



Legal Issues of Pathological Gambling

病态性赌博法律问题探究

(英文)



吕冬娟 著

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内容提要

因病态性赌博所增加之社会成本已逐渐成为世界上最紧迫的公共政策挑战之一, 有很多专家或学者从医学或社会学的角度详细论述了这一问题。然而, 从法律的角度对这一问题的认识还处于起步阶段。基于此背景, 本书从法律的视角研究了病态性赌博所衍生之法律问题, 主要内容包括: 病态性赌博的概念和特征; 解释“自我隔离”制度或“自我禁入赌场”制度的法律考虑; 从民法角度来探讨博彩业经营者是否对病态赌徒承担相应的谨慎义务; 以刑法视角来诠释病态性赌博所衍生之问题; 阐述负责任博彩的相关法律制度架构及博彩业经营者的法律责任。本书既可作为法学类硕士研究生的教学用书, 也适用于司法系统从事负责任博彩实践及理论研究的人士阅读。

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BINGTAIXING DUBO FALÜ WENTI TANJIU

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Preface

There remain little doubts that the major trends regarding gambling over the past several years have been towards its increased acceptance, legitimization, and legalization in various forms in different parts of the world. The recurring underlying reason for casino legalization over the past years might be economic and tourism development. However, gambling is not always an economic panacea. There is also a variety of social problems arising from gambling related activities with several legal implications. Those social costs of gambling can include an increase in crime, prostitution, and alcohol and drug use in the gaming area. One of the most commonly cited reasons for the society objections to the introduction of casino gambling appears to be the fear of the advent of pathological (compulsive) gambling which may be a serious problem if not effectively dealt with. Despite the fact that pathological gambling is recognized as a medical disorder in USA, it has been increasingly regarded by the governments and the gaming industry as an issue of legitimate concern for the public. It has gradually become one of the most urgent public policy challenges in the world. There are a large number of publications which deal in detail with this issue from the medical and sociological angles. However, knowledge of this problem from the perspective of regulations and law is still in its infancy. In this context, it will be of much theoretical and practical significance to find out how to understand this issue correctly and find a rational legal system to regulate it. This book tries to deal with many important legal issues with regard to one of the most important problems which are highly contentious — pathological gambling, in the hope of giving certain inspiration to help

people confronted with this problem from law and regulations point of view throughout the world. At the same time, the book serves as a reference to sound development of Macau's gambling industry. The investigation attempts to touch upon the latest developments of some western jurisdictions addressing these legal issues regarding pathological gambling by emphasizing the current problems encountered by the judges and the courts in these jurisdictions and it is expected to provide some valuable suggestions for the Macau SAR Government in exploring and configuring effective regulations on the foreseeable questions induced from pathological gambling.

The book is organized as follows. Besides introduction and conclusions, this book consists of five chapters. Chapter I deals with a general introduction to gambling and pathological gambling. Chapter II analyzes legal considerations of Self-Exclusion program. Chapter III discusses an important question as to whether or not gaming operators owe a duty of care to pathological gamblers. Chapter IV focuses on the relationship between pathological gambling disorder and criminal law. Chapter V explains responsible gambling program.

This book has been specially prepared as a reference guide to provide information helpful to legislators, judicial staff and related academic researchers. At the same time, I hope that this book full of experimental writing can achieve the desired effect of inspiring and encouraging more deep research findings to emerge.

I would like to thank City University of Macau, Ministry of Education Key Research Institute of Humanities and Social Sciences at Universities—Research Centre for Macau Social and Economic Development (RCMSD), Rector Shuguang Zhang, Vice Rector Fanqing Kong, Pro-Rector IP Kuai Peng, Pro-Rector Qianwen Chen, Mr. Robert Chan, Registrar Shuying Li, Mr. Wicky and Mr. Jason Kuok. So for their great help and support for the publication of this book. I would also like to thank Caiyun Lu, Haibo Li, Xiaofei Yu and their colleagues of Intellectual Property Publishing House, as well as Peggy involved in planning and coordinating the publication of this

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Introduction

0.1 Opening remarks

During the latter part of the 20th century, legalized gambling expanded rapidly throughout the world. Up to now, casinos are open in every state in Australia, in the United States, in every country in Europe, and Korea, Malaysia, Philippines and Macau of China in Asia.^① Singapore has made a tremendous entry into the casino market since 2009. The proliferation of the casino industry is expected to tremendously increase in the near future throughout the Asian region, with Macau SAR, which recently liberalized the gaming industry ultimately taking a leading role. Some people hold that Macau is creating a new “Las Vegas” within Asia.^② It cannot be denied that the gaming sector is a vital part of the economy of Macau SAR and some western countries. Macau, a small city with only 30.4 square km of land (up to 2015), currently has been well known for its dramatically successful gambling industry. It has significantly caught the attention of both local and international people. Since the handover of Macau, its economy is growing rapidly due to the gambling policy. Gambling industry has become the most important part of Macau’s

① Cabot, A. N. (1996). Introduction. In *Casino gaming—Policy, Economics and Regulation* (pp. 1-2). Las Vegas: UNLV International Gaming Institute.

② Lopes, G. (2003). A Journey to Las Vegas, *Macau*, Livros do Oriente, Macau, Decemeber, 58-62.

economy which belongs to the microeconomic system with the characteristics of high dependence—an easy to be influenced by external factors from the world. Some people believe that Asia-Pacific represents the world's best economic opportunities for the foreseeable future. Yet, the sheer magnitude of the opportunities means that the corresponding challenges are also unprecedented in various aspects.

Gambling is a leisure activity engaged in by most players. However, it is a problematic behavior with advantages and disadvantages. Indeed, once a gaming enterprise is begun, there arises an instant dependency on it to provide intensive jobs and tremendous tax revenues. Meanwhile, by the reason of its place of this industry, casino gambling also encourages the development of tourism. Ever since the Macau's handover, the rapidly increased mainland Chinese travelers have become the main source of visitors in Macau. Nowadays, both the Tourism and the Gambling become Macau's core industries. Government would find it difficult (if not impossible) to close a casino or any other gambling venue that provides a large number of job opportunities in this area, as well as substantial tax revenues. Unfortunately, best opportunities for the foreseeable future do not mean that there are not significant challenges. The reverse side of this development is that in the same period the problematic gambling addiction increased as well. In other words, while the development of the gaming industry creates more gambling tax, and other advantages, meanwhile, it also leads to adverse consequences, such as pathological gambling, bankruptcy, suicide, and criminal issues.

In fact, gambling is an old activity of human beings. For most of these people, it is a relaxing activity. Most individuals gamble for enjoyment for their luck. Indeed, the people's way of life has changed from seeking material satisfaction to chasing non-material satisfaction. Owing to the rapid development of technology and increase of productivity, individuals'

life has been greatly improved. Thus, making a living is no longer a major problem. With material needs satisfied, people naturally seek non-material needs. Some people hold that almost any activity related to leisure industries is thriving. Gambling, as one of the most popular pastimes, is one of the important non-material needs people seek. To non-compulsive gamblers, gambling just is a hobby, regular activity, rather than an approach to get rich. They tend to monitor their stakes and seldom get into unmanageable debts.

Indeed, for those people, this activity is basically a social and recreational event. However, this is not the case with pathological gambling which is a recognized impulse control disorder of the Diagnostic and Statistical Manual (DSM-V) of the American Psychiatric Association. According to this view, for some gamblers, gambling becomes a disorder, characterized by an irrepressible urge to bet money.^① Men or women of any age can be pathological gamblers. Certain individuals may suffer the detrimental consequences associated with pathological gambling which is identified in every social class. This problem is regarded by some people as an affliction that brings adverse outcomes to individual gamblers, their families, their friends, their communities and the general public because of the relationship between pathological gambling and the need in pursuit of money to support pathological gambling habits, sometimes through increased criminal offenses in order to finance their gambling addiction or pay off gambling debts.^② Problem gambling is often considered to be a less severe form of pathological gambling. It is a term that refers to a broader category of individuals demonstrating patterns of gambling addiction

① American Psychiatric Association (APA). (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5 ed.). Washington, D.C.: American Psychiatric Association.

② Lesieur, H. R., Blume, S. B. (1987). The South Oaks Gambling Screen: A New Instrument for the Identification of Pathological Gamblers. *AM. J. PSYCHIATRY*, 144 (9), 1184-1188.

that is associated with negative effects.^① This study attempts to consider problem and pathological gambling as a similar category to discuss. It ultimately dominates the gambler's life and has a multitude of detrimental results for the gamblers themselves and their friends, families and other relevant people. Depression, drinking and taking drugs often go along with pathological gambling. Pathological gamblers may also think about committing suicide. Pathological gambling has been linked to a variety of crimes, including violent crimes (i.e. aggravated assault, rape, robbery and murder), property crimes (i.e. larceny, auto theft and burglary), insurance fraud, and forgery, tax evasion, tax fraud, juvenile crime, drug and alcohol-related crime and domestic violence.^② Pathological gamblers may bring about other severe outcomes. It is an enduring issue that cannot be ignored. Governments have to ensure a balance between raising maximum positive results and corresponding negative social consequences.

Some people agree that the social costs of pathological gambling are enormous. These disadvantages resulted from it might be financial or psychological, or a combination of both for the individual, his or her immediate family members, and those in close relationships with the individual and then the society at large. The legalization of gambling parallels the growing number of pathological gamblers throughout the world. Given that the prevalence of gambling is related to the accessibility of gambling activities and those new forms of gambling are increasingly being legalized throughout Macau SAR and many western countries and areas, this figure is expected to rise.

Currently, pathological gambling may be one of the fastest-growing

① Volberg, R. A. (2001). Gambling and problem gambling in North Dakota: A replication study, 1992 to 2000. Report to the North Dakota Office of the Governor. Gemini Research.

② Grinols, E. L. (2004). Chapter 7. In *Gambling in America: Costs and Benefits*. Cambridge: Cambridge University Press. 232-235.

public health problems in various parts of the world.^① At the same time, owing to the current status of increasing the availability and types of gambling, understanding its downside is now much more important than ever before. Because of the above mentioned detrimental consequences caused by pathological gambling, coupled with the fact that the gaming industry has grown rapidly on an international scale within the recent years, this issue has become a growing barrier to the gaming industry, thus, it is not a surprise as to why pathological gambling has captured such attention throughout the world. There is no room for underestimation or oversight of the negative impact resulted from the gaming industry. Although this problem as a type of gambling addiction primarily has been considered to be of a psychological nature by APA^②, this addiction is also a social phenomenon and highly related to the development of gaming legislation. This issue poses problems for legislators in most jurisdictions that appear both intriguing and, at times, insurmountable. That is, we cannot only just treat this kind of question as a psychological issue but also we must concentrate on the legal strategies (for the purpose of confronting the risks of crime and other possible problems) underlying the gambling addiction. This book attempts to highlight some important legal issues of pathological gambling.

It cannot be denied that the efforts to understand the subject of

① Castellani, B. (2000). *Pathological Gambling: The making of a medical problem*. Albany: State University of New York Press. 1-5.

② American Psychiatric Association (APA). (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5 ed.). Washington, D.C.: American Psychiatric Association.

American Psychiatric Association (APA). (1980). *Diagnostic and Statistical Manual of Mental Disorders* (3 ed.). Washington, D.C.: American Psychiatric Association Press. B1-2.

See also: American Psychiatric Association (APA). (1987). *Diagnostic and Statistical Manual of Mental Disorders* (3 ed.). Washington, D.C.: American Psychiatric Association. B2-4.

See also: American Psychiatric Association (APA). (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4 ed.). Washington, D.C.: American Psychiatric Association. B4-7.

pathological gambling have been made for many years. There is much research regarding pathological gambling from the perspective of sociology or medication.⁹ However, there is very little study for this issue from the legal point of view in a holistic way.⁹ Furthermore, when comparing other problems triggered by gambling, pathological gambling has received very little attention. In addition, although there has been a lot of improvements in this area, there are still more questions than answers which have important public policy and legislative implications. More importantly, greater efforts at regulation and control as well as efforts to mitigate the negative impacts of legalized gambling throughout the world are badly needed. Therefore, pressing forward with the book on this issue from the angle of law has very important significance.

This book embraces no ambitious aims like to give a comprehensive understanding to the current theories of pathological gambling. This book just serves as an important guide to the continuous development of gambling from the perspective of law in the best interests of the public. My purpose has been to highlight some legal issues of pathological

● The popular literature deals with problem gamblers who have found their way to Gamblers Anonymous which has existed as a self-help program for problem gamblers since 1957. Some cases provide valuable ideas of compulsive gamblers (for example, Wagner, 1972; and Waller, 1974). A related literature focuses on the issue of compulsive gambling and warns of its dangers (for example, Estes, 1990; Geisler, 1990; and Moody, 1990). Some psychiatrists and psychologists have contributed various theories about compulsive gambling, numerous case researches of problem gamblers and the personality characteristics of problem gamblers (for example, DSM-III, 1980; DSM-IV, 1994; and Custer and Milt, 1985).

● Some studies provide constructive ideas by focusing on one aspect, rather than adopting an all-round way. See:

Bauer, J. E. (2006). Self-Exclusion and the Compulsive Gambler: The House Shouldn't Always Win? . *Northern Illinois University Law Review*, 27(1), 63-94.

Brown, R. I. F. (1987). Pathological gambling and associated patterns of crime: comparisons with alcohol and other drug addictions. *Journal of Gambling Studies*, (3), 98-114.

Davidson, M. J. (1989). Aces over eights: Pathological gambling as a criminal defense. *Army Law*, 11, 11-16.

Kalajdzic, J. (2008). Cameron's Rejection of a Duty of Care to Problem Gamblers: A Problematic Defense of Ontario's Gaming Industry. *Gaming Law Review*, 12(1), 55-59.

gambling in an effort to encourage the governments of the Macau SAR and other Asian regions to be aware of these matters with regard to pathological gambling and to proactively take steps to address them from the rules and regulations point of view.

0.2 Key research questions

The issue of pathological gambling is a continuing hot debate for many years throughout the world. This book intends to comprehend and illuminate this controversial issue from the perspective of law, by developing an analytical framework for the purpose of finding whether or not there are arguments that can justify it, in some cases and under certain circumstances.

Despite the recognition of “pathological gambling” as a mental disorder in the third edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual* (published in 1980), and the inclusion of pathological gambling as an “impulse control disorder” of the most recent version of the manual (DSM-IV, published in 1994), there is a general controversy whether or not pathological gambling is an illness from the legal point of view.^① Up to now, the answer to this question may be far from clear in every corner of the world.

In order to have a deep understanding of the issue of pathological gambling from the perspective of law, I attempt to highlight three important

① American Psychiatric Association (APA). (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5 ed.). Washington, D.C.: American Psychiatric Association.

American Psychiatric Association (APA). (1980). *Diagnostic and Statistical Manual of Mental Disorders* (3 ed.). Washington, D.C.: American Psychiatric Association Press. B1-2.

See also: American Psychiatric Association (APA). (1987). *Diagnostic and Statistical Manual of Mental Disorders* (3 ed.). Washington, D.C.: American Psychiatric Association. B2-4.

See also: American Psychiatric Association (APA). (1994). *Diagnostic and Statistical Manual of Mental Disorders* (4 ed.). Washington, D.C.: American Psychiatric Association. B4-7.

areas, namely self-exclusions, duty of care and criminal law issues concerning this topic. My key research problems surrounding these areas will be discussed later in greater detail.

0.3 Sequence

Besides the brief introduction, this book is made of five more chapters and a final part, where the conclusion drawn from our study. Every effort of this book is made to propose an analytical framework of pathological gambling according to the current legislative development of some western countries where pathological gambling is increasingly concerned by the public and the governments of some western countries.

The brief introduction to this book includes opening remarks, key research questions, organization of the book and methodology.

Chapter I outlines a general introduction to gambling and pathological gambling. First of all, the first part of this chapter deals with the background of this topic. In it, this work tries to begin by providing an overview of the shifts in the manner that society considers gambling in some western countries throughout the centuries with particular reference to the impact of pathological gambling on individuals and the whole society, as well as a brief introduction to the current development of Macau's gaming industry, coupled with the Macau's gaming regulations. After that, this book continues by explaining briefly the definition and the forms of gaming. Secondly, the benefits and costs of gambling will be analyzed depending on the current context. Thirdly, the focus shifts to debate the issue of prohibition versus legalization of gambling. Fourthly, possible solutions for a legislator throughout the world are discussed. Fifthly, six different models adopted by some western jurisdictions regulating the gaming industry are touched upon. In the second part of this chapter, I undertake an overview on the background of the doctrine of