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LEGAL WISE BY MDME | YEAR OF THE BENCH

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It has now become somewhat commonplace to say that, following the preponderance of the legislative and executive branches in the 19th and 20th centuries, we are now living the century of the judiciary. As societies and relationships within them become more and more complex, legislators are failing to keep up in passing adequate, up-to-date laws. As a result, there has been a shift in the seat of citizens' rights, which are now enforced by courts more than they are enacted by parliaments or cabinets.

One could say that this is the case in Macau, where the onset of 2017 sees the Courts handling matters that could and should have been dealt with and avoided through timely and competent – and not even complex – legislative action.

The first comes to mind in the form of the much talked-about expired land concessions affair.

There is now little doubt that the 2013 law went too far and failed to contemplate a fair treatment for such cases where, by the Government's own admission, lack of development was not due to the concessionaires' fault. And while there is certainly a very good argument that other existing legal mechanisms would be able to see past the letter of the law, in the current anti-corruption environment, no Government officer would want to delve in this legal analysis at the risk of being "misinterpreted".

On the other hand, a simple amendment to the law would easily clarify the matter – but at the expense of losing face, a price that apparently no one wants to bear. And so, it now comes down to the Macau Courts to navigate through the debris of this legislative shipwreck and bring about some justice to those seeking it and deserving of it.

The Courts will also need to clean up after the legislator's mess in civil matters.

To name but one case, the Second Instance Court's recently ruled that an individual's high-return "deposit" with a gambling promoter should be considered a valid and enforceable loan – rather than an investment subject to risk contingencies –

giving rise to a full repayment obligation. This paved the way for several similar claims to be asserted, perhaps involving discussions on the gaming operators' liability, or even probing into the Government's own responsibility for absence of proper regulation and supervision of an activity that, for years, has been completely unlegislated and unregulated.

Finally, 2017 will have the Macau Courts once again tackling the results of the legislator's inaction with regard to the very core of individuals' rights and liberties.

Ten years after Macau was shaken by the news of the arrest of its then Secretary for Transport and Public Works, 2017 commences with the SAR's former Prosecutor standing trial at the Last Instance Court.

A decade's worth of lessons wasted, once again the holder of a high public office stands trial to face a single all-or-nothing decision which he will not be able to appeal, simply because having been tried in first instance by the highest court of the jurisdiction, there will be no court to appeal to.

Under a legal framework that remains a blatant violation of the right of appeal set out in the International Pact for Civil and Political Rights – which, lest we forget, remains in force in Macau – the judges' responsibilities are obviously immense.

Furthermore, it is to be expected that the indictment and trial of the Prosecutor's alleged counterparts will soon follow suit. In this case, they will stand trial before the Court of First Instance, with the protection of the full scope of defense guarantees afforded by Macau law. Again, however, the court will need to make sure that



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their presumption of innocence is not rendered moot by a conviction of the Prosecutor in his own separate trial.

This is 2017. But it can easily turn into a whole century if the Government does not pick up its pace.

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