report No. 1/III/2009 of the CRPMM. The quoted report enunciated, in a somewhat flexible manner, the untouchability of the principles and system contained in Government bills, and did not fail to reconcile the amendments thereto with such principles and system. The Committee concluded that, despite the existence of profound modifications, the amended version was nonetheless in conformity with the legislative policy endorsed by the Plenary during the stage of approval in general.

Therefore, it is the appropriate stage for introducing adjustments and improvements which may be deemed convenient, in order to submit the text of the Government Bill for debate and voting on the specifics by the Plenary.”

In conclusion, “In the context of debating and voting on the specifics, it is incumbent upon the Plenary, with full and prior knowledge of the committee’s report, to decide, with finality, on the merit of the norms submitted thereto.”

I must underscore that the Rules, by placing the stage of approval in general before that of examination — ultimately ending with a Committee Report — and in view of the sustained praxis, funnels such work on the specifics to the epicentre of the committees’ tasks and functions.⁷⁵⁹

The dynamics of profound modifications⁷⁶⁰ to technical solutions and, under Article 119, subparagraph (a), add to several cases of modifications to politico-legislative options,⁷⁶¹ and to the reality of legal-technical improvements that parliamentary practice

⁷⁵⁹ See Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 32: “the majority of Members adopts an attitude of total adherence to Government Bills. Even if such bills contain flaws or contradictions in the underlying political options, those Members have been expressing their belief in the possibility of introducing the necessary modifications during the examination on the specifics by the specialised committees, at a later stage of the legislative process.”; see also, “under the current legislative procedure, the work performed by the committees, of assessing and effectively monitoring the proponent, directly affects the quality of the legislation and the efficiency thereof”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 *Administração* 997, 1023. An example may be brought forth by Report No. 1 II/2003 of the FSC, on the Government Bill entitled “Framework of the careers, positions and remuneration of Customs staff”: the Plenary approved, on the whole, a bill containing norms in clear transgression of the Basic Law; the situation was subsequently resolved only in committee.

⁷⁶⁰ An important study, yet to be performed, would be a comparative analysis of the texts of Government bills, in their original version and in the final version of the laws published in the OG. Many will be the cases of deep and significant modifications, in some instances showing clear legal-technical improvements, in others better suitability of the “new” solutions *vis-à-vis* the values and principles of justice, constitutionality, legality, etc. Is there is an effective parliamentary contribution to “good legislation”: albeit masked as the second or third versions authored by the Government. Apropos, “*There have been many Government bills, throughout the three legislatures of this Region, which have undergone modifications – at times profound –, between the original version, as approved on the whole, and the alternative version, as approved on the specifics.*”: Report No. 1/III/2009 of the CRPMM.

⁷⁶¹ These modifications may not endanger a bill’s principles and system, insofar as these become unrecognisable, or absolutely dissimilar, from the ones approved on the whole. Remember that “*The legislative process is, by its very nature, a process for confronting and laying out all interests, political options and values judgments; it is a process for the seeking of, and reaching, a consensus in a democratic way, through the will of the majority.*”: Liu Dexue, ‘Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”’ (2014) 102 *Administração* 997, 1016. Indeed, as illustrated by Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 24: “*The Executive is reluctant to accept reasonable opinions and suggestions presented during the examination of bills by the Plenary; it has been necessary to engage in several fora with the authorities, namely through negotiations.*” See also Ji Chaoyuan, ‘Sobre o Constitucionalismo do Regime Político da Região Administrativa Especial de Macau’ (2012) 1 *Revista de Estudos de ‘Um País, Dois Sistemas’* 77 et seq.

Recalling again that “*The legislative process is, by its very nature, a process for confronting and laying out all interests, political options and values judgments; it is a process for the seeking of, and reaching, a consensus in a democratic way, through the will of the majority.*”: Liu Dexue, ‘Considerações sobre as

has allowed to be formally adopted as the proponent's own, in the case of Government bills.

Internal meetings of the Committee prepare the analysis of a bill on a substantive level; in meetings with a proponent, consensual solutions are sought with the Committee — in the case of Government bills, to formulate suggestions for improvement thereof.

Amendment proposals may be introduced at this stage, in relation to any and all bills, excepting those removed from the supervening legislative initiative of the Members and the committees.

A reference is due to technical meetings, ie between the Advisory Staff of the Legislative Assembly and the Government Advisors (in a broad sense), in the case of Government bills. Not infrequently, such practice, exercised by all concerned in accordance with political options, allows for drawing up the version of a bill's text to be voted on in the specifics.⁷⁶²

4.1 Committee Report

The Committee report⁷⁶³ deserves special emphasis.⁷⁶⁴ This formal document issued by

estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio “um país, dois sistemas”” (2014) 102 *Administração* 997, 1016. See Report No. 1/III/2009 of the CRPMM: “The legislative process triggered by a Government bill requires the interaction between the Government and the Legislative Assembly: in light of the applicable constitutional and procedural norms, co-operation is the operative concept. Such cooperation is complex and does not always follow the same contours and modalities, as it covers a varied set of acts, across the several stages of the legislative process, under which both bodies' spheres of intervention are disciplined and calibrated by the separation of powers.” See also JI CHAOYUAN, *Sobre o Constitucionalismo do Regime Político da Região Administrativa Especial de Macau*, *Revista de Estudos de “Um País, Dois Sistemas”*: Vol. I, 77 et seq.

⁷⁶² To exemplify: “In addition to the aforementioned formal meetings, there were several working meetings, held both internally and at the level of legal-technical discussions between the advisory staff of this Legislative Assembly and representatives of the Executive..., which contributed, in the spirit of mutual and frank co-operation, to several technical improvements of the Government bill's final version.”: FSC, Report No. 3/V/2014.

⁷⁶³ “Descriptive reports” are used for other purposes, for example, in the context of petitions and monitoring committees, with a view to reporting facts. As such, they resemble minutes of meetings rather than documents for formulating opinions. For the latter purpose, the appropriate act is the Committee Report, notwithstanding the letter of Article 120, paragraph (2) of the Rules. Due to its collegiate nature, the Legislative Assembly is a complex body, unfolding into a plethora of other bodies, both individual (for example, the President of the Legislative Assembly) and collegiate (for example, the Board and the committees). “*If parliaments are unimaginable without a Plenary, the truth is that modern parliaments cannot likewise be imagined without parliamentary committees.*”: Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 299.

⁷⁶⁴ Underlining the Report within the examination stage, José Melo Alexandrino, José Melo Alexandrino, *Lições de Direito Constitucional*, vol II (AAFDL EDITORA 2015) 252. See also Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 401. In Macau, as in most modern parliaments, the work performed by parliamentary committees is of the utmost importance. As said, in general, “*Today, the conventional notion is that a strong system of committees, however defined, is a necessary if not sufficient condition for the legislature to operate effectively, not least in terms of influencing the content of legislation and holding the executive accountable.*”: Martin Shane, ‘Committees’ in Martin Shane and Thomas Saalfeld and Kaare Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 352. Or “*In*

the committee, as a collegiate body, is wherein the assessment of the specific solutions contained in each bill is reached, focussing, in particular, on: the adequacy of such solutions *vis-à-vis* the principles and system of the bill as approved in general; the search for the most appropriate legislative means for the proper execution of the bill; the repercussions of the bill on the legal principles and the legal order; and the legal-technical perfection of the normative provisions. The said appraisal in committee, as embodied and *publicised* by the Report, corresponds to a qualified form of *internal preparation* within the legislative procedure.⁷⁶⁵

In most cases, it is in the Report that the rationale underpinning the text's options is encapsulated and the progress of the committee's work is reported. The Report is probably the most relevant interpretative tool for measuring and capturing the legislative intent of a bill.

A few more words on the committee Report are warranted.

There is no pre-established template for drafting and correlating the contents of a Report — and arguably, such a template may not be necessary. Similarly, fixed rules governing its structure, length, depth, style, etc, are absent. In most cases, reports follow a very similar itinerary, including sections such as introduction, context, general assessment,⁷⁶⁶ examination of specifics (often article by article), and conclusions. Occasionally, additional chapters addressing related issues or appendices may be incorporated.

4.2 Dissenting Votes

Another issue worth mentioning is the possibility of not only dissenting votes being tallied, but also of the reasons underlying such dissent being declared/stated.

While, in truth, such practice is uncommon,⁷⁶⁷ it is no less true that there is no

most legislative bodies, committees are the workhorses of the legislative process": Sebastian Saiegh, 'Lawmaking' in Martin Shane and Thomas Saalfeld and Kaare Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014) 482, and "Indeed, committees are widely recognised as important arenas of legislative deliberation [...] Committees are critical parts of the organisation of most legislatures": Ingvar Mattson and Kare Strom, 'Committee effects on Legislation' in Mark Hallerberg and Döring Herbert (eds), *Patterns of Parliamentary Behavior: Passage of legislation across Western Europe* (Routledge 2004) 91–92.

⁷⁶⁵ Carlos Blanco de Morais, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 401.

⁷⁶⁶ This general assessment is common and its requirement self-evident; moreover, the approval on the whole precedes a real study of the principles and the system of the bills, as we have shown. An in-depth and detailed analysis would hardly be cogent if not previously informed by an analysis of those principles and systems. However, in the past there was a certain tendency to exclude such a general assessment from reports.

⁷⁶⁷ The absence of a committee Member's signature on a Report may signal dissent; the more widespread practice is to insert references in a Report, to the effect that *some Members do not agree with this solution or the committee did not reach consensus on this point*, or, more rarely, by attaching opinions on the proposed text of a bill. In other words, dissenting votes are accounted for substantively but not formally, ie without recognising, exercising and guaranteeing the right to dissent from the majority and for such vote to be identified, namely for reasons of political accountability.

procedural obstacle thereto.⁷⁶⁸

On the contrary, either by following the general principles on the functioning of collegiate bodies,⁷⁶⁹ namely those pertaining to the rights of members thereof, or by an integrated interpretation of the Rules of Procedure, one arrives at the unblemished right of committee Members to include their dissenting votes in Reports and, consequently, to be able to explain and state the reasons thereof.

Allow me to delve briefly into this issue.

Collegiate bodies, be they political, administrative (and private/civil), etc, obey a set of operating principles⁷⁷⁰ inherent to their collegiality, including the rights and duties of their members. The norms that impact the operation of public collegiate bodies are found, namely, in the Basic Law, in the Administrative Procedure Code,⁷⁷¹ and in the Rules of Procedure of the Legislative Assembly.

Members of collegiate bodies naturally have, among others, the following rights: to attend the meetings of the body to which they belong; to be informed of, and summoned to, such meetings; to have access to documentation supporting information on the work of the collegiate body; to participate in discussions; and, obviously, to vote and to express/declare the reasoning behind a dissenting vote — this is a general principle governing collegiate bodies.

Paragraph (1) of Article 30 (Record of dissenting vote in the minutes) of the Code of Administrative Procedure Code establishes the following: “*The members of a collegiate body may record their dissenting vote in the minutes, together with the reasons for such vote.*” In truth,

“A dissenting vote is, after all, a declaration/statement made by a member of a collegiate body, through which he or she publicly expresses, before the peers, his or her vote and, eventually, the respective reasons. [...] If the member in question wishes to record the dissenting vote [...] he or she shall make a statement into the minutes to the effect that the vote was not cast in favour of the deliberation or resolution taken [...] Such is enough to make

⁷⁶⁸ One may not likewise support the existence of a custom — there is no conviction of any prohibited act or behaviour in this regard.

⁷⁶⁹ For a summary of the current framework, Mai Men Ieng, ‘Breve ensaio sobre os princípios de órgão colegial administrativo’ (2008) 80 Administração 425 et seq.

⁷⁷⁰ See Paulo Otero, *Direito Constitucional Português Volume II – Organização do Poder Político* (Almedina 2010) 29 et seq speaking, for example, of the principle of internal self-organisation, the majority principle, the principle of accountability. See also Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 80 et seq.

⁷⁷¹ Which serves, mutatis mutandis, as a common default set of norms for filling unregulated gaps or lacunae on the functioning of political collegiate bodies. Expressing this idea of normative application to other collegiate bodies, Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 191.

his or her position public.”⁷⁷²

This principle is also enshrined under private law. Article 146, paragraph (2), subparagraph (d) of the Civil Code provides for the obligation to include in the minutes “*The record of the vote cast by any member of the body who so requests*”.

The principle in hand is detected beyond these normative acts. In the Rules of Procedure of the Legislative Assembly, one encounters clear manifestations of such principle, in alignment with the above-mentioned operating framework.

Article 4 establishes the duty of Members to participate in voting. Since the right to vote is evident,⁷⁷³ in this case on a Report, unanimity may not, in consequence, always be required. Any Member may vote differently from the majority and record such dissent as an externalised and formal statement in the appropriate locus, the text of the Report, ie not only internally but informally. In fact, as established under Article 82, paragraph (2), “*No Member in attendance may refrain from voting, without prejudice to the right of abstention.*”

Furthermore, the Rules of Procedure devote several norms to the issue of declarations/statements of votes. Significantly, Article 66: “*1. Any Member may issue oral or written statements of his or her vote, for the purpose of explanation thereof.*”⁷⁷⁴ This is the established general principle. Although formulated *apropos* plenary meetings, the principle is nevertheless expressed with a general, wide scope.

Several other procedural norms regulate this subject matter: for example, Article 58 provides for the floor to be given to Members to make addresses, in particular, to issue statements of vote; such statements are published in the Legislative Assembly’s Official Gazette, pursuant to Article 97, paragraph (2); the statement of vote is expressly mentioned under the rules for the debates on issues of public interest, per Article 139, paragraph 4).⁷⁷⁵

It would be contradictory if Members could enjoy the right to make statements concerning their votes, especially of dissenting ones, in plenary session, by nature a public and more solemn meeting, and could not do likewise in committee, a body operating, as a rule, behind closed doors. Even stranger would be the proposition that a Member may not record a dissenting vote in his or her committee’s Report, but later, in the Plenary, freely exercise the right of giving an account of such occurrence and recording his or her

⁷⁷² Lino Ribeiro and Cândido De Pinho, *Código do Procedimento Administrativo anotado e comentado* (Fundação Macau 1998) 242–43, adding that the record of a dissenting vote is obviously a written one.

⁷⁷³ The collegiate will of the committees and of the Plenary is formed by voting, and not, for example, by acclamation.

⁷⁷⁴ The next paragraphs stipulate thus: “2. Oral statements may not exceed three minutes. 3. Written statements shall be delivered to the President by the end of the respective meeting.”

⁷⁷⁵ Article 73 (Collaboration or attendance of other Members) may also be invoked: “*Members may send written observations to committees on matters within the competence thereof.*” If Members not belonging to a committee may send written observations thereto, from this idea of openness and transparency it must follow that such possibility shall also apply to committee members.

position.

Moving on to other connected issues of relevance.

4.3 Other Issues

The role of the Legislative Assembly's Advisory Staff⁷⁷⁶ is of particular significance,⁷⁷⁷ in the search for the most adequate technical solutions, in the research of elements in comparative law, in the filtering of possible non-conformities with constitutional norms, in the material and formal harmonisation of the internal solutions of each bill

Normally, this stage, which is typically preparatory but pre-delimited by the approval of a bill in general, is the procedural moment for carrying out consultations and hearings, be they mandatory or not. In this area, the parliamentary legislative procedure is very open.

In fact, not only is there a general and permanent invitation on the website of the Legislative Assembly,⁷⁷⁸ so that "Residents may send their opinions on bills to the Legislative Assembly by post or via e-mail,"⁷⁷⁹ but it is also not uncommon for the Legislative Assembly to conduct mandatory consultations not previously carried out by the Government, to engage in mandatory consultations on Members' bills, to repeat consultations, and to widen the spectrum of entities to be consulted (for example, invitations to representative bodies to opine or to participate in Committee meetings).

At this stage, the committee may invite third parties to the Legislative Assembly,

⁷⁷⁶ Cf "A parliamentary advisory service is defined as any action carried out by one or more persons who, by delivering information, opinions, advice or recommendations on a specific matter, intends to support Parliament or Congress, its bodies or members, in the exercise of their public functions": Nicolás Martínez and Mario Poblete and Joaquín Ugalde, 'Hacia una conceptualización del impacto legislativo de las asesorías parlamentarias' (2014) 3 Revista Chilena de Derecho Parlamentario 92, 95.

⁷⁷⁷ See for example, "Among the players that contribute to an increased level of legislative certainty are the parliamentary advisory services." and "Parliamentary research and advisory services are essential for increasing legislative certainty.": Nicolás Martínez and Mario Poblete and Joaquín Ugalde, 'Hacia una conceptualización del impacto legislativo de las asesorías parlamentarias' (2014) 3 Revista Chilena de Derecho Parlamentario 92, 92 and 96, respectively.

⁷⁷⁸ See, on this, João Santa Rita, 'A internet e a participação dos cidadãos na feita das leis' (2005) 39 Legislação 40, who speaks of the internet as a means for participation in the legislative process, which has greatly broadened the extent of generalised consultations, and presents several technical aspects capable of enhancing openness and participation. See also, with some relevance, Marina Pietrangelo, 'Qualche riflessione sui metodi della consultazione popolare al tempo di Internet, a margine dei referendum consultivi veneti su indipendenza e autonomia' (*federalismi.It*, 26 January 2015), downloaded on https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=28641&content=&content_author=.

⁷⁷⁹ Such opening up of the Legislative Assembly has provided effective results: many contributions and suggestions have been received in this way and, at times, such possibility is mentioned in Reports, which have included the former in attachment to the latter. For example, "On the other hand, the Committee received contributions over this period, in pursuance of a policy of openness of the Legislative Assembly, translated into "Residents may send their opinions on bills to the Legislative Assembly in writing or via e-mail": FSC, Report No. 3/V/2014.

under Article 74 of the Rules of Procedure, request information and opinions,⁷⁸⁰ and conduct fact-seeking or study missions.

The committee finalises its work by delivering its duly grounded report, within the timeframe allotted by the President of the Legislative Assembly, after consulting with the President of the Committee. If no deadline has been set, the report must be submitted to the President of the Legislative Assembly, in the case of bills, no later than thirty days from delivery of the respective text to the committee; with respect to amendment proposals, the default deadline is seven days. The committee may request an extension to the deadline, which normally occurs as a result of the complexity of the task, difficulties in the relationship with the proponent, etc

Especially concerning Members' bills, the Committee may present amendment proposals — and even substitution or replacement texts — as mentioned and exemplified above.

In the event that the committees fail to deliver their reports within the allowed period — the pre-determined deadline or that of the extensions — the bills are submitted to the Plenary, for debate and voting on the specifics, regardless of the reports.

This phase is thus concluded. From such moment onwards, the so-called second version (or third version, etc) of the Government bills enter the legislative procedure, in lieu of the originally submitted versions from which the entire process arose. Such eradication of the Government's legislative initiatives has no procedural grounding.

5. Debate and Voting on the Specifics of a Bill

We enter the next stage: after the moment of legislative initiative, the procedure carries on with a constitutive step (approval in general), going on to a preparatory phase (examination on the specifics), and returning to a constitutive moment (debate on the specifics). Amendment proposals (modification, suppression, substitution, or addendum) become relevant at this stage.

Two possible routes are now open.

5.1 Debate and Voting on the Specifics of a Bill — General Rule

The debate and voting on the specifics⁷⁸¹ deal with each and every article. The President of the Legislative Assembly may decide to put more than one article or amendment

⁷⁸⁰ “Therefore, in the event of a legally required consultation which has not yet taken place, either because the Government omitted such step before submitting its bill, or because the bill in question was initiated by Members, such consultation must be performed now.”: António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 481.

⁷⁸¹ I must reiterate that, in the case of Government bills, the texts subject to debate and voting are not the same ones which ran the course of the preceding moments — the second version (or third version, etc) of the bills are voted on now, in lieu of the texts previously approved in general.

proposal to the vote simultaneously or, at his or her own initiative, in view of the complexity of the subject-matter, or at the request of any Member, proceed to voting by paragraphs or subparagraphs.

The order of voting on the specifics is as follows:

- (a) Proposals for suppression;
- (b) Proposals for substitution;
- (c) Proposal for modification;
- (d) Debated text, with the inclusion of the amendment proposals, as approved;
- (e) Proposals for addenda to the text voted on.

If two or more amendment proposals of the same nature are submitted, they are put to the vote in the following order:

- a) Proposals submitted by the committee;
- b) Proposals submitted by Members;
- c) In each of the preceding paragraphs, in the order of the respective submission.

At the request of any Member, the Plenary or the committee may decide to postpone — only once — the vote on the specifics to the next plenary or committee meeting, as the case may be.

The re-appraisal of the text by a committee is possible:

“Upon deliberation of the Plenary, at the request of any Member, and until the start of voting is announced, the text of a bill may be sent to any committee for the purpose of a new examination on the specifics, within the deadline set out by the Plenary.”

There are no known cases of effective use of such possibility, apart from a single exception.⁷⁸²

5.2 Exceptional Case of Voting in Committee and Final Overall Voting

Pursuant to Article 121 of the Rules of Procedure, the Plenary may, at any given moment,

⁷⁸² Cf “The subject-matter generated some debate in the Plenary and, because it was not possible to harmonise positions, the Plenary decided, in accordance with the [...] Rules of Procedure, to suspend the meeting and send the bill to the Committee for re-appraisal.”; and “In conclusion, the Committee considers that the amendments now effectuated – which are duly highlighted in the new version of the Government bill submitted to the Legislative Assembly — clarify the Members’ doubts; as such, the bill may now be voted on in its entirety.”: FSC, Report No. 2/ II/2004, Government bill entitled “Law Relating to the Legal Status of Refugees”.

decide to submit the vote on the specifics to the competent committee,⁷⁸³ or, if more than one exists, to that which it considers most appropriate for the purpose.

In such case, the President of the Legislative Assembly sets a deadline that reasonably allows for not only the drafting and presentation of the committee's record of proceedings, but also the subsequent debate and voting on the specifics — for reasons of transparency of the legislative process, the debate and voting of a bill or shall always be recorded and documented in minutes, which are attached to the committee's descriptive report.

However, there can always be a call-back of voting: the Plenary may, at any time, call the vote on the specifics back to itself, by means of a resolution at the request of any Member.

The stage of final overall voting only occurs when a prior vote on the specifics in committee is held, entailing the non-application of the special features thereof to the legislative procedures wherein voting on the specifics is carried out in plenary session.

The texts of the bills approved on the specifics in committee are delivered to the President of the Legislative Assembly, for the purpose of final overall voting in the Plenary. Any member may request a debate on given articles, and also submit proposals to amend the text approved in committee, until the period of final overall voting commences.

The effects of a negative decision taken in the final overall voting are indeed quite particular. The bill is, for lack of a better metaphor, “resurrected”, with the consequent restarting of the legislative procedure:

“1. In the event of non-approval of the text of a bill in final overall voting, the Plenary may deliberate to:

a) Send the original text to an ad hoc committee established specifically to perform a new examination, debate and voting on the specifics, without prejudice to the provisions of Article 123, or

b) Proceed to a new debate and voting on the specifics in the Plenary.”

Failure to approve the text of a bill, as set forth above, is tantamount to its definitive rejection.

6. Final Drafting

Subsequent to these votes and approvals, the legislative procedure moves on, returning to

⁷⁸³ See an example, Committee on Social Affairs, Education and Culture, Report No. 6/94, Vote on the specifics of the bill on the General Framework Law on Family Policy, “*I. Following the deliberation taken in the plenary session of 8 July 1994, the vote on the specifics of the bill draft law in question was submitted to this Committee under Article 137, paragraph 3), of the Rules of Procedure.*” and “*II. On the vote, 2. The bill was voted on as follows*” — after the issuance of the normal analytical report by said Committee.

an absolutely common pipeline, to the final drafting stage.

The final drafting Committee is endowed with the power of absolute and final say, as procedurally defined.⁷⁸⁴

The said committee decides on its own,⁷⁸⁵ without requiring the consent of the bill's proponent or of any other party.⁷⁸⁶ It is crucial to note that the final drafting must not alter the legislative intent, limiting itself to enhancing the systematisation and style of the text perfecting the systematisation and style of the text — for instance, to eliminate the brackets for identification of normative acts, to correct typos, to harmonise the wording, and to introduce other formal improvements, mainly in the domain of formal legislative technique.

In practice, the final drafting is often carried out between the Legislative Assembly's Advisory Staff and the President of the Committee.⁷⁸⁷

The definitive text is confirmed with the signature of the President of the Legislative Assembly, under Article 130 of the Rules of Procedure;⁷⁸⁸⁷⁵⁰ refusal to sign, on political grounds, is not allowed.

⁷⁸⁴ Article 129, paragraph (2): "The final drafting committee may not modify the legislative intent and shall limit its task to perfecting the systematisation and style of the text."

⁷⁸⁵ Perhaps in view of the trappings of a bill's proponent as the "owner" of the legislative process — which, at this stage, is increasingly untrue — the final wording, in practice, sometimes is determined or consented by the proponent, in apparent non-compliance with the procedural framework.

⁷⁸⁶ Cf. "It should be stressed that this was one of the few provisions warranting an amendment from the proponent, a fact worth noting, given the general context of this Government bill. This issue is raised in the present document as a courtesy and to foster a good collaborative environment, as its resolution depends entirely and exclusively on the Committee, under the terms clearly set out in Article 129 of the Rules of Procedure. If the Government does not proceed with the amendment, the drafting committee shall do so, at the stage of final drafting. [...] Furthermore, as has become evident, this issue may, if not resolved beforehand, be fully addressed at the moment of the final drafting." FSC, Report No. 2/V/2017, "Control of the cross-border transport of cash and bearer negotiable instruments". See also, "One must also mention that the final drafting of the texts of approved bills is the responsibility of the competent committee; such committee may not modify the legislative intent, and shall limit its role to improving the systematisation and style of the text, as commanded by Article 129 of the Rules of Procedure." FSC, Report No. 5/VI/2018.

⁷⁸⁷ A tendency — in direct and unequivocal non-conformity with procedural law — for the final drafting to be carried out, or subject to a prior "validation": by the proponent, is detectable, ie committees withholding the final drafts of Government bills until obtaining the support of the Executive or its departments or services.

⁷⁸⁸ In the past, a framework existed for Members to challenge the final draft — eg the inaccuracies therein — within five days; the President was responsible for deciding such challenge, and the text was considered to be definitive provided that no challenges were submitted, or after the decisions thereon were delivered, in accordance with the original wording of Articles 128 and 129, paragraph 1), revoked by Resolution No. 2/2009, *Amendment to Resolution No. 1/1999, which approved the Rules of Procedure of the Legislative Assembly*. Recalling said suppressed provisions: "Article 128 (Challenges) 1. Any Member may challenge inaccuracies, within five working days after receiving the text of the final draft. 2. The President is responsible for deciding the challenge, within forty-eight hours; the challenging Member may appeal to the Plenary until the meeting following the announcement of said decision is held. 3. If the text may only be communicated after the normal period of operation has ended, or during suspensions thereof, the powers of the Plenary provided for in the preceding paragraph are exercised by the Board. Article 129 (Definitive text; confirmation) 1. The unchallenged text, or the one reached after decisions on challenges thereto have been delivered, is considered definitive. 2. The definitive text is confirmed with the President's signature." Making an express reference to this framework, José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 243.

7. Signature by the Chief Executive and Veto

This moment embodies the start of the legislative procedure's monitoring stage. Bills approved by the Legislative Assembly become law after being signed by the Chief Executive. This act roughly corresponds to a control of the merits and the constitutional conformity of the texts approved by the Legislative Assembly and signed by the respective President.

The Chief Executive may, however, decide in certain cases to refuse to sign,⁷⁸⁹ ie to *veto politically*,⁷⁹⁰ giving rise to a *second deliberation on Members' bills*.

Article 132 of the Rules of Procedure establishes the framework:

"1. In the event of refusal to sign a Members' bill, under the terms of Article 51 of the Basic Law, such bill is resubmitted, within ninety days, to the Legislative Assembly, for the purpose of confirmation thereof.

2. The new appraisal is carried out in a plenary meeting to such end scheduled by the President.

3. The voting in general shall be on such confirmation.

4. The debate on the specifics shall occur provided that, until the end of the general debate, amendment proposals are submitted; in such case, voting shall be solely on the articles within the scope of said proposals.

5. In the case provided for in the preceding paragraph, voting on the specifics may precede the vote on the whole, if so decided by the Plenary, at the request of no less than three Members. 6. There shall be no final drafting of the text left unchanged after the second deliberation."

A decision by the Legislative Assembly to confirm a Members' bill requires approval by a vote of no less than two-thirds of all Members, under Article 51 of the Basic Law. Faced with such deliberation, the Chief Executive has two alternatives: either sign the bill and order publication thereof, within 30 days, or dissolve the Legislative

⁷⁸⁹ Underlining this point and framing it in the context of "*mutual co-operation and cross-restrictions between the executive and the legislature*": Song Xixiang, 'Sobre as Relações entre o Poder Executivo e o Legislativo e o Judicial em RAEHK e RAEM' (2012) 4 Revista de Estudos de 'Um País, Dois Sistemas' 119, 121, "*the executive imposes restrictions on the legislature: in the legislative process, the Chief Executive may refuse to sign, and even dissolve the Legislative Assembly*".

⁷⁹⁰ Lino Ribeiro, *Curso de Procedimento Administrativo* (SAFP 2001) 28; José Eduardo Figueiredo Dias, 'Procedimento legislativo', in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 246; Carlos Blanco de Moraes, 'A organização do poder político-legislativo no território de Macau — Durante e após a transição para a soberania Chinesa' in *Estudos em Homenagem ao Prof. Doutor Rogério Soares* (Coimbra Editora 2001) 171. See also Cheong Pou Man, 'Conhecer a Lei Básica de Macau Através da Teoria e Regime Democráticos' (2002) 58 Administração 1139, 1283.

Assembly.⁷⁹¹

Indulge me with a recollection of the observations made above, regarding the exclusion of Government bills from this framework. Nonetheless, it is questionable whether such logic applies in the following scenario, implausible in practice, but legally possible: what happens if Members, through amendment proposals, modify the original text of a Government bill to a degree deemed unacceptable by the Chief Executive, who consequently might wish to veto the future law, as worded by the Members? Should such case not be contemplated? Would the so-called supremacy of the Chief Executive over the Legislative body not impose an extension of the power to veto? If so, does the Basic Law, in its narrative, allow for this enlargement?⁷⁹²

A final question: could this case be construed as a special procedure?

This stage exhausts the Rules of Procedure's regulation of the legislative procedure, but does not mark the end of the legislative procedure. In fact, there are other *ex post* "moments", beyond the Rules of Procedure: publication, and — although outside the scope of the legislative procedure *per se* — reporting of the law for record in Beijing.

8. Publication

The Chief Executive,⁷⁹³ after signing the laws,⁷⁹⁴ sends these for publication in the OG.

One may contend that the publication of laws, and of all other normative act⁷⁹⁵

⁷⁹¹ Cf an emphasis on the notion of general interest, "In the context of the aforementioned Articles 51, 52 and 54, these are of the same nature, providing a balance between the Chief Executive of the Macau Special Administrative Region (MSAR) and the Legislative Assembly, particularly with respect to the legislative power. In the event of a serious dispute regarding legislation between the Chief Executive of the Macau Special Administrative Region and the Legislative Assembly, the general interest is the basis for consideration and judgment.": Wu Tianhao, 'Sobre o "Interesse Geral" Mencionado na Lei Básica da Região Administrativa Especial de Macau' (2012) 1 Revista de Estudos de "Um País, Dois Sistemas" 122.

⁷⁹² Inasmuch as this issue is legally framed in the Basic Law and the Rules of Procedure, I believe no such veto may exist. See António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 483, especially 484.

⁷⁹³ Lino Ribeiro, *Curso de Procedimento Administrativo* (SAFP 2001) 28, highlights this important intervention by the Chief Executive at this stage of the legislative process, one of "*integrating effectiveness*": *in addition to the stage of control, as discussed*: wherein the *right to veto* is placed, "*linked to the requirement of signature*".

⁷⁹⁴ The other acts of the Legislative Assembly, including those of a normative nature, are published by the sole order of the President of the Legislative Assembly.

⁷⁹⁵ In its entirety and both official languages. Therefore, it can hardly be understood why many international instruments appear in the OG, without either the Chinese or Portuguese language, and sometimes with a partial version in only one official language! For example, Chief Executive's Notice No. 69/2011, published in the OG, No. 42, Series II, of 19/10/2011, uses Japanese (by the Government of Japan) and Chinese (by the Government of the People's Republic of China). There is no translation of the note, issued in Japanese, into the two official languages, Chinese and Portuguese, and there is no translation of the note, issued in Chinese, into Portuguese. Consider also Chief Executive's Notice No. 49/2011, published in the OG, No. 36, Series II, of 07/09/2011, which uses Portuguese (by the Government of the Republic of Mozambique) and Chinese and Portuguese (by the People's Republic of China), with no translation into Chinese of the note issued by the Republic of Mozambique; Chief Executive's Notice No. 10/2014, ordering the publication of the authentic English language

(resolutions, independent administrative regulations, complementary administrative regulations, national laws, national regulations, instruments of international law) in the official journal has a “certifying effect: the published text is the legal one, with a presumption of being in conformity with the original text.”⁷⁹⁶

This is a stage concerning the effectiveness of the legislative procedure, without which no legal effects may arise — Article 78 of the Basic Law establishes that “*Bills approved by the Legislative Assembly of the Macau Special Administrative Region only enter into force after being signed and published by the Chief Executive.*” In accordance with such constitutional obligation, Article 3 of the Law on forms and templates of legal enactments provides: “*Under penalty of legal ineffectiveness, the following are published in Series I of the Official Bulletin: (1) The laws; [...]*”.

version of the “Agreement between the Government of the Macau Special Administrative Region of the People’s Republic of China and the Government of Japan on the Exchange of Information on Tax Matters”: without a Chinese version nor a Portuguese one! It should also be noted that certain international acts originating from the United Nations Security Council, which were systematically published in the two official languages of the MSAR, are now being published in Chinese and English, with no translation into Portuguese; for example, Chief Executive’s Notice No. 74/2011, published in the OG, No. 43, Series II, of 26/10/2011, which orders the publication of Resolution No. 1988 of the United Nations Security Council, makes use of the English and Chinese languages, without a translation into Portuguese. What can one say? First, other international agreements have been published, correctly from a technical point of view and, in accordance with the usual practice, in the two official languages (or with the required translation into both official languages) in the OG; for example, Chief Executive’s Notice No. 28/2011, published in the OG, No. 32, Series I, 08/08/2011, Chief Executive’s Notice No. 29/2011, published in the OG, No. 32, Series I, of 08/08/2011. Second, it is highly doubtful whether international acts not properly published in the official languages are effective, given that the consequence of a failure to publish in the OG, or of a defective publication, is legal ineffectiveness. Third, it is neither understandable, nor acceptable, that English has emerged as a kind of authentic language, alongside and in full equality with the authentic Chinese version, while Portuguese is not even used. In this regard, “*The unity and publicity of the Law have always been fundamental principles of the Macau legal system. The Basic Law enshrined the principle of the continuity of the legal system, therefore said their fundamental principles must be understood to have been maintained [...] It is from the publicity given to the texts of treaties, of the acts relating thereto, as well as others acts to be executed, that the application of international law becomes possible in our system [...] In the field of conventional (multilateral or bilateral) international law, the publicity of acts (other than just treaties) is especially important: not only is it obviously necessary to acquire knowledge of the texts of the treaties (which are have the value of law, thus requiring cognisance of their existence), but also because it is essential to know when and how they are applied.*”: TSC, Report No. 2/II/2002; “*The application of official bilingualism in Macau is not only one of the important characteristics of the regional society, but also an advantage. [...] The official languages are used on official occasions, ie in the performance of the functions of administrative bodies, in the production of legal enactments by legislative bodies and the rulings by judicial bodies.*”: Ieong Wan Chong, *Anotações à Lei Básica da RAEM* (Associação de Divulgação da Lei Básica de Macau 2015) 45; “*With the establishment of the Macau Special Administrative Region, the custom of using the Portuguese language in the judicial system is preserved, one of the characteristics of Macau. The use of Portuguese, as a legal-technical language, reveals the origin of the legal system previously in force in Macau, maintaining the uniqueness of the judicial language, thus ensuring, both from a legal scholarship and a case-law point of view, the intrinsic relationship with the original system.*”: Zhu Lin, ‘A situação da língua chinesa nas sentenças judiciais de Macau — Duma perspectiva dos direitos fundamentais’ (2007) 75 *Administração* 159; and finally, “All local bodies in the Region must use the official languages and may not reject the use thereof, nor just use only one and reject the other.”: Xiao Weiyun, *Conferência sobre a Lei Básica de Macau* (Associação Promotora da Lei Básica de Macau, Macau, undated) 66. See also, for a comprehensive clarification of language in the shaping legal rights and duties, Pedro Pereira de Sena, ‘Direito Linguístico: direitos e deveres nas palavras da lei’ (1997) 36 *Administração* 385 et seq.

⁷⁹⁶ José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 248.

Failure to publish a law results in its original ineffectiveness:⁷⁹⁷ the law may indeed exist and be valid, but it does not produce “*any legal effects*”.⁷⁹⁸

The concept of publication is — for several reasons, eg the idea of publicity *per se*⁷⁹⁹ — the focal point for the purpose of determining the period of *vacatio legis*; in the words of MENEZES CORDEIRO, “a nuclear importance: the *vacatio* deadlines are counted from such event, and it is certain that, before publication, legal enactments are ineffective.”⁸⁰⁰

Next comes a stage located nearly outside the range of the legislative procedure, with the purpose of ordering and formalising the participation of subjects within political bodies; notwithstanding such assertion, the entry into force phase does belong to said procedure.

9. Entry into Force

The moment of publication of laws should not be confused with the moment of their entry into force. Although such moments may coincide in time, normally the entry into force operates at a later date.⁸⁰¹

The period between those two moments is termed *vacatio legis*:

“The *vacatio legis* period is intended to enable the addressees to know the law before it begins to take effect. More than allowing potential addressees to know the law, this period of *vacatio legis* reinforces the legitimacy of legal norms. It is a clear indication of the undesirability of ‘surprise laws’, ignored by their addressees and, as such, leading to non-compliance.”⁸⁰²

The Law on forms and templates of legal enactments⁸⁰³ establishes as a first and general principle that laws (among other normative acts such as resolutions and administrative regulations) enter into force on the day stipulated therein. This rule allows the lawmaker to “determine, on a case-by-case basis, the date of entry into force of each

⁷⁹⁷ The ineffectiveness is original in nature whenever “*the act or fact is contemporary with the making of the law*”: Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 129.

⁷⁹⁸ Marcelo Rebelo De Sousa and Sofia Galvão, *Introdução ao estudo do Direito* (Lex 2000) 130.

⁷⁹⁹ As Iong Ka Ton defends, ‘Considerações Sobre a Divulgação Jurídica Promovida pela Administração Pública de Macau’ (2001) 54 *Administração* 1439, 1440: “*Once the law has been made, publication comes next. The publication of the law is, of course, a process of legal dissemination. Bills are not laws until they are examined and approved by voting within legislative bodies, and, furthermore, the other legally required procedures are completed. These laws do not produce the intended effects of regulating social relations and the conduct of the population, even if generally known by the latter. For the law to be known to all and to duly produce effects, it has to be made public, with a view to the understanding, execution and compliance with the law by the population and the civil service.*”

⁸⁰⁰ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 *A Feitura das Leis* 365, 366.

⁸⁰¹ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 *A Feitura das Leis* 365.

⁸⁰² TSC, Report No. 2/II/2005, Government bill entitled “Electronic documents and signatures”.

⁸⁰³ Article 10, Law No. 3/1999 dated 20 December 1999.

law, by taking into account its inherent characteristics, and, most relevantly, results in the establishment of a period of *vacatio legis*, even if subsidiary (which is nothing more than the period, between the publication of the law and its entry into force, recognised as “normal”).⁸⁰⁴

In other words, a decision-making autonomy in this particular regard is recognised for each and every law, taking into account the judgment of the lawmaker⁸⁰⁵ on aspects such as opportunity, necessity, complexity, novelty, scope and relationship of the new framework to be introduced in the legal order with other sources of law and normative acts — namely the correlation with complementary acts. This means that the *general vacatio legis* may be suppressed, shortened, or extended.⁸⁰⁶

In this respect, the Civil Code is also convergent, as a law on laws: Title I, On the laws, their interpretation and application.

There is, therefore, a normative duplication,⁸⁰⁷ stemming from the same formal source (law), on the same subject-matter (law, excluding other normative acts?⁸⁰⁸), the solution being identical in both sources. Albeit with a different wording, Article 4 of the Civil Code⁸⁰⁹ points equally to the principle of the autonomy of each law in defining the moment of its entry into force and follows the same general subsidiary criterion of such event occurring on the sixth day after that of publication, provided the law in question is silent on the issue.

This decision-making autonomy for and of each legislative act⁸¹⁰ may operate by indicating a pre-determined date, by establishing that the entry into force shall take

⁸⁰⁴ TSC, Report No. 2 II/2005, Government bill entitled “Electronic documents and signatures”.

⁸⁰⁵ Such judgment may differ from that of the proponent. See, for example, TSC, Report No. 2 IV/2012, which considered that the entry into force, originally set for the following day, should be amended to 30 days after publication, in order to allow the competent departments and bodies to become better familiarised with the new legal framework. Other examples can be consulted in the TSC’s Report No. 4/IV/2013, invoking legal clarity and certainty and an adequate preparatory timeframe; “*The Committee considers that the proposed vacatio legis period should be lengthened to 180 days, albeit per a previous informal suggestion by Government In short, half a year is a very reasonable period for the purposes of the entry into force of this law, allowing it to be known by the special addressees and for measures to be taken to adapt to the provisions of the law.*”: TSC, Report No. 3/II/2005; or “*The provision, contained in the initial version of the Government bill, for the law to enter into force on the day following its publication, is not suitable.*”: TSC, Report No. 2/II/2005.

⁸⁰⁶ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 365, 366. The author defends that the suppression or the shortening of the *vacatio legis* tend to occur when there is a need for immediate legislative action, while the enlargement thereof is justified in view of especially complex legal enactments, *ibid*, 367.

⁸⁰⁷ See, for a criticism of this type of norms being included in the Civil Code, Jorge Miranda, ‘Em vez do Código Civil, uma lei sobre leis’ (2007) 47 Legislação 21, 25 et seq.

⁸⁰⁸ Law regardless of its source. The issue is whether other normative acts — be they endowed or not with the legal force and value of law — should be included. An example to consider are the normative orders.

⁸⁰⁹ “Article 4 (Entry into force of the law), 1. The law, regardless of its source, only becomes mandatory after being published in the Official Gazette. 2. Between the publication and the moment of entry into force, a period of time, as determined by the law, shall elapse; in the absence of such determination, the law shall enter into force on the sixth day following that publication.”

⁸¹⁰ José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CREDE-DM 2016) 92, mention “the nearly uniform practice in the MSAR for legal enactments to contain a provision on the entry into force”.

place after a certain period of time from the day of publication, or by conditioning the entry into force to acts to be practiced in the future, namely by other entities (for example, the publication of an administrative regulation by the Chief Executive).

The date of entry into force may vary greatly. For example, we encounter laws that come into force 180 days after the date of their publication,⁸¹¹ others after 90 days,⁸¹² or 30 days following publication;⁸¹³ some specify that the entry into force occurs on the day following publication,⁸¹⁴ by adopting the different technique of choosing a given calendar day,⁸¹⁵ such as a waiting period of half a year, a couple of months, etc

Other cases do not actually establish the entry into force, but such date is determinable, although no longer by the legislator: either is by conditioning the entry into force — usually of to just a few norms — to complementary enactments, or to other factors the moment of which occurrence may be uncertain.

The latter situation is exemplified in the case of the Administrative Litigation Proceedings Code: under Article 9 of Decree-Law No. 110/99/M, of 13 December 1999, which approved said Code: “*The present legal enactment and the Code hereby approved enter into force on the date on which the Court of Final Appeal begins to operate.*”

The legislator may, for several reasons, revise the decision previously taken on the appropriate moment for the entry into force and, by means of a normative act of identical legal value — as must be — modify such moment to a different, usually later, one.⁸¹⁶ For example, the entry into force of the Civil Code and the Commercial Code was postponed by one month, from 1 October to 1 November 1999.⁸¹⁷

It should be noted that, when dealing with the so-called *Great Codes*,⁸¹⁸ it is

⁸¹¹ Law No. 8/2014, Prevention and control of environmental noise, or Law No. 3/2014, Legal framework on the occupational safety card in the building industry.

⁸¹² Law No. 9/2012, Deposit Guarantee Scheme.

⁸¹³ Law No. 2/2012, Legal framework on video surveillance in public spaces.

⁸¹⁴ Law No. 1/2009, Addendum to Law No. 21/88/M — “Access to the Law and to the Courts”.

⁸¹⁵ For example, “*The present law enters into force on 1 March 2014.*”: Law No. 11/2013, Law on Safeguarding of Cultural Heritage; “*The present law enters into force on 1 January 2011.*”: Law No. 4/2010, Legal Framework on Social Security; and “*The present law enters into force on 15 August 2009.*”: Law No. 13/2009, Legal framework governing the internal sources of norms.

⁸¹⁶ I am unaware of cases where the entry into force has been antedated or brought forward by reference to a moment in time already established in a published law, probably because such may blemish the principles of legal clarity and certainty, negatively affecting the predictability created with the publication of the law and the original norm on the *vacatio legis*. Nonetheless, in view of the existence of long periods before the entry into force, and the urgent need to regulate certain subject-matters — which may even be greater after the publication of the law in hand — such a possibility should perhaps not be ruled out, albeit of infrequent occurrence, as it flouts the legitimate legal expectation previously created about the moment when the regulatory framework would have started to be applied.

⁸¹⁷ Cf the preamble of Decree-Law No. 48/99/M, of 27 September: “Given that the conclusion of the legislative process relating to the Code of Civil Procedure was possible only at the present moment, it is not viable to set the date of 1 October for said Code to enter into force; consequently, it is advisable to postpone, for one month, the entry into force of the Civil Code and of the Commercial Code, thus enduring that these three Great Codes may enter into force at the same time.”

⁸¹⁸ See, for example Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 365, 367.

common and suitable to establish a reasonably long *vacatio legis* period.⁸¹⁹ In Macau's case, due to very specific contingencies in the transition process,⁸²⁰ such major legal codes entered into force after a somewhat reduced period of *vacatio legis*.

A very unique example of very long period of *vacatio legis* is the Macau Basic Law.⁸²¹ This constitutional law was adopted on 31 March 1993, at the First Session of the Eighth Legislature of the National People's Congress of the People's Republic of China and promulgated by Decree No. 3 of the President of the People's Republic of China, to enter into force on 20 December 1999. In other words, it underwent a *vacatio legis* period of more than six and a half years.⁸²²

Unless a law determines the date of its entry into force, then general criterion kicks in: "In the absence of a determined day, the legal enactments referred to in the preceding paragraph enter into force on the sixth day after that of publication."⁸²³ — in other words, such is the default *vacatio legis*.⁸²⁴

The entry into force of laws and other normative acts only occurs after publication thereof in the OG of the MSAR, the official journal serving as the proper and appropriate means to inform the community of the creation of new legislative acts, which shall enter into force and thus become capable of producing legal effects. Upholding principles such as democracy, transparency, and legitimacy, it is imperative that laws are

⁸¹⁹ "The present legal enactment and the Code of Criminal Procedure hereby approved enter into force on 1 April 1997, being solely applicable to procedures initiated after such date, regardless of the moment when the offence was committed; procedures pending on said date shall continue to be governed by the repealed legislation until a final res judicata decision thereon has been delivered.": Decree-Law No. 48/96/M, of 2 September 1996. This legal enactment was approved on 15 August 1996.

⁸²⁰ Cf, as an example of these specific contingencies, "Finally, it must be reiterated that the absence of a new judicial organisation compatible with the Basic Law will prevent the new Code of Civil Procedure (CPC) from unveiling the full gamut of its potentialities, especially in the domain of appellate procedures. The Committee is hopeful that the current impasse will be quickly resolved, so that the CPC may be completely implemented as soon as possible.": AHC for Monitoring and Participating in the Drafting of the Legislative Texts Relating to the Civil Code, the Code of Civil Procedure and the Commercial Code, Report No. 3/99, Appraisal of the Project relating to the new Code of Civil Procedure of Macau.

⁸²¹ Jorge Bacelar Gouveia, 'Fontes do Direito e Direitos Fundamentais em Macau' in *Direito Constitucional de Macau* (IDILP 2012) 79.

⁸²² At the time, issues such as "pre-effectiveness": convergence, consideration of the content of the Basic Law as a reference point for the legislative reforms to be undertaken, were discussed, I have always taken the view that such were distinct questions. See Paulo Cardinal, 'A Transição e o sistema político de Macau: continuidade ou convergência?' (1997) 4 *Revista Jurídica de Macau* 27, 34 et seq; and Manuel Escovar Trigo, 'A transição na Declaração Conjunta' (Simpósio sobre população e desenvolvimento em Macau, Macau 1993): "Since the Basic Law has not entered into force, and does not have pre-effectiveness, the essential question — from a legal point of view — is that which pertains to its present "reference" value, and to its possible claim to retroactive application, after it enters into force. A positive legal reference value is on legislative policy, regarding the adaptation of the current system to the future one of the MSAR, in addition to issues of predictability, publicity and accessibility for its addressees. In the development of Macau's legal system, one should not, naturally, be indifferent to the approval of Basic Law, nor its normative content."

⁸²³ Article 10, paragraph (2), of Law No. 3/1999.

⁸²⁴ As Menezes Cordeiro points out, "the generic *vacatio legis* periods are subsidiary in nature.": Menezes Cordeiro, 'Problemas de aplicação da lei no tempo. Disposições transitórias' (1986) 2 *A Feitura das Leis* 365.

not clandestine, unwritten, or informal.⁸²⁵

There exists a possible differentiation between entry into force and production of effects.⁸²⁶ Normally, the moment of entry into force corresponds to the moment when the legislative act becomes effective, both phenomena being therefore concurrent.

However, such synonymy may not always be the case: “The entry into force of a law should not be confused with its effectiveness, which may be retroactive.”⁸²⁷

Indeed, the legislator may intend to change the typical moment for a law to take effect, which is that of the entry into force.⁸²⁸ In such cases, the production of effects becomes temporally distinct from the moment of entry into force.⁸²⁹ The effects reverberate over time in a different way, either with a view to a postponing the production thereof to a certain moment in the future — often determined with the approval and entry into force of another complementary legal enactment — or, conversely, to facts which have already occurred, thus producing retroactive effects, projected into the past.⁸³⁰

In addition to limitations under constitutional and international law, good legislative policy dictates that “retroactivity, even if admissible, should be avoided. Life follows its own natural course of events, generating stability and confidence. The intention to modify the past, in itself, constitutes a harmful social disturbance, which the legislator should only consider if absolutely necessary.”⁸³¹

In conclusion, the entry into force of a law refers to the moment from which such law becomes applicable in the legal order; it is rooted in the very idea of a normative act. Whereas legal effectiveness pertains to the moment from which a segment — small or large, but always a segment — of the normative fabric contained in a law begins to produce effects in the legal order. Such production, in principle, may either be projected

⁸²⁵ “It should be noted that if a law is applied by the Administration before publication or, after such event but before the term of the *vacatio legis*, the acts issued under such application shall be ineffective, except in putative situations.”: Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2012) 471.

⁸²⁶ Cf José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016) 91, who also alert to the difference.

⁸²⁷ João Gil de Oliveira and José Cândido de Pinho, *Código Civil de Macau — Anotado e Comentado*, Livro I, vol I (CFJJ 2018) 99.

⁸²⁸ “The entry into force refers to the moment when a legal enactment or some of its provisions begin to be applicable, becoming officially part of the legal order. Effectiveness reflects the moment when a legal enactment, or some of its provisions, once entered into force and applicable, begin to actually produce effects.”: José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016).

⁸²⁹ And not before. See José Miguel Figueiredo and António Manuel Abrantes, *Manual de Legística Formal* (Fundação Rui Cunha/CRED-DM 2016) 91, who mention “*once entered into force*”.

⁸³⁰ The entry into force of a law — or of another normative act — must always precede the production of the respective desired effects, given that a law, if not yet in force in the legal order, does not belong thereto, and is obviously devoid of effectiveness. After the entry into force of a law, it is possible for norms to have retroactive effects.

⁸³¹ Menezes Cordeiro, ‘Problemas de aplicação da lei no tempo. Disposições transitórias’ (1986) 2 A Feitura das Leis 377.

retroactively,⁸³² or, more commonly, deferred to a later time, eg after the approval of a complementary administrative regulation.

The legislative procedure is thus concluded.

⁸³² One must be mindful of the guarantee anchored on the prohibition of more unfavourable retroactive laws in certain subject-matters, especially in the fiscal and criminal law domains; see a manifestation thereof under Article 29 of the Basic Law. On this issue, see, for instance, Jorge A. F. Godinho, 'A Lei Basica e o Direito Penal' (1993) 6 (19/20) *Revista de administração publica de Macau* 153, 165, and Jorge A. F. Godinho, *Macau Business Law and Legal System* (LexisNexis 2007) 16.