

**University of Macau
Faculty of Law**

**International Business Law
Master and Postgraduate Program**

2008/2009

**Introduction to Macau Law
Prof. Jorge Godinho and Dr. Paulo Cardinal**

Course outline

This course attempts a panoramic but in-depth view of the key features of the legal system of the Macau SAR, including its history, its sources of law, its basic nature as a civil law legal system, and the special political and juridical nature of Macau as an autonomous regional entity within the People's Republic of China which is anchored by fundamental principles enshrined in an international treaty (the Sino-Portuguese Joint Declaration) and followed and reaffirmed in a domestic Basic Law.

The Basic Law itself, the autonomy of the SAR, the fundamental rights system, the political system, the structural divisions of the legal system, and fundamental concepts of civil law and commercial law shall all be discussed. A reference will also be made to international law issues especially relevant for Macau, namely the issue of Macau's international law personality and the relation between domestic sources of law and international law, without putting aside the special status of the Joint Declaration.

The course also emphasizes the main sources and actors relevant for business activities, especially the administrative law framework and the work of the regulators.

Participants are required to have a Sino-Portuguese Joint Declaration and the Macau Basic Law. It is assumed that all participants have a certain degree of familiarity with Macau in general and the Basic Law of the Macau SAR in particular. It is assumed that all participants read the materials for the seminars in advance. Due to the relative scarcity of available English materials, additional references in both Portuguese and Chinese may be provided. It is worth mentioning that Hong Kong bibliography is of interest for some of the topics most particularly in what concerns to Basic Law issues.

Seminar 1

Historical background and evolution of the legal system of the Macau SAR

There is a need to understand the history in order to appreciate the present constitutional, political and economic context of the Macau SAR, as well as its legal status within the legal system of the PRC. This seminar shall discuss the legal and political history of Macau and the evolution culminating in the political-judicial transition process and its most relevant legal document, the Sino-Portuguese Joint Declaration. Key achievements of the transition period shall be commented upon, as well as the legal transformations occurred on 20 December 1999, and since then, and the place of Macau in the context of the PRC's constitutional structure.

Compulsory materials

- F. GONÇALVES PEREIRA, 'Towards 1999: the political status of Macau in the Nineteenth and Twentieth Centuries', in R. D. CREMER (ed.), *Macau. City of commerce and culture*, API Press, Hong Kong, 2nd ed., 1991, 261 ff.
- JORGE GODINHO, *Macau business law and legal system*, LexisNexis, Hong Kong, 2007, pp. 1-7.

Also of interest

- JORGE COSTA OLIVEIRA *et al.*, 'An outline of the Macau legal system', *Hong Kong Law Journal*, 1993, 358 ff.

Seminar 2

The legal system of Macau as part of the Roman-German 'family' of legal systems

The purpose of this seminar is to discuss in which manner Macau does fit in the continental legal tradition, and the implications of this in terms of sources of law, codification, academic work, and legal professions. Of particular interest is to trace the genealogy and organization of the Macau Civil Code. In a second phase, the seminar shall discuss the sources of law in more detail.

Compulsory materials

- K. ZWEIGERT and H. KÖTZ, *An introduction to comparative law*, 2nd ed., OUP, Oxford, 1987, pp. 111-112.

- JORGE GODINHO, *Macau business law and legal system*, LexisNexis, Hong Kong, 2007, pp. 8-22.

Also of interest:

- JORGE COSTA OLIVEIRA et al., 'An outline of the Macau legal system', *Hong Kong Law Journal*, 1993, 358 ff.
- CRISTINA NOGUEIRA DA SILVA, 'Legal history', in CARLOS FERREIRA DE ALMEIDA, ASSUNÇÃO CRISTAS and NUNO PIÇARRA (eds.), *Portuguese law. An overview*, Almedina, Coimbra, 2007, 15 ff.

Seminar 3

Macau law branches and the regulation of economic activities

Taking the public law/private law dichotomy as an organizing theme, this seminar explores the general features of the branches of law of the legal system of Macau in general, and especially some of the key areas relevant for private business transactions: the 1999 Macau Commercial Code and the 1999 Macau Civil Code, including its core features and influences, and more broadly the types of circulation of legal models that can be detected in them, including the indirect influence of EU law. It shall also make reference to other relevant legislation applicable to banking, insurance and gaming, namely to stress the link between private law and public law applicable to economic activities.

Compulsory materials

- J. GODINHO, *Macau business law and legal system*, LexisNexis, Hong Kong, 2007, pp. 23-41.
- J. GODINHO, 'The regulation of gaming and betting contracts in the 1999 Macau Civil Code', in *Gaming Law Review*, vol. 11, no. 3, 2007, 572 ff.
- J. GODINHO, 'Three years of Macau law', in *Macau Business*, June 2007.
- J. GODINHO, 'Law and business in Macau: it is time to step up a few gears', in *Macau Business*, August 2008.

Seminar 4

Administrative law and tax law

Invited guest: Mr. Luís Pessanha, Legal adviser at the Legislative Assembly and Lecturer, Faculty of Law, UM

This seminar shall focus on administrative law, business regulatory aspects, and tax law. It is intended to allow for a general overview of the local tax system, with

special attention being paid to the taxation of labor and corporate income, as well as taxes on gaming revenues. Reference will also be made to the international tax treaties that Macau has so far entered upon and its small off-shore scheme.

Brief consideration shall be given to local business registration and licensing requirements. The administrative organization and structure of the Macau SAR will be introduced. There shall be a brief reference to the administrative procedures of the public administration and the legal remedies available to citizens to react against unfavorable decisions. The legal framework of administrative contracts and the connected public tender procedure will be discussed. It is to hope that a rough picture of the functioning, rules and makeup of the regional public administration will emerge.

Given the broad scope and vast number of issues to be address hereunder this seminar will be of introductory nature only and open for following-up questions.

Compulsory materials

- J. GODINHO, *Macau business law and legal system*, LexisNexis, Hong Kong, 2007, pp. 24-27.
- LUÍS PESSANHA, 'Gaming Taxation in Macau', *Gaming Law Review and Economics*, Volume 12, Number 4, 2008, pp. 344-348.

Also of interest

- CARLOS NORONHA, *The Law and Practice of Macau Taxation*, 2d ed., Pearson, 2006.
- LOUISA HO MEI VA, *Macao – Master Tax Guide*, 2d ed., CCH 2007.

Also of interest (available in Chinese *and* Portuguese, but *not* in English):

- ROGÉRIO EHRHARDT SOARES, *Sentido e Limites da Administração Pública* [Purpose and Limits of the Public Administration] [公共行政機關之意義與限制], *Cadernos de Direito de Macau*, Direcção dos Serviços de Administração e Função Pública, 1997(also available in Chinese).
- PEDRO GONÇALVES, *O Contrato Administrativo: A Instituição Contratual como Formação da Administração Pública* [The Administrative Contract: A Contractual Institution of the Public Administration] [行政合同: 合同制度作為公共行政機關作為之一種形式], *Cadernos de Direito de Macau*, Direcção dos Serviços de Administração e Função Pública, 1997(also available in Chinese).
- LUÍS PESSANHA, 'Os Jogos de Fortuna e Azar e a Promoção do Investimento em Macau' [Games of Chance and Promotion of Investment in Macau],

Administração, Number 77, Volume XX, 2007, pp. 882-886 (also available in Chinese).

Seminar 5

The Macau Basic Law – the domestic *Grundnorm*

This seminar intends to discuss the Macau Basic Law, outlining its main contents and its constitutional nature and place in the system of sources of law applicable in the Macau SAR as its *Grundnorm* in the self-contained and *independent* Macau legal system. Of special mention will be the relation of the Basic Law with the Joint Declaration. Reference shall be made to other sources of law and to the still current controversy on the legal nature of Administrative Regulations and its relation with the Laws and the Decree-Laws as well as possible avenues of solution to this vexata quaestio.

Compulsory materials

- YASH GHAI, *Hong Kong's New Constitutional Order*, 2nd edition, Hong Kong University Press, 1999, pp 65-80, 137-153, 174-187, 493-500.
- PAULO CARDINAL, *The Constitutional Layer of Protection of Fundamental Rights in The Macau Special Administrative Region*, paper presented at the 20th LAWASIA Biennial Conference, Hong Kong, June 2007, session Public Law – Constitutional Protection of Human Rights.
- PAULO CARDINAL, 'Continuity and Autonomy – Leading Principles Shaping the Fundamental Rights Constitutional System in the Macau Special Administrative Region', in FERRER MAC-GREGOR, EDUARDO, ZALDÍVAR LELO DE LARREA, ARTURO, (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho, t. iv, derechos fundamentales y tutela constitucional* (available at <http://www.bibliojuridica.org/libros/6/2558/13.pdf>).

Also of interest

- YASH GHAI, 'The Basic Law of the Special Administrative Region of Macau: some reflections', *International and Comparative Law Quarterly*, 183.

Also of interest (available in Chinese and Portuguese, but *not* in English):

- JORGE BACELAR GOUVEIA, 'A Lei Básica da Região Administrativa Especial de Macau - contributo para uma compreensão de direito constitucional', [The Basic Law of the Macau Special Administrative Region - a contribution to a constitutional law understanding], *Boletim da Faculdade de Direito, Universidade de Macau*, 2001, 11 (also available in Chinese)

- PAULO CARDINAL, ‘O sistema político de Macau na Lei Básica - separação e supremacia do Executivo face ao legislativo’ [The Macau political system under the Basic Law – separation and supremacy of the executive over the legislature], *Administração*, 19/20 (also available in Chinese)
- JORGE COSTA OLIVEIRA, ‘A continuidade do ordenamento jurídico de Macau na Lei Básica da futura Região Administrativa Especial’, [The continuity of the Macau legal order in the Basic Law of the future Special Administrative Region], *Administração*, 19/20, (also available in Chinese)

Seminar 6

The autonomy of the Macau SAR

The key characteristic of the status of the Macau SAR is that it enjoys ‘a high degree of autonomy’. The extent of such autonomy (political, juridical, judicial, external and financial) as well as its juridical anchors is the object of discussion in this seminar. It is of utmost importance to stress that the scope of the SAR autonomy goes beyond the normal boundaries of the allocated powers of federated states and, needless to say, of other territorial autonomies hence a comparative constitutional law approach will also be brought forward. Please note that, due to the importance and complexity of this main theme, it is possible that the subject will not fit in one seminar alone thus partially continuing to the next one.

Compulsory materials

- PAULO CARDINAL, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.
- YANG FENGCHUN, *Chinese Government*, FLP, Beijing, 2004, pp. 247-249.
- MARCO OLIVETTI, *The Special Administrative Regions of the PRC and its comparison with autonomous regions models*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.

Also of interest (non-compulsory):

- YASH GHAI, *Hong Kong’s new constitutional order*, 2nd edition, Hong Kong University Press, 1999, pp. 65-80, pp. 137-153, pp. 174-187, and pp. 493-500.
- J. J. GOMES CANOTILHO, *The autonomy of the Macau Special Administrative Region between centripetism and good governance*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.

- ALBERT H.Y. CHEN, *The theory, constitution and practice of autonomy: the case of Hong Kong*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.
- EDUARDO CABRITA, 'International and constitutional limitations on the autonomy of the Macau Special Administrative Region', *Macau Law Journal*, special issue, 2002, pp. 167 ff.
- ARNALDO GONÇALVES, 'A paradigm of autonomy: the Hong Kong and Macau SARs', *Contemporary Southeast Asia*, 1996, vol.18, issue 1; pp. 36 ff.
- GIANCARLO ROLLA, *The development of asymmetric regionalism and the principle of autonomy in the new constitutional systems: a comparative approach*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.

Seminar 7 The Macau political system

This seminar focuses on the constitutional design of the Macau political system and on the *de facto* dynamics of the system. The *words* and the *men* of the political system. The Executive block — The Chief Executive, the Government, the Executive Council — and the Legislative Assembly, the checks and balances mechanisms, the predominance of the former over the latter. The legislative procedure in a nutshell. The judiciary, its organization, guarantees, and its practice will also be object of analysis as well as a discussion on the pros and cons of formally introducing a judicial mechanism of constitutionality control, that is to say the control of conformity of laws and administrative regulations vis-a-vis the Basic Law.

Compulsory materials

- PAULO CARDINAL, *Macau's political system during the transition: continuity or convergence?*, *Macau Law Journal*, special issue, 2002, pp. 287 ff.
- YASH GHAI, *Hong Kong's new constitutional order*, 2nd edition, Hong Kong University Press, 1999, pp. 243-302.
- PAULO CARDINAL, 'Macau: The Internationalization of an Historical Autonomy', *Boletín Mexicano de Derecho Comparado*, Número 122 Mayo-Agosto 2008 (available at <http://www.juridicas.unam.mx/publica/rev/boletin/cont/122/art/art3.htm>).

Also of interest:

- PAULO CARDINAL, 'Continuity and Autonomy – Leading Principles Shaping the Fundamental Rights Constitutional System in the Macau Special

Administrative Region', in FERRER MAC-GREGOR, EDUARDO, ZALDÍVAR LELO DE LARREA, ARTURO, (coords.), *La ciencia del derecho procesal constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus cincuenta años como investigador del derecho, t. iv, derechos fundamentales y tutela constitucional* (available at <http://www.bibliojuridica.org/libros/6/2558/13.pdf>).

Also of interest (but unavailable in English):

- PAULO CARDINAL, *O sistema político de Macau na Lei Básica - separação e supremacia do Executivo face ao legislativo*, [The Macau political system under the Basic Law – separation and supremacy of the executive over the legislature], *Administração*, no. 19/20, vol. VI, 1993, pp. 79-101 (also available in Chinese)

Seminar 8 **The fundamental rights system**

The Macau system of fundamental rights, namely its content and protection mechanisms. The Basic Law, the international covenants, other international treaties, the domestic legislation, the remedies, the international monitoring. The Portuguese legacy. The lacunae, especially in the judicial guarantees and the labour areas? The Macau fundamental rights system as one of the most *guarantistic* - though not perfect - in the Asia context as pointed out in international reports on the subject matter. Prospects of evolution.

Compulsory materials

- PAULO CARDINAL, *The judicial guarantees of fundamental rights in the Macau legal system – a parcours under the focus of continuity and of autonomy*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.
- JORGE BACELAR GOUVEIA, *Fundamental Rights in the Macau legal system*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.
- VITALINO CANAS, *The general regime of fundamental rights in the Basic Law and in the international instruments*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution», Macau, 2007.

Also of interest:

- YASH GHAI, *Hong Kong's New Constitutional Order*, 2nd edition, Hong Kong University Press, 1999, pp. 401-456.

- YASH GHAI, The Basic Law of the Special Administrative Region of Macau: some reflections, *International and Comparative Law Quarterly*, 183.
- PAULO CARDINAL, *Os direitos fundamentais em Macau no quadro da transição: algumas considerações*, Cuestiones Constitucionales, 14, UNAM, Mexico, (also available in Chinese in *Administração*, 71.)
- SIMON YOUNG, *The Basic Laws and the fundamental rights in the S.A.R.s*, paper presented at the Conference One Country, Two Systems, three legal orders – perspectives of evolution, Macau, 2007.
- Several general and specific reports such as from the UN bodies, ILO, NGOs, EU and the USA department of State

Seminar 9

The Macau SAR *vis-à-vis* International Law

Macau and international law and the international community. Historical importance of international law to Macau's status. A *Kantian perpetual peace* tradition in motion? Again the Joint Declaration. Macau as an international legal person (its capacity and limits), membership of international organizations, relevant international legal instruments in the fields of commerce, criminal law, civil aviation, environment, intellectual property. The relationship of international law and domestic law. The case law of Macau courts on issues of international law.

Compulsory materials

- PAULO CARDINAL, *International Law Notes*, FSH, University of Macau, 2008
- RODA MUSHKAT, 'The international legal personality of Macau', *Hong Kong Law Journal*, 24, 1994
- YASH GHAI, *Hong Kong's New Constitutional Order*, 2nd edition, Hong Kong University Press, 1999, pp. 457-492
- *Core Document*, Macau Government.

Seminar 10

Follow up, general discussion and panoramic conclusions

This seminar shall provide an opportunity to wrap up the main themes and characteristics of the legal system of Macau, as discussed in previous seminars as well as to allow the follow up of issues that might had taken longer than a single seminar. On the other hand, it will be used to interlink several subjects and seminars, for

instance, the relation between fundamental rights and autonomy, and to provide a panoramic comprehensive set of conclusions.

The materials are all the above mentioned ones.

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