
PART 6

RECENT DYNAMICS, DEVELOPMENTS AND REFORM

XX.

THE DYNAMICS ON THE GROUND

1. Introduction and Background

Throughout this course, both in terms of the present written Handbook and, especially, in the discussions held in class, an evident conclusion may be drawn on this following theme: the dynamics on the ground — or, maybe less suitably, the *law in action* — are effectively conforming, moulding, conditioning the landscape of the legislative procedure.⁹⁶⁰

As seen above, in addition to the written sources of the legislative procedure — the Rules of Procedure with their centrality, the Basic Law with its primacy, and a set of ordinary laws with their own scope — unwritten sources, such as usages and customs, do exist, however limited they may be. I have outlined, in general terms, their nature, vocation and admissibility as normative sources, and discussed the relations thereof *vis-à-vis* the written sources; it is time to detect possible examples and apply my arguments thereto.

In Macau, several usages and customs penetrate the legislative procedural practice, to a perhaps unseemly degree. The facts on the ground reveal instances of particular aspects of the lawmaking process being subordinated to a primacy of operational reality over rules-based behaviour, of facticity over normativity, which is an *a priori* illegitimate phenomenon.

Hence, there is need to *shed the light* of facticity (the dominant practices) *on* the legally established framework, in order to better understand the legislative procedure as it operates on the ground — what actually happens, in opposition to what should happen.⁹⁶¹

There are, fundamentally, two large areas of *praxis, customs, usages, etc.*, that require analysis: the “*praeter* Rules of Procedure” ones, and those that may be “*contra* Rules of Procedure”.

Two preliminary notes in this regard: firstly, the boundary between those two areas is fluid; secondly, the value — or the legal invalidity — of each area will, in principle, be quite different.

⁹⁶⁰ As in many others and within many legal systems.

⁹⁶¹ I am not expressing, in any way, assent to such solutions as dictated by the praxis; on the contrary, in some cases.

2. *Praxis, Usages and Customs praeter Rules of Procedure*

Function, value, and admissibility — We may attempt to grasp this type of practice or usage as measures that the dynamics on the ground progressively sought out, as a way to fill lacunae, and as a means to “create” new dimensions within the scope of the regularly established rules-based legislative procedure.

Are these practices endowed with legal value? Could they, for example, be considered customs and, to that extent, sources of law in the context of legislative procedure? And, if so, how do they stand *vis-à-vis* the regular written norms of the Rules? For example, if there is a lacuna to be filled, the solution found by the practices shall have to be rooted in the *raison d'être* of the lacuna, and in accordance with the spirit of the missing procedural norms.⁹⁶²

A note worth remembering in the present chapter: Article 26 of the Rules of Procedure provides that the Committee on the Rules of Procedure and Members' Mandates is competent to “*suggest to the Plenary the modifications that the practice may advise*”. In other words, it expressly alludes — with a certain touch of novelty⁹⁶³ — to practices. Their existence is thus recognised; but how and with what value?

Is such a norm intended to accept the existence of procedural practices and recognise their intrinsic value while recommending, whenever possible, their incorporation into the procedural normative text? Or is its normative intent focussed on recognising that such practices may only attain legal value through their insertion in the Rules?⁹⁶⁴ This second option is the one that deserves my adherence, as previously propounded. Moreover, said practices may not be construed, nor applied, contra the Rules of Procedure.

A few examples come to the fore:

The *formal* second, third, fourth, etc versions of Government bills: these are nowhere to be seen throughout the long text of the Rules. It is even less feasible to include them in the very precise and circumscribed concept of amendment proposals. The practice tied to such versions of texts is absolutely overwhelming, notwithstanding the unsustainable weight of the Rules' silence on this issue. I confess my hesitation in

⁹⁶² However, there is a place for Article 159 of the Rules of Procedure: “(Interpretation and solving of omitted cases) 1. The Board is competent to interpret the present Rules and to solve the omitted cases, being able, for this purpose, to consult the Committee on the Rules of Procedure and Members' Mandates. 2. The deliberations of the Board taken under the previous paragraph, when written, are published in the Series II of the Legislative Assembly's Official Bulletin.” What is at stake under this provision are deliberations of the Board, as manifestations of intra-parliamentary case-law — even if unwritten and unpublished — and not practices, the formation thereof not requiring a deliberation.

⁹⁶³ In terms of comparative law; for example, there is no similar norm in the Rules of Procedure of the Assembly of the Republic of Portugal; however, there was a parallel norm in the previous Rules of Procedure (subparagraph [g] of Article 39).

⁹⁶⁴ Or is it simply intended to signal that, in the event of problems, inadequacies and insufficiencies being detected in the course of procedural practice, the CRPMM has the power and the duty to identify such cases, and to initiate modifications accordingly?

subsuming this praxis either under the heading “*praeter* Rules of Procedure”, or beneath the label “*contra* Rules of Procedure”. If singly viewed in isolation, one may consider them to be *praeter* Rules; if, contrariwise, they are intended to reveal a prohibition of submitting Members’ amendment proposals in relation to all Government bills, then one could not avoid qualifying such practices as *contra* Rules and *contra constitutionem*.⁹⁶⁵

Negotiations with the Executive: they are inevitable in the normal preparatory and examination stage of any legislative process. They could possibly be received, in a more explicit fashion, within the Rules.

The profound material and formal modifications proclaimed by the Legislative Assembly/specialised Committees, albeit formally adopted by the proponent in the case of Government bills: this issue is closely related to the previous one *apropos* the second and third versions, and is massively present in practice.

I have shown ad nauseam that, in many cases, no doubts whatsoever exist as to the power of the Members and the Committees to submit amendment proposals relative to Government bills. Such cases could possibly fit into the next category, although as an inherently strange self-refraction of parliamentary legislative powers. The question in hand is one of free political choice or option: Members may wish not to submit amendment proposals, which is entirely different from contending that such proposals may not be accepted at all, otherwise this situation would fall fully into the *contra legem* category.

Preliminary appraisals:⁹⁶⁶ they are not provided for in the Rules of Procedure, nor are they apparently alluded to, or subject to a presupposed relevance, unless, under Articles 103 et seq, one entertains the possibility, or the requirement, of decisions based on judgments of legality or procedural conformity, thus presumably warranting the issuance of a preliminary informational document, such as a technical note. In any case, its implementation shall always be covered by the normal powers of the President of the

⁹⁶⁵ Irrespective, on this point, of the issue of constitutionality of the procedural norm which expressly precludes the submission of amendment proposals to Government bills reserved to the latter body’s original legislative initiative.

⁹⁶⁶ Cf for example, “Technical note – 1. The Assembly’s support services shall prepare a technical note for each bill. 2. Whenever possible, the technical note shall contain, namely: a) An analysis of the conformity with the established formal, constitutional and procedural requirements; b) A legal and scholarship-based framework of the topic, including at the European and international levels; c) An indication of other national and European pending initiatives on identical matters; d) The compliance with the Law on publication, forms and templates of legal enactments; e) A succinct analysis of the facts, situations and realities to be regulated; f) A historical outline of the raised problems; g) An appraisal of the consequences of approval, and a prediction of the expenditure arising from the respective application; h) References to contributions from interested entities, namely the opinions issued therefrom. 3. The Assembly’s support services shall deliver the technical note to the competent parliamentary committee, within 15 days from the date of acceptance of the respective bill. 4. The technical note shall be appended to the report issued by the parliamentary committee and accompany the legislative initiative throughout the entire legislative process.”: Article 131 of the Rules of Procedure of the Assembly of the Republic of Portugal. About this note, introduced in 2007, and its importance, especially in terms of increased quality of legislation, see Fernando Bento Ribeiro and Anna Ciammariconi, ‘The influence of comparative law on the Portuguese Parliament and the Legislative Process’ in Nicola Lupo and Lucia Scaffardi (eds), *Comparative Law in Legislative Drafting* (Eleven International Publishing 2014) 39 et seq.

Legislative Assembly.

Other issues, of a more political nature, could be raised at this juncture.⁹⁶⁷

3. “Distortions”, Practices, Usages, and Customs *contra* Rules of Procedure

I reiterate that the border between these two areas is not always easily demarcated, the opposite occurring in some instances.

Consider function, value, and admissibility. In the case of practices or usages in contravention of procedural norms, I cannot uncover any legitimate function (or one which may be expected to be legitimised). This rationale is extensive to customs, unless the procedural norms under attack are unrelated to the norms or principles of the Basic Law⁹⁶⁸ — I am inclined to accept, in the latter situation, customs *contra* Rules of Procedure.

In the area under scope, I hold the view that, in principle, such practices must be rejected and stripped of any value — possibly with the sole exception of legitimately formed and constitutionally compliant *contra* Rules customs (and here, I must admit, with strong reservations).

When looking more deeply into procedural customs — in the *proper* sense of customs as a normative source — a few questions arise, such as the relation thereof with written norms, the hierarchy or equivalence between both types of norms, if a succeeding norm derogates a preceding one, etc

I take the liberty of recalling the considerations above, regarding Article 26 of the Rules of Procedure.

Naming a few possible examples:

The extension of the role of the Executive Council until the closure of the process, and not merely *ex ante*: it is illegitimate, infringing upon the norms and principles of the Basic Law and of the Rules of Procedure.

In addition, from the observable behaviour of the Legislative Assembly, a custom based on such practice may not be ascribed to this body, which has not assented thereto peaceably and without reservation; furthermore, the durability of said practice is not *immemorial*.⁹⁶⁹

Such custom, even if duly formed as a source of norms, would necessarily have

⁹⁶⁷ The habit of not formally, or expressly, rejecting (through a vote of non-approval) Government bills, which are preferentially withdrawn by the proponent: this issue is strictly political and falls outside the Rules of Procedure. This practice may not enter the scope of the aforementioned Article 26 of the Rules.

⁹⁶⁸ And in general, of the constitutional order of Macau.

⁹⁶⁹ Even though that which is considered to be immemorial may, nowadays, be more compressed.

to be constitutional and not merely procedural in nature; otherwise, it may not legitimately set aside a written procedural norm. In any event, the Basic Law, the unavoidable limit of limits, may never be contradicted.

The rejection⁹⁷⁰ of supervening initiatives *vis-à-vis* Government bills, if deemed allowed — purportedly because not under purview of Articles 104 and 105 of the Rules of Procedure: such a custom,⁹⁷¹ would I believe, directly violate several express procedural norms, rendering the inadmissibility thereof; moreover, said alleged custom would be tainted by constitutional illegitimacy, by contravening the Basic Law's norms and principles. On the other hand, if relegated to the position of a mere usage,⁹⁷² the practice of Members' refraining from submitting supervening initiatives would, as a usage *per se*, be correctly devoid of legal value as a normative source.

It is important to highlight, once again, that said custom would be *contra constitutionem* and therefore disallowed,⁹⁷³ as intending to modify, or be inconsistent with, “a whole series of norms”,⁹⁷⁴ a situation rejected outright by the best legal scholarship, including that which accepts the existence of *contra constitutionem* custom,⁹⁷⁵ if limited to a single norm.

The *tyranny* of “public consultations”: these have increasingly gained the lustre of compulsoriness, even in situations of compliance with international obligations, and in highly technical and specialised subject matters.

The first case, a veritable *obsession* with holding public consultations for the fulfilment of international legal obligations, represents an unwise option; the potential for embarrassment in the event of possibly negative feedback from such public consultations is worrisome. See the following:

“despite being a legislative initiative aimed at meeting international obligations, the MSAR Government decided to submit its bill to public consultation between October and November 2014. Compliance with obligations under international law rarely allows for a significant margin for deviation; as such, holding a public consultation on the implementing

⁹⁷⁰ Different from the non-submission; and in violation of the Basic Law, the Rules of Procedure and contrary to precedents — as in the case of the Law on the Right of Assembly and Demonstration, previously amended by a Members' bill, which in turn was subject to amendment proposals by the Committee, without any — unnecessary — authorisation by the Chief Executive, and Reports by the competent Committee, for instance on the Law relating to the “Legal framework for guaranteeing the rights and interests of the elderly”.

⁹⁷¹ Which does not exist. There are several cases of acceptance of supervening initiatives and of formal committee reports reaffirming this legal power, to which both the Members and the committees are entitled.

⁹⁷² Recall the formal challenge filed against the President of the Legislative Assembly, for having rejected an amendment proposal to the Government's bill to amend the Law on the Right of Assembly and Demonstration — this suggests the *prima facie* absence of a conviction of mandatory behaviour, an element required for the creation of a custom.

⁹⁷³ Gomes Canotilho, *Direito Constitucional e Teoria da Constituição* (Almedina 2003) 862.

⁹⁷⁴ Jorge Miranda, ‘Parecer’ in Diogo Freitas Do Amaral and Gomes Canotilho and Jorge Miranda and others (eds), *O Presidente da República e o Parlamento: O procedimento legislativo* (Assembleia da República 2004) 100.

⁹⁷⁵ *ibid.*

measures thereof is, in principle unjustified, especially in highly complex technical matters. However, this Committee believes that hearing the population is justified, insofar as it would require the legislative policy options be put to the test, thus benefitting the legislative processes.”⁹⁷⁶

However, contrariwise, see:

“According to the Government, the present bill aims to comply with a provision of the Convention, and not to create a legal framework for policy in this area; taking into account that the subjects and objects of the criminal offence are already regulated in the Convention, and that policy shall remain unchanged with respect to the definition of the sanctions, in view of the proper standardisation with the Penal Code, public consultation on said bill was waived.”⁹⁷⁷

Open public consultations — going beyond the participation of experts — in areas of great technical complexity⁹⁷⁸ are not only less useful, but may render decision-making on a given proposed solution to be imperative and inflexible — the law could take on a quasi-referendum feature.⁹⁷⁹

I submit that it is absolutely unacceptable for a bill to be left unchanged on the basis of results of prior public consultations.⁹⁸⁰

Similar arguments have been taken up, but none have led to my conclusion. An example thereof is the idea of a deliberative survey on a possible review of the Press Law, which has been going on for several years, and with no end in sight.⁹⁸¹

As I wrote elsewhere:

⁹⁷⁶ FSC, Report No. 1/V/2015, Government bill entitled “Elimination of bearer shares and amendments to the Commercial Code”.

⁹⁷⁷ FSC, Report No. 6/IV/2014, Government bill entitled “Framework for the prevention and repression of acts of corruption in foreign trade”.

⁹⁷⁸ “[...] the perplexity arising from the use of this mechanism in the context of this very sensitive and highly technical legislative reform. Quite specific and detailed questions shall be asked. Apparently, the desire to import this state-of-the-art methodology would make much more sense for purely executive processes – for example, a deliberative survey on whether, and where, a new Macau-Taipa bridge should be built, at what time the border post to the Mainland should be opened or closed, or if, how much and where, more affordable housing should be built.”: 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.

⁹⁷⁹ See *inter alia*, the Macau Lawyers Association Opinion on the Government bill entitled “Elimination of bearer shares and amendments to the Commercial Code”: 2015.

⁹⁸⁰ Not only because the law-making body does not necessarily have to legislate in direct response to a position perceived to have greater popular acceptance, but also because of the evident dearth of quality and reliability of a large segment of the public consultations so far carried out.

⁹⁸¹ Which is becoming a very strong trait of legislative processes initiated by the Government. Other examples: the legislation regarding medical malpractice, protection of animals, and the freezing of assets. All relevant — and, in some cases, very urgent — subject-matters, reaching the Legislative Assembly labelled as urgent, after an extremely long period of maturation in the corridors of government, and in studies and public consultations.

“A few words about the innovative methodology in progress, the so-called deliberative survey. One should not fear something just because it constitutes a novelty. The idea is captivating and challenging. No doubt. However, in this specific case, I hold two reservations: one is that of legitimization; the other, that of suitability and timeliness. As for legitimization, my reservation relates precisely to the issue a posteriori, ie when a proposal with the contents, as pre-defined by such survey, is finalised, will the Government be prevented from altering said contents when the legislative process is formally initiated (presumably by the Executive)? And, later on, will the local parliament — with a majority of elected Members — be delegitimised from introducing amendments, or be constricted by the fundamental options resulting from said survey?”⁹⁸²

The interpretation, the solution to omitted cases, and the filling of lacunae *contra* Rules of Procedure: I discussed these situations above and set the limits thereto. For example, if there is no omission, there is no lacuna to fill; possible lacunae must be filled within the scope of the system, in light of the Rules and the norms and principles of the Basic Law.

The failure to mention the prior consultation of the Executive Council in Government bills: it was an irritating and reiterated praxis, in frontal contravention of the Rules of Procedure and, indirectly, of the Basic Law. Such practice has apparently been discontinued.

4. Other Considerations

One may not assert that all such distortions and practices are politically motivated. I contend that other reasons may be pure ignorance or simple inertia, without untoward intentions.

There are often practical difficulties arising from the complexity and technical difficulty attached to certain matters, as well as insufficient numbers of qualified or specialised staff, be it in the Legislative Assembly or in the Government.⁹⁸³

Another aspect is the lack of quality or publicity⁹⁸⁴ of the preparatory and comparative studies carried out by the proponents, especially the Government, thus risking a loss in legislative quality during highly specialised legislative processes, with a

⁹⁸² 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.

⁹⁸³ For instance, it is not conceivable that Government bills be drafted by laypersons (non-lawyers); similarly, in discussions of a legal-technical nature, the Government should be represented by lawyers.

⁹⁸⁴ Cases of unkept and continued promises (even in the final stage of the legislative process) have been witnessed and also instances when information and documentation were not provided to the Committee, although later found to be freely accessible on a Government website.

frequent and unnecessary duplication of efforts.

A further remark is directed at the cyclical *swamping* of the Legislative Assembly as legislatures draw to a close, through the late and massive submission of complex Government bills.

In effect, as the then President of the Legislative Assembly complained,

“a frequent scenario as the end of each legislative session approaches is the Executive’s penchant — after not presenting legislative initiatives for a prolonged period of time — for submitting bills at a fast pace, simultaneously or massively, in a very short timeframe. [...]”

In this context, the Legislative Assembly is compelled to either work half-heartedly, to wait for the Government, or to work hastily at full steam and under great tension, to the point of exceeding its capacity.”⁹⁸⁵

Finally, it is not acceptable that the Government spend year after year, if not decades, studying a certain subject-matter — with the involvement of different departments, with studies, reports, consultations, seminars, study missions — and, after submitting the relevant bill, expect that the Legislative Assembly be able to study, analyse, amend, debate, vote and approve such initiative just in a hurry.

⁹⁸⁵ Susana Chou, *Balanço do Decénio de Actividades da Presidente da Assembleia Legislativa: 1999.12.20–2009.10.15* (Assembleia Legislativa 2009) 24. See also, “the Committee reaffirms that, in this matter, there should be no haste; it would not be legitimate or reasonable to require the Legislative Assembly to quickly approve a Government bill without due consideration and study, after the Government has spent over a decade carrying out studies, seminars and consultations. Indeed, the population in general, the medical and nursing staff, health care providers, legal operators, and possibly the local insurance companies, would not comprehend how the Legislative Assembly could rush into passing a law in a careless and untimely manner. Undue speed is the enemy of conscientious timeliness.”: TSC, Report No. 1/IV/2012; and, “when submitting legislative proposals, the Government must take into account the availability of the Legislative Assembly; it is not convenient to do everything at the same time, as such may cause the Legislative Assembly to be unable to make its assessment for lack of time.”: Jiang Hua, ‘Mútuco controlo e articulação entre o Executivo e o Legislativo na RAEM’ (2001) 99 *Administração* 163. On this issue one can, with benefit, bring here the following words: “Over speed lawmaking caused legislative inflation and imprudent legislation; bureaucratic lawmaking ignored common people’s participation in the lawmaking procedure; [...] although did not necessarily mean low quality of law, the over speed lawmaking caused that some laws, regulations, decrees and rules were in conflicts with each other”: Peng He, *Chinese Lawmaking: From Non-communicative to Communicative* (Springer-Verlag 2014) 21–22.