XXII.
CONTRIBUTIONS TO A REFORM OF THE LEGISLATIVE PROCEDURE

In this closing chapter, I intend only to provide the reader with clues for possible reflection on a review — or possibly a genuine reform — of the Rules of Procedure. As such, the following paragraphs are mainly presented under several topics.

Once more, I would like to restate that the thoughts below are of a strictly personal nature, expressed under the umbrella of both legal science and scholarship on the one hand, and my own professional experience on the other. The said elements for legal reform do not reflect any political opinions whatsoever.

Throughout these pages and my Lessons, I have left suggestions on each legal framework or problem. Therefore, the task now is simply to lay out a repertoire of ideas, without further comments, unless the complexity of the issue demands otherwise.

A first suggestion is to place the stage of approval in general after the phase of examination and delivery of the respective report by a Committee.[1007] Much has been written and adduced above on this matter; I personally believe that introducing this profound change to the legislative procedure would prove to be most useful and adequate, reinforcing the legitimacy of the procedure itself.

A second suggestion is the elimination of the framework that renders the limits placed on the original legislative initiative applicable to the members' supervening initiative. In other words, one should return to the *status quo ante* the "leap" performed by the Rules of Procedure *vis-à-vis* Article 75 of the Basic Law, thus eliminating a procedural norm which does not conform with Macau's Constitution *in a broad sense*. In order to achieve this aim, it would suffice to remove the expression "*and the amendment proposals*" from Article 107 of the Rules of Procedure.

A third issue: should real special processes be created?

[1007] Cf, "However, I have reservations regarding the submission of a text to the Plenary, for approval on the whole, without a prior assessment by a Committee.": Member Victor Ng, during the debate on the Rules of Procedure, Colectânea de Legislação Regulamentadora da Assembleia Legislativa, Vol II, Regimento da Assembleia Legislativa da RAEM. See also, "However, legislative practice over more than a decade after reunification demonstrates that the appraisal carried out during the general debate is not sufficiently rigorous. The debate on legislative policies and the possible socio-economic consequences thereof is not sufficiently deepened: some problems that must be raised or resolved in the stage of general debate appraisal were postponed to the stage of examination on the specifics, which makes the latter proceedings more difficult.": Liu Dexue, 'Considerações sobre as estratégias da reforma jurídica de Macau e do desenvolvimento do direito no contexto do princípio "um país, dois sistemas"' (2014) 102 Administração 997, 1021.

For example, a special process for the confirmation of bills provided for in Article 51 of the Basic Law?

Another example entails a special process governing the following scenario: the Legislative Assembly refuses to approve the Budget bill, or refuses to approve a Government bill, which, in the opinion of the Chief Executive, affects the general interest of the MSAR. A special process could be established to implement a formal procedure for consultations to attain consensus as outlined in Article 52 of the Basic Law.[1008]

For instance, a special process governing the application of national legislation?[1009]

Or a special process governing legislative participation in the application of international law instruments to the MSAR, especially on subject-matters found within the areas reserved to the law?

This is a very complex issue embedded with doubts and uncertainties, specifically concerning the competence — and its respective contours and limits — of the Legislative Assembly; and a topic on which the Basic Law is normatively parsimonious or silent.[1010] A glance at some relevant reports[1011] of the Legislative Assembly issued after the establishment of the MSAR allows one to immediately perceive how muddied the waters are.

Under a comparative perspective, the following words may shed some light on the possibilities:

[1008] Clarity and predictability would be augmented, and there would be no need to introduce changes which jeopardise the principle of formal equality between bills, as occurred with the 2015 amendment to Article 109 of the Rules of Procedure.

[1009] One of the modalities for the application of national legislation in the MSAR entails the participation of the Legislative Assembly, since national laws "*are applied locally by way of publication or legislative act of the Macau Special Administrative Region.*": Article 18 of the Basic Law.

[1010] See *inter alia*, Patrícia Ferreira, 'Algumas questões acerca da aplicação do direito internacional na Região Administrativa Especial de Macau' (2006) 1 CFJJ 148. See also, Liu Gaolong, 'Aplicação e efeito do direito internacional em Macau' (2009) 28 BFDM 50; Fong Man Chong, 'Alguns Aspectos em Torno da Vigência da Lei Básica na Fase Inicial (II) — Reflexões Sobre a Aplicação do Direito Internacional na Raem' (2003) 62 Administração 1272; Jorge Bacelar Gouveia, 'Fontes do Direito e Direitos Fundamentais em Macau' in *Direito Constitucional de Macau* (IDILP 2012) 49, 94–95; 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) 209 et seq. It would be very useful to consider a law specifically relating to the method and to the form for conclusion of international law instruments by the MSAR, while simultaneously amending the Law on forms and templates of legal enactments in accordance. On these issues, see Patrícia Ferreira, above, 157 et seq.

[1011] TSC, Report No. 2/II/2002, Examination on the specifics of the Government bill entitled "Law on the compliance with certain acts of International Law"; SSC, Report No. 1/2002, Government bill entitled "Procedure for the notification of requests within the scope of judicial co-operation"; SSC, Report No. 1/II/2003, Government bill entitled "Taxation framework in case of regional or international double taxation"; SSC, Report No. 2/II/2005, Government bill entitled "Addendum to Law No. 2/2003"; FSC, Report No. 1/II/2004, Government bill entitled "Law on the Status of Refugees"; FSC, Report No. 2/II/2004, Government bill entitled "Law on the Status of Refugees"; FSC, Report No. 2/III/2006, Government bill entitled "Law on Judicial Co-operation in Criminal Matters".

> "Looking at Parliament's intervention in particular, there are different solutions in comparative law, on an increasing scale: exclusion; purely consultative competence; deliberative competence, concurrent with other bodies, on all or a few matters; division of competence with the approval of certain treaties reserved to Parliament; competence of approval by Parliament depending on referenda; exclusive parliamentary competence."[1012]

Note the absence of any reference in the Basic Law to a role to be played by the Legislative Assembly in this context. Contrariwise, one encounters the competence of the Chief Executive to "*conduct, on behalf of the Government of the Macau Special Administrative Region, external affairs [...] as authorised by the Central Authorities*";[1013] and the provision to the effect that the MSAR Government may "*make appropriate arrangements for the application to the Macau Special Administrative Region of other relevant international agreements.*"[1014]

On the other hand, it is necessary to recognise the existence of a wide range of matters within the areas reserved to the law and enacted by the Legislative Assembly, as it is common for many instruments of international law to regulate those very same issues. Examples that quickly come to mind include fundamental rights, taxation[1015] and criminal law. In the MSAR, this question is actually of greater significance because international

[1012] Jorge Miranda, *Direito Internacional Público* (Lisboa 1995) 93–94. In the Territory of Macau, and according to the specific situation of each international convention, the role played by the Legislative Assembly oscillated between exclusion and a mere consultative competence, ie during the phase of "*prior consultation of the bodies of territorial self-government*": Article 3, paragraph (3) of the Organic Statute. See Paulo Cardinal, 'A Transição e o sistema político de Macau: continuidade ou convergência?' (1997) 4 Revista Jurídica de Macau 27, et seq.

[1013] Article 50, subparagraph (13) of the Basic Law.

[1014] See Article 138 of the Basic Law, which refers to international law instruments to which the PRC is not a party.

[1015] On this topic, see eg "In the MSAR, it is normally understood that international or interregional tax agreements, entered into by the Chief Executive, under the terms of Law No. 2/2003, as amended by Law No. 3/2005, do not require further approval by the Legislative Assembly (by way of a resolution) and subsequent ratification by the Chief Executive (declaring that the MSAR is bound by the provisions of the conventions, as duly authorised by the Legislative Assembly). On this point, explaining that the competence for the Chief Executive arises from his competences to represent the MSAR externally, and to conclude international agreements, pursuant to the Basic Law, in terms that are not entirely conclusive, see Report No. 1/II/2003 of the SSC, dated 29 January 2003, on the Government bill entitled "Taxation framework in case of regional or international double taxation", especially 3–7; and Report No. 2/II/2005 of the SSC, dated 30 June 2005, regarding the Government bill entitled "Amendment to Law No. 2/2003": 3–4. I believe that this perspective, being essentially correct, does not rule out the need for subsequent approval, by the Legislative Assembly, of the tax conventions, signed by the Executive representing the MSAR, which focus on the core aspects of the taxation framework. This corresponds to international practice and it seems to me that such approval by the regional parliament must occur, at least when it comes to matters of the exclusive competence of the Legislative Assembly, as is the case in the field of taxation, under the terms of Article 71, paragraph 3), of the Basic Law, due to the fact that these conventions introduce new regulation to the tax system. Such has not been the constitutional practice in Macau, and the Legislative Assembly does not proceed to approve international or interregional agreements – on any and all matters, whether these be within or without the scope of the areas reserved to the law – signed by the Executive, nor does the subsequent ratification by the Chief Executive – in order for the convention in hand to enter into force in the MSAR legal order – likewise occur.": Luís Pessanha, 'Algumas Notas sobre o Acordo contra a Dupla Tributação entre Macau e Moçambique' (Questões Jurídicas Contemporâneas relativas ao Comércio e Investimento China-África, Macau, 2014).

conventions occupy a higher stratum in the hierarchy of legal norms *vis-à-vis* domestic laws, under the principle of primacy of international law.[1016]

If the Legislative Assembly is excluded from any intervention in these processes, such omissions do nothing but skirt the legislative competence reserved through international legal instruments.

The Legislative Assembly of the Territory of Macau, in the pre-handover era, was called upon to render its opinion on a certain type of instrument of international law.[1017] The role was a purely consultative one to be sure, but nonetheless one that empowered, and moreover, enabled the legislative body to disseminate the content and relevance of each international treaty.[1018]

What is the current legal position in the MSAR?

A first and possible answer, which I sensed before the handover, is the demotion of the Legislative Assembly from a secondary acting role to that of a complete non-actor, ie to the exclusion thereof.[1019] The praxis has, however, provided a few examples of the opposite tendency — in other words, a modicum of inclusion of the Legislative Assembly in processes related to international law instruments, albeit in an inconsistent and inconstant manner. There is no reason why, in relation to other international law instruments, namely when the respective regulated matters fall within the areas reserved to the law, the Legislative Assembly should not equally be called upon to intervene.

The situation remains fluid, as the following words demonstrate:

[1016] In addition to the quote in the preceding footnote, see, "The principle of the prevalence of international law over domestic law seems to me to be reasonably established in the legal order of Macau, as outlined in Article 1, paragraph 2) of the Civil Code, and uncontested by the Macau courts, which recognise the full validity of said principle under the fundamental framework of the Basic Law (in particular, see the CFA Decision in Case No. 2/2004": Luís Pessanha, 'Algumas Notas sobre o Acordo contra a Dupla Tributação entre Macau e Moçambique' (Questões Jurídicas Contemporâneas relativas ao Comércio e Investimento China-África, Macau, 2014). See also 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) 217, "The MSAR courts recognise the supra-legal value of conventional international law within the sources of Macau Law. However, judicial decisions have diverged as to the normative foundations supporting this conclusion": Cristina Ferreira, 'Comentário ao Acórdão do TUI n.° 2/2004 sobre a posição do direito internacional convencional na hierarquia das fontes de Direito na RAEM' (2015) 6 Legisiuris 55 et seq.

[1017] Paulo Cardinal, 'A Transição e o sistema político de Macau: continuidade ou convergência?' (1997) 4 Revista Jurídica de Macau 27, 46.

[1018] For instance, see CCARFG, Report No. 8/VI/98, *Extension to Macau of the Convention on the Rights of the Child*; CSAEC, Report No. 8/99, *Extension to Macau of Conventions No. 22, No. 23 and No. 158 of the International Labour Organisation (ILO)*; CCARFG, Report No. 19/VI/98, *Extension to Macau of the 1979 International Convention Against the Taking of Hostages*; or CCARFG, Report No. 11/VI/99, *Extension to Macau of the Charter of United Nations*: "*The competence attributed to the Legislative Assembly is of a mandatory but consultative nature – as is clear from the Organic Statute and reaffirmed by the repeated legal understanding and reports of this Assembly — to be exercised prior to the application and/or extension of an instrument of international law; the President of the Republic is not bound by the opinion of this (or the other) body of territorial self-government.*"

[1019] Paulo Cardinal, 'A Transição e o sistema político de Macau: continuidade ou convergência?' (1997) 4 Revista Jurídica de Macau 27, 56.

> "The present Government bill is materially similar to a legislative authorisation law — a typology of legislative act not in existence in the current legal order of the MSAR. The bill submitted to the Legislative Assembly is intended to authorise the Government of the MSAR, more specifically the Chief Executive, to enter into regional and international agreements with a view to avoiding double taxation. Thus, it appears that the Legislative Assembly, with the approval of the present bill, is legitimising Government intervention in subject-matters within the former body's exclusive competence, eg the essential elements of the taxation framework — Article 71, paragraph (3) of the Basic Law. This is a somewhat delicate issue, falling within the competence of the Legislative Assembly, and an issue which, with the approval of this bill, shall become the focus of Government intervention. The Committee analysed the matter under the provisions of the Basic Law on the competences of both bodies, and concluded that, although the Legislative Assembly does have the exclusive competence to legislate on the taxation framework, it is no less true that the exclusive competence to represent the Region externally is attributed to the Government."[1020]

The above example is a positive, at least prospective, step towards a more appropriate legal solution, notwithstanding the route thereto being far from clear-cut.[1021]

Proceeding to further suggestions for, or elements of, a reform of the Rules of Procedure of the Legislative Assembly:

— Expressly recognising other requirements for the acceptance or rejection of legislative initiatives, especially where the norms and principles of the Basic Law have been violated? I say yes, vehemently. And what about violations of the Sino-Portuguese Joint Declaration on the Question of Macau? An identical solution seems justly appropriate to me.

And violation of Law No. 13/2009? I answered in the affirmative above; let me just recall the concept of "borrowed constitutionality" carried by this law.

[1020] SSC, Report No. 1/II/2003, Government bill entitled "Taxation framework in the case of regional or international double taxation", "The Basic Law does not, therefore, provide for any other MSAR body, other than its executive body, to be able to conduct external affairs. Nonetheless, it is also the responsibility of the Legislative Assembly, under the terms of [The Basic Law], to define the taxation framework of Macau. In view of this legal architecture, it will be up to the Government to negotiate agreements with external entities within the limits of the competence reserved to the Legislative Assembly. However, as the Legislative Assembly lacks the competence to represent the MSAR externally and does not grant authorisations to the Government for the purposes of concluding agreements in matters reserved thereto, it would be an impasse if legislation were not approved to authorise the Government to conclude agreements with other countries and regions in fiscal matters. It is, therefore, the division of competences provided for in the Basic Law which necessitates that the Legislative Assembly, in matters of its exclusive competence, approve a law enabling the Government to conclude agreements with a view to avoid double taxation and tax evasion."

[1021] See *inter alia*, António Katchi, *As Fontes do Direito em Macau* (Faculdade de Direito da Universidade de Macau 2006) 432 et seq.

And what about requirements for compliance with international treaties? I also deem such to be appropriate, especially though not exclusively for international law instruments provided for in Article 40 of the Basic Law: the ICCPR, the ICESCR, and the ILO Conventions.

— Creating specialised committees based on subject-matter? It seems to be a valid option, already made evident by the dynamics of the monitoring committees.

— Transforming the Legislative Assembly from a merely supporting body for the legal-technical improvement of legislation, into a true and proper legislative body? Yes, definitely. One should entertain the introduction of a few procedural norms to reflect such a purpose.

— Formalising the above identified issues of practices, usages and customs *praeter* Rules, via Article 26 of the Rules of Procedure.

— Enlarging the power of legislative initiative (both original and supervening) of the Committees? I believe so. This development could also compensate for the shortfall of such initiative being exercised by individual Members.

In this context, I support the implementation of a truly complete framework for the submission of substitution or replacement texts drafted by the competent committee, with obvious advantages in terms of formalisation, presentation and integration of the new solutions recommended by such a body.

— Expressly recognising areas of legislative initiative reserved to the Legislative Assembly, its Members and Committees, especially in matters pertaining to the Legal Status of the Members and to the Organic Law of the Legislative Assembly. This measure could easily follow the legislative technique adopted in the Rules of Procedure: by linking rejection decisios to the specific bills and proposals which fail to comply with certain organic, material and formal requirements.

— Clarifying the conjoining or merger of bills, ie the joint appraisal of bills on identical subject-matter, with an evident streamlining of the legislative process.

— Expressly recognising the principle of equal formal dignity between Members' and Government bills? Certainly, not only because this principle does exist as described above, but also because such measure would, above all, serve as a yardstick — charged with symbolism and imagery in the eyes of the population — befitting and benefitting the Legislative Assembly.

— Formally establishing the acceptability of second and third versions of Government bills as submitted time and again by the Executive? I believe so, first of all as a means of ensuring transparency and recognising the existing *factuality*. This would involve a few important modifications to the Rules of Procedure — the mere introduction of an article would not suffice, but the clarification of various aspects is required. Such a change should not render it absolutely impossible for Members and Committees to submit amendment proposals to any and all Government bills.

— Related but distinctive to the previous suggestion is the issue of allowing amendment proposals (other than substitution or replacement texts as mentioned in the previous paragraph) submitted by the Government. Should such also encompass Members' bills? Yes, I am inclined to accept this possibility as long as it does not equate to an invasion of the legislative initiative reserved to Members.

— Establishing the proponent's obligation, especially in the case of Government bills, to provide all available additional information (studies, comparative law, etc).[1022]

— Establishing mandatory consultations and hearings during the stage of examination on the specifics in Committee, for example, ones held by the MLA. Such a measure should be supplemented by the non-mandatory consultation of associations, entities, etc, pertinent to the matter under appraisal, especially when very relevant. I must underline that the latter case corresponds to the current practice of the Legislative Assembly.

— Formally inserting into the Rules of Procedure the idea expressed on the Legislative Assembly's official website: "*Residents may send their opinions on bills to the Legislative Assembly by post or via e-mail.*", in such a formulation or perhaps one more refined and open-ended which includes any and all local inhabitants and legal persons.

Here concludes this journey through the legislative procedure of Macau.

[1022] For example, Article 124, paragraph (3) of the Rules of Procedure of the Assembly of the Republic of Portugal: "Government bills shall be accompanied by the studies, documents and reports on which they are grounded."