THE AO MAN LONG CORRUPTION AND MONEY LAUNDERING CASE

Macau:

Ao Man Long was the first Secretary for Public Works in the Government of the Macau SAR, a post equivalent to minister to which he was appointed on 20 December 1999, at age 43, and then reappointed in 2004 for a second term. Ao graduated in mechanical engineering from the University of Taiwan, obtained an MBA at the University of Macau, and had served as a Macau civil servant since 1987.

The scandal emerged with Ao's arrest, on 6 December 2006, and was followed by a first trial during the second half of 2007, which took place directly before the Macau Court of Final Appeal, where he was convicted to 27 years imprisonment on 30 January 2008. No appeal was lodged. A second case was opened in 2009, in which Ao was sentenced to a further one and a half year of imprisonment. At the time of writing there are reports that a third set of charges may be filed.

Following the Portuguese tradition, the highest ranking public officers are tried before the Court of Final Appeal for crimes committed in the exercise of their functions. This rule exists in a number of other countries and there are various justifications for it, some more convincing than others: senior judges are better prepared for high profile cases, are less prone to political interference, and the institutional setting is more adequate.

The Macau Court of Final Appeal was created in 1999 upon the transfer of sovereignty from Portugal and is composed of only three judges. Ao was first represented by lawyer Luís Mendonça Freitas, a former head of the Commission against Corruption and of the Judiciary Police during the 1990s, who ceased to be the lawyer of Ao Man Long in March 2007. The second lawyer was Nuno Simões, who took over the case and followed it through until completion of the first trial. In the second trial the lawyer was appointed by the court.

The stages of criminal proceedings are normally two or, depending on the strategy of the defence, three. The first is the investigation, conducted by the public prosecution, which may lead to an accusation or to a decision not to proceed further with the case. If there is an accusation, it is optional, as a second phase, to have a judicial review of the decision to accuse (instrução). If there is an accusation, or if it is confirmed at the review (if it takes place), a public trial shall follow. In Macau there is no 'plea bargaining' and the promoter is legally bound to proceed with the case and formulate an accusation, except in very limited cases (restricted to minor offences). There is no trial by jury: it is foreseen in the law but it is never used in practice.

The initial accusation was released in June 2007 and it listed 117 crimes: 43 crimes of abuse of power; 41 crimes of corruption for unlawful fact; 30 crimes of money laundering; 1 crime of economic participation in business transactions; one crime of intentional wrong declaration of assets; and one crime of illicit enrichment.
Ao Man Long applied for the review of the accusation. It was presided by one judge, Chu Kin, who as a result was barred from participating in the subsequent trial. The outcome of this phase was that 41 crimes of abuse of power were dropped, in the wake of the standard understanding, by criminal law professors and commentators, that every crime of corruption inherently includes an element of abuse of power by the civil servant involved, and therefore it does not make sense to accuse such civil servant for corruption and, additionally, by abuse of power, as that would amount to an undue duplication or extension of criminal responsibility.

The trial in the Court of Final Appeal opened in October and concluded on 12 December 2007. Ao Man Long was found guilty of: 2 crimes of abuse of power; 20 crimes of corruption for an unlawful fact; 20 crimes of corruption for lawful fact; 14 crimes of money laundering; 1 crime of intentional wrong declaration of assets; and crime of illicit enrichment. The outcome was 27 years imprisonment plus confiscation of 800 million MOP.

One issue of particular interest that was much discussed was that of the right of appeal. Should Ao have a right of appeal? The matter was addressed in an interim admissibility decision, which considered an appeal that had been lodged regarding issues of evidence, by the judge in charge of the case, Judge Viriato Lima, on 12 December 2007. Judge Lima held, in conclusion, that there was no right of appeal regarding the evidence issues raised; that there would be no right of appeal of the final decision; and, furthermore, that the laws could not be changed in order to create a right of appeal while the case was pending. It namely stated that "It is not possible to lodge an appeal from the decisions issued by the CFA as a result of an obvious principle of procedure law, according to which it is not possible to appeal the decisions of the supreme body of a judicial organization, given that there is nowhere to appeal to. (…) Therefore, the CFA has the final word in the cases submitted to it, and its decisions close the cases."
However, this is debatable. Under the ICCPR, art. 14(5), 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'. The ICCPR guarantees a right to judicial review in relation to the decisions that affirm guilt and impose the penalty. That is not what was at issue in the interim admissibility decision, which dealt with a matter of evidence, so the decision of 12 December needed not consider the matter. However, as mentioned, Judge Lima went on consider and answer other issues that were not before the CFA. Specifically, Judge Lima affirmed that even if it was an appeal from the final decision, still there would be no right of appeal: "Anyway, we can add straight away that even if the decision of the CFA was a decision considering the accused guilty of having committed a crime, it would also not be possible to appeal". This is due to an understanding according to which "The legislator, by stating that in some cases the CFA is the Court competent for [a very restricted number of cases foreseen in Macau law] surely has taken into account that this Court, being the highest in the Macau SAR, has the best prepared and more experienced judges, as should be presumed. Therefore, the legislator has accepted that it decides in first instance and in last instance."

On the interpretation of the ICCPR, Judge Lima drew attention to the parallel case of the European Convention on Human Rights (ECvHR) and, on this basis, stated that it is possible to have exceptions to the rule foreseen in art. 14(5) ICCPR. The ECvHR, Protocol 7, art. 2, was cited as an instance of the general principle according to which there can be no appeal from a supreme court. He went on to conclude: "It is a fact that in art 14(5) ICCPR this exception is not expressly foreseen, which is probably due to the fact that the

ICCPR is from 1966, while the said Protocol is much more recent, from 1984, and therefore more updated. But this does not mean that art. 14(5) should not be interpreted as we stated, that is, there is no breach of art 14(5) ICCPR when the court that tries the case in first instance is the CFA".

With due respect, this interpretation missed a key point: in order to have an exception to art. 14(5) in the domestic legal order, it would have been necessary to formulate a reservation to the ICCPR. Macau, China, could have formulated a reservation, but chose not to do so. Various States including Belgium, Italy, Holland and Switzerland have done it. Therefore, art. 14(5) ICCPR is in force without limitations in the Macau.
The HR Committee has already considered this issue at least twice:
Jesús Terrón vs Spain (Com. no. 1073/2002, CCPR/C/82/D/1073/2002, November 2004): MP of the regional parliament of Castilla-La Mancha, sentenced for forgery of documents in the Spanish supreme Court; and also in Luis Oliveró Capellades vs Spain (Com. no. 1211/2003, CCPR/C/87/D/1211/2003, August 2006) a member of parliament convicted of forgery, organized crime and tax crimes in connection with unlawful financing of the Socialist Party. In both cases, Spain was held to be in breach of the ICCPR for not allowing an appeal.
The ICCPR commentary states: "Where the highest court of a country acts as first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect» (Human Rights Committe, General comment no. 32. Article 14: Right to equality before courts and tribunals and to a fair trial, doc. CCPR/C/GC/32, 2007, point 47).
However, the issue was never played out. Just days after being convicted, Ao's lawyer announced that his client had instructed him that he would not be appealing the decision. As a result, no attempt to file an appeal ever took place.
As a final observation on this point, it may be said that the issue is a problem of law: judge Lima was right in observing that no other Court exists above the Court of Final Appeal, and a court cannot create another court. However, judge Lima was wrong on the ICCPR: it grants a right of appeal to everyone in Macau. If Ao Man Long had appealed from the final decision, the appeal should have been allowed, to comply with the ICCPR. It would then be for the Macau SAR to solve the problem, which indeed has not yet disappeared: it is created by the law on judiciary organization. In the final analysis, it is for the legislator to solve the matter. The law should be amended, either by having more judges in the CFA or by eliminating the criminal cases that are heard in first instance by the CFA, moving them to the Court of Second Instance.

Regarding the crimes, the charge of abuse of power related to the appointment of a person to be a board member of a public utility company. Allegedly, the persons appointed had no qualifications for the position. It is hard to see any crime here: there seemed to be the regular exercise of the statutory powers of the Secetary. Under the law there were no specific requirements regarding qualifications, experience or others. The only requirement was of course political trust in the person appointed.
The accusations for corruption related to a very large number of public works. It was stated that in some cases in which there was a public tender Ao ordered his subordinates to select a certain company. In other cases there was no public tender but rather a direct selection of a contractor in order to gain a financial advantage to be paid by such contractor. In others there was the acceleration of inspections and approvals of private works. The parties accused of being involved in active corruption were tried separately in the court of first instance.

Another major point of interest relates to money laundering, which is regulated in Law 2/2006, of April 3. The decision of the Court of Final Appeal was quite significant in that it affirmed various interpretations on a number of debated points on this crime. The Court has essentially dismissed nearly all of the restrictive or narrow interpretations that the defense had advanced regarding the crime of money laundering. Namely, on the jurisdiction of the Macau courts, the Court considered that all financial transactions involved in the case took place at least partially in Macau and therefore all could be prosecuted before the courts of Macau. On the question of whether a link with organized crime under the law of 1997 was necessary, an issue that had been questioned in Macau over the years, the Court denied that that was the case: the law did not require a connection to organized crime, an important point because Ao was not charged with organized crime.
On the question of the relation between the predicate crime and money laundering, the question was raised

as to whether a person can be prosecuted for the crime that generated the proceeds and also for the laundering of the same proceeds. The Court stated that this is possible, with various arguments, namely observing that the legally protected interest is different.

Another major point of interest ws the the direct challenge mounted against the crime of illicit enrichment, whereby civil servants who have assets abnormally higher than those declared in their prior declarations, and who do not concretely justify when and how they were gained, or their legal origin, are punishable with a penalty of up to three years imprisonment and a fine, together with confiscation of the assets the origin of which has not been justified. This type of provisions are usually suspect of operating a presumption of unlawful origin and a reversal of the burden of proof, for there seems to be a presumption that the assets have an unlawful origin, which signifies an underlying suspicion that other crimes have been commited. As well known, a presumption in criminal law breaches the opposite constitutional rule, the presumption of innocence. These types of crimes, in Italy, are described as crimes 'of mere suspicion', or 'of position' or 'without action', given that the fact described by the law as a crime is a mere status, an observation of the existence of property, and it is neither an action nor an ommission. The crime is merely a scheme to overcome the difficulty in providing evidence of actual unlawful conduct. The CFA held that there is no breach of the presumption of innocence. It held that the possibility to demonstrate the lawful origin is a defense (similar to self-defense or necessity), and the presumption of innocence only refers to the objective or subjective elements of the crime, but not to the defenses.As mentioned, Ao was sentenced to 27 years; the maximum penalty under Macau law is 30 years. The prison term was found to be harsh, at least in Portuguese legal circles. However, it has to be recognized that there were many serious crimes, involving very large transactions and amounts.

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