MACAU'S RESPONSE TO THE NOVEMBER 2016 INTERPRETATION OF THE HONG KONG BASIC LAW

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Macau's Government has proposed legislation to bring its electoral law regime into compliance with the National People's Congress Standing Committee's 7 November 2016 interpretation of Article 104 of the Hong Kong Basic Law (the 'November Interpretation').

Macau had already been working on amendments to its electoral regime in anticipation of next year's quadrennial Legislative Assembly election. The original proposal generated controversy throughout the summer for expanding the candidate screening powers of the local Legislative Assembly Election Affairs Commission (CAEAL) – a municipal body whose membership is appointed by the Chief Executive. Macau's Secretary of Administration and Justice, Sonia Chan, sought deeper amendments following the November Interpretation. The revised version was introduced along with an explanatory text on 7 December 2016.

The document is notable for its drafters' views of Macau's obligations following an NPCSC interpretation of the Hong Kong Basic Law. Although they are two separate legal jurisdictions governed under separate constitutional regimes, Macau has long been contrasted with Hong Kong as an "obedient child" in its "one country, two systems" autonomous relationship with Beijing. Until now there was no better modern example than Macau's compliant codification of controversial Article 23 national security legislation in 2009.

In the present oath-taking saga, the Hong Kong judge tasked with applying the NPCSC's November Interpretation to the actual case at hand attempted to mitigate reputational damage to the local common law system by stressing his independent decision-making rationale. Indeed, two advocates of Hong Kong independence were ultimately disqualified from serving in the Legislative Council. Rather than dodge a perception of interference, the Macau Government enthusiastically seeks to embrace the November Interpretation despite lacking the contextual background for which it was prescribed. Macau has no independence movement.

The reform package seeks to amend *Law 3/2001: The Electoral Law of the Legislative Assembly of the Macau Special Administrative Region.* The most significant provision would make ineligible for candidature prospective legislative deputies "who refuse to declare that they uphold the Basic Law […] and that they are faithful to the MSAR of the PRC," as well as unseat those who "do not uphold the Basic Law […] or are not faithful to the MSAR of the PRC." The tests for post-assumption fidelity are undefined.

Other notable amendments include:

1) Provisions restricting officers of foreign governments from serving in the Legislative Assembly (Articles 4 and 6);

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2) Slight changes to the composition of the CAEAL (Article 9);
3) Introduction of broad statutory definitions for the concepts of "electoral propaganda" and "electoral activities" (Article 75-A);
4) Introduction of a duty to communicate any "electoral propaganda activities" to CAEAL for approval at least 18 days in advance of an election (Article 75B);
5) Introduction of criminal liability for legal persons or their agents who violate the Electoral Law (Articles 143 and 148), including the application of Macau electoral law to circumstances occurring outside of the MSAR.

Nine of ten members of a Legislative Assembly commission reviewing the proposal agreed to its terms, suggesting it will be adopted in time for next year's election.

I have translated the entire text of the revised proposal, but its explanatory note is over 100 pages long. I therefore share my translations of the more notable articles with their accompanying passages from the explanatory note below. The original Portuguese versions (which I operated from) are here. The original Chinese versions are here. I am not a certified translator and so any errors in this unofficial text are my responsibility alone.

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SELECTED TEXT AND EXPLANATIONS

ARTICLE 4: Incompatibilities
[1-5]
6. A Deputy may not, for the duration of his term of office, hold the following posts or posts:
1) Member of parliament or legislative assembly of a foreign State, in any scope, namely federal, national, regional or municipal;
2) Member of government or worker within the public administration of a foreign State, in any scope, namely federal, national, regional or municipal.

Explanatory Note: 20. Incompatibilities (pp 21-27).

The draft law amends *Law 3/2001*, adding a rule to its Article 4 which stipulates that a Member may not, during the exercise of his mandate, hold posts or posts at any parliamentary level, be a member of government, or work in the public administration of any foreign State.

In order to prevent doubts and conflicts in cases of "double fidelity" it is extremely necessary to clarify this point of law, thus improving the requirements of candidacy for the position of Deputy. It was then suggested to change the article related to "Incompatibilities" stipulated in *Law 3/2001*, clarifying that there are incompatibilities for Deputies of the Legislative Assembly during their mandate for political positions in other countries, thus preventing similar situations from recurring.

The Commission has agreed to this rule and, at the same time, has discussed with its proponent whether or not it may violate the Basic Law or restrict political freedom. It also put some concrete questions, for example, about the situation in other countries. Can the Deputies of Macau be at the same time Deputies of Taiwan? Can they also be "honorary consuls" or "economic advisers"? The current law does not require the Deputy to declare that he/she also has the function of an "economic adviser," so how should such cases be resolved if they occur? The proponent explained this in detail:

(1) Article 1 of the Basic Law states: The MSAR is an inalienable part of the PRC, and its Article 12 enshrines "the MSAR is a region of the PRC, which enjoys a high degree of autonomy and is directly subordinate to the Central People's Government." These two articles clearly reflect the principle of the country's sovereignty and the legal status of the MSAR, clearly demonstrating that the MSAR is not, in any situation, considered a separate political entity. The principle of the country's sovereignty and the legal status of the MSAR show a clear dependency. Admitting persons who concurrently exercise a political function in a foreign State would run counter to the principle of the country's sovereignty and conflict with the legal status of MSAR.

(2) Article 101 of the Basic Law provides: […] the Deputies of the Legislative Assembly […] shall uphold the Basic Law of the MSAR of the PRC […] shall take an oath under the law. This article, which clearly prohibits "double fidelity," has a very strict legal principle:

1) The duty to uphold the Basic Law is imposed on all Deputies of the MSAR, without exception for Deputies holding foreign nationality. Taking into account the historical reality of Macau (the Preamble of the Basic Law), this Law does not prohibit permanent residents of the MSAR who do not have Chinese citizenship to exercise the charge of Deputy, but this also does not mean that Deputies who have not complied with the Basic Law or who hold political office or are employed in the public administration of a foreign State. These Deputies are not exempt from the constitutional duty to be faithful to the MSAR of the PRC only because they have a foreign nationality;

2) In the first place, to uphold the Basic Law is to uphold that the Government of China returned to exercise sovereignty over Macau on 20 December 1999, and that sovereignty has a characteristic of excluding parties. To uphold the Basic Law means that it is necessary to comply with and apply what is enshrined in this Law, especially as to the sovereignty of the Country and the legal status of the MSAR;

3) To be faithful to the PRC and to the MSAR is a comprehensive concept in that the MSAR cannot be separated from the PRC, to do otherwise would violate Articles 1 and 12 of the Basic Law. It is necessary to point out, in particular, that the nature of the loyalty owed to the PRC and to the MSAR is identical, and there are differences as to the level of demand as the fidelity enshrined in Basic Law Articles 101 and 102 require that it be owed to the MSAR of the PRC. In the light of the foregoing, Article 102 cannot be used to deny [the duty in] Article 101.

4) Mainland China, Hong Kong and Taiwan are all inalienable parts of China, belonging to a single country. The occupation of political posts in these regions is naturally different from the occupation of political posts in foreign States. […]

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ARTICLE 6: Ineligibles
[1-6]
8) Those who refuse to declare that they uphold the Basic Law of the MSAR of the PRC and that they are faithful to the MSAR of the PRC […] or that they do not uphold the Basic Law of the MSAR of the PRC or are not faithful to the MSAR of the PRC;
[9].

Explanatory Note: 20. Ineligibles (pp 27-35).

[…]

Third, the 24th Plenary Session of the Standing Committee of the National People's Congress released on 7 November 7 2016, the "Interpretation of Article 104 of the Basic Law of the Special Administrative Region of Hong Kong by the Standing Committee of the National People's Congress. "According to the text of this legislative interpretation: "to uphold the Basic Law of the HKSAR of the PRC and to be faithful to the HKSAR of the PRC" is, on the one hand, indispensable to the oath determined by that article, and, on the other, are legal requirements and conditions that the candidates or holders must meet for the assumption of public positions provided for in that same article.

It is explicit in the above Interpretation that: upholding the Basic Law of the HKSAR of the PRC and adhering to the HKSAR of the PRC is the legal qualification that candidates or officeholders must hold in the HKSAR. The Interpretation further emphasizes that both candidates and officeholders must uphold the Basic Law of the HKSAR of the PRC and be faithful to the HKSAR of the PRC because it is a duty stipulated in the Basic Law of Hong Kong, that is, a condition to becoming a candidate.

Although the mode of expression in Article 101 of the Basic Law of the MSAR and that in Article 104 of the Basic Law of the HKSAR is not completely the same, the substantive content is identical. For the foregoing, this interpretation of the Standing Committee of the National People's Congress is undoubtedly a guiding document for Macau.

In fact, this requirement is not a novelty, and it is a duty foreseen by the Basic Law, because, according to the "Specific Methodology for the Formation of the First Legislative Assembly of the Macau Special Administrative Region of the People's Republic of China," adopted on 10 April 1999 by the Seventh Plenary Session of the Preparatory Commission of the Macau Special Administrative Region of the National People's Congress. Article 4(1) provides that: "Members of the First Legislative Assembly shall uphold the Basic Law of the Special Administrative Region and shall be prepared to be faithful to the MSAR of the

PRC and to meet the requirements of the Basic Law of the MSAR." Article 5 provides that:

> Members elected directly or indirectly to the last Legislative Assembly of Macau, who fulfill the requirements of paragraph 4 of this Methodology, shall deliver to the Secretariat of the Preparatory Committee of the Special Administrative Region of Macau the proper form to confirm the status of the Members of the first Legislative Assembly, accompanied by the corresponding supporting documents, in order to confirm the membership of the first Legislative Assembly by the plenary session of the Preparatory Commission on the proposal of the Bureau of the Preparatory Commission after its consideration.

This shows that upholding the Basic Law and fidelity to the MSAR of the PRC already constitute requirements regarding the Statute for Members of the Legislative Assembly, as defined in the methodology for the constitution of the First Legislature of the Legislative Assembly. Thus, the Government considers that the constitution of this regime is preventive in nature. In the light of the clear interpretation of the National People's Congress, Macau should improve said regime, given that Article 101 of the Basic Law of Macau and Article 104 of the Basic Law of Hong Kong are essentially the same. The amendment of the Electoral Law is in progress, above all, the revision of the alteration of the norms related to electoral capacity, expressly adding the respective articulations to the proposed law.

Accordingly, among the various conditions of ineligibility, a number have been added to Article 6 of the Electoral Law, which provides that "[t]hose who refuse to declare that they uphold the Basic Law of the MSAR of the PRC and who are faithful to the MSAR or who, for proven facts, do not uphold the Basic Law of the MSAR of the PRC or are not faithful to the MSAR." This is a new adjustment of the draft law. Regarding the issue of the implementation of this standard, there was a discussion, at the technical level, with the proposer, who stated that it would be up to CAEAL, in the future, to take Decisions, according to the law and according to the concrete situation, that can be appealed to the Court of Final Appeal.

Content contained in the Declaration, as provided for in paragraph 2) of paragraph 2 of Article 30, has been added. Thus, it is expected that there will be a "sincere statement signed by each candidate, which states that he accepts the application, upholds the Basic Law of the MSAR, is faithful to the MSAR and is not covered by any ineligibility."

In addition, Article 47-A (Loss of Candidate Status) and Article 47.0-B (Appeal) have been added and, in the latter, provide that "[a] decision determining the loss of the status of a candidate TUI, to be lodged by the agent's representative on the day following the notification referred to in paragraph 4 of the preceding article. '"The TUI shall, within two days, decide definitively and immediately notify the applicant and the CAEAL." Article 47-C concerns the consequences for the list of candidates.

It should be emphasized that this requirement was clearly defined in the concrete methodology for the constitution of the First Legislature of the Legislative Assembly of the MSAR. Now it is a question of merely taking advantage of this opportunity to improve this rule, through the amendment of the Electoral Law, with a view to proceed with a more comprehensive regulation, in order to prevent and exclude the comments and activities inherent to the secession of the State.

As regards the declaration defined in Article 30(2) of the draft law, the Commission and representatives of the Government discussed its content, nature, freedom of expression and the respective criminal laws, among other matters. Throughout the discussion process, the Government insisted that the statement include the following: declare that the application is accepted, which upholds the Basic Law of the MSAR of the PRC, loyalty to the MSAR, and is not subject to any ineligibility. The assessment of the declaration is a legal and not a political assessment, as the Basic Law provides for the defense of the Basic Law of the MSAR and the fidelity to the MSAR of the PRC as legal duties that candidates and Members of the Legislative Assembly must comply with. The signature of the declaration is therefore a prerequisite, as a necessary condition, which candidates to the Legislative Assembly must meet, which should not be equated with freedom of expression or political censorship. This is because freedom of expression deals with a right endowed by the Basic Law, but it is not at the same time an absolute right; in fact, it is subject to the restrictions of the law, therefore, the freedom of expression of the candidates and Legislative Assembly is restricted by the legal duties, expressly enshrined in the Basic Law, to uphold the Macau Basic Law and to be faithful to the MSAR. Moreover, although crimes that are harmful to the security of the State and to the MSAR are governed by the Criminal Code and the Law on the protection of the State, the violation of the provisions of the Basic Law with a violation of criminal law must not be confused; the consequences are the loss of status, in the first case, and a criminal penalty in the latter. Therefore, the nature of the violation is different, as well as the legal consequences, so that a comparison cannot be made between them. As regards the criteria applicable in the event of a breach of the declaration, the draft law already provides for the criteria for the status of candidate, and recognition of their conformity is established by evidence based on specific facts. Moreover, if there is a dispute about knowledge of the fact, it is also possible to resolve it via legal actions, with a view to ensuring the legality and fairness of decisions.

Following the discussion, the members of the Commission agreed on the content concerning the defense of the Basic Law and the fidelity to the MSAR of the PRC. A Member expressed his reservations about the need to add such provisions, since, compared to Hong Kong, Macau has a different political environment. Throughout the discussion process in the field, the Commission received opinions from associations in writing on the subject matter.

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ARTICLE 9: Composition, Appointment and Duration (of the CAEAL)
1. The Electoral Affairs Committee of the Legislative Assembly, hereinafter referred to as CAEAL, shall be composed of one chairperson and at least five members.

2. The members of CAEAL are appointed in the year prior to the year of election, from permanent residents of the Macau SAR, of recognized repute, by order of the Chief Executive.
[3]
4. Without prejudice to the provisions of the following paragraph, the CAEAL shall become operational on the day its members take office and shall dissolve 21 days after the general election, and may be extended, if necessary, by the Chief Executive.
[5-6].

Explanatory Note (pp 54 – 57)

The title of this Article in the initial version of the proposal was "[a]ppointment, composition and duration." Following the amendment of paragraphs number 1 and 2, the Electoral Affairs Committee of the Legislative Assembly, [now] composed of one president and four members, shall be constituted by a president and at least five members, and it is defined that the CAEAL members shall be appointed in the year before an election.

The Government stated in the public consultation document that the aforementioned amendment is intended to enable CAEAL to be "constituted one year before the year of an election, so that preparation and coordination work can be developed earlier, thus solving some organizational difficulties in a timely manner. On the other hand, awareness-raising work should be realized as early as possible, upon the preparation of relevant instructions, with an objective of enabling all sectors of society to understand the rules to be followed during the electoral process, thereby benefiting the guarantee of an election that is fair, transparent, impartial and complete.

In the course of assessing this section, many understood that, in the final report of the public consultation, the Government maintained its suggestion a representative of the Public Prosecutor's Office (*Ministério Público*) participate in the CAEAL. However, the amendment of this Article is simply to increase the number of members without stipulating their identity. According to the proponent's justification, "it is not necessary that the law expressly foresee the participation of a representative of the Public Prosecutor's Office. The President and the members of CAEAL are chosen from among the permanent residents of the MSAR, are of repute, and are nominated by the Chief Executive. The conclusion contained in the final report of the public consultation should be considered in the process of choosing the President and members of CAEAL. "

Opinions arose considering that, if CAEAL were of a permanent nature, it could better develop dissemination work, voter registration, the treatment of complaints and hearing of opinions, and demonstrate the importance attributed to democracy. The proponent replied that "it should be taken into account that some of the work can be carried out by the relevant services, for example: voter registration and awareness work are currently functions of the SAFP, which can work together with the CCAC to better develop these works via articulation with CAEAL, to strengthen the dissemination and improve the management of electoral work. In addition, in accord with international practice, the CAEAL is generally presided

over by a judge, but in order not to overload the work of the judges, it is considered to be more appropriate to maintain the membership of that body one year in advance.

[…]

As a consequence of the amendment of Article 94(1) regarding the deadline for the presentation of the discriminated-against electoral accounts to be changed from "30 days after the election" to "90 days after the election," the final version changes number 4 of this Article to postpone the deadline for dissolving the CAEAL from "150 days after the general election" to "210 days after the general election."

The Commission agrees with the proposed content.

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ARTICLE 75-A: Electoral Propaganda

1. For the purposes of this law, “electoral propaganda” means the activity carried out by any means to disseminate a message that collectively meets the following requirements:
    1) It directs public attention to one or more candidates;
    2) Suggests, expressly or implicitly, that voters vote or fail to vote for this candidate or candidates.
2. For the purposes of point (1) of the preceding paragraph, the term 'public' shall mean residents of the Macau SAR and legal persons who enjoy electoral capacity in accordance with Article 2 (2).

Explanatory Note (pp 16-18)

The current Electoral Law utilizes the concepts of "propaganda" and "electoral propaganda" in several articles, but the law does not contain explicit definitions; therefore, in the execution and application of the law, there are divergences in its interpretation, even becoming a focal point of judicial litigation. For example, *Appellate Judgment No. 35/2008* states: "[t]he dispute in this appeal lies in the interpretation of the term 'propaganda' and goes on to analyze how to interpret the concept.”

Thus, in order to delimit the concept of "electoral propaganda," Article 75-A was added, clarifying that, for the purposes of the Electoral Law, election propaganda is understood as the disclosure of a communication that cumulatively meets the following requirements: 1) Directs the public's attention to one or more candidates; 2) Suggests, either expressly or tacitly, that voters vote or fail to vote for this candidate or candidates. That is, election advertising is considered to be any notice issued that promotes or impedes one or more candidates from being elected.

According to the proponent, the definition of electoral propaganda is the presupposition and basis for the application of the other articles of the electoral law, which is the reason why all situations must be considered as best as possible,

and covered, within the scope of regulation, all acts of electoral propaganda in practice. At the heart of this definition is that electoral propaganda directs public attention to one or more candidates and suggests, explicitly or implicitly, that voters vote or fail to vote for that candidate or candidates.

In truth, from the perspective of comparative law, defining the concepts of "electoral campaign" or "electoral propaganda" is a common practice of electoral laws in other countries. For example, Article 61 of the Electoral Law for the Assembly of the Republic of Portugal and section 2 of Chapter 554 Elections (Corrupt and / or Illegal Conduct) Ordinance of Hong Kong contain similar stipulations.

The Commission agreed with the option and its concretization in order to define electoral propaganda, but raised questions about the content, especially regarding the ways in which the electoral propaganda was enumerated in number (3) of this Article from the initial version of the proposed law. It is a non-exhaustive list, but its criteria and scope are unclear. In addition, some precepts may give rise to different interpretations, for example, discourse at social events in item (7), etc. Moreover, given that the definition of electoral propaganda defined by this article is applicable to the whole of the law by means of this revision, it is more appropriate to define a series of acts in an abstract way, and it is necessary to take into account the precepts in force in order to ensure consistency between them and those added. On the basis of the discussions, the two parties agreed to introduce adjustments. The detailed explanation of the respective analysis will be made in the part of the appreciation in the specialty.

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ARTICLE 75-B: Communication of Electoral Propaganda Activities
1. The application agent shall notify CAEAL in writing, in person or by electronic means, by the 18th day prior to the day of the election, information regarding the content, date and place of carrying out of the electoral propaganda activities that he, the candidates or voting members of the nominating committee will organize, except for activities whose notification is provided for in *Law 2/93/M of May 17 (Right of Meeting and Manifestation)*, as amended by *Laws no. 7/96/M of 22 July* and *n. 16/2008*.
2. After the expiry of the period referred to in the preceding paragraph, in the case of changes in activities, the updated information shall be communicated to CAEAL, up to two days before the activity is carried out or, in case of *force majeure*, up until the activity itself.
3. CAEAL shall publish as soon as possible on the official website of the Legislative Assembly communications received pursuant to paragraphs 1 and 2.

Explanatory Note (pp 79-82)

In the initial version of the proposed law this Article contained four sections; the final version contains only three.

As for the content suggested in the initial version, some people questioned the following: if there is a change in one of the activities, do they have to present a new declaration or declare only that the activity that has changed? Can it also cover activities to be added later? Should the estimated expenditure on the declared electoral activities per candidate wishing to organize or participate in these activities exceed the defined expenditure ceiling? It is natural that many people, to support a particular candidate, comment publicly on their electoral program, will this Article then restrict citizens in the practice of political activities? If a citizen who is not a supporter of a particular candidacy utters, on a radio program to which the listeners call, a speech whether to support or not support a particular candidate, is this violating the law? Why is it expected that the communication will be made "until the 25th day before the day of the election"? And what were the criteria adopted for the establishment of such a deadline? Does this provision violate the right of associations to freedom to carry out activities? As some changes in the situation during elections are difficult to predict, it is likely that there is a need to move forward immediately with the implementation of activities which cannot therefore be communicated in advance. There are also those who understand that, in the case of sound advertising, it is not necessary, according to Article 78 of the current law, to make the respective communication to the administrative authorities, therefore, this article is not articulated with said Article 78, and in accordance with the provisions of *Law 02/93/M (Right of Assembly and Demonstration)*, the holding of public meetings and demonstrations should be communicated to the Civic and Municipal Affairs Bureau at least three working days in advance out to a maximum of 15 working days.

According to the proponent's explanations, "[i]t is mandatory to communicate the electoral campaign activities that will be organized by: candidates, agents of the candidates, agents of the candidacy committee, and supporters of the candidate. During the electoral campaign, CAEAL and society in general will be able to confirm more easily if an ongoing campaign activity has been communicated or has not been communicated. In case of change of date, location or content of the previously reported activity, only update information is communicated; Information on activities that have not been modified."

Following the cancellation, in the final version of the proposed law of the candidacy scheme, the corresponding amendment of this article was made, that is to say, the merger of its paragraphs numbered 1 and 2. On the other hand, the final version of the proposed law took as a reference the solution adopted in n. (1) of Article 94 on the rendering of accounts and adopted the same solution in paragraph 1 of this Article, suggesting that it is only the candidate that is responsible for the communication of electoral propaganda activities.

As there are those who understand that the deadline for advance notice is long, in the final version, the deadline for said communication is up to the 18th day. According to the tenderer's explanation, this deadline was set taking into account the duration of the electoral activities, which is 15 days, and the time required for administrative work. In the final version of the proposed law, the content of no. 2, that is to say that the period initially set for the communication has been shortened, and a provision has been introduced which provides that "by force majeure" communication may be made "up to the day before the day on which the activity is organized" with a view to facilitate the request of the representatives of the

candidacies, thus achieving the balance between the management and enjoyment of rights.

In addition, an exception to paragraph 1 was added in the final version, expressly providing that the communication of activities regulated by *Law 2/93/M* is not included in the reporting obligation of the electoral activities provided for in this Article. According to the applicant, CAEAL communicates and coordinates with the IACM in order to handle the dissemination of its activities after the communication.

The Commission agrees with the amendments made.

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ARTICLE 143-A: Facts and Figures Outside the MSAR
Without prejudice to the general regime for the application of criminal law and laws established in matters of judicial cooperation, this law shall also apply to acts constituting crimes under Articles 151 to 153 and 168 to 170 that were practiced outside of the MSAR.

Explanatory Note (pp 93-96)

The stipulation of the initial version resembles that of Article 3 of *Law no. 10/2014* (*Prevention and Repression of Acts of Corruption in External Trade*). Some people have questioned the following: in practice, is the provision enough to control and inhibit denigrating acts outside the MSAR in order to avoid impacts upon the election results of denigrated candidates?

Thus, in the words of the proponent: "[t]he objective of this Article is to enable the acts carried out outside the borders of Macau to be considered unlawful acts under the *Electoral Law* that can be controlled by the same law, so as to establish the grounds for investigation and punishment of the acts in question, and thus avoid cases of the impossibility of applying Macau law in cases of illegal acts practiced outside of its borders. The authorities will strictly comply with current legislation (in particular the *Law on Judicial Cooperation in Criminal Matters* and the *Code of Criminal Procedure*), in order to carry out, in conjunction with similar authorities in other countries and regions, investigations into the respective facts."

The stipulation of the initial version resembles that of Article 3 of *Law no. 10/2014* (*Prevention and Repression of Acts of Corruption in External Trade*). According to some opinions, the respective stipulation of *Law no. 10/2014* is based on the "principle of universal jurisdiction," but the facts constituting a crime or misdemeanor under the Article under review may not be done abroad, and the nature of these unlawful acts may not be considered criminal acts under the "principle of universal jurisdiction." With regard to the application of criminal law in space, the *Criminal Code* of Macau adopts four principles, namely: the principle of territoriality, the principle of protection, the principle of residence, and the principle of universal jurisdiction. Theories on the application of criminal law in space have been detailed in the general assessment of this opinion.

The respective opinion was accepted by the proponent, and the Article was subject to alteration, in accord with line (a) of Article 5(1) of the *Criminal Code*, with the following justification: "Given the strong geographical and human connection between the MSAR and neighboring regions, in order to avoid judicial responsibility, offenders may commit, outside Macau, unlawful acts under the *Electoral Law*, especially acts of electoral corruption. Therefore, if the *Electoral Law* does not have a special disposition on this possibility, the delinquents may flee from the law. On the other hand, legislative election is an important component of the political system of the MSAR. The fact that the *Electoral Law* provides for a whole range of illicit criminal acts is intended to ensure stability, fairness and integrity, among other important legal rights, in elections. These legal assets should be protected in the regime of a special forum, as such illicit acts damage the good jurisdiction of Macau, and not those of other states or regions, and therefore should not be expected to be sanctioned by the laws of other countries or regions."

Therefore, the final version provides that all crimes committed outside the MSAR and typified by the proposed law are of a serious nature and may not be punished abroad:

(1) Coercion and fraudulent deception on the nominating committee (Article 151);
(2) Coercion and *fraudulent devices* (*artifícios fraudulentos*) on the designation of voters (Article 152);
(3) Coercion and fraudulent deception upon the candidate (Article 153);
(4) Coercion and fraudulent devices against the voter (article 168);
(5) Coercion relevant to employment (Article 169);
(6) Electoral corruption (Article 170).

The 6 crimes mentioned above are typified by the present law, are related to the "organization of the electoral process" or with "voting," and may be committed outside of Macau.

The Commission agrees with the amendment.

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ARTICLE 143-B: Liability of Legal Persons

1. Legal persons, even if irregularly constituted, as well as associations without legal personality and special committees are responsible for the crimes and contraventions provided for in this law when committed in their name and in the collective interest by their organs or representatives.
2. The liability of legal persons is excluded when the agent has acted against orders or express instructions of those who are entitled.
3. The liability of the entities referred to in Paragraph 1 does not exclude the individual liability of the respective agents.
4. Where the offender is a legal person, and if its members of the administrative body or persons representing it in any way are held responsible for their illegal acts, they are jointly and severally liable with the legal person for the fine imposed.
5. If the fine is imposed on an association without legal personality or special commission, the joint assets of that association or committee shall be responsible

for it and, in their absence or lack thereof, jointly and severally, the assets of each of the associates or members.
6. The termination of the employment relationship that occurs due to the application of the sentence of judicial dissolution or any accessory penalties is considered, for all purposes, as a termination of employment contract without just cause on the initiative of the employer.

Explanatory Note (pp 96-97)

This Article remains the same throughout the initial version and the final version of the proposed law, only its number (1) has undergone editorial improvement due to the expression "criminal wrongdoing," whose concept covers both crimes and misdemeanors. There had been an overlap with contraventions, so that expression was changed to "crimes." This is a purely technical change.

As regards the content of this Article, there is nothing new but rather, as in other existing laws, it provides for situations in which legal persons (although irregularly constituted), as well as associations without legal personality and commissions, are responsible for the crimes and contraventions provided for in this law and situations in which liability is excluded, and the non-exclusion of the individual responsibility of respective agents, as well as situations in which its members have to jointly and severally assume the fines imposed and the treatment of the employment relationship between legal persons and their employees in the event of judicial dissolution, etc.

The current *Electoral Law* does not provide for the criminal liability of legal persons. In the respective consultation document, the Government provides the following explanations:

"In accordance with criminal legislation in force, in principle, only natural persons can assume criminal responsibility for the commission of a crime, while legal persons may assume criminal responsibility if this provision is provided for in individual legislation. In social, political and economic development, there is a greater diversification of the model of electoral campaign activities carried out in the name of associations or other legal persons, and it is necessary to expressly regulate in the *Electoral Law for the Legislative Assembly* the enforcement of criminal responsibility […] in order to effectively deter and combat the unlawful acts of legal persons, such as irregular advertising and the crime of electoral corruption. "

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ARTICLE 148-A: Principal Penalties and Ancillary Penalties for Legal Persons
1. Where the offender of the offenses referred to in this section is a legal person, he shall be punished with the following major penalties:
    1) Fine;
    2) Judicial dissolution.
2. The penalty of fine shall be fixed in days, at least 100 and at most 1,000.
3. Each fine day corresponds to an amount between 100 and 10,000 *patacas*.

4. The penalty of judicial dissolution shall be decreed only when the founders of the entities referred to in number (1) have had the exclusive or predominant intention of committing the crimes referred to therein or where repeated practice of such crimes shows that those entities are being used, exclusively or predominantly, for that purpose, either by its members or by its management.
5. Corporations may apply, in isolation or cumulatively, the following accessory penalties:

1) Suspension of political rights for a period of 2 to 10 years;
2) Deprivation of the right to subsidies or subsidies granted by public services or entities, for a period of 1 to 5 years;
3) Other judicial injunctions;
4) Publicizing a summary of the conviction, at the expense of the convicted person, in one Chinese-language and Portuguese-language newspaper each among the most read in the Macau SAR, and by posting a public notice in such languages for a period of not less than 15 days in the place of exercise of the activity in a way that is visible to the public.

Explanatory Note (pp 97-99)

Number (4) was not included in the initial version, but as other unlawful criminal laws provide, under the criminal liability regime for legal persons, the situations in which legal persons may be punished by judicial dissolution, and in order to maintain the consistency of the laws in general, it is proposed to clarify the criteria for the application of the penalties in question. The proponent accepted their opinions and added the respective norms to the final version.

Numbers (1) to (3) of this Article provide for the principal penalties of legal persons, including fine and judicial dissolution, as well as the number of days and the amount of the daily fines. Number (4) also provides for situations in which legal persons may be punished with judicial dissolution; and number (5) provides for ancillary penalties, for a total of five lines.

In the initial version, line (2) of number (5) provided for "prohibition of the exercise of certain activities." According to some opinions, ancillary punishments serve to aid the main punishment by consolidating and forming part of the content of the criminal punishment; its content must therefore be expressly defined to avoid breaching the principle of "*nulla poena sine lege*."

According to the proponent's explanations, "the scope of 'certain activities' provided for in this Article is determined by reference to other separate criminal laws, such as *Law No. 5/2013*, *The Food Safety Act*. It is believed that the legislature wanted to grant a discretionary power to the judicial magistrates at that time, so that they could render an appropriate sentence in accordance with the specific case."

These explanations by the proponent have not put an end to all doubts, since *Law No. 5/2013, Food Safety Law*, does not refer to such "certain activities." However, considering the matters regulated in this law, the judge, when determining what activities prohibited under the law, has the conditions to determine the prohibited

types of activities. But it seems that this law does not define the conditions for the judge to determine what concrete activities may be prohibited.

The proponent accepted those views and deleted this line in the final version.