
XVIII.

NEGATIVE LAWMAKING IMPETUSES AND SUSPENSIVE IMPETUSES

I shall explore⁹³⁸ two final types of lawmaking impetuses, namely, negative impulses, and — for lack of a better designation — suspensive or deferring impetuses.

1. Negative Impetuses

Negative impetuses, also qualified as *counter-lawmaking impetuses*,⁹³⁹ are impulses, pressures, oppositions, all aimed at preventing, impeding, or inhibiting the enactment of legislation.

A first class of negative impetuses is provided by two legal instruments belonging to the MSAR constitutional order: the Joint Declaration and the Basic Law. “And these counter-impetuses or negative impetuses may also be constitutional in nature — the Constitution is a brake on legislating on certain matters, or in a certain manner; this means that enacting laws would be tantamount to legislating unconstitutionally;”⁹⁴⁰

Both of these cases are mandatory negative impetuses.

1.1 Joint Declaration

The Joint Declaration determines that, during its period of effectiveness (the half century from 20 December 1999), the basket of twelve fundamental policies⁹⁴¹ shall apply to Macau — eg the current social and economic systems, and the way of life, shall remain unchanged; the Macau Special Administrative Region shall be granted independent executive, legislative and judicial powers, including that of final adjudication; the Central People’s Government shall not levy any taxes in the Macau Special Administrative Region.

Irrespective of whether these policies are properly included in the Basic Law, and of whether they are interpreted as material limitations to amendments thereto, such fundamental policies are valid *per se*, and irradiate real negative lawmaking impetuses,

⁹³⁸ Although with a few lingering doubts.

⁹³⁹ See Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 Legislação 15, 16.

⁹⁴⁰ Marcelo Rebelo De Sousa, ‘A decisão de legislar’ (1991) 1 Legislação 15, 20.

⁹⁴¹ “2. The Government of the People’s Republic of China declares that, in accordance with the principle of “one country, two systems”, the People’s Republic of China shall apply, regarding Macau, the following fundamental policies”.

preventing the enactment laws in contravention of said fundamental policies.

1.2 Basic Law

That which was expounded on the fundamental policies applies equally to the Basic Law. This instrument also establishes several negative lawmaking impetuses. For example, the Basic Law inhibits the regional legislator from initiating and enacting laws in violation of those policies. Imagine, *ad absurdum*, a law providing that final judicial adjudication is transferred to a court outside the Region.

The negative impetuses extend beyond the scope of the twelve fundamental policies. As a constitutional text, with a parametric function for all regional normative acts, — eg under the terms of Article 11 — none of the legal frameworks therein established, however diminutive, may be affected by any law. Imagine, again *ad absurdum*, a Government bill to the effect that the Rules of Procedure of the Legislative Assembly are enacted by administrative regulation, or by a law with legislative initiative reserved to the Executive. In other words, several negative lawmaking impetuses emerge throughout the provisions and the principles contained in the constitutional text. The principle of autonomy, for instance, carries the weight of a negative lawmaking impetus in relation to laws intended to stray beyond the limits of such autonomy.

The aforesaid is rooted in Article 5 of Law No. 13/2009:

“The Legislative Assembly exercises the competences provided for in the Basic Law of the MSAR, including the competence to enact, amend, suspend and repeal laws on any matters within the scope of the MSAR’s autonomy.”

1.3 Political Impetuses

As for other negative impetuses — now of a legally non-binding nature — two cases of political ones come to mind.

In the first scenario, the Chief Executive issues a publicly states that leasing or renting of real estate falls strictly within the domain of commerce and should be left to market forces without legislative intervention. In the second scenario, the President of the Legislative Assembly declares publicly that, after a given date, as the end of the legislative term approaches, no further Government bills will be accepted due to insufficient time for thorough evaluation. These hypothetical or actual statements represent counter-lawmaking impetuses, each with a distinct foci — one specific and the other general.

2. Suspensive or Deferring Impetuses

I equate suspensive or deferring impulses with the drivers triggering the suspension, stoppage, or postponement of the legislative process to a more appropriate later moment,

albeit such impetuses do not substantively oppose the enactment of a given legislative measure.

A possible example of this situation would be the following:

“Without calling into question the legislative power and the legislative initiative of the Legislative Assembly, having publicly announced a review of the CAC Law, it seems that the Chief Executive should be made aware of this petition, for possible consideration of the suggested amendments, within the scope of the announced review (subject to the Chief Executive’s initiative), as it is more appropriate and convenient, for reasons of normative-systematic unity, to insert such possible amendments (apropos the deadlines for conclusion of the investigative phase) as part of the aforementioned global review of the CAC framework.”⁹⁴²

⁹⁴² TSC, Report No. 1/III/2008, *Petition submitted by João Miguel Barros, dated 13 December 2007 – repeal of provisions of Law No. 10/2000*. Or, see eg, less assertively, TSC, Report No. 2/III/2008: “*Having analysed the petition, the Committee: [...] 2) Proposes that the petition be delivered to the Chief Executive, accompanied by the present Descriptive Report, in order to taken into account for the drafting of the special legislation on part-time employment.*”