
PART 5
A FEW PRECEDING AND COMPLEMENTARY
ISSUES RELATIVE TO
THE LEGISLATIVE PROCEDURE

XVII.

THE LAWMAKING IMPETUS

1. Introductory Remarks

To complement the preceding chapter, it might be interesting to present a few brief words on other aspects related to, but outside the immediate gravitational orbit of, the legislative procedure *per se*, with the latter co-habiting both upstream and downstream.

These three aspects are grouped together only for convenience and do not possess any common thread or umbrella. The only unifying link shall be one of co-existence with, or proximity to, the legislative procedure.

2. The Notion of Lawmaking Impetus and Distinction from Legislative Initiative

The first issue to be addressed naturally precedes the legislative procedure — the lawmaking impetus and, in a certain sense, the decision to legislate.

At this moment, at issue is not the legislative initiative — discussed previously — but something conceptually and practically different:⁸⁶⁰ “The lawmaking impetus is, may be, or must be, at the origin of the process, but falls outside thereof;”.⁸⁶¹ The lawmaking impetus may be considered as one of the components — not the only one, I must emphasise — of the *occasio legis*.⁸⁶²

This determining or stimulating factor in jumpstarting the legislative procedure may be derived either directly and compulsorily from a legal norm — *eg*, the most common cases, from the realm of non-legislative normative procedures, are the complementary administrative regulations — be unleashed from legal impetuses devoid of a mandatory normative conformation — *eg* in the case of Macau, rulings and decisions within the framework of judicial activity — or indirectly from other diverse factors, also

⁸⁶⁰ This concept, distinct from that of the legislative initiative, was introduced in Portuguese-speaking legal scholarship by Gomes Canotilho. See, for example, Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 *Legislação* 15.

⁸⁶¹ Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268.

⁸⁶² *ibid* 270–271.

not normatively binding on the lawmaker,⁸⁶³ which may be called *political impetuses*,⁸⁶⁴ namely those arising from given public bodies or sprouting from the exercise of the fundamental right of petition.⁸⁶⁵

I shall also discuss diffuse or social impetuses, for example through the conveying of positions by associations or organised *vested interests*, and, from another perspective, the negative lawmaking impetuses and the *suspensive or deferring* lawmaking impetuses.

Two aspects should also be noted. First, as far as legal impetuses are concerned, in particular, the binding ones, one should bear in mind that, de rigueur, such impetuses germinate in norms, and not in legislative acts *per se*.⁸⁶⁶ in truth — and herewith comes the second aspect — a single law may contain norms giving rise to lawmaking impetuses *de facere*, together with other norms constituting negative impetuses. I shall examine examples of this situation.

Laws causally linked to lawmaking impetuses may also contain a specific timing for implementation,⁸⁶⁷ as were the legislative authorisations, or else, as is usually the case, there is no stipulation of the precise and determined timeframe for impetuses to bear fruit.

3. Sino-Portuguese Joint Declaration on the Question of Macau

Commencing the analysis of the lawmaking impetuses arising from legal norms, the Joint Declaration comes to the forefront.

A significant impetus, especially relevant in Macau's transitional framework⁸⁶⁸ of 50 years, under the aegis of “One Country, Two Systems” principle, finds expression in the Joint Declaration, which led to the formulation of the Basic Law:

“The fundamental policies mentioned above and the respective clarifications in Annex I to the present Joint Declaration shall be established in a Basic Law of the Macau Special Administrative Region of the People's

⁸⁶³ For a few classifications of lawmaking impetuses, see *inter alia*, Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268 et seq; Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 *Legislação* 15 et seq; Carlos Blanco de Moraes, *Curso de Direito Constitucional I* (Coimbra Editora 2015) 486 et seq.

⁸⁶⁴ Cf Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 269.

⁸⁶⁵ I would also attempt the following categorisation: constitutive impetuses (creating an obligation to enact laws), and merely declarative impetuses (which declare, suggest, promise, or warn of, the appropriateness of enacting laws).

⁸⁶⁶ There could be an entanglement between norms and legislative acts, namely in laws governing general legal frameworks and, above all, in the cases — absent in contemporary Macau — of legislative authorisation laws.

⁸⁶⁷ Another example would be a negative political impetus, such as rejecting Government bills for laws beyond a certain moment, but before the end of a legislature. Such procedurally ungrounded practice has occurred in the past, under the guise of a statement of principle; it is a political impetus precisely because it has no legal backing.

⁸⁶⁸ Cf *inter alia*, Paulo Cardinal, ‘Determinantes e linhas de força das reformas legislativas em Macau’ (1998) 40 *Revista Administração* 385 et seq.

Republic of China by the National People's Congress of the People's Republic of China, and shall remain unchanged for fifty years.”⁸⁶⁹

Further positive lawmaking impetuses may be drawn therefrom.

In effect, this international treaty requires the existence of laws and, in the absence thereof, the respective enactment. For instance, “*The Macau Special Administrative Region [...] shall, in accordance with the law, protect the cultural heritage in Macau.*”⁸⁷⁰ it seems clear that such a law shall have to be in the books; or “*The interests of the inhabitants of Portuguese descent in Macau shall be protected in accordance with the law.*” Other examples are that the “*Macau Special Administrative Region may use its own regional flag and emblem.*”, “*The Macau Special Administrative Region shall protect foreign investment in accordance with the law*”, and

“The Macau Special Administrative Region shall recognise and protect, in accordance with the law, the land concession contracts⁸⁷¹ legally concluded, or approved, before the establishment of the Macau Special Administrative Region, which extend beyond 19 December 1999, and the rights arising therefrom.”

Most importantly, when the Joint Declaration proclaims that

“The Macau Special Administrative Region shall ensure, in accordance with the law, all the rights and freedoms of the inhabitants and other persons in Macau, namely the personal freedoms, the freedoms of expression, of the press, of assembly, of association, of movement and migration, to strike, to choose a profession, of academic research, of religion and belief, to communications, and the right to private property.”

Such impetuses are horizontally applicable to all these fundamental rights, which, if unregulated, must become the object of lawmaking.

4. Basic Law

The Basic Law, as Macau's Constitution — in a *broad* or functional sense — naturally contains lawmaking impetuses.

The constitutional text provides for several types of lawmaking impetuses with different.

On a first level, Article 23 states:

“The Macau Special Administrative Region shall enact laws, on its own, to prohibit any act of treason against the Motherland, secession, sedition,

⁸⁶⁹ Article 12 of the Joint Declaration.

⁸⁷⁰ Article 2.5 of the Joint Declaration.

⁸⁷¹ These “concessions” are leases of public land for private use.

subversion against the Central People's Government, and theft of state secrets, to prohibit foreign political organisations or associations from conducting political activities in the Macau Special Administrative Region, and to prohibit political organisations or associations of the Region from establishing ties with foreign political organisations or associations."

In other words, the Basic Law requires the MSAR, in the name of its profound autonomy, to enact laws on its own with a view to prohibiting certain acts which are harmful to national sovereignty, as well as prohibiting certain activities by political organisations. Accordingly, Law No. 2/2009, Law on the Defence of State Security, was approved.

Article 40 establishes that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions, as applicable to Macau, shall remain in force and shall be implemented through the laws of the Macau Special Administrative Region."

Putting aside the contentious issue surrounding this alleged and bizarre⁸⁷² dualism,⁸⁷³ in opposition to the monistic reception of international law, a characteristic of

⁸⁷² Expression used by Jorge Costa Oliveira, 'O efeito directo dos Pactos Internacionais sobre os Direitos do Homem e o artigo 40.º da Lei Básica da RAEM' (unpublished, 1998).

⁸⁷³ Which resulted from a blind replication of the counterpart norm contained in the Basic Law of Hong Kong, a legal system that undoubtedly follows a dualistic model of reception of international law. The letter and the history of the MSAR Basic Law norm make it difficult, but not impossible, to defend the maintenance of a monistic system of automatic reception — such may be achieved only by resorting to other norms and principles, for example, Article 138 of the Basic Law, the principle of continuity, ie by recourse to the legal system as a whole. On this issue, see eg Paulo Cardinal, 'A Tale of Two Cities — The Judicial Protection of Fundamental Rights in the Exceptional Autonomous Regions of Macau and Hong Kong of The PR of China and the Role and Influence of International Law Instruments on Human Rights', in Jónatas EM Machado, João Carlos Loureiro and Fernando Alves Correia (eds) *Estudos em Homenagem ao Prof. Doutor J.J. Gomes Canotilho*, vol III (Coimbra Editora 2010) 242–45 et seq; Yash Ghai, 'The Basic Law of the Special Administrative Region of Macau: Some Reflections' (2000) 49 ICLQ 183, 183 et seq; António Malheiro Magalhães, 'The Application of the International Covenants on Human Rights to the «Autonomous» Legal System of the Macau S.A.R. — Considerations on Article 40 of the Basic Law' in Paulo Cardinal and Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders — Perspectives of Evolution — Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer-Verlag 2009) 607 et seq; Cristina Ferreira, 'A Aplicação do Direito Internacional Público — Região Administrativa Especial de Macau, da República Popular da China, nos Direitos de Língua Portuguesa' in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds), *O Direito Internacional Público Nos Direitos De Língua Portuguesa* (Universidade Nova de Lisboa, Faculdade de Direito 2018) 221–22, "Legal scholarship in Macau is consensual on the hierarchical position of conventional international law within the sources of domestic law, based on the principle of continuity of the MSAR legal order. The same cannot be said on whether the MSAR retains a monistic system." and, in summary, "the verbatim introduction of this Article from the HKSAR Basic Law signifies the "importation" of dualistic elements into the legal order of the MSAR, as Hong Kong belongs to the Common Law Family, characterised for having a dualistic system. This constitutional provision reflects an insertion of a clause demanding the incorporation or transformation of international norms, typical of dualistic systems, when determining that ILO Pacts and Conventions shall only be applicable through the enactment of MSAR laws. For these authors, after 19 December 1999, two systems began to co-exist in the MSAR — a first one, dualistic, for ILO Pacts and

Macau's legal order — which, I submit, remains unchanged today — the important trait to realise is the following one: what is required, *de minimis* in reinforcing the system, is the existence of laws in such areas.

Many such laws precede the resumption of sovereignty over Macau;⁸⁷⁴ however, the idea of a lawmaking impetus arising from the constitutional norm is still valid if subject-matters in need of a proper regulation remain — not necessarily limited to non-self-executing international norms). Evidence of this rationale can be found in the lawmaking impetuses stemming from the conventions of the International Labour Organisation, such impetuses having been received and relayed by the quoted provision of the Basic Law, in matters such as the freedom to form trade unions, the rights to strike and to collective bargaining, and the duration of the maternity leave.

A second type of lawmaking impetus is directed from norms on fundamental rights with a *scarcer constitutional development* — being nonetheless directly applicable and self-executing. The paradigm case is Article 27, which brings together, in extreme simplicity, fundamental rights such as the freedom of expression of the press, publication, association, assembly and demonstration, along with the freedom to form and participate in trade unions and the right to strike. The idea of a normatively established lawmaking impetus⁸⁷⁵ is definitely enshrined, perhaps less assertively, and at times hand-in-hand with Article 40 of the same Basic Law.

Other cases may be briefly invoked under Articles 119, 121, and 128 of the Basic Law.⁸⁷⁶

5. Instruments of International Law

Another locus of lawmaking impetuses is that of instruments of public international law containing obligations to legislate and/or possessing non-self-executing provisions, thus requiring legislative implementation.

For example, see Article 4 of the Convention on the Rights of the Child, signed in New York on 26 January 1990, Article 14, paragraph (5), of the International Covenant on Civil and Political Rights, and the Convention relating to the Status of Refugees, of 28 July 1951, and its Additional Protocol, of 31 January 1967, which amended said

Conventions, and another one, monistic, for the other instruments of conventional international law. Inversely, other authors espouse the maintenance of a monistic system, despite the source of Article 40 being of a dualistic provenance. For such authors, this article should be interpreted in light of the principle of continuity of the MSAR legal order, which, on the one hand, imposes the maintenance of the characteristics of the Macau legal system and, on the other hand, recognises the type of obligations emerging from the ILO Pacts and Conventions, containing mostly norms of a programmatic nature (non-self-executing)."

⁸⁷⁴ José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 161.

⁸⁷⁵ Not merely from a legal perspective. This norm may obviously project lawmaking impetuses towards other levels, namely the strictly political one.

⁸⁷⁶ In relation to the Rules of Procedure of the Legislative Assembly, as the normative procedure in question is not a legislative one, the notion of norm-making impetuses may be applied.

convention and impelled the approval of Law No. 1/2004, Legal framework on the recognition and loss of refugee status.⁸⁷⁷

The Conventions of the International Labor Organization constitute an area rich of lawmaking impetuses. For example, Article 4 of Convention No. 167, on Safety and Health in Construction, adopted in Geneva on 20 June 1988, and, in general, Convention No. 87, on Freedom of Association and Protection of the Right to Organise, adopted in San Francisco on 9 July 1948, and Convention No. 98, on the Right to Organise and to Collective Bargaining, adopted in Geneva on 1 July 1949.

6. Laws Governing General Legal Frameworks

Continuing on the normative level, a reference is due to laws governing general legal frameworks — irrespective of considerations on their placement and grounding in Macau's legal order — implying lawmaking impetuses.

For example, Law No. 4/98/M, of 29 July 1998, General Framework Law on Employment and Labour Rights Policies, contains lawmaking impetuses, specifically decisions to legislate a posteriori. Examples of laws that may drive lawmaking impetus are Law No. 21/2009, Law on the hiring of non-resident workers, and Law No. 4/2010, Legal Framework on Social Security.

One more example is the regime found in Law No. 2/91/M of 11 March 1991, General Framework Law on the Environment (namely, Article 18 on noise control), and Law No. 8/2014, *Prevention and Control of environmental noise*.

7. Reunification Law

The Reunification Law, Law No. 1/1999, although not a law governing a general legal framework *per se*, does contain lawmaking impetuses. Article 3, paragraph (5) provides for the following:

“Legislation previously in force in Macau and adopted as legislation of the Macau Special Administrative Region, when applied after 20 December 1999, shall undergo the amendments, adaptations, limitations and exceptions as may be necessary, in order to bring them into conformity with the status of Macau after the resumption of the exercise of sovereignty by the People's Republic of China, and with the relevant provisions of the

⁸⁷⁷ See the Explanatory Note of the Government bill: “The purpose of the present bill is to ensure compliance with the norms of the Convention and the Protocol... which are not self-executing. In fact, although most of the norms contained in the Convention are self-executing, and, therefore, do not require any implementation, as is the case with the norms regarding the definition of refugee, respective legal status, the principle of non-expulsion, etc, there are other norms necessitating implementation through legislation.”; and FSC, Report No. 1/II/2004: “the Macau legal order lacks a normative instrument establishing the procedures that the MSAR must adopt for analysing applications for the granting of refugee status. This is a legal lacuna, which must urgently be filled, in view of the international obligations binding on the Central Government.”

Basic Law of the Macau Special Administrative Region.” And paragraph 3) establishes that “Legislation previously in force in Macau, as listed in Annex II of the present law, contravenes the Basic Law of the Special Administrative Region of Macau, and is not adopted as legislation of the Macau Special Administrative Region. However, until new legislation is enacted, the Macau Special Administrative Region may taking as reference the previously adopted practices, handle the matters regulated therein, in accordance with the principles contained in the Basic Law of the Macau Special Administrative Region.”

As both norms are primarily and functionally aimed at the interpretation and application of the law, they instil the idea of *a posteriori* lawmaking, especially emphasised by the command “until new legislation is enacted”.

8. Law No. 13/2009

Law No. 13/2009, *Legal framework governing the internal sources of norms*, a law with “borrowed constitutionality”,⁸⁷⁸ as afore-discussed, entails, under Articles 8 and 10,⁸⁷⁹ a lawmaking impetus whenever matters contained in administrative regulations have intruded into the sphere of areas reserved to the law.

9. Judicial Activity

Moving on to non-legally binding lawmaking impetuses, unsupported by legal norms,⁸⁸⁰ I shall limit this excursion to a few more significant or potentially richer modalities.

The first type is anchored in *judicial activity*.

While it is true that, in the MSAR, there is no properly regulated procedure for judicial review of constitutionality, it is no less true that, especially in more recent times,⁸⁸¹ the courts of Macau and, in particular, the Court Final Appeal (CFA), have ruled

⁸⁷⁸ Recalling Paulo Cardinal, ‘Notas breves e esparsas sobre o regime jurídico de enquadramento das fontes normativas internas: Lei Básica e Lei n.º 13/2009’, in *Direito, Transição e Continuidade - Escritos Dispersos de Direito Público de Macau* (Fundação Rui Cunha/CRED-DM 2017) 355.

⁸⁷⁹ “The administrative regulations published before the entry into force of the present law continue to be effective until such time of their amendment, suspension or repeal through legislation, including in the event of non-compliance with the legal framework herein established.” The said legislation (in the sense of normative acts) should be limited to the form of law, to ensure full compliance with Law No. 13/2009, and, indirectly, with the Basic Law, thereby emptying the space (for possible violations) opened by this transitional mechanism.

⁸⁸⁰ See the table in Jorge Miranda, *Manual Direito Constitucional V* (Coimbra Editora 2011) 268–270.

⁸⁸¹ On this evolution, see *inter alia*, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 164 et seq; Paulo Cardinal, ‘Região de Direito — alguns tópicos sobre fiscalização da constitucionalidade e jurisdição da liberdade num Direito (também) em Língua Portuguesa’ in Jorge Bacelar Gouveia (org), *Congresso do Direito de Língua Portuguesa* (Almedina 2010) 271 et seq; Luís Pessanha, ‘O Direito à Saúde como Direito Fundamental e a Questão do Tabagismo’ (2011) 30 BFD 255, 264, “The MSAR courts, invited to assess the validity of ordinary norms, under the Basic

on the non-conformity of legislative norms with the Basic Law,⁸⁸² and have affirmed the power to decide on the non-application of norms found in contravention of that constitutional text.⁸⁸³ Case-law has shown that courts have “direct access” to the Basic Law, and the power to refuse the application of a norm in violation of the Basic Law, without the need for any prior request to such effect by the litigants.⁸⁸⁴

The courts have, on the other hand, not yet attained the desirable step of formally declaring the unconstitutionality of norms — or their reinforced or qualified illegality — with mandatory *erga omnes* effects. Naturally, such a declaration of unconstitutionality may have to lead to the enactment of new legislation. As shown above, the regional courts remain fearful: non-application of an unconstitutional norm, on a case-by-case basis and with *inter partes* effect, is the preferred course of action.

In comparative law and in the context of the theory of legislation, the control of the constitutionality of normative acts by the competent judicial bodies has been playing an increasingly relevant role. As GOMES CANOTILHO points out,⁸⁸⁵ the evolution of constitutional law (in the sense of its normative value) has been progressively enhanced by constitutional case law, “*either through the insistence on the principles of legislation (requirement of, and adherence to, the principles of determinability, clarity and development of laws), or through a duty to improve and adapt the laws.*” Such words should echo strongly in Macau, in juxtaposition with the legislative intent of Law No.

Law of the MSAR, in their decisions of the cases thereto submitted (see article 143 of the Basic Law of the MSAR), first came to consider, somewhat timidly, the Basic Law of the MSAR as a simple law of reinforced value (see Decision of the Court of Second Instance, of 1 February 2001 (Case No. 1153-A), but quickly came to recognise that it is truly a regional materially constitutional law (See, inter alia, Decision of the Court of Second Instance, of 16 June 2005 (Case No. 61/2005); Decision of the Court of Second Instance, of 24 November 2005 (Case No. 106/2004); Decision of the Court of Second Instance, of 27 April 2006 (Case No. 223/2005); Decision of the Court of Final Appeal, of 26 August 2001 (Case No. 7/2001); Decision of the Court of Final Appeal, of 25 October 2006 (Case No. 9/2006); Decision of the Court of Final Appeal, of 18 July 2007 (Case No. 28/2006); Decision of the Court of Final Appeal, of 12 May 2010 (Case No. 5/2010)).”

⁸⁸² “The Basic Law prevails over all Macau laws, so any legal enactment incompatible therewith is null and void.”: Wang Zhenmin, “*Um país, dois sistemas*” e a *Lei Básica de Macau* (Assembleia Legislativa, 2008). As Jorge Bacelar Gouveia pointed out, “there is no doubt that the constitutional function attributed to the Basic Law requires a mechanism to gauge the respect of the other laws of Macau to the former’s normative supremacy. The worst that could happen would be to conclude that the primacy of the Basic Law, within the Macau Legal Order, would not be aided by a procedural mechanism capable of imposing the constitutional effectiveness of Basic Law, on the ground, in the context of the legal universe of Macau.”: Jorge Bacelar Gouveia, ‘Macau no Direito Constitucional de Língua Portuguesa’ in *Direito Constitucional de Macau* (IDILP 2012) 193. See also Vitalino Canas, ‘The General Regime of Fundamental Rights in the Basic Law and in the International Instruments’ in Paulo Cardinal and Jorge Costa Oliveira (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution – Essays on Macau’s Autonomy after the Resumption of Sovereignty by China* (Springer-Verlag 2009) 674. The above does prejudice to the desirability of creating a true mechanism for the judicial review of the constitutional conformity of regional norms.

⁸⁸³ See *inter alia*, “In cases submitted to trial, courts may not apply norms, contained in laws or administrative regulations, which contravene the provisions of the Basic Law or the principles contained therein, even if no litigant raises the question of illegality, without prejudice to the provisions of Article 143 of that Law.”: Decision of the CFA, Case No. 29/2012; Decision of the CFA, Case No. 29/2012; Decision of the CFA, Case No. 33/2012.

⁸⁸⁴ As espoused, going back to 1997, by Fernando Alves Correia, ‘A Fiscalização da Constitucionalidade das Normas do Ordenamento Jurídico de Macau à Luz da Recente Jurisprudência do Tribunal Constitucional’ (1997) 4(3) *Revista Jurídica de Macau* 26, 26.

⁸⁸⁵ Gomes Canotilho, ‘Os impulsos modernos para uma teoria da legislação’ (1991) 1 *Legislação* 7, 9.

13/2009, the *Legal framework governing the internal sources of norms*, and the principle of sufficiency or completeness of the law.⁸⁸⁶

The CFA, in the Decision delivered in Case No. 5/2010, stated:

“Without prejudice to the legislative discretion that must be accorded to the lawmaking body, the existence of contradictory legal frameworks applicable to officials, without any reasonable justification, violates the principle of equality, leading to arbitrariness and unjustified differential treatment. [...]

[I]t is within the remit of these bodies to issue a “positive” judgment on the legal solution; in other words, a judgment whereby the scrutinising body starts by considering the situation as if it were the legislator, followed by an assessment on the rationality of the legislative solution infused with its very own idea of what the “reasonable”, “fair”, or “ideal” solution would be, or should have been. The control of constitutionality cannot go so far: the competent bodies may only render a “negative” judgment, hence setting aside those legal solutions found to be irrational [...] Therefore, either Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M, in conjunction with Article 98, paragraph 1) of the Statute of the Macau Civil Servants (SMCS), or Article 97, paragraph (6), of the SMCS, violate the principle of equality.”

Such was the specific background of the case.

In view of this double tack, the CFA added:

“Everything points towards Article 5, paragraph 2, subparagraph b), of Decree-Law No. 21/87/M, in conjunction with Article 98, paragraph 1), of the SMCS, violating Article 25 of the Basic Law [...] The challenged act must be annulled, because it applied Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M.”

Given this correct justification and decision by the supreme court, one may identify an obvious lawmaking impetus: the legislative body should modify the described discriminatory framework, namely by enacting a norm to repeal Article 5, paragraph 2), subparagraph b), of Decree-Law No. 21/87/M.

Allow me to add, in the context of these more tenuous lawmaking impetuses, a

⁸⁸⁶ Recalling Article 4, paragraph (2): “The law shall have a determinate, precise and sufficient content that includes a clear prescription of the commands intended to create legal norms of conduct for the addressees, rules of action for the administration and standards of control for judicial decisions on disputes.” On this norm, once again, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 137–38.

few words on the “*dialogues between the legislative and the judiciary*”.⁸⁸⁷ In the relations between the legislative branch and the judiciary, the legislation clearly aimed at correcting judicial interpretations that were perceived as not ideal was approved twice in the field of fundamental rights: freedom of demonstration and access to justice.⁸⁸⁸

One may conjure up a couple of examples of Members’ bills on fundamental rights, which sought to respond to difficulties and limiting interpretations, doubts, and deviations, from *inter alia*, the judiciary. Although formally initiated by Members of the legislative body, the lawmaking impetus was dictated by judicial practice.

A first example is that of Law No. 16/2008, *Amendment to Law No. 2/93/M — “Right of Assembly and Demonstration”*: given that in the special procedure for protecting the rights of assembly and demonstration, under Law No. 2/93/M, there is a clear intention of procedural informality, not fully reflected in the letter Article 12 thereof, there seems to have a failure to adequately express the legislative intent, notwithstanding the fact that the *travaux préparatoires* demonstrate an evident legislative policy oriented both to the simplification of procedures and pre-conditions, and to waive the requirement of legal representation in filing the motion to seek judicial relief.⁸⁸⁹ The spirit of the law is precisely to open said special procedure to laypersons, bearing in mind the practical difficulties in finding advocates who might, in a timely manner, be available to represent complainants in politically sensitive litigation.

According to the relevant Report: “In any case, during these 20 years of enforcement of the law, there has been some hesitation on whether legal representation is required.”⁸⁹⁰ After recognising such “hesitation” as a lawmaking impetus, the path to solve the issue and reinforce this fundamental right is laid bare: “Through the addendum of new paragraph 3) to the aforementioned Article 12 of Law No. 2/93/M, to expressly inscribe the non-mandatory nature of a legal representation”.⁸⁹¹ Furthermore,

“Underpinning this legislative initiative is the need to improve a few specific aspects of the wording of Law No. 2/93/M, of 17 May, to prevent an overly literal approach to the norms from leading the interpreter astray,

⁸⁸⁷ Cf Jorge Godinho and Paulo Cardinal, ‘The Macau Court of Final Appeal – The First Decade’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 632. On Hong Kong, especially the issue of *constitutional review*, see Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press 2015).

⁸⁸⁸ Jorge Godinho and Paulo Cardinal, ‘The Macau Court of Final Appeal – The First Decade’ in Simon Young and Yash Ghai (eds), *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong* (Cambridge University Press 2014) 632, “There have been problems in the past with the judicial review of administrative decisions that restricted the right to hold political rallies, and these issues must be decided swiftly to ensure that freedom of demonstration can be exercised. One problem was the uncertainty over the competence of courts to hear the case; another problem was whether judicial representation by a lawyer was mandatory or not. The other issue was reported denials of the right to have a lawyer present when investigated by public authorities, regardless of whether the person is a suspect or a witness.”

⁸⁸⁹ Ruling that there would be no dispensation of legal representation under this law, eg Decision of the CSI in Case No. 621/2006.

⁸⁹⁰ TSC, Report No. 2/III/2008.

⁸⁹¹ *ibid*; see also Articles 8 and 10 of the Law No. 13/2009, *Legal framework governing the internal sources of norms* (n 878).

to an understanding not in accordance with the spirit of the law and the will of the legislator.”⁸⁹²

This legislative process also took advantage of the opportunity to solve another doubt raised in judicial circles, which frequently resulted in the exercise of the right of assembly and demonstration being thwarted. The question was simple: which is the competent court? Would the CFA be competent, in its ultimate role as the guarantor of freedoms?⁸⁹³

Such uncertainty often resulted in the denial of due process and justice, and the consequent negation of the effective exercise of this fundamental right because, while the CFA would (wrongly) declare itself incompetent, and the procedure would be conducted by the CSI, often the administrative decision denying a demonstration would have already produced its desired effects before the (untimely) decision by the CSI was delivered. The legislator understood the problem, correctly interpreted the situation, and, for the avoidance of further doubts, introduced a legislative measure in order to give effective judicial relief to these fundamental rights. The results of this legislative change are well known, and deemed to be generally positive, as demonstrated by the vast case-law of the CFA in this matter.

A second example is that of Law No. 1/2009, *Addendum to Law No. 21/88/M — “Access to the Law and to the Courts”*, which purported, with the addendum of a new article, to develop several aspects, namely the general principles that everyone has the right to assistance by an advocate in any judicial procedure, as a witness, declarant or defendant, and that everyone has the right to be accompanied by an advocate, when appearing before any public authority, namely judicial and criminal investigation authorities, regardless of the person’s procedural status.

As the relevant Report explained:

“The proponents considered that, due to several difficulties, namely interpretative differences, the access to the Law, particularly in the very important hallmark of guaranteeing professional support and representation by advocates, has not been satisfactory in some cases, therefore the need for the present legislative initiative”, and, with special emphasis on the matter in hand, “The Committee is aware of the doubts and uncertainties felt in the

⁸⁹² TSC, Report No. 2/III/2008, “Although, at times, it may seem to the more informed lawyer that the current wording will already be sufficiently clear and explicit, provided that the legal norms are well interpreted, and in particular if the travaux préparatoires are taken into due and deserved consideration.”

⁸⁹³ Ruling itself to be incompetent, the CFA, in Case No. 43/2006 (not available on the website of the MSAR courts), invoked the following reasoning: under the provisions of the Reunification Law, approved by Law No. 1/1999, the expression “Superior Court of Justice” should be interpreted as referring to the CSI (Annex IV, paragraph 3). There are natural exceptions, however; for example, the same CFA has already recognised, in a decision on another matter, in Case No. 1/2001, that the countless references to the Superior Court of Justice, as contained in piecemeal legislation, should be understood in light of the distribution of competencies operated with the entry into force of the General Framework Law on the Judicial Organisation, approved by Law No. 9/1999. See also the distributions and adjustments to the competencies of the courts, as operated by the 2013 review of the Code of Criminal Procedure.

practical conforming of this fundamental right, and considers that the legislator is duty-bound to clarify such doubts and uncertainties, and to adequately fill the core protective scope, expected from such fundamental right, to the brim.”⁸⁹⁴

This quote illustrates the express acknowledgement of a lawmaking impetus for this legislative measure.

The decisions of the CSI⁸⁹⁵ (and those of the Administrative Court⁸⁹⁶) that ruled to be illegal certain administrative regulations found in breach of the areas reserved to the law — and, in parallel, refused to recognise an independent regulatory power by the Executive — constituted, despite the subsequent decision of the CFA on the issue,⁸⁹⁷ considerable lawmaking impetuses,⁸⁹⁸ which strongly contributed to achieving the approval of Law No. 13/2009.

I shall now proceed to the so-called *purely political* impetuses.

10. Commission Against Corruption

The Ombudsman’s role carried out by the Commission Against Corruption (CAC) takes on a potential importance in the context of lawmaking impetuses.⁸⁹⁹

Under Article 4 of Law No. 10/2000,⁹⁰⁰ Organic Law of the Commission Against Corruption of the Macau Special Administrative Region, the following powers are provided for:⁹⁰¹

“9) To make recommendations or suggestions on interpretation, amendment or repeal, in the event that deficiencies are detected in legal norms, namely those affecting persons’ rights, freedoms, guarantees or legitimate interests,

⁸⁹⁴ FSC, Report No. 1/II/2009, adding: “In conclusion, the Committee reaffirms its agreement with the bill and, in general, with the options therein, particularly with the underlying philosophy and the purpose of clarifying and guaranteeing a component of the fundamental right of access to the Law.”

⁸⁹⁵ For example, Case No. 223/2005.

⁸⁹⁶ For example, Case No. 38/05/EF.

⁸⁹⁷ Case No. 28/2006.

⁸⁹⁸ See the cryptic wording of the Explanatory Note of the Government bill leading to the approval of Law No. 13/2009: “the legal and judicial communities, as well as academics and civil society, have increased and diversified their knowledge of the MSAR legislative system, in particular in relation to the status, nature and effectiveness of administrative regulations; many different points of view have been recorded.” See also the competent report, which explicitly refers to a set of judicial decisions, by several courts, with “diversified meanings” and “important differences in opinion”.

⁸⁹⁹ See, in general, on this relevant role of recommending the adoption of legislative measures, Cristina Ferreira, ‘Em prol dos direitos fundamentais em Macau—a Provedoria de Justiça do CCAC e as demais instituições que promovem os direitos humanos’ (2010) 23(88) Administração 397, 397 et seq *passim*.

⁹⁰⁰ As amended by Law No. 4/2012, Amendment to Law No. 10/2000 “Commission Against Corruption of the Macau Special Administrative Region”.

⁹⁰¹ General competencies, as set out in Article 3: “(5) To exercise Ombudsman actions, promoting the protection of persons’ rights, freedoms, guarantees and legitimate interests, ensuring, through the means mentioned in the following article and other informal means, the legality in the exercise of public powers, as well as justice and efficiency of public administration.”

or on the enactment of new legal norms; however, when the subject-matters fall within the competence of the Legislative Assembly, such positions shall be contained solely in written information delivered to the Chief Executive.”

And, moreover,

“10) To propose to the Chief Executive the enactment of normative acts aimed at improving the functioning of departments and services, and at respecting administrative legality, namely for the purpose of eliminating factors that may facilitate corruption and illicit or ethically objectionable behaviours;”.

The first provision is very clear regarding the recommendatory function⁹⁰² *apropos* the adoption of new legislation. The second one, even though referring to the enactment of norms by the Chief Executive, should be read, in areas reserved to the law, as also signifying the presence of a lawmaking impetus, and not merely a *norm-making* impetus.

The role of the Ombudsman *vis-à-vis* lawmaking impetus is well recognised in comparative law,⁹⁰³ with varying degrees or different modulations, going as far as a “*para-legislative activity by the Ombudsman*”.⁹⁰⁴

The CAC, according to its annual Activity Reports, has exercised these competencies,⁹⁰⁵ which are naturally exhausted in the suggestions and recommendations made, not extending to any possible legislative results.

Another aspect concerning paragraph 9) is worth mentioning. Indeed,

“there were those, within the Committee, who opined on the inadequacy, and perhaps inefficiency, of the solution under which, in matters falling within the competence of the Legislative Assembly, the CAC would limit itself to informing the Chief Executive in writing of its position [...] without prejudice to the CAC reporting to the Chief Executive under the terms of the Basic Law, when possible deficiencies in legal norms are detected, namely those affecting persons’ rights, freedoms, guarantees or legitimate interests, the CAC should be able make recommendations or suggestions to the Legislative Assembly for the amendment or repeal of such norms, or for the enactment of new ones.”⁹⁰⁶

⁹⁰² Which is not a function pertaining to, nor a competence for, legislative initiative.

⁹⁰³ For developments, see Luís Silveira, ‘O Provedor de Justiça e a feita das leis’, (1995) 12 Legislação 51.

⁹⁰⁴ Marcelo Rebelo De Sousa, ‘O Provedor de Justiça e o procedimento legislativo’ (Provedor de Justiça – Sessão comemorativa 1996).

⁹⁰⁵ See, for example, 2012 Activity Report of the Commissioner Against Corruption of Macau, Annex I, 2011 Activity Report of the Commissioner Against Corruption of Macau, Annex I, and the Research Report: Some considerations on the prosecutorial procedure and the application of sanctions for administrative offences, 2005.

⁹⁰⁶ FSC, Report No. 1/IV/2012, “Amendment to Law No. 10/2000 (Commission Against Corruption of the Macau Special Administrative Region)”.

I fully subscribe to this view. On the one hand, the circumstance of the CAC being accountable to the Chief Executive, in addition to being a different issue, cannot, obviously, prevent the CAC from addressing, without any intermediation, other institutions and entities — as, in fact, such occurs in other cases.⁹⁰⁷ On the other hand, whenever fundamental rights are at stake — a material domain reserved to the law, wherein the Government is not entitled to exclusive legislative initiative — the CAC should be allowed to address legislative recommendations directly to the local parliament.⁹⁰⁸

11. Monitoring Committees of the Legislative Assembly

The Monitoring Committees of the Legislative Assembly constitute driving forces behind lawmaking impetuses but not legislative initiatives *per se*.

Under Article 30 of the Rules of Procedure, such Committees are tasked, *inter alia*, with monitoring the matters relative to the area of governance for which they were created, as well as the application of the laws approved by the Legislative Assembly for such an area; these tasks are finally complemented by the competence to propose the measures deemed necessary or appropriate, in accordance with the results of said monitoring function.

Naturally, such measures may include legislative ones — as a declaration of suitability, or a recommendation to this effect; that which is proposed is the set of measures to be (under)taken, and not a formal legislative initiative.⁹⁰⁹ It is always possible for the proposed measures to be contained in a bill co-sponsored by committee Members; however, other aspects would come into play, such as the strict requirement of Article 75 of the Basic Law, and the reality of the dynamics on the ground, which has shown a poor level of success in respect of Members' *exercise and practice* of their own powers, namely that of legislative initiative.

12. Ad Hoc Committees of the Legislative Assembly

The Ad Hoc Committees of the Legislative Assembly may also be a source of lawmaking impetuses. In effect, while ad hoc committees may indeed *replace* standing committees

⁹⁰⁷ Cf Article 4, “(12) To address recommendations directly to the competent bodies, with a view to correcting illegal or unjust administrative acts or procedures, or to the performance of the required acts”.

⁹⁰⁸ For a historical reference, see, “The High Commissioner is competent: j) To propose to the Legislative Assembly and to the Governor the adoption of legislative measures aimed at improving the functioning of departments and services, and at respecting administrative legality, namely for the purpose of eliminating factors that may facilitate corruption and illicit or ethically objectionable behaviours;”: Article 4 (Competencies), Law No. 11/90/M, of 10 September 1990, on the High Commission Against Corruption and Administrative Illegality.

⁹⁰⁹ Eg Monitoring Committee for Public Administration Affairs, Report No. 1/V/2017, regarding a suggested amendment to Law No. 8/2014.

within the framework of the legislative process (the case of the Gaming Law⁹¹⁰), there have been other ad committees resembling the above-mentioned monitoring committees.

This was the situation experienced with the Ad Hoc Committee for the Analysis and Improvement of Legislation for the Protection of Minors. In its working Report, the committee concluded:

“After analysing the legislation on the protection of minors, the committee considers that the solution to the issue in hand must be approached from two perspectives: the legislative and the executive. At the legislative level, the existing legal framework must be improved, and the existing lacunae filled, in order to obtain a scientifically sound system, a natural aim for any legislator.”

As referred to in relation to the monitoring committees, it is always possible for the proposed measures to be contained in a bill co-sponsored by ad hoc committee Members; however, other aspects would come into play, such as the strict requirement of Article 75 of the Basic Law, and the reality of the dynamics on the ground, which has shown a poor level of success in respect of Members’ *exercise and practice* of their own powers, namely that of legislative initiative.

13. Consultative and Collaborative Bodies

A few lines *en passant* relating to consultative bodies and *collaborative* bodies. In addition to a generally passive role — as previously discussed — of intervention only upon request from third parties, a few of such bodies may, on their own initiative, make legislative recommendations.

The Macau Civil Aviation Authority, in accordance with its Article 5, paragraph a), of its Statute, approved by Decree-Law No. 10/91/M, of 4 February 1991, is competent to “*study and propose laws, regulations and administrative measures aimed at guaranteeing the safety of air navigation, and to guide and co-ordinate the exercise of civil aviation activities*,”.

The Consultative Council for Public Administration Reform, under the terms of Administrative Regulation No. 18/2007, is competent, within its scope, to promote studies and submit proposals on, for example, the legal framework of the Civil Service.

The Consultative Council for Legal Reform, pursuant to Chief Executive Order No. 59/2005, may consult the opinions of civil society and respective professionals, depending on the matters under scope, on the need to regulate legislative matters, and

⁹¹⁰ Also, the AHC for the Analysis of Legislative Initiatives Relating to the Civil Service, which exercised *full legislative procedural functions* relating to three laws: Report No. 1/ III/2009, Government bill entitled “Fundamental Provisions of the Statute of the Civil Service Management and Leadership Staff”: Report No. 2/III/2009, Government bill entitled “Framework of the civil service careers”: and Report No. 3/III/ 2009, Government bill entitled “Framework of the nursing staff’s career”.

issue suggestions based on the consultations and the reflection carried out, aimed at the development of the legal order and the adaptation thereof to the evolution of the social environment.

The Council of Judicial Magistrates is competent to study and propose the adoption of legislative measures aimed at the efficiency and the improvement of the judicial system.⁹¹¹

Likewise, the Council of Magistrates of the Public Prosecution Service is competent to study and propose the adoption of legislative measures aimed at the efficiency and the improvement of the judicial system.⁹¹²

14. Government Annual Policy Action Address

A short reference herein to the purely political nature of the Government Annual Policy Action Address, as a repository of a programme containing legislative promises.⁹¹³

15. Public Consultations

Deemed mentionable is the launching of public consultations by the Executive,⁹¹⁴ which, *per se*, already demonstrate a possible desire to legislate — the results of such consultations may sustain or justify a legislative initiative.

These cases equally constitute factors of a lawmaking impetus.

One must take into account that the results of public consultations *per se* do not remove from the lawmaking body its untouched legislative power, nor its capacity to decide how to conform the normative solutions.⁹¹⁵

On the issue of the scope of public consultations, a critical comment: the ease with which the “population” is summoned, and is invoked, is at times plainly inadequate. There are matters which, owing to their well-defined object and clear-cut scope, or to their technical complexity, should not be subject to consultation by the population in general,

⁹¹¹ Article 95, paragraphs 15) and 16), of Law No. 10/1999.

⁹¹² Article 107, paragraphs 9) and 10), of Law No. 10/1999.

⁹¹³ Which do not bind the Legislative Assembly, nor preclude the exercise of legislative initiative by Members. The content of the Policy Action Address does not entail an extension of reserved legislative initiative in favour of the Government.

⁹¹⁴ See the Norms on *Consultation on Public Policies*, approved by the Chief Executive Order No. 224/2011. Under the principle of separation of powers, these norms, by their very nature and form, do not bind the Legislative Assembly, nor the Members. Those Norms establish the carrying out of public consultations in the area of public policies, including decision-making and related measures and legislation. The wording thereof is, at times, haphazard and even inappropriate for an act with normative content. See also, in general, on this topic, Pan Guanjin, ‘Uma Análise do desenvolvimento do sistema consultivo da RAEM do ponto de vista da democratização das políticas’ (2010) 89 *Administração* 719.

⁹¹⁵ Paulo Cardinal, ‘Tópicos Soltos Sobre Liberdade de Imprensa, Direitos e Deveres dos Jornalistas e Reforma Legislativa no Âmbito da Lei Básica de Macau e do Princípio «Um País, Dois Sistemas»’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 653.

but preferably by persons and entities relevant to the issues.⁹¹⁶

16. Right of Petition

Finally, the Right of Petition, the legal framework of which is established, fundamentally, in the Basic Law, in Law No. 5/94/M, of 1 August 1994, *Exercise of the Right to Petition*, and in the Rules of Procedure of the Legislative Assembly.⁹¹⁷

This fundamental right may be explained, in short, as a right to protect other rights, both as a guarantee for non-contentious redress — as opposed to a guarantee for administrative or judicial challenge, action or impugning proceeding — and also as a right to political participation. The former allows for drawing the attention of the competent addressed bodies to situations of illegal or unjust acts; the latter is aimed at raising problems of general interest, with ultimately corrective or prospective purposes.⁹¹⁸

In Macau, the fundamental right of petition⁹¹⁹ is conceived as a non-judicial instrument for the protection of persons' rights, of legality, or of community interests, by means of submitting petitions (in a strict sense) to political bodies or any public authorities, along with representations, claims or complaints, under the terms of Article 1 of Law No. 5/94/M, of 1 August 1994.

On the one hand, it is a right to guarantee other rights, ie it plays a role in defending and preventing violations of certain fundamental rights, by safeguarding private interests. On the other hand, it is a political right, as it may be configured as an

⁹¹⁶ Which is not a function pertaining to, nor a competence for, legislative initiative. In addition, see eg the MLA's *Opinion on the Government bill entitled "Elimination of bearer shares and amendments to the Commercial Code"*, 2015, wherein the addressed audience of the public consultation is questioned, both qualitatively and quantitatively.

⁹¹⁷ On the process for petitions, Articles 144 et seq.

⁹¹⁸ Jorge Miranda, 'Notas sobre o Direito de Petição' in Paula Costa e Silva and Pedro Pais de Vasconcelos and António Menezes Cordeiro (eds), *Estudos em Honra do Professor Doutor José de Oliveira Ascensão*, vol I (Almedina 2008) 470. See also "*The right of petition [...] simultaneously contains two essential purposes: – On the one hand, it is a right to guarantee other rights, performing a function to defend and prevent violations of certain fundamental rights, thus ranking alongside other such rights (eg the right to special relief and the right to resist); – On the other hand, there is an aspect of political law, as said right may be an instrument for the participation of persons in the exercise of political life, an example of which is the submission of suggestions regarding the general interest.*": Explanatory Note of Members' Bill No. No. 9/V/ 94.

⁹¹⁹ The petition is widely accepted as a fundamental right in the MSAR: "For the avoidance any possibly remaining doubts that may be raised about this autonomous process, it seems useful to provide a few brief references to characterise this right of petition. This is a fundamental right to be exercised by any citizen or legal entity.": CRPMM, Report No. 1/IV/2011. See also TSC, Report No. 1/III/2005, "The right of petition is one of the oldest fundamental rights in force in Macau": and, "At the level of ordinary legislation, the exercise of this fundamental right is consolidated and regulated by Law No. 5/94/M, of 1 August.": and Report No. 1/III/2008 of the FSC, mentioning "competent legal norms that command the exercise of this fundamental right, both at the constitutional level – paragraph 18) of article 50, and paragraph 6) of article 71, of the Basic Law — and at the level of ordinary legislation — Law No. 5/94/M, of 1 August — and also under procedural norms, Articles 143 to 145 of the Rules of Procedure of this Legislative Assembly." See furthermore, *inter alia*, Paulo Cardinal, 'O Direito de Petição em Macau: Breves Notas' in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 661 et. seq, José Melo Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa Especial de Macau* (CFJJ 2013), 166.

instrument for the participation in the exercise of political life, such as the submission of suggestions regarding the interests of the community, or the defence of legality. In this regard, the right of petition can therefore also be a process of political oversight or control, when addressed to the Legislative Assembly — distinct and autonomous from others.⁹²⁰

Legally speaking, once a petition is submitted, a duty of examination by the petitioned body is established, and the right to due procedure and communication is enshrined.⁹²¹

“The exercise of the right obliges the addressee to receive and examine petitions, representations, claims and complaints, and to communicate the decisions that might be taken.”⁹²²

Having fulfilled the duty of examination, the addressed entity may, or may not, make a decision or take an action. In the case of the Legislative Assembly, such action may be purely political — for example, signalling a desire, or an option in a Descriptive Report — or, depending on the case, may result in a legislative act.

As such, the duty of examination may be a driver of a lawmaking impetus,⁹²³ either taken up by the Government, or within the Legislative Assembly, in light of Article 14 of Law No. 5/94/M:

“The committee’s examination of petitions and of the respective preparatory elements may result, namely, in the following:

a) The appraisal by the plenary of the Legislative Assembly, under the terms of Article 18; [...]

c) The drafting, for future sponsorship by any Member, of a legislative

⁹²⁰ CRPMM, Report No. 1/IV/2011.

⁹²¹ Good examples of compliance with the duty of examination can be found, *inter alia*: Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 2/VI/98, Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 5/VI/98: a petition was accepted, the duty of examination was fulfilled by the committee, and only after such analysis, in view of the object of the petitions, the decision was taken to close the proceedings. See TSC, Report No. 1/IV/2009, Petition on the review of the legislation on prevention and limitation of smoking, Law No. 21/96/M, of 19 August, “*The Committee understands the state of mind of the petitioner with regard to accelerating the pace for the enactment of said legislation, ... on 7 December 2009, the MSAR Government honoured its commitment by submitting, during the analysis of the petition by the Committee, the bill entitled “Framework for the Prevention and Control of Smoking”: which has already been accepted by the President of the Legislative Assembly. This means that the matter is already being appraised. Therefore, the Committee closed the proceedings, as the petitioned object was rendered moot upon submission of said bill. The Committee’s descriptive report concludes as follows: 1) To close the proceedings on the petition, on the grounds that the object thereof become extinct.*”

⁹²² Article 8, paragraph (1).

⁹²³ Paulo Cardinal, ‘O Direito de Petição em Macau: Breves Notas’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 686. Adding, “[i]n effect, the examination of petitions and the respective preparatory elements, as carried out by the Legislative Assembly committee, may, in particular, result in the drafting, for future sponsorship by any Member, of a legislative measure deemed to be justified. The subject-matter contained in the petition is not put to a vote; however, based thereon, any Member may exercise the right of initiative, under the terms of the Rules of Procedure. This applies both to the areas of original legislative initiative, and to those of supervening legislative initiative.”

measure deemed to be justified;

d) A proposal to the Governor for a possible legislative or administrative measure”.

Article 18, paragraph 3) of the same law establishes that the matter contained in the petition shall not be put to a vote; however, any Member may exercise the right of initiative under the Rules of Procedure.⁹²⁴ Such applies both to areas of original legislative initiative and to those encapsulated by supervening legislative initiative.

The exercise of the right to petition may undoubtedly operate as a lawmaking impetus,⁹²⁵ as envisaged under the applicable law, by laying down one of the typical effects under Article 14. As a means for *defending legality or the interests of the community*, the exercise of the right to petition can substantiate the idea of *more typical petitions*, the purpose of which is the “exercise, in general, of the legislative competence; de rigueur, a diffuse impetus for potential legislative initiatives.”⁹²⁶

A final note on the link between the law regulating the right to petition, and the Rules of Procedure.

The right to petition is fundamentally regulated by law, but there is a set of provisions on such matters included in the Rules of Procedure of the Legislative Assembly. A couple of issues require attention: the reserved areas of the law versus the reserved area of the Rules of Procedure, and the harmonisation between both normative acts.

The right to petition, as a fundamental right, is safeguarded under the reserved areas of the law.⁹²⁷ This means that other normative sources would be denied access to the regulation of this fundamental right. On the other hand, reserved areas for parliamentary procedural rules also exist. Thus, from the outset, only the law would be able to establish the legal framework for the right of petition, especially with regard to restrictions thereto. Such would also entail, from the outset, that the Rules of Procedure

⁹²⁴ Article 18, paragraph 3. See petitions expressly requesting the introduction of legislative measures and consequent descriptive reports: eg, TSC, Report No. 1/III /2005, Petitions concerning the execution and improvement of legislation on the prevention and limitation of smoking, Law No. 21/96/M, of 19 August; Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 6/VI/98, Petition on “Request for the urgent and adequate guarantee of rights not covered, or insufficiently provided for, by Law No. 5/98/M, of 3 August”; and “Suggestion for an urgent amendment to articles of the such law”: presented by Free Association of Conscientious Objectors. While it is true that no bill has so far directly resulted from petitions, it is no less true that several reports have analysed the respective requests and, either by virtue of the announcement of legislative initiatives by the Executive in the near future, or for reasons of political convenience or opportunity, have not triggered the adoption of Members’ bills. Cf Paulo Cardinal, ‘O Direito de Petição em Macau: Breves Notas’ in *Estudos de Direitos Fundamentais no contexto da JusMacau – Entre a autonomia e a continuidade* (Fundação Rui Cunha/CRED-DM 2015) 686.

⁹²⁵ For instance, “Another very important driver, which has long been claimed in several fora, was the setting of deadlines for the conclusion of cases investigated by the CAC. In effect, this issue has been subject to warnings and criticisms from the most varied sectors, including this Legislative Assembly”: FSC, Report No. 1/IV/2012, “Amendment to Law No. 10/2000 (Commission Against Corruption of the Macau Special Administrative Region)”.

⁹²⁶ Luís Barbosa Rodrigues, ‘O Direito de Petição perante a Assembleia da República’ in Jorge Miranda (org), *Perspectivas Constitucionais*, vol II (Coimbra Editora 1997) 656.

⁹²⁷ Per the Basic Law and Law No. 13/2009.

would not be able to contain norms on the framework of that fundamental right.⁹²⁸

During the legislative procedure of Law No. 5/94/M, this question was glimpsed at, together with the issue of harmonisation.⁹²⁹

“The Committee, although recognising that the procedural rules — articles 167 to 173 — do involve provisions from the text of the present Members’ bill, but in a harmonised manner, considers that the Legislative Assembly, in a possible future review of the Rules of Procedure, should therein include all the principles that may be contained in the law (if approved), and which might pertain to this Assembly.”⁹³⁰

Strictly speaking, there should be no procedural rules on this matter,⁹³¹ or, alternatively, the Rules of Procedure should be reduced in their scope and breadth,⁹³² being limited to an indispensable minimum,⁹³³ with norms solely related to the principle of parliamentary self-organisation. For example, such as reduced scope would only encompass issues such as the President’s competence to determine the classification by subject-matter, and the mentioning of the petitions in the first plenary meeting following their admittance, *inter alia*. In any case, these internal organisational rules may not interfere with the exercise of the right to petition beyond that which is set out in the law.

A few smaller sub-issues need to be attended to. For instance, Article 145, paragraph (1), of the Rules of Procedure requires the proper identification of the petitioners, with the indication of their name, marital status, address and profession. Under Article 9, the correct identification of the petitioner shall contain his or her domicile. The inference is that marital status and profession are unnecessary elements of identification.

In other words, the irrelevance of all this personal information for the purposes

⁹²⁸ Maria Luísa Duarte, in a context of analogy, affirms that the areas reserved to parliamentary law should be interpreted in order to exclude the insertion, in the rules of procedure of the autonomous regions, of norms on the development of the fundamental right to petition, emphasising a refusal to accept the establishment of additional or qualifying requirements in relation to the law regulating said fundamental right; such measures would be unconstitutional: Maria Luísa Duarte, *O Direito de Petição* (Coimbra Editora 2008) 93–94.

⁹²⁹ Particularly to the issue of normative harmonisation: “It should be noted that the necessary conformation of the procedural framework with the law, and the articulation between both, is not always exempt from difficulties, nor, at times, from contradictions.”: TSC, Report No. 1/ III/2005.

⁹³⁰ Committee on Public Administration and Finance, Report No. 7/94. The Explanatory Note of the Members’ bill also anticipated the issue: “*In fact, only the Rules of Procedure of the Legislative Assembly dedicate some norms (Articles 167 to 173) to the matter under consideration, such norms naturally having an almost bureaucratic character.*”

⁹³¹ I believe that the Rules of Procedure of the Legislative Assembly maintain a set of rules on the petition process because, in the past, a lacuna in the legal order did exist; in one way or another, it was important to proceed to the elimination thereof.

⁹³² In this sense, focussing precisely on a positive normative conflict between legal norms and procedural norms, “*Nor may one argue, in this case, on the basis of a possible invasion of the sphere of “procedurally reserved areas”*”; ie requirements contained in the Rules of Procedure, but absent from the law, were set aside, Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 3/VI/98.

⁹³³ For example, the Rules of Procedure of the Assembly of the Republic, in Portugal, while maintaining a section on the matter, contains but a single and meagre article.

of exercising the fundamental right of petition, but, above all, as a practical corollary of the principles of reserved areas of the law, and of the minimum procedural intervention (circumscribed to matters of internal self-organisation), I submit that those additional elements of identification may not be demanded of petitioners, due to the partial inapplicability of the procedural norm.⁹³⁴

17. Diffuse or Social Impetuses

According to an author, “diffuse impetuses, or impetuses from pressure groups, associations, public opinion, the media...” are those that may “influence legislative production in any way, with more or less intensity.”⁹³⁵

It is no secret, nor surprising, that these diffuse or social impetuses are particularly relevant in a small place such as Macau.

Seldom does an item in a newspaper avoid being treated as a possible driver of a legislative intention to regulate a given matter in an allegedly lacunose situation, which is later revealed to be untrue and hastily denounced. Frequent pressures are also felt to enact laws in response to tunnelled visions or wishes by vested interests, unconcerned with the general and legitimate interests of the community,⁹³⁶ and jeopardising that which is accepted as “good legislation”; at times, such interests have gone to the extreme of desiring the introduction of unfair rules, thus challenging the cherished principles of lawmaking.⁹³⁷

⁹³⁴ In agreement, see *inter alia*, “Indeed, and contrary to what the Rules of Procedure require — paragraph (2) of Article 167 — the lack of indication of the “marital status” or “profession”: may not, under Law No. 5/94/M (in much greater conformity with the applicable constitutional norm), constitute a reason for rejecting a petition.”: Committee on Constitutional Affairs, Rights, Freedoms and Guarantees, Report No. 3/VI/98.

⁹³⁵ Jorge Miranda, *Manual de Direito Constitucional*, vol V (Coimbra Editora 2011) 270.

⁹³⁶ Cf “The influences on legislation of lobbies, pressure groups and, in general, of organisations or persons from the so-called civil society, should also be highlighted, reinforces the complex nature of the norms and the difficulties in structuring a coherent and unitary legal system.”: José Eduardo Figueiredo Dias, ‘Procedimento legislativo’, in *Formação Jurídica e Judiciária — Colectânea, Tome I* (CFJJ 2006) 232. Also “Macau’s own legal substratum is not solid and its political system is Executive-led, to which is added growing pressure from the gaming sector and from other social and political groups.”: Feng Bangyan He Xiaojing, ‘Características Básicas e Tendência de Desenvolvimento da Ecologia Política de Macau após o seu Retorno à RPC’, (2012) 1 *Revista de Estudos de “Um País, Dois Sistemas”* 146, 153.

⁹³⁷ FSC, Report No. 2/V/2014.