

LINGUISTIC PLURALISM AND THE LEGAL SYSTEM OF MACAU

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Abstract: China's resumption of sovereignty over Macau in 1999 ended almost 450 years of Portuguese occupation. The creation of Macau Special Administrative Region (Macau SAR) in 1999, premised on the unique concept of "One Country, Two Systems," facilitated the through-train of Macau's pre-existing Portuguese-style legal system. The continuation of the pre-existing legal system had to operate in a new environment, where Chinese is the official language with room for Portuguese also to be used as an official language by Macau SAR's legislature, executive and judiciary. In the context of the primacy of the Chinese language and the use of Portuguese in the public sphere in the future Macau SAR administration, the Portuguese administration in its twilight years had to embark on a massive project to translate laws into Chinese, ready in time for adoption in the Macau SAR. With limited know-how and expertise, the translation project was not very successful in the beginning but from statute to statute the quality of translations improved. The challenge facing the Government of the Macau SAR is the successful implementation of the legal system in the changing social context where there is only a tiny fraction of Portuguese speakers among the local residents who man the legislature, judiciary and the administration—in effect the whole government machinery. This article examines how the dualist legal system of early years of Portuguese rule, where Portuguese law applied to the Portuguese residents and Chinese law applied to Chinese residents, evolved into a monist legal system where the Portuguese-style law of Macau applied to all residents. It then examines Macau SAR's new bilingualism where Portuguese-style laws enacted in Portuguese are made applicable through a Chinese translation. The article does not engage in the discussion of difficulties in accurately describing Portuguese legal concepts in a language where the associated legal concepts are far from similar, in spite of the fact that civil law has historically influenced both Portuguese law and modern Chinese law. The aim of this article is to examine the difficulties that are encountered, especially the reactions of Chinese legal community, in implementing the laws of Macau SAR as much as possible true to the intent of the lawmaker and propose practical solutions to overcome them.

Keywords: *legal dualism; bilingual law; Portuguese law in Macau; Chinese legal language; legal literacy; Continental European civil law; official language policy; legal culture; cost and benefit analysis*

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I. Introduction

This article examines the place of language in Macau's legal system. More specifically, it examines how Macau's legal system, which evolved from the Portuguese legal system, which in turn is based on the Continental European civil law, can make a successful transition into a governance system suitable for a Special Administrative Region of the People's Republic of China—a system where Chinese is the official language. There has been much debate on various aspects of this transition. For instance, can Macau law be properly studied and effectively implemented without lawyers, judges and legal educators who are competent in both Portuguese and Chinese? Will members of the Macau legal community become alienated from the legal system that Macau inherited from the Portuguese, if they are only competent in Chinese? Should Portuguese be a mandatory language requirement for school children? Should law be taught in universities both in Chinese and Portuguese? Why has not the Portuguese legal culture successfully integrated with the Chinese culture, especially the Chinese legal culture? This article explores how Macau may overcome some of the practical difficulties in implementing a bilingual legal policy. It does not provide an extensive analysis of the linguistic challenges, which have already attracted scholarly attention, or the more challenging task of delving into the consistency of the existing legal concepts and procedures in Macau with those that operate in China.

Like Hong Kong, Macau was a territory of China before it fell into the hands of Western powers during the Age of Discovery. While Hong Kong became a British colony, Macau became part of the Portuguese empire. When the Portuguese arrived in Macau in the mid-sixteenth century, it was a settlement of Fukien and Cantonese people under the jurisdiction of Xiangshan county.¹

Macau was a commercial port from the early part of sixteenth century. After freeing Macau from pirates with the help of the Portuguese, in 1557 the Chinese Government permitted the Portuguese to settle in Macau. Macau quickly turned into one of the very rare ports for transcontinental trade. It attracted people from nearby cities in Guangdong Province to work, particularly as labourers, who made Macau their home. Gradually Macau became densely populated. The Imperial Chinese Government rarely interfered in the Macau Government's affairs. By the beginning of the seventeenth century, the Portuguese had established various public institutions such as the Senado (Senate), ouvidor (Chief Justice) and Notary.

1 Macau has always been predominantly a Chinese society. Tong Io Cheng, "The Road towards a Sustainable Legal Order: In Search of the Rule of Law for 'One Country, Two Systems' in Macau's Post-Colonial Hybridity" (2015) 17 *Academia Sinica Law Journal* 15 (a publication in Chinese). For the history of Macau as relevant to our discussion, see FG Pereira, "Towards 1999: The Political Status of Macau in the Nineteenth and Twentieth Centuries" in RD Cremer (ed), *Macau: City of Commerce and Change* (Hong Kong: API Press, 2nd ed., 1991) and BV Pires, "Origins and Early History of Macau" in RD Cremer (ed), *Macau: City of Commerce and Change* (Hong Kong: API Press, 2nd ed., 1991); and HS Yee and SH Lo, "Macau in Transition: Politics of Decolonisation" (1991) 31(10) *Asian Survey* 905.

During the period roughly between 1557 and 1849, the year when the Portuguese were able to take full control of Macau, there came into operation what Portuguese intellectuals refer to as legal dualism,² which became the hallmark of Macau politics. This system played a major role in widening the gap between the Chinese residents and the Portuguese authorities. In Macau, dualism meant the recognition and enforcement of Portuguese law and Chinese law whereby (i) disputes between Portuguese residents (including Chinese residents who had become Christians), were settled according to Portuguese law and (ii) disputes among Chinese residents were settled according to Chinese law. This dual system of administration of justice gave rise to two difficulties: (i) There was no legal mechanism for the settlement of disputes between these two classes of people and (ii) jurisdiction in relation to disputes between Chinese residents was not exclusively in the hands of the Portuguese administration.

In order to understand how these two problems were resolved, it is important to note that ancient Chinese law was almost exclusively concerned with criminal offences and as such there was hardly any Chinese law relating to civil disputes that the Portuguese administration could apply to Chinese residents. This also meant that whenever a civil dispute arose between a Portuguese resident and a Chinese resident it could not be settled by applying Portuguese law. As a result, such disputes had to be resolved through non-legal processes such as mediation. Often, the informal resolution of such inter-community civil disputes was much influenced by the relative political power or social status of the parties. The non-exclusivity of jurisdiction of the Portuguese administration in criminal cases arose this way. While generally deferring to the authority of the Macau Government in criminal cases involving Chinese residents, the Chinese authorities tended to defy the Macau Government and exercise their own authority in relation to serious crimes involving Chinese residents. (During this period of rivalry for jurisdiction, there were two prominent cases in 1743 and 1748 where the trial was conducted in Macau jointly by Portuguese and Chinese authorities.) In the early years, the Chinese authorities would arrest the suspect to be taken to China for trial. When in later years the Chinese influence over Macau declined, the Chinese authorities would instead subpoena the suspect to attend trial in China. The next development was for the Chinese authorities to refrain from exercising any criminal jurisdiction in Macau, paving the way for Portuguese administration to assume sole jurisdiction in all criminal cases. With the decline of the Chinese Imperial Qing Dynasty, the Portuguese were able, in 1849, to take full control of Taipa and Coloane and declared

2 This is the description of legal historian António Manuel Hespanha. See António Manuel Hespanha, *Panorama da História Institucional e Jurídico de Macau* (Macau: Fundação Macau, 1995) 30 ff. Legal dualism encompassed all aspects of life: language was no exception. "A dualism has been shown in all aspects of life: in the exercise of political power, the administration of justice, religious structures, trade affairs, even the urban administration". R Pereira Alfonso, "The Political Status and Government Institutions of Macau" (1986) 16(1) HKLJ 28.

that Macau would henceforth be independent from the Qing Empire, bringing to an end the era of legal dualism.

In the mid-twentieth century, the newly established People's Republic of China adopted a policy of reunification with historical Chinese territories including Taiwan, Hong Kong and Macau. The unification policy was first implemented in Hong Kong through the Sino-British Joint Declaration of 1984. Shortly afterwards, in 1987, China and Portugal entered into a similar agreement, the Joint Declaration on the Question of Macau. During the period between the making of the Joint Declaration and resumption of Chinese sovereignty over Macau in 1999, the so-called transitional period, Portugal and China were engaged in preparing for the establishment of the Macau Special Administrative Region. The Portuguese Government was particularly concerned about the future of the official language and the legal system, but even in early 1990s, Portuguese-administered Macau did not have a language policy with clear objectives, especially for the administration of justice.³ Public and private institutions made an effort to address the government's lack of clear objectives and a plan to implement them. In the late 1980s, the Portuguese colonial government established a bureau tasked with adopting a language policy and began to consider the possibility of establishing a bilingual legal order.⁴ This led to local residents paying more attention to the usefulness of the Portuguese language, and those who had successfully mastered the language joined Macau's first law programme.

Macau became a SAR of the People's Republic of China in 1999. Under the Basic Law of the Macau SAR, the "one country, two systems" principle forms the backbone of Macau's legal system.⁵ It envisages the continuity of

3 See Maria Trigo, "Reflections on Macau's Language Policy" (1992) 16 *Administração: Revista de Administração Pública de Macau* (Macau Public Administration Magazine) 617 (a bilingual publication in Portuguese and Chinese).

4 From the beginning of the transitional period, the Macau Portuguese Government had begun to prepare for the Chinese translation of the laws. Several major codes in Macau were directly translated from the existing Portuguese legal texts at the time. They were the results of a major project, undertaken by the Macau Government and completed under time constraints by a large group of Portuguese and Chinese legal experts from Macau and Mainland China.

Cheng, "The Road towards a Sustainable Legal Order: In Search of the Rule of Law for 'One Country, Two Systems' in Macau's Post-Colonial Hybridity" (n.1) 55.

5 See Yash Ghai, "The Basic Law of the Special Administrative Region of Macau: Some Reflections" (2000) 49(1) *International and Comparative Law Quarterly* 183 for an excellent account of Macau's transition to China. Professor Yash Ghai traces the political history of Macau and identifies some problems, which are quite relevant to our discussion:

Portugal had neglected to educate the people of Macau in the Portuguese, which was, and is to continue, as an official language. Its legal and particularly judicial system was still closely tied to Portugal ... [The Portuguese] needed time to localise the civil service, which was dominated by the Portuguese at the higher echelons and by the Mekanese (descendants principally of marriages or liaisons between Portuguese and Chinese) at the middle levels, excluding local Chinese from any role in policy or administration. (p.187)

Macau's previous legislation and way of life.⁶ However, the principle of continuity carries with it significant legal consequences. One of these has been the maintenance of a European-based (Portuguese) legal system in an Eastern culture and society.

II. Language: A Dilemma in Macau Politics

The Portuguese governed Macau for almost four and a half centuries. An institutionalised colonial structure was introduced in 1849 and Portuguese became the only official language. This history greatly influenced Macau's public domain (politics, administration and law) and, to some extent, guided the direction of its social development. However, the influence of the Portuguese language hardly spread beyond the public domain. In other fields, such as commerce, education and cultural life, Portuguese was not commonly used in Macau society, either because the Portuguese administration deliberately refrained from making Portuguese the official language outside government business, or because governmental inefficiency impeded the expansion of the official language policy beyond the public domain.

Today, primary and secondary education in Macau is conducted in Chinese or English.⁷ Only a few public schools use Portuguese as the language of instruction. As Chinese is the mother tongue of most students in Macau, there is no natural Portuguese language environment. Even students in Portuguese language schools may not be proficient in Portuguese. The Portuguese language is not actively promoted in schools, resulting in a shortage of bilingual talent. Since the city was founded, the Portuguese-speaking population of Macau has remained less than 5 per cent, compared with over 90 per cent who speak Chinese. Many Southeast Asian workers who live in Macau do not speak Portuguese or Chinese, and as many of them are residents, Macau society cannot ignore their interests. This compounds the complexity of the Macau language problem.⁸ Within the Chinese-speaking

6 *Ibid.* Referring to Macau's pre-existing legislation, Professor Yash Ghai observed that:

... most of the body of the law was in the form of Portuguese legislation. Most of the legislation was also only in the Portuguese language. It was clear that although not a requirement of the Basic Law (notwithstanding evidence that Chinese view has changed), laws would have to be translated into Chinese, and preferably re-enacted as local legislation, with suitable amendments to adapt them to the circumstances of Macau (most of the codes were of ancient vintage, and had ceased to apply even in Portugal). (p.193)

7 Before the handover, public sector employment was virtually the monopoly of Portuguese or Macanese citizens (Macau-born Portuguese). The rest of society never communicated in the Portuguese language. Today, primary and secondary schools use Chinese or English as the medium of instruction preparing their students for further education and employment. English being the preferred language of international communication, it has gained ascendancy as the second language.

8 For example, in the fourth election of the Legislative Council, a group of candidates claimed to represent Southeast Asians.

population, there is tension between Mandarin and other dialects of Chinese (mainly Cantonese and Fukien). The suggestion that Mandarin should be made mandatory in Macau has not been well-received.⁹ The Macau Basic Law does not provide a clear answer to this dilemma.¹⁰ Here, we do not intend to tackle all of the problems related to language use in Macau. Instead, we concentrate on the status of the official language and its implications for the power shift within the legal community.

III. The Official Language Dispute and the Basic Law

A. *Giving priority to the official language: A dilemma*

The language dispute relates directly to art.9 of the Basic Law of Macau, which states that “In addition to the Chinese language, Portuguese may also be used as an official language by the executive authorities, legislature and judiciary of the Macau SAR”. Before the Macau SAR was established in 1999, but several years after the adoption of Macau Basic Law in 1993, a disagreement arose among legal scholars over the meaning of art.9. The Standing Committee of the National People’s Congress issued an official interpretation on 2 July 1999 stating as follows: “In case of any discrepancy between the Portuguese text and the Chinese text, the Chinese text shall prevail”.

To evaluate the significance of this interpretation, it is helpful to examine some of the representations made by the parties to the controversy. Supporting the primacy of the Chinese version of the Basic Law, WY Xiao, widely known as the “Guardian of the Basic Law” wrote the following:

“The Chinese language will play a key role in the future of the Macau SAR. It will be the main official language of the executive authorities, legislature

⁹ Dr Leong Sok Man, of the Macau Polytechnic Institute, who has extensively researched this question, makes the following observation:

There is a lack of evidence to support using Mandarin as the official Chinese language. There is no compulsory provision about enforcing Mandarin as an official language in the SAR and it is a matter of autonomy of the SAR. Mandatory language policies in this area would be legally untenable.

She goes on to say: “Imposing Mandarin as an official language violates the rules of linguistics. Promoting a language policy must not go against the accepted practices in the community and would hinder natural development of language”. See Leong Sok Man, “On the Language Development in Macau under the ‘One Country, Two Systems’ Policy” (2011) 2(8) *Academic Journal of “One Country, Two Systems”*, (Macau Polytechnic Institute) 34–41 (a publication in Chinese). The quotation is present author’s translation.

¹⁰ Compelling Macau residents to use Mandarin would obviously change their way of life, contrary to the Basic Law guarantee.

and judiciary of the Macau SAR ... When a discrepancy in an explanation or understanding occurs between the Portuguese and Chinese texts, the Chinese text shall prevail ... in the future, the Chinese language must be applied in the government, legislative council, courts and procuratorates of the Macau SAR”.¹¹

In defence of the primacy of the Chinese version of the Basic Law, linguistic scholars have tried to prove from a grammatical perspective (“functional text”) that art.9 clearly accords primacy to Chinese over Portuguese by stating that Portuguese may also be used as an official language.¹²

We admit that these experts’ observations are to some extent reasonable. Even without any official intervention, historical documents and the wording of art.9 clearly show that the Chinese language is given priority. However, the question is not whether the Chinese language should take priority over the Portuguese language, but how the formula “first Chinese, then Portuguese” can be turned into a criterion for interpretation.

The Chinese text should prevail in any case of any conflict between the Portuguese and Chinese versions of a legal rule. In practice, however, judges and lawyers might prefer the original Portuguese version of a law, when the Chinese translation does not appear to truly reflect the true meaning of the law, and thus be in conflict. It is submitted that the Basic Law does not provide a clear answer. A purely literal interpretation of this norm suggests that in legislative activities, the main concern is to use the Chinese language. It is submitted that the rationale behind according primacy to the Chinese version is to encourage the use of Chinese in legislative activities. The background of this norm is also clear. During the Portuguese administration of Macau, Portuguese was the only official language. The legislature, judiciary and executive authorities never used Chinese. Now that Macau is an SAR of the People’s Republic of China, the Chinese language should of course be given priority. However, the draftsmen of the Basic Law must have anticipated that there would be differences between the Portuguese and Chinese versions of legal provisions, potentially leading to problems of interpretation.¹³ Interpreting the law typically falls within lawyers’ expertise. Generally, it is beyond the purview of politicians.

11 See Xiao Weiyun, *One Country Two Systems and the Basic Law of Macau SAR* (Beijing: Peking University Press, 1993) pp.77–78 (a publication in Chinese). The quoted words are the present author’s English translation.

12 See Leong Sok Man, “On the Language Development in Macau under the ‘One Country, Two Systems’ Policy” (n.9).

13 See Kuan Kun Hong, *The Effectiveness of Chinese and Portuguese Texts in Macau Legislation from the Perspective of the Interpretation of Law Studies* (Cadernos de Ciencia Juridica: University of Macau, Publications Centre, 2006) p.136 (a publication in Chinese).

B. *Mastering the Portuguese language is mastering Macau law*

Some legal scholars have argued that knowledge of the Portuguese language is not essential to learning Macau law,¹⁴ but others do not agree.¹⁵ The serious conflicts over this seemingly methodological issue have not emerged without cause. In some ways, they refer to two conflicting premises: (a) interpretations of law may not be sound if the interpreter of the law is not able to understand the original Portuguese version, which may not have been accurately translated; and (b) the power of interpretation has passed into the hands of a new generation of interpreters, who may not be proficient in Portuguese, but approaches to translation must change with the times.

What is the relationship between mastering the Portuguese language and understanding Macau law? Portuguese law, which influenced Macau law, itself originated in Continental European civil law. This suggests that the Portuguese legal culture is not the main exporter of legal knowledge. Therefore, it is only when we are acquainted with civil law in general that we can understand and apply Macau law without much difficulty. To some extent, the arguments following this premise seem reasonable.

The Taiwanese experience is quite instructive for Macau, as it well illustrates how a foreign legal culture (German law) can be adapted to a society mainly populated by Chinese. The Taiwanese Civil Code is based on the German *Bürgerliches Gesetzbuch*. However, the Taiwan Government does not require legal professionals to be proficient in German. There are differences between Macau and Taiwan, though. Macau's official languages are Chinese and Portuguese, whereas Taiwan's official language is Chinese. Therefore, the question of whether German or Chinese should be used in legal practice would never arise in Taiwan. The academic context is also different. For a long time, many Taiwanese scholars pursued legal studies in Germany. Some of them became doyens of Taiwanese legal scholarship (such as Professors Wang Ze Jian, Su Yongqin, Lin Shan Tian and Chan Min). Thus, within academia, Taiwanese lawyers recognise the importance of German legal doctrine and case law for a proper understanding of Taiwanese law.

In the case of Macau, the conflict of opinion is not as sharp as it may appear. Thus, the hypothetical question should not be "Can one understand Macau law without mastering the Portuguese language?" Perhaps the right solution would be to have Macau law enacted in both Chinese and Portuguese, so that proficiency in

14 Zhao Guoqiang, "Thoughts on Some Problems of Legal Reform" in Zhao Guoqiang (eds), *Legal Reform and Legal Development in Macau* (Beijing: Social Sciences Academic Press, 2011) p.89. See also Zhao Guoqiang, *Research on Macau Criminal Law (General Theory of Crime)* (Beijing: Social Sciences Academic Press, 2012) p.2 (both these are publications in Chinese).

15 In an interview with the Portuguese media in 2010, a Portuguese lawyer said: "The legal regime of Macau can only be understood by people who master Portuguese. Obviously, ignorance of the Portuguese language is ignorance of Macau law". See António Falcão (2010/12/06) *Hoje Macau* 4 (a publication in Portuguese) (author's translation into English).

Chinese would be sufficient to understand the law. Obviously, those who wish to explore the origins of concepts and expressions should be able to read Portuguese legal documents and related literature.

C. *Improving the quality of translations*

Apart from those who criticise the use of Portuguese in Macau law, some criticise the “inaccuracy of Chinese expressions used in Macau legal text. Some scholars have recently referred [to] this as a lack of normativity of Chinese legal expression in Macau”.¹⁶

Macau’s Portuguese Government only began to work on a Chinese translation of Macau law during the period of transition from Portuguese rule to Macau Government under the Basic Law (roughly from 1985 to 1999). There was obviously limited time available for carrying out this task because the handover of Macau occurred immediately after the translation was completed. It would have been unacceptable for China to continue to apply laws that were written only in Portuguese. Translating and adapting¹⁷ existing laws (especially the important codes constituting the “corpus” of the Macau law) were the most important functions required for a swift legal transition.

A large team of legal experts from Portugal, Macau and China, many of whom are still active in the Macau legal community, were invited by the Portuguese Macau Government to work together on this project. The Government provided substantial manpower and material support to the translation project.

Considering the haste with which Macau legislation was translated into Chinese, it was unrealistic to expect the first drafts to be perfect. The first statutes to be translated were from the criminal code. Mainly due to the lack of experience in legal translation at the time, the criminal code has attracted the most criticism.¹⁸ It must be kept in mind that it was not easy to produce a Chinese version of the Macau Criminal Code, especially because of the absence of guides to translation from Portuguese to Chinese or Chinese translations of textbooks on Macau law which had been published in Portuguese. Over time, as experience accumulated, the translations of other codes improved; however, regardless of how good a translation is, it is never the same as the original. The danger of translation haunts even an “exporter”¹⁹ of legal scholarship such as Germany, because a large part of

16 See Ji Chaoyuan, “Some Problems of Legislating in Chinese in Macau SAR” in Yang Yunzhong (eds), *Essays on the Academic Conference “Rule of Law and Improving a Legal System”* (Macau: Union of Macau Scholars, 2010) p.121 (a publication in Chinese). See also Herbert S Yee, *Macau in Transition: From Colony to Autonomous Region* (London: Palgrave Macmillan, 2001), especially Ch.3 “The Politics of Localization” where he deals with legalisation of Chinese as an official language.

17 The theory of selective adaptation might help to explain this. See Wang Chao, “China’s Treaty Compliance with the WTO: Perspectives of Selective Adaptation and Institutional Capacity” (2019) 6(1) *Journal of International and Comparative Law* 139.

18 Ji Chaoyuan, “Some Problems of Legislating in Chinese in Macau SAR” (n.16) p.122.

19 In the sense that the German Civil Code became a benchmark for codification.

its Civil Code is based on Roman law, the texts and commentaries of which are written in Latin.

In recent years, Chinese scholars have begun to appreciate the value of legal translations in Hong Kong and Macau. They argue that outsiders cannot easily understand the difficulties in achieving bilingual legislation in these two former colonies.²⁰ Hong Kong and Macau both legislate bilingually: the former in Chinese and English and the latter in Chinese and Portuguese. “To achieve the same meaning and effectiveness in both the Chinese and English texts, sometimes we can only sacrifice the elegance of the Chinese language”.²¹

Finally, we must point out that 20 years after the handover, high quality legal translation is now guaranteed at least at the legislative level. Since the handover, Macau’s legislative assembly has spent much time and effort implementing a bilingual policy and forming a competitive team with expertise in law coupled with strong language skills. The presence of such native Portuguese and Chinese speakers has gone a long way towards ensuring that the Portuguese and Chinese texts are as close in meaning as possible.

IV. Legitimacy of the Bilingual Legal System

It is useful to examine some of the arguments for and against bilingualism.

A. *Thesis against the legitimacy of the bilingual legal system*

(i) The population thesis

The bilingualism debate often draws on the linguistic population ratio argument, which highlights that more than 95 per cent of Macau residents cannot speak Portuguese. The strongest argument promoted by a group of legal scholars lacking a background in local or Portuguese-based legal training, favours eliminating the Portuguese language from Macau legal practice.²² A moderate form of the thesis, promoted by local linguists, advocates greater use of Chinese.

Would adopting Chinese as the only language of law be a violation of the language rights of those whose mother tongue is Portuguese, especially those with Chinese-Portuguese ancestry? As a weak or minority group, they need some legal protection. The “Beijing-Oslo Recommendations on Protection for the Rights of Linguistic Minorities”, drafted by Chinese and European scholars, would require, at a minimum, compliance with the following criteria:²³

20 See Wensheng Qu, *Research from Dictionaries: Translation History of Legal Terms in China* (Shanghai: Shanghai People’s Press, 2013) pp.273–274 (a publication in Chinese) (author’s translation).

21 *Ibid.* (author’s translation).

22 See Xiao Jian-Fei, *Right to Choose a Language: Politics and Law in Language* (Law Press, 2012) pp.226, 228, 229 (a Chinese publication).

23 *Ibid.*

- (a) ensure that in a region where a minority group constitutes the majority of the community, its language is used to transact official business;
- (b) ensure that civil servants who have a close relationship with members of a minority group can communicate in the minority language;
- (c) ensure that members of minority groups can use their own language in oral or written communications with their local administrative departments and can receive replies in the same language;
- (d) ensure that members of the minority groups can use their own language in oral or written applications;
- (e) ensure that communications by members of minority groups in their own language are as effective as communications in the common language of the country; and
- (f) ensure that all documents or forms are widely available in minority languages or in a bilingual format, including the appropriate minority language.

Although Macau is not obliged to implement the above recommendations, eliminating Portuguese from Macau legal practice may go against the modern ideals accepted by most scholars, including those from China. A linguist recently made the following observation about language in Macau:

“Strong language” and “weak language”, “majority language” and “minority language” are concepts in sociolinguistics.... *For a very long period of time, in the legislative and judicial fields of Macau, the “strong language” was Portuguese and Chinese was the “weak language”;* however, the opposite was the case for Macau society as a whole. This resulted in a gap between the legal language and social language of Macau which is the source of the main conflict over the two official languages in Macau. As Portuguese has always been the main language in the legislative and judicial fields, the status of the Chinese and Portuguese languages is not equivalent. However, this problem is less prominent in the administrative field.²⁴

We have no doubt about the validity of this observation from a linguistic perspective. However, it does not explain why Portuguese has been so extensively used in Macau’s legal system. The Macau SAR government’s resolve to promote the Chinese language is beyond doubt.²⁵ Otherwise, improvements to its public

24 See Leong Sok Man, “Official Languages of the Macao SAR” (2012) 13 *Study on One Country Two Systems* 34, 39 (a publication in Chinese) (author’s translation).

25 See S Shiga, “A Study of Chinese Legal Culture: With Reference to the Litigation Landscape” (1988) 3 *Journal of Comparative Law* 18 (a publication in Chinese), where the author provides a vivid account of the Chinese legal culture and argues it cannot be detached from the Chinese language.

services would not have come so quickly. Language-related problems (or language barriers) cannot be solved solely, directly or immediately by a government's language policy. There is no doubt, however, that a proper language policy can help to reduce conflicts and enhance future development. Three things can be done to ensure the effective implementation of a bilingual legal policy: (1) make people proficient in both official languages; (2) promote interaction between people of the two language groups and (3) promote the teaching of law in both languages.

(ii) The inferiority of the Portuguese legal culture thesis

Some scholars attack both the existence and the strengthening of the Portuguese legal influence in Macau.²⁶ They claim that Portugal is not an advanced developed country and that Portuguese legal scholarship and legislative products are not the best model for Macau. In their view, if Macau law is developed on the basis of Portuguese legal culture, it will be difficult to upgrade the Macau legal system. It has even been suggested that translating legal writings from Portuguese into Chinese is harmful because it strengthens the primacy of the Portuguese language and legal culture, making it impossible to establish a local professional legal culture in Macau.²⁷

(iii) The economic interest thesis

It has also been suggested²⁸ that because the scale of economic exchange between Macau and Portugal and other Portuguese-speaking countries is small,²⁹ there is no economic justification for developing the law in the Portuguese language.

B. Thesis in favour of the legitimacy of the bilingual legal system

(i) The historical thesis

The most important argument in defence of the bilingual legal system is what we call the historical thesis. We must first point out that although the Portuguese have ruled Macau for over 450 years, the history of the bilingual legal system is rather short. There are different opinions about when the bilingual legal system began in Macau. One opinion suggests that Macau's bilingualism began with the signing of the Joint Declaration on the Question of Macau in 1987. At that time, a few policies

26 See Xie Gengliang, "Legal Transplant, Legal Culture and Legal Development: A Criticism of the Legal Status of Macau" in Zhao Quoqi (eds), *Legal Reform and Legal Development in Macau* (Beijing: Social Sciences and Academic Press, 2011) pp. 131–139 (a publication in Chinese).

27 *Ibid.*

28 *Ibid.*

29 Wang Chao provides a useful perspective. He highlights the role played by Macau as a link between China- and Portuguese-speaking countries. The policy objective of China is also very relevant to Macau. See Wang Chao, "China and the Agreement of Government Procurement: Costs, Benefits and Challenges of Accession and Implementation" (2015) 2(2) *Journal of International and Comparative Law* 259.

were implemented to construct the foundation of the bilingual system.³⁰ The main policies and their implementation are as follows:

- (a) Establishing a Legal Translation Office (which was done in 1988);
- (b) Recognising the Chinese language as the official language (see Decree no. 455/91 of 1991);
- (c) Promoting legal education (the first law programme was introduced by the University of East Asia, the predecessor of the University of Macau, and commenced in 1989);
- (d) Publication of a Portuguese-Chinese glossary of legal terms;
- (e) Publication of all Macau legislation in both Chinese and Portuguese (see Decree no. 11/89/M of 1988);
- (f) Promulgation of laws in Chinese and Portuguese (for instance, the Macau Criminal Code was promulgated in 1996 in both Chinese and Portuguese);
- (g) Publication of Chinese versions of all major codes (this was accomplished in 1999); and
- (h) Promulgation of the Macau Basic Law (art.9 of which confirms the bilingual system).

Since the handover in 1999, the Legislative Assembly has enthusiastically implemented Macau's bilingual policy. Later, several groups of bilingual magistrates were trained by the Macau Government. The bilingual legal system took root in Macau as time passed. Because of these historical facts, some Portuguese scholars have defended the bilingual legal system in Macau based on the so-called principle of continuity.³¹

(ii) The social cost and benefit thesis

To fully appreciate the challenge that Macau faces in maintaining a bilingual legal system, it is natural to observe how other bilingual legal systems work. Canada's bilingual legal system, for example, is reputed to be successful, perhaps due to full cooperation between the Government and research institutions. Resources are provided by the Government and large research projects are undertaken by academic institutions. Carrying out this work requires many bilingual lawyers. Unlike Macau, Canada has no lack of bilingual lawyers.

The main difficulty for Macau is producing bilingual talent. The experience of the past decades has taught us the real cost of providing the necessary training. It is not only that resources must be allocated for training but people must also

30 See Salvatore Casabona, "The Law of Macau and Its Language: A Glance at the Real 'Masters of the Law'" (2011–2012) 4(1) *Tsinghua China Law Review* 223, 230.

31 See Paulo Cardinal, "The Judicial Guarantees of Fundamental Rights in the Macau Legal System: A *Parcours* under the Focus of Continuity and of Autonomy" in Paulo Cardinal (eds), *One Country, Two Systems, Three Legal Orders: Perspective of Evolution* (Heidelberg: Springer, 2009) pp.221–269, 227.

be willing to be trained. It is not easy to influence people's economic decision-making in a society like Macau, with its healthy economic environment and many employment opportunities. We can list the reasons why Macau people should learn the Portuguese language,³² but citizens always make the final choice based on their own costs and utility judgments.

Experience has shown that language education must begin early in life. Studies have shown that secondary students in Macau do not consider it important to learn the Portuguese language.³³ One possible reason for Macau students' reluctance to learn Portuguese is their heavy workload. Another reason is their preference for English as the second language, which they rightly consider a more useful medium for communicating with the outside world. Creating a good Portuguese learning environment is particularly difficult because the Portuguese administration never laid a foundation for this purpose. Learning Portuguese may be necessary, but it is not a priority. Instead of trying to popularise the learning of Portuguese, the best course would be to support those who wish to learn the language.³⁴

V. Concluding Remarks

There is no easy solution to the language problem in Macau law. We contend that abandoning the bilingual legal system and starting all over again with a solely Chinese-based legal system would be neither wise nor rational. The practical experience of the past 20 years has been that the decisions of the legislators who drafted the Basic Law of Macau were probably the right ones. Macau's bilingual legal system is a historical choice. There is a price to perfecting it, but it is worth the price. Whatever the benefits of a bilingual legal system are, the social conditions of Macau have only permitted limited bilingualism.

A bilingual legal system requires bilingual operators. However, not all those involved in the system, lawyers and non-lawyers alike, need to be proficient in both languages, and it must be possible for those who are proficient in only one language to actively participate in legal work. Well-trained bilingual lawyers are required for the efficient operation of a bilingual legal system. However, a lawyer is not a better lawyer simply because he is bilingual. In principle, a legal system, whether bilingual or monolingual, must pursue justice. The lack of bilingual lawyers might cause some difficulties at the initial stages of the development of a bilingual legal system. Nonetheless, this should not lead to permanent barriers against those who are not bilingual.

32 See Leong Sok Man, "On the Language Development in Macau under the 'One Country, Two Systems' Policy" (n.9).

33 *Ibid.*

34 See Lei Pui Lam (a member of the Macau Legislative Council), "The Unrealistic Promotion of Portuguese Language Education" (31 December 2013) *Citizen Daily* 3. (a Chinese Newspaper).

In view of the above discussion, the following conclusions can be drawn. The bilingual legal system of Macau is a product of the region's colonial history, politics and culture.³⁵ Macau is a predominantly Chinese society, but a bilingual system must be maintained within the public sphere and legal field. The Basic Law of the Macau SAR promises to respect Macau's history, protect its minority communities and continue its social system. However, the scope of a truly bilingual legal system is conditional on how valuable it is to Macau society. Although Chinese, as the language of the majority, must have a special place in Macau, it is also important to protect the languages of minority residents, especially the Portuguese. Effective measures, including providing adequate financial and other resources, must be taken to promote bilingualism in the public sphere so that bilingualism serves the development of Macau society. To fulfil the above plans and policies, the Government must clarify the boundaries of the bilingual system. To maintain the normal functioning of the bilingual system and prevent the work of the public and legal sphere from becoming confused and restricted by language, legislative or administrative interventions should be undertaken whenever necessary.

35 It is quite obvious that both the Ming Dynasty and the Qing Dynasty had jurisdiction over Macau for a long time. Chinese residents in the area *followed their own customs* and were ruled by the Guangdong government under the Imperial law. *The written laws of the Ming and Qing dynasties are of course a part of the Macau legal history.* ... As a process of cognition, the interpretation of law is influenced by a number of internal and external factors. *The Chinese way of thinking, influenced by Confucianism, still has its impact on the whole of East Asia in general, and Macau in particular.* (emphasis added)