THE VALUES OF THE *ESTADO DE DIREITO* (STATE OF LAW) IN THE FIGHT AGAINST CORRUPTION

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1. The theme of this session cannot be considered in isolation from the general context of this Seminar, namely corruption and its impact on modern societies, but bearing in mind the typical structuring elements of the *Estado de Direito* ("State of Law").
In taking this as a starting point, the need arises to refine concepts in advance. In doing so, we come up against our first difficulty, resulting from the multilingual nature of this Seminar: is the "*Estado de Direito"* ("State of Law"), originating from German culture in the second half of the 19th century, exactly the same as the "*Rule of Law*" that was assimilated into Anglo-Saxon culture on the basis of the political and constitutional history of Great Britain? This is the first area of concern to us.
The second area involves a consideration of the distinctions that should be made between the obligations of the state and the rights of citizens. The question here is whether it is justifiable to include the crime of corruption through lawful acts within the catalogue of criminal behaviour.
The sole aim of this presentation, which is deliberately simple and, in leaving aside many important aspects of the problem, is particularly modest in comparison with those which you have already heard today and will later have the opportunity to hear, is to voice a series of concerns which have been constructed around these two topics. I would therefore request your tolerance for any weaknesses in a text that is deliberately designed to be general in scope and is not concerned with adopting a very technical approach.

2. Let us begin, then, with the first question: what do we mean when we refer to the *Estado de Direito* ("State of Law"), a term used here in Portuguese, rather than the English term "Rule of Law"?
In order to simplify matters, let us look briefly at what the experts have to say.
According to the teachings of Professor Gomes Canotilho ([1]), the *Estado de Direito* ("State of Law") brings reasonable material *principles* and *values* to bear upon a human order of justice and peace. These are: the *freedom of the individual*, *individual and collective security*, *responsibility and the ability of attributing responsibility to those in power*, the *equality of all citizens*, and the *prohibition of discrimination against individuals and groups*.
In this sense, the following constitute the structuring principles of the *Estado de Direito* ("State of Law"): *security*, *trust*, *generality*, the *abstract nature of the law*, the *non-retroactivity of legal rulings*, the *separation of powers*, and the *guarantee of judicial means*. ([2])
Following this, the eminent professor posits the essential connection that will close the concept: the *Estado de Direito* ("State of Law") must be democratic, hence the notion of the *Estado de Direito*

[1] "O Estado de Direito ("State of Law")", Joaquim José Gomes Canotilho, Cadernos Democráticos, page 7
[2] Idem, page 26

Democrático ("Democratic State of Law").
Caution, however, is required here, since this generalisation contains certain dangers. The warning, however, is simple enough: whilst Western political cultures may well have many uniform features, it would not appear that the concept of the "*Estado de Direito* ("State of Law")" and "Democracy", in the broad sense presented here, can be easily exported, as a whole, to other cultures, namely Asian cultures. It may be more prudent to advance a potentially more general formulation which establishes the concept of the *Estado de Direito* ("State of Law") thought the incorporation, in this contente, of its incorporation of "subjective" or "fundamental rights". As it is stressed by Prof Danilo Zolo: "this notion re-emerges as a political-legal theory which emphasises guardianship of "human rights", those rights which have been defined by a long series of national constitutions and international conventions throughout the 19th and 20th centuries, in particular the right to life and individual security, to freedom, ownership of private property, autonomy in negotiations and political rights".

3. The Anglo-Saxon idea of "Rule of Law" has a conceptually more limited meaning and, literally translated, is closer to the idea of "empire of law" or "predominance of law". Its main characteristics are:

1. The obligation to adopt *just,* legally regulated procedures when it is necessary to judge and punish citizens by depriving them of their liberty or property;
2. The predominance of the laws and customs of the nation as opposed to the discretionary nature of authoritative power;
3. The subjection of all executive acts of power to the sovereignty of the representatives of the people (parliament);
4. The right to, and equal access to, courts of law for all individuals, for the purpose of defending their rights according to the principles of common law and before any (public or private) entity.

The Americans have added the idea of the Constitutional State or, in other words, the right of the people to create a *higher law* (the Constitution) which lays down the essential schemes of government and their respective limits ([3]), thus adding another framework to the concept.

4. However, it is obvious that the equation is not yet complete.
Certain devotees of political science and philosophy have taken it upon themselves to speculate with the basic concepts, leading to results which have at times proved controversial. One example of this is the idea that totalitarian States are also *Estados de Direito* ("States of Law"), in the sense that they have an established "Law" or "Legal Order". Political history, for example, records that the theories embodied in German National Socialism used the notion of the *Estado de Direito* ("State of Law")" to justify Hitler's political model.
The problem which some of these authors are unable to resolve concerns the impossibility of defending the existence of an *Estado de Direito* ("State of Law") that is not fully subject to the law and scorns

[3] *Idem*, page.

individual rights under the pretext that it is necessary to safeguard policies that ensure or justify "national security". This is an issue that has become very much in vogue after 11 September, albeit with adjustments and always with the justification that exceptions cannot justify the rule. Indeed, it is a good thing that exceptions cannot become generalisations, since this would easily lead us to another paradigm in which the emergence of an *Estado de Direito* ("State of Law"), or Rule of Law would ultimately provide the perfect mask for autocratic and totalitarian systems which fail to respect fundamental rights.

5. It is undeniable that there are typical factors that indicate an *Estado de não-Direito* ("State of Non-Law") and these are impossible to ignore, however well the cosmetics are applied. Examples include the existence of bad or authoritarian magistrates or magistrates only concerned with protecting the system from its own weaknesses, the incorrect application of the law, the existence of an institutional culture that favours the principle of the opportunity in criminal investigation by persecuting some whilst allowing others to go unpunished, the deliberate invalidation of criminal procedures due to laxity or self-interest, and a lack of freedom of expression and access to Courts.

6. At this point I am obliged to digress in order to provide a context for what I intend to discuss next. The fact that we are holding this Seminar in Macao inescapably calls for a discussion of certain problems that exist here, no matter how much effort is made to restrict the themes to abstract or theoretically general terms.
The mechanisms for responding to the values underpinning the *Estado de Direito* ("State of Law") in Macao have been put to the test as a result of various judicial proceedings involving corruption and money laundering that date back to the end of 2006, when the judicial calm once enjoyed here was suddenly thrown into turmoil.
As a result of these cases, I have been publically denouncing situations which I consider harmful and which violate the structuring principles of the *Estado de Direito* ("State of Law"). I do not advocate the hypocrisy of silence and the respect I own both to my conscience and the values I follow obliges me to mention such situation.
Yet at this present moment my direct approach has brought me up against ethical restrictions, as a lawyer involved in one of these proceedings, which prevent me from being able to openly discuss the essential aspects of this upheaval.
I remain silent for the time being on the concrete issues which have emerged out of these cases.
But I cannot avoid referring those cases motivated until now three institutional positions of great importance:

(i) The recommendations from the Legislative Assembly of Macao submitted to the Government in the Report of 29 February 2008, regarding some changes in the Statutory and Organic Law of Commission against Corruption (CCAC);
(ii) The public statement issued on 8 May 2008 by the Macao Lawyers Association, expressing clear concerns with the violation of the judicial secrecy by Commission against Corruption;

(iii) The letter addressed to the Macao's political and judicial bodies on 11 May 2009 by the International Union of Lawyers (UIA), showing concern with the way Commission against Corruption conducted its 2007 and 2008 investigations regarding the aforementioned judicial procedures.

Let details aside, in general terms and following what the abovementioned authors have stated, I will permit myself to add, invoking the catalogue of "subjective rights" already mentioned, that the *Estado de Direito* ("State of Law") is threatened in any of the following situations:

(i) When the principle of "innocent until proved guilty" is violated, this being especially serious when it occurs on the initiative of criminal investigation bodies;
(ii) When judicial secrecy is violated;
(iii) When, during the inquiry phase, obstacles are placed in the way of suspects that prevent them from exercising their right to consult lawyer;
(iv) When the essential formalities enshrined in the Code of Criminal Procedure are violated;
(v) When procedural decisions are made which threaten the adversarial principle and consequently the right of the accused to a defence.

In short, an *Estado de Direito* ("State of Law") is a State that respects fundamental rights and the rights of citizens, it is a State that respects the *Principle of Legality* and the *Principle of Proportionality* and it is a state that takes responsibility for its own actions.

7. This having been established, let us now look at the problem of corruption facing us all and which, in addition to compromising individual morality, threatens the ethics of the social system and affects the basis of the authority of the state. I refer here, of course, to the *Estado de Direito* ("State of Law"), since the *Estado de não-Direito* ("State of Non-Law") would not view the fight against corruption as one of its priorities....

8. The phenomenon of corruption extends far beyond any simple definition produced by criminologists and members of the legal profession. Analysis of the economic aspects began some years ago and attempts have been made to demonstrate the adverse effects of corruption on the development of states and the economic costs that corrupt practices bring to bear on political systems.
In a recent study published in Portugal, Rui Teixeira Santos ([4]) stated that "corruption is not only a moral problem or a problem of social justice but, above all (...) a problem of economic efficiency, in addition to encompassing the problem of who acts as paymaster." He added: "corruption *creates* a *dead weight* on the market, representing a diminution in well-being and therefore an impoverishment of the economy, which may explain precisely why the poorest countries are the most corrupt (...). Corruption threatens policies that are designed to combat poverty and its perception, within less sophisticated economies that depend on international aid, makes these countries more vulnerable to international blackmail and less able to attract foreign investments. Corruption is therefore an additional factor in the

[4] "Economia Política da Corrupção – caso dos Estados Lusófonos, Bnomics, Oct. 2009, page 43

lack of competitiveness amongst the economies of the poorer countries".

9. In conjunction with this idea we may add another dimension to the problem we need to consider: corruption cannot be dissociated from the international mechanisms for laundering and recycling money that has been obtained illegally in order to release it into circulation once again. This is another vital aspect that must be analysed, interpreted and given serious consideration, particularly with regard to large-scale corruption, against which the fight must, of necessity, be associated with other mechanisms designed to control sudden wealth.
No one holds onto dirty money for long and spending it at the rate of a dollar a day makes life difficult!

10. It is important not to slacken off the fight against corruption which, although it may not be transnational in terms of its dynamics, is transnational in its dimensions.
As awareness of this transnationality has grown, nations have begun to reach an understanding on the need to create international normative instruments in order to establish common ground for regulatory principles and standards.
The most significant example of this is the United Nations Convention against Corruption adopted in New York on 31 October 2003, which was specifically concerned with "the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law".
Another relevant example is the Council of Europe Criminal Law Convention on Corruption signed in Strasburg on 30 April 1999, whose Preamble states that "corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development and endangers the stability of democratic institutions and the moral foundations of society".
A common feature of both these international treaties is that neither risks defining what "corruption" is, which, in itself, would appear to be a strong indication that the apparent simplicity with which the concept is interiorised does not correspond to its conceptual diversity and the way in which various jurisdictions define the subjective and objective elements of this type of crime.

11. I do not intend to theorise here on the crime of corruption. It is more useful to present a brief outline and consider what the law in Macao has established in this respect and the provision for methods of investigation.
The Macao Penal Code contemplates active and passive corruption through lawful and unlawful acts. Recently legislators have added a new typology to the list, criminalising certain kinds of behaviour practised in the private sector that are analogous to those previously cited. However, these are another kettle of fish, and I deliberately intend to leave them aside.
Typically, suppressing the crime of corruption is rooted in the need to protect the same legal asset.
In both cases it involves a deviation from the kind of behaviour that is required of public employees. In other words, as Almeida e Costa affirms, "during the course of his duties, the corrupt public employee

harnesses his professional powers to serve his private interests, which is the same as saying that, in abusing the position he holds, he *replaces* or *substitutes* the state by invading its sphere of activity". This "manipulation of the state apparatus by the employee (...) is an infringement of the requirements of legality, objectivity and independency which, in an *Estado de Direito* ("State of Law"), must always preside over the fulfilment of public duties" ([5]).
There is an objective separation between active and passive corruption. This distinction leads us to the conclusion that only the passive corruptor violates the "legal asset" which should be protected, since it is only he who has the power and the capacity, inherent to the position he occupies, to act against it. Conversely, the active corruptor may create the conditions under which this violation can take place, and it is necessary to determine whether the behaviour in question is the result of his own initiative or rather solicited or demanded by the public employee.

12. The Public Prosecutor's Office is the entity responsible for initiating criminal proceedings and investigating criminal inquiries, in accordance with criminal procedural law.
There is, however, one very specific feature to this in Macao: any investigation of corruption and fraud committed by public employees is the responsibility of an independent body known as the "Commission against Corruption" (CCAC), mentioned above, which nowadays has additional powers that include the authority to investigate corruption in the private sector.
In terms of criminal investigation, the CCAC is an autonomous and independent organisation and its work is not subject to any form of effective external control, although its investigative actions may be questioned within the context of judicial proceedings. The CCAC also serves as a citizen's Ombudsman, striving to ensure legality and defending the rights of individuals.
In addition, as a result of Article 59 of the Basic Law of Macao (a law which for the sake of convenience we may say has constitutional status), the CCAC forms part of the executive power structure of the RAEM, is appointed and dismissed by the Government of the People's Republic of China and is answerable only to the Chief Executive or, in other words, the Head of the Government of Macao.
In its present framework, the CCAC is therefore not only a criminal investigation body but may also be considered a political body.

13. The CCAC Statutory and Organic Law endows it with exceptional powers in criminal investigations, already censured by the Legislative Assembly of Macao, and which, in my understanding, violate the essential aspects of the *Estado de Direito* ("State of Law"). The two most important of these powers involve:
(i) Exempting the CCAC (like any other public and police bodies) from the legal obligation to inform the Public Prosecutor's Office of any of its ongoing initiatives and current procedures;
(ii) Granting the CCAC the power to carry out criminal investigations that do not involve any time

[5] Almeida e Costa, "Comentário ao artigo 372º, in Comentário Conimbricense do Código Penal, Tomo III, Coimbra Editora, 2001, page 661.

limits for their completion. In theory, this situation enables the CCAC to establish the accused at the start of any investigation and maintain this status "*ad infinitum*".

14. This is not a model for investigation that I would defend, but I also recognise that the existing system, as enshrined in the Basic Law, can only be adjusted or altered with great difficulty, In addition it benefits from the fact that it is identical to the model adopted in Hong Kong, which has always served as an important precedent for solutions adopted here.
I understand that the Public Prosecutor's Office, through an autonomous specialised department that would still be part of the hierarchy, should be responsible for investigating corruption, following the example of what is already happening in relation with all economic criminality, namely economic crimes and money laundering.
What we have in Macao, therefore, is a two-headed system with all the inconveniences and risks associated with coordination and lack of responsibility that can result from this. I also totally disagree with the inclusion of the powers of Ombudsman and criminal investigation within the same body. However, the political choices have been made and we have to live with them.

15. Whatever the system adopted, there is one principle that must be reaffirmed: the more transnational and organised the states and their criminal investigation agencies involved in the fight against crime may be, they cannot compromise the fundamental principles of the *Estado de Direito* ("State of Law"), whatever their motives, whether these involve security, the need for more responses, new responses, more efficient responses, or even the social need to get results and identify the guilty.
Crime is fought, it is true, with resources, a firm hand and conviction, but also with total and scrupulous respect for the law! The criminal investigation authorities cannot ever be permitted to deviate in any way from legal principles, far less use illegal methods to combat crime in any form.

16. In conclusion, allow me to return to the question I raised in the beginning, concerning corruption through lawful acts. It is certainly not the most relevant issue within the context of transnationality and the dimensions of the phenomenon of corruption, yet maybe it is also worth considering questions that are more directly linked to people's everyday lives, that is the lives of those who have nothing to do with the negotiations that only the mighty and powerful have access to.

17. However much we may want to pursue the corrupt, it is important to seriously evaluate the legitimacy of states which penalise corruptors, or, more correctly, active corruption through lawful acts, without taking, previously or simultaneously, the appropriate measures to simplify the administration in order to make society simpler and more transparent, either at the same time or prior to this.
It is common knowledge that obtaining illicit results or results prohibited by law is not the only reason to resort to corruption. Often individuals and companies practise corruption in order to exercise their rights within the appropriate period of time, to ensure, for example, that a piece of paper does not sit forgotten in an office but is properly forwarded. Corruption is often practised to make sure that bureaucratic administrators do not slumber at their desks but carry out their work zealously and

competently. It is also often practised due to necessity, since governments are inefficient at fighting bureaucracy and permit bad practice within the administration.
It is this kind of corruption that slowly and deeply undermines the foundations on which modern societies function, because it does so insidiously, traversing the whole of society, with the added risk of allowing the phenomenon of corruption to become generalised and creating the conviction that a small bribe can be socially useful.

18. When states do not create efficient mechanisms of controlling the administrative machinery they are objectively encouraging corruption, are objectively complicit in this process and objectively lose the moral authority to criminalise the type of corruption we are referring to: the crime of active corruption through lawful acts.
Prevention is therefore an imperative duty of States. The prevention of corruption includes:

a) The creation of a strict Code of Good Administrative Practice,
b) The modernisation of the public administration,
c) The removal of bureaucracy and the simplification of procedures,
d) Making all individuals in the administrative hierarchy responsible for artificial hindrances, unjustified delays and omissions within the context of any administrative proceedings.

An entrepreneur who sees his project approved within the legally stipulated period of time, who sees inspections and audits booked punctually, who receives his permits without delays etc., does not need to "oil the wheels".
This is why I have been arguing for a long time that all "priority surcharges" usually stipulated in administrative regulations and which only serve as an excuse for the state to justify an extra source of revenue, should be abolished.
The administration should view all matters as urgent. An *Estado de Direito* ("State of Law") does not grant special privileges, even to the state itself, and fair economic opportunities should exist for all.

19. Business competitiveness (both individual and company) depends on a healthy environment.
How can business people enter into honest competition in a market that is always so dependent on the state apparatus, if the state proves disloyal to entrepreneurs by not creating the conditions under which they can legally compete?
It is for these reasons that we can argue that States display a lack of moral legitimacy in criminalising and penalising corruption through lawful acts since, as a general rule, such penalization constitutes an institutional way of masking the States's failure to carry out its traditional duties which – we should recall – must serve individuals and companies (and not the other way around) and must serve them effectively, diligently and punctually.
In order to mask these kinds of situations, rather than assuming responsibility for, and improving the administrative machinery as the way in which public bodies function, the simplest solution for governments is to conceal their own inability and incompetence by criminalising acts practised by those they administer.
This is not the best way forward and, to a certain extent, the situation described is also a perversion of

the essential principles of the *Estado de Direito* ("State of Law").

20. Marcus Cicero said that "The habit of tolerating everything may lead to many mistakes and many dangers". We are, in fact living in a time of rupture.
Modern societies cannot tolerate corruption and must fight it with determination. They have an ethical and social imperative to fulfil.
Yet it is also important to state unequivocally that equivalent greater damage is done to societies when states do not carry out their function of preventing corruption, or when policies employ forbidden methods to fight crime.
As the Portuguese proverb says, "you shall know a bird by its flight".
And indeed it is through their actions, and the extent of their responsibilities within a complex web that does not always reflect everyone's interests, that each individual becomes known.

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