

LEGAL TRANSPLANTS AND THE ON-GOING FORMATION OF MACAU LEGAL CULTURE*

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I. Introduction. II. A long voyage by Caravelle (from 1554 – 1999): the legal transplant from Portugal to Macau. III. In search of a legal culture at present and in the past: Is there a ghost inside the machine? IV. The Formation of a unique legal culture for Macau: a still on going process and a challenge for the near future. V. Conclusion.

I. INTRODUCTION

1. *General concerns*

In the primitive stages, law was a reflection of customs and convictions of a society, sometimes morphologically termed “spirit of a people.” Yet since the birth of the Roman law, a strong paradigm has taken roots. Most of the modern legal systems derive more or less directly from either the Roman law or its substantial descendent, the English Common Law.¹ The history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law.²

When we study the history of legal process, some general reflections of legal transplants can be inferred:

Firstly, transplanting of individual rules or a large part of a legal system is extremely common. This is true in both early and recent times.

Secondly, transplanting is the most fertile source of development.

Many changes in modern legal systems are the result of borrowing. This is so for both individual rules and for systemic norms. A voluntary reception or transplant involves a change in the law, which in reality might be a result of many factors, such as climate, economic conditions, religious outlook or even circumstances not connected with specific factors operating within the society as a whole, or with the general historical trend. In addition, law, like technology, is very much the fruit of human experience.

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¹ Cohen, Morris R. and Cohen, Felix S., *Readings in Jurisprudence and Legal Philosophy*, Boston, Toronto, 1951, p.101.

² Lowie, R. H., *Primitive Society*, New York, 1920, p. 441.

Just as very few people had thought of the wheel and yet once it was invented, its advantages could be seen and the wheel was used by many. In a similar way, though important legal rules were invented by a few people or nations, once invented, their value was readily appreciated, and the rules were adopted by many nations.

Though transplants of legal norms or even systems have been common in social history of human beings, it does not always imply successful outcome. A successful legal transplant, like that of a human organ, will grow in its new body, and become part of that body but at the same time the rule or institution would continue to develop in its present system also.³ Then the concept of “voluntary major transplants” takes shape,⁴ which may be the simplest solution for legal transplantation as a cost-saving process. That is, “when either an entire legal system or a large portion of it is replicated in a new sphere”,⁵ through spontaneous or intentional legal borrowing.⁶ Rodolfo Sacco categorized legal transplantation into two ways; one is imposition and the other is prestige.⁷ The latter sometimes involves a process of *bricolage*,⁸ i.e. simply pasting together whatever one has at hand. Sometimes the transplanted law may appear to have a ludicrously tenuous relevance to the receiving society, because lawmakers of the receiving society did not spend adequate time, or lacked the technical competence, to anchor the transplanted norm in the local reality.

Save for some exceptional cases where transplants of laws were done voluntarily,⁹ the expansion of European countries through war and conquest was primarily responsible for transplantation of their laws into countries in

³ Watson, Alan, *Legal Transplants: An Approach to Comparative Law*, Virginia, 1974, p. 27.

⁴ *Ibidem*, p. 29.

⁵ Mancuso, Salvatore, “Legal Transplants and Economic Development: Civil Law vs. Common Law?”, In Jorge Costa Oliveira and Paulo Cardinal (eds.), *One Country, Two Systems, Three Legal Orders - Perspectives of Evolution*, Berlin Heidelberg, Springer, 2009.

⁶ Watson, Alan, “Aspects of Reception of Law”, *Am. J. Comp. L.*, num. 44, 1996, p. 335. See That could happen in mainly three ways; firstly, when a people move into a new territory only to find that there is no comparable civilization, and so take their law with them; secondly, when a people move into a different territory where there is a comparable civilization, to make sure their regulations and customs remain, they take their law with them; and thirdly, when a people voluntarily accept a large part of the system of another society, for solutions of problems they met had already been given in other systems. A legislator who drafts the law may save a lot of time and thinking by simply adopting the approach of the origin country.

⁷ Gambaro A, Sacco R (1996) Sistemi giuridici comparati. UTRT, Turin. See also Mancuso, Salvatore, “Legal Transplants and Economic Development: Civil Law vs. Common Law?”, *op. cit.*

⁸ Refer to the construction or creation of a work from a diverse range of things which happen to be available, or a work created by such a process. The term is borrowed from the French word *bricolage*. See Berkowitz, Daniel, *et al.*, “The Transplant Effect”, *Am. J. Comp. L.*, num. 51, 2003, p. 172.

⁹ *Idem*.

Asia, Africa, North America and Latin America. This happened when the powerful states stood up to the rest of the world and fought for their so-called “influence sphere” and strengthened their power and dominant status by forcing their colonial territories or other small countries to accept their culture and languages, ruling them with their laws and regulations. In these cases, as legal rules were usually not tailor made for the latter, the social, economic and institutional contexts between the origin and the recipient country often differed remarkably, causing conflicts in the application of law. In such cases the process of “transplantation” would be a painful and disgraceful for the recipient countries.¹⁰ After prolonged periods, the imposed legal systems gained *de facto* influence or legal binding force in the colonial territories, and the former alien laws became “domestic” laws actually in force in the colonial territories, diverting their legal systems to a different and new stream of legal development.

That is to say, when a recipient country (regardless of how it received the legal rules) applies a rule it has transplanted from a different legal system, it is effectively applying a rule developed in a foreign socioeconomic order to its own local circumstances. Thus interpretation and/or implementation of a legal rule shall and must differ from its original mode. As a matter of fact, imperialism and colonization resulted in massive transplantation of western laws to other parts of the world. The majority of the people at the law-receiving end (often small and powerless countries or regions) had no choice but to adapt the law, and were sometimes not able to even familiarize themselves with the law once it had been enacted.¹¹

The Macau Special Administrative Region (hereinafter “Macau”) is an interesting case in the context of the transplantation theory mentioned above. Although Macau was not conquered by force, the Portuguese Law was, to a certain extent, imposed on Chinese residents. Ever since the first permanent and official Portuguese trade base was established at Macau in the year 1557, with the consent of the Ming Government, this island, only 40 miles west of Hong Kong, has found itself in a curious situation even after four hundred years of development. On one hand, the Portuguese had actually run the government and the legal system of Macau for about four

¹⁰ According to some scholars, transplant countries are likely to suffer from the “transplant effect”, i.e. the mismatch between pre-existing conditions and institutions and the transplanted law, which weakens the effectiveness of the imported legal order. *Ibidem*, p. 171.

¹¹ For instance, this argument is often invoked to explain comparatively low litigation rates in Japan and other Asian countries in the time after the legal transplantation process. For a discussion of long term litigation rates in Japan, please see Haley, John Owen, “The Myth of the Reluctant Litigant”, *J. Jap. Stud.*, num. 4, 1978, p. 6; See also, Ramseyer, J. Mark, “The Cost of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan”, *Yale L.J.*, num. 94, 1985, p. 604, and West, Mark D., “The Pricing of Derivative Action in Japan and the United States”, *Nw. U. L. Rev.*, num. 88, 1994, p. 1436.

hundred years, and the whole legal system had been well established;¹² and on the other hand, the geological status of Macau as an exclave of Portugal separated Macau from the Portuguese jurisdiction. Some scholars argue that the Portuguese have left Macau with an institutional foundation insufficient for the area to retain its Portuguese legacy and, therefore, it has been unable to develop and localize Portuguese law. As a result, the people of Macau find themselves ill equipped to thwart wholesale domination by the mainland.¹³

Historically, in ancient and early modern times, the region now known as Macau was governed by the Chinese empire and fell within the jurisdiction of the “Chinese legal system.” When we talk about the legal culture and the mixed legal system of Macau, we cannot ignore the deep roots of the ancient Chinese way of thinking, namely, the oriental way of thinking derived from Confucianism. The legal orders, which are still affecting the legal life of Macau, are generally respected in formatting of its own legal culture by Macau over time. In the Sino-Portuguese Joint Declaration, China has promised to respect Macau’s existing social and economic systems and lifestyle for 50 years.¹⁴ Similar to Hong Kong, Macau gained the status of a Special Autonomous Region with its own legal and economic systems (in accordance with Article 31 of the Chinese Constitution).

The Macau legal culture is in the process of formation, and it is likely to turn out to be quite a unique one under the policy of “One Country Two Systems”. This is necessarily a result of a political decision made by China based on the mutual understanding it had with Portugal¹⁵ on respecting the *status quo* of Macau because of the historical relationship.¹⁶ Therefore, the traditional Chinese culture and the Portuguese legal culture have collided in Macau. Transplanted legal rules and codes made Macau accommodate a

¹² Containing a complete and typical category of civil law system which was obviously derived from the European continent, including *Código Penal* (Criminal Code), *Código de Processo Penal* (the Criminal Procedure Code), *Commercial Code*, *Código Civil* (Civil Code), *Código de Processo Civil* (the Civil Procedure Code), *Código do Registo Predial* (Code of the Land Registry), *Código do Registo Comercial* (the Commercial Registry Code), *Código do Procedimento Administrativo* (Code of Administrative Procedure Code), *Código do Registo Civil* (Civil Registration Code), *Regime das Custas nos Tribunais* (Rules of Court Costs in the Courts), *Código do Notariado* (Notary Code), *Código de Processo Administrativo Contencioso* (Code of Administrative Legal Procedure) etc. All these codes and rules are similar to the general civil law system, in that legislation is the main source of law and case law that, while clearly relevant, is not a major source of law.

¹³ See Layman, Jeff, “Macau's Handover to Mainland China: Assessing the Transplant of Portuguese Law on Chinese Soil”, available at <http://www.ciaonet.org/>, visited on Nov. 7th, 2009.

¹⁴ *Ibidem*, para. 2.12.

¹⁵ *Idem*.

¹⁶ Chinese tolerance of the Portuguese in Macau dates back to the early era of occupation when Portuguese traders flourished by bringing Chinese silk to the Japanese and Jesuit missionaries such as Matteo Ricci who donned the robes of a Confucian scholar.

more European and continental approach to law when Portuguese settlers dominated this place; a generally European way of legal reasoning took roots in Macau. However, in contrast with Hong Kong, another former colonial area which was once occupied by the British,¹⁷ Macau's judicial system is still struggling to find a legitimate foundation for legal autonomy. The Joint Declaration laid down a basic framework for the establishment of a locally based legal community and a program was launched in 1989 to adapt the Portuguese legal system to Macau and translate the existing laws into Chinese.¹⁸ However, difficulties have often been encountered in the program of translating Macau's laws from Portuguese to Chinese.¹⁹

After the handover of Macau by Portugal to China, the process of formation of Macau's legal culture has frequently faced challenges from various directions: namely, what is the role of Portuguese legal culture and the traditional Chinese legal culture? How its legal system could technically justify to be a unique one?

Of course, despite these technical issues, the legal system of Macau is making progress.

This paper is dedicated to discussing the impact of legal transplants and the on-going formation of Macau legal culture, i.e. to examining how Portuguese legal customs and legal order were launched in an alien region and how the mixed local community accommodated this system, besides the prospects for Macau to build its own legal culture.

2. A brief review of the notions of "Legal Transplant" and "Legal culture"

Law is never static; it changes continuously.²⁰ Nonetheless, in humanities, changes should not happen without due cause. The concept of "legal transplants" (first coined in the 1970s by the Scottish-American legal scholar W.A.J. Alan Watson in an attempt to explain movement of laws and legal institutions between states) has become central to the study of

¹⁷ English and Chinese were declared the official languages of Hong Kong, possessing equal status, in 1974. In 1986 it was determined that all laws could be enacted in English and Chinese. As a result of these moves, Hong Kong developed the highly technical and specialized expertise necessary to implement a constitutional basis for bilingual legislation. *See* Jeff Layman.

¹⁸ *Idem*.

¹⁹ These problems include: (i) a lack of consensus on the equivalence of specific concepts in Chinese and Portuguese; (ii) instability of the Chinese legal system; and (iii) inability of the Chinese language to effectively express concepts contained in the original Portuguese versions.

²⁰ Mancuso, Salvatore, *Legal Transplants...*, *op. cit.*, p. 75.

comparative and international law.²¹ In fact, the moving of a rule or a system of law from one country to another or from one people to another has been common since the earliest recorded history. Examples of transplant of private laws go back to at least the Code of Hammurabi (17th century BC).²² Public law transplants have been common for centuries in cases of dominant powers seeking to rebuild smaller states in their own image,²³ and in case of states in political transformation seeking prestigious models.²⁴

There are two main types of legal transplants: one imposed during occupation and the other as part of a voluntary reform process initiated by the law-receiving country. Differences in the transplanting process may impact receptivity (defined as the country's ability to give meaning to the imported law)²⁵ of the transplants. While an integrated legal system tries to change and evolve in tune with foreseeable needs of the society, an imposed system might have direct impact on the domestic system and lead to legal chaos rendering the original legal track unforeseeable.

As we already know, virtually all civilized countries nowadays have a set of rules embodied in codes or court cases that were established by designated state organs, and the state institution in charge of enforcing the rules.²⁶ All these elements interact and work together, forming a dynamic system usually termed as the "normal legal order".²⁷ It is a system which works firmly and continuously to keep the community regulated. However, where there is a formal legal order, there is a response to the legal order by the community members, and these are the values and attitudes which bind the legal system together; values which determine the degree of sanctity of the legal system in the culture of the society as a whole. The existence and importance of these values depend upon; the kind of training and habits the lawyers and judges have; what the people think of law; willingness of different entities and individuals to resort to legal processes for settling disputes and the purpose for which people turn to lawyers and use other officials and intermediaries, besides the degree of respect for law,

²¹ Miller, Jonathan M., "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", *AM. J. COMP. L.*, num. 51, 2003, p. 839.

²² Watson, Alan, *Legal Transplants: An Approach to Comparative Law*, (2nd ed.), 1993, pp. 22-24.

²³ Owen, John, "The Foreign Imposition of Domestic Institutions", *Int'l Org.*, vol. 56, num. 2, 2002, pp. 375, 376-77, 379.

²⁴ See Henkin, "Introduction", in Louis Henkin & Albert J. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* 1, 1990, pp. 13 and 14.

²⁵ Berkowitz, Daniel *et al.*, "The Transplant Effect", *Am. J. Comp. L.*, num. 51, 2003, p. 179.

²⁶ *Idem.*

²⁷ *Idem.*

government and tradition.²⁸ This description of “legal culture” by Friedman became popular after he used it for the first time in 1969. There is no precise definition of the concept but post-modernists adopt a notion derived from the systems theory: “*the framework of intangibles within which an interpretative community operates, which has normative force for this community...and which, over the longue durée, determines the identity of a community as community.*”²⁹ This is basically the concept of “legal culture” adopted by us as a starting point.

After the above review of notions of “legal transplant” and “legal culture”, the next question shall be how legal transplantation affects legal culture? Throughout history, many colonised states suffered when imposed legal rules merged into their legal systems, and became the dominant legal prescription in force. Generally speaking, introduction of a set of new legal rules may always cause chaos at the beginning but after the rules get embedded in the culture, they do indeed nurture a new legal order incorporating the values mentioned above.

3. The structure of our exposition

This paper addresses the case of Macau, a city located in the southern coast of China and belonging to the Guangdong Province in ancient times. It fell under the administration of the Portuguese Government in the XIX century, and recently (since 1999) gained the status of Special Administrative Region of the Peoples’ Republic of China. We examine the process of legal transplantation in Macau and its role in the formation of its legal culture.

The first part of our exposition is chronological. It begins with a demonstration of what the situation of the Macau legal order was before the process of legal transplantation started. Then the focus shifts to the legal transplantation process itself, including its causes and effects.

The second part starts with evaluation of the current situation (through a description of the law in force, the judicial system, legal education and the legal community, etc.), presenting a relatively clear picture of the current legal system and the possibility of detecting a legal culture. Finally, by outlining several positive and negative elements, the paper explores the possibility of constructing a unique legal culture for Macau in the future.

²⁸ Friedman, Lawrence M., Legal Culture and Social Development, *Law and Soc’y Rev.*, num. 4, 1969-1970, p. 34.

²⁹ See Garoupa, Nuno and Ogus, Anthony, “A Strategic Interpretation of Legal Transplants”, *Journal of Legal Studies*, num. 35.2, 2006, pp. 339-364.

II. A LONG VOYAGE BY CARAVELLE (FROM 1554 – 1999): - THE LEGAL TRANSPLANT FROM PORTUGAL TO MACAU

1. *Prologue*: “strangers with awesome behavior and weird clothing filling the mountain and sea”³⁰

From the epigraph, we may imagine how shocked the Chinese official was when he noticed the number of Portuguese leading their way to Macau.

A long time ago, the place known as Macau nowadays was already inhabited by Chinese residents from the nearby regions. In the Ming Dynasty, when the Portuguese were allowed by local officials to settle, it was a region governed by Xiangshan County, Guangdong Province,³¹ where Chinese law applied.

At the time, the legal system in force could be represented in two levels; the written law of the Ming Empire, and the regional customs of Guangdong Province and Xiangshan County.³² The former mainly included a synthetic code titled “*Ming Lü*” (*Ming Dynasty Code*), which structure and content borrowed mainly from the *Tang lü* (*Tang Dynasty Code*).

In ancient China, just like many other ancient civilization, judicial and administrative functions were not performed separately. Some of the administrative and judicial powers were shared by the officials according to the Emperor’s delegation. However, the Emperor himself also reserved the legislative power. Official law always includes two main components, penal law and administrative law. The “unofficial” law was the customary law of the people, rules that developed in localities or in merchant guilds for handling of matters of common concern.³³ The magistrate could derive principles of civil law directly from provisions of the penal code or indirectly read into a criminal statute to excavate a basis for a private civil suit.³⁴

³⁰ Extracted from a report of a Chinese official (Pang Shangpeng) of the Guangdong Province to the Ming Emperor in 1564. See He, Zh. H., *Juiciary Change of Macau in the Ming Dynasty and Qing Dynasty*, Union of Macau Scholars, 2009, p. 2.

³¹ Haiou, Liu, *Outline of the Macau Legal History*, JiLin University Press, 2009. pp. 2-19.

³² *Idem*.

³³ Resources are from Hulsewé, Anthony F. P., “The Legalist and the laws of Ch’in”, in W. L. Idema (ed.), *Leyden studies in Sinology*, 1981; also see Hulsewé, Anthony F. P., “Remnants of Ch’in Law: An annotated translation of the Ch’in legal and administrative rules of the 3rd century B.C., discovered in Yünmeng Prefecture, Hu-pei Province in 1975”, Vol. 1, Leiden, 1985.

³⁴ Zhang Zhongqiu, *From Chinese Legal Genealogy to East Asian Law-Legal Tradition of East Asia and its Change and Trend*, *Journal of Nanjing University (Philosophy, Humanities and Social Sciences)*, num. 1, 2007.

Finally, in terms of spirit, the Confucian view of law was always centered on morality. Also, where a new piece of legislation was being considered, discretion would be used to assess its relationship to the existing law. Equality before law was never officially accepted as a legal principle and a practice. Besides, a person could not be convicted of a crime without a confession; torture was often used to elicit such a confession.

In conclusion, before the Portuguese' settlement in the middle of the 16th century, Macau was ruled under a centralized monarchical hegemony similar to other parts of China. The traditional Chinese legal culture³⁵ was composed of a social-legal structure rooted in Confucianism and rulings of a monarchical hegemony.

2. Balance and "harmony": A legal order characterized by its pluralism (1554-1849)

In 1535, Portuguese traders were allowed to anchor ships in Macau's harbors and had the right to carry out trading activities following a ship wreck, though not the right to stay onshore.³⁶ Portuguese settlement, with the acquiescence of local Chinese authorities, dates back to the middle of the sixteenth century.³⁷ However, it was not until the year 1557 that the Portuguese established a permanent settlement in Macau, paying an annual rent of 500 taels of silver,³⁸ and the ground rent payments began in 1573. It was believed that the Portuguese were allowed to settle in Macau later because they helped expel the pirates around the southern sea of China, and thus gained the trust and recognition of Chinese officials and merchants.³⁹

All the above lead to the conclusion that the Portuguese coming to Macau in the XVI century did not act as conquerors or a colonial power, but with an image of merchants or visitors. As the number of Portuguese settlers began to grow, they started organizing their own political and municipal unit, the Senado. Gradually, it seems a kind of balance or harmony was established between the Chinese government and the Portuguese community in Macau. As informed by an author in the 1980s, "A dualism has been shown in all aspects of life: in the exercise of political

³⁵ Traditional Chinese law refers to laws, regulations and rules used in China up to 1911, when the last imperial dynasty fell. It has undergone continuous development since at least the 11th century B. C., and the traditional legal culture matched this Chinese law.

³⁶ Liu, G. L. and Zhao, G. Q., *A New Conspectus of Macau Law*, Macau Foundation, 2005, p. 2.

³⁷ Pires, B. V., "Origins and Early History of Macau", in Cremer, R. D. (ed.), *Macau: City of Commerce and Change*, 2nd ed., Hong Kong, API Press, 1991.

³⁸ Bong Yin, Fung, *Macau: a General Introduction*, Hong Kong, Joint Publishing (H.K.) Co. Ltd., 1999 (in Chinese).

³⁹ Noronha silveira, Jorge, *Subsídios para a História do Direito Constitucional de Macau, 1820-1974*, tradução por C. Y. Sam e H. F. Vong, GTJ/ADAT, 1997 p. 1.

power, the administration of justice, religious structures, trade affairs, even the urban administration”.⁴⁰

Nonetheless, this raises little doubt that the sovereignty of China over Macau was not challenged in that period. In fact, between the middle of the 16th century to the middle of the 19th century, Macau society in general was still under the jurisdiction of the Chinese empire (Ming and Qing dynasties).⁴¹ An exceptional case was Chinese residents in Macau who turned into Christians. In this case, regardless of their nationality, Portuguese law was applied.⁴² In other cases, Chinese legal rules (Ming Lü and later Da Qing Lü Li) applied in legal disputes among Chinese residents and those between the Chinese and the Portuguese. The Chinese community of Macau always resorted to the Chinese alderman, and the local customary rules also played a key role in solution of disputes.⁴³ As to disputes among Portuguese, Portuguese laws were applied, and the Portuguese judicial organs were responsible for solution of disputes.

On the other hand, according to the traditional Chinese political philosophy, it was normal for relevant foreign organs to govern the disputes within their own society (the regime of the so-called “*Fan Fang*”, which refers to the strategy and towards foreigners). The self governance of a foreign population in a Chinese land in no way indicates a loss of sovereignty or loss of jurisdiction.

It should however be noted that in the 16th century Macau, or even the whole Chinese Empire, law was not consciously identified as a separate element, but instead as an expression of political, economical or military powers. In this context, Portuguese legal order⁴⁴ could not be imposed on the Chinese community by force. Nor had it attracted voluntary adoption because of its technical prestige. There might be many reasons for such a balance having been maintained for a long period of time. Firstly because

⁴⁰ Alfonso, R. and Pereira, “The Political Status and Government Institutions of Macau” 16:1 Hong Kong Law Journal, 1986, pp. 28-57.

⁴¹ Noronha e silveira, Jorge, *Subsídios para a História do Direito Constitucional de Macau, 1820-1974*, tradução por C. Y. Sam e H. F. Vong, GTJ/ADAT, 1997, pp. 2 and 28.

⁴² Hespanha, A. M., *Panorama da História Institucional e Jurídica de Macau*, Fundação Macau, 1995, pp. 30 and 45.

⁴³ See, Liu, G. L., and Zhao, G. Q., *A New Conspectus of Macau Law*, Macau Foundation, 2005, p. 2; and in a particular area (for example, in the trading area) of law, see Li, X. P. and Chen, Y. X., *The Administrative System of Macau Commerce by the Ming Dynasty*, Macau, Macau Foundation, 2002, p. 360 ss.

⁴⁴ A period known to Portuguese lawyers as “*Epoca das Ordenacoes*”. If we want to put it in a more cultural perspective, we may look at it from two aspects. In the positive law aspect, the main sources of law comprised the “*Ordenacoes Filipinas*” and “*ius comune*”; while in the ideological aspect, the philosophy of Late Scholastic and Humanitarianism became dominant. See Almeida Costa, M. J., *Historia do Direito Portugues*, 3a ed., Almedina, 2001, pp. 289 ss.

Macau was a small city far away from the political and military centre of the Chinese Empire. Secondly because in terms of military and economic power, population and literacy, the Portuguese community in Macau was not in a dominant position. Nonetheless, since contact among Portuguese and Chinese people was frequent, juridical concepts were inevitably exchanging and penetrating from one side to the other. However, during this early period, the impact of Portuguese culture, especially the legal culture in Macau, was indirect and of limited dimensions.

3. *The rotten wood and the worm: colonialism and the critical period for legal transplantation (1849- 1974)*

A. *Colonization in general and the case of Macau*

Colonization, which causes transplantation of law in the recipient area, is quite a complicated phenomenon. The body of law develops in the country of origin over a long period of time and the nature of the law dovetails social conditions and institutions of the country of origin. In short, within legal families there is a “fit” between legal text and the social context in countries where a legal system has originated. However, when laws from origin countries were transplanted into other countries or regions they did not always fit the indigenous societies.

There were an array of different conflicting forces, continuous effects of local legal orders, the imposed legal forces and demands of the indigenous society. However, generally demands of the indigenous society were ignored or overwhelmed by the other forces. In this sense, legal transplantation is normally a result of two colliding forces and its outcome can be any one of the following three scenarios:

a) Firstly, the imposed legal order is completely absorbed by the recipient legal system and causes no change in the recipient legal culture. However, this never happens.

b) The imposed legal order is merged with the recipient’s system. This has been quite common in the world, both in colonial times and modern times. This often happens when the “donor” and the recipient countries belong to the same legal family and accept the changes smoothly.

c) The recipients accept the foreign legal system completely. This often happens in developing countries that receive a foreign law because of colonization, as is the case with Macau. The foreign forces are so dominant that the recipient regions cannot choose their own legal family.

As already stated, colonization can be considered as the most important driving force of legal transplantation in the early times of Macau’s

legal history, and the Portuguese legal system (which was considered as part of legal culture), which has successfully taken root in Macau. Intellectuals in ancient European powers (here we mainly refer to Portugal and Spain) sometimes justified their conquest or occupation with religious reasons (the divulgation of Christian faith), with the belief that the use of force in such cases corresponds to justice.⁴⁵ Yet authors of the modern day could hardly support such a point of view. Although Portuguese settlers did not colonize or conquest Macau by force in the beginning, the balanced “convívio” among Chinese and Portuguese in this small island began to change from the late XVIII century onwards, as soon as the Qing government started decaying and falling. Since then (namely, since the *Providências Régias* of D. Maria I of 1783), the intention of Portugal claiming sovereignty over Macau became more and more clear. The Portuguese seizure of control of Macau (in the end, still a game of power) started with the intervention of their Governor in all issues related to urban and rural administration of this “territory”,⁴⁶ and at the same time, claiming jurisdiction over the Chinese in and around Macau. Significant moves of Portugal and its colonial government in the XIX century include, inter alia, the following: in 1822 the Portuguese Constitution declared Macau an integral part of Portuguese territory (the first time Portugal claimed sovereignty over Macau); in 1845 Portugal declared Macau a free port, challenging the Chinese right to levy and collect custom duties,⁴⁷ and in 1849, Governor Ferreira Amaral took full control of Taipa and Coloane and abdicated the jurisdiction of the Qing government over Chinese residents in Macau. Finally, the Treaty of Beijing led to a remarkable integration of Macau into the Portuguese constitutional and administrative system.⁴⁸

B. How laws were transplanted in the colonization period

According to some Chinese scholars, in this period, Portugal established its colonial domination in Macau.⁴⁹ However, as we have shown in the previous discussion, Portuguese law was not dumped into Macau all of a sudden. The presence of the Portuguese and the use of Portuguese law in Macau, though in a restricted manner, was a continuous process. However,

⁴⁵ Legal historian A. M. Hespanha termed it “A antropologia jurídico-política da expansão portuguesa”. See Hespanha, A. M., *Panorama da História Institucional e Jurídica de Macau*, Fundação Macau, 1995, p. 31.

⁴⁶ Noronha e silveira, Jorge, *Subsídios para a História...*, op. cit., p. 12.

⁴⁷ Ghai, Yash, “The Basic Law of the Special Administrative Region of Macau: Some Reflections”, *International and Comparative Law Quarterly*, num. 49, 2000, pp. 183-198.

⁴⁸ Under the 1888 Beijing Treaty China agreed to perpetual occupation and governance of Macau by the Portuguese, and in return Portugal agreed not to alienate Macau to another state without Chinese consent.

⁴⁹ Wu, Z. L., *Macau Political System*, Macau Foundation, 1997, p. 89; Mi, Y. T., *Macau Legal System and Continental Law Family*, CUPL Press, Beijing, p. 19.

in the XIX century, this process suddenly accelerated and expanded. After decay and fall of the Qing Dynasty, the Portuguese government finally found an opportunity to take control of Macau. As a consequence of political control, the main body of Portuguese law was applied to the whole Macau society.

Systemically speaking, the most important indicators of this critical moment in the process of legal transplantation should be the main elements of Portuguese law, namely, the Penal Code (Código Penal) of 1852, the Civil Code (Código de Seabra) of 1867, Civil Procedure Code (Código de Processo Civil) of 1876 and the Commercial Code (Código Comercial) of 1888), which were all made applicable to Macau soon after their promulgation.

Nonetheless, in terms of shaping the political status of Macau and their impact on the life of the local people, we shall instead focus on three legal documents. First, the “Tratado de Amizade e Comércio com a China”, signed in 1862 and confirmed by the Qing Government in 1887, which recognized the perpetual occupation and governing of Macau by Portugal; second, the “Código dos Usos e Costumes dos Chinas de Macau”, of 1909, which collected some norms from Guangdong and Guangxi provinces, mainly related to marriage and succession;⁵⁰ and third, the “Lei de 11 de Abril de 1856”, the first law made by Portugal to regulate the occupation and transaction of non-cultivated land overseas,⁵¹ and a series of subsequent legislative attempts (namely, 1901, 1908, 1928, 1940, 1961, 1965, 1973, 1980) intended to modify or substitute the 1856 land law. It was by this series of land related legislations that Chinese residents were obliged to transact and register their rights to the land they had owned for generations, and had transacted according to the law or customary norms of their motherland. Since land and the plantings or constructions on pieces and parcels of land are the most important properties of the people, the impact of the change of land law was significant. In fact, many of the local residents failed to comply with the new measures imposed by the land law, and remained in possession without a legal title, a phenomenon whose impact subsists till date. Additionally, it must be noted that these land laws were not applicable in Portugal; these laws were tailor-made for Portugal’s overseas colonies only. The law of 1856 is actually considered an authentic move of the Portuguese project of colonization.⁵²

⁵⁰ Hespanha, A. M., *Panorama da História Institucional e Jurídica de Macau*, Fundação Macau, 1995, p. 64.

⁵¹ Martínez Valadas Preto, António, “O Regime de Terras do Estado em Moçambique, in *A Questão das Terras em Macau – Doutrina*”, *Revista Jurídica de Macau*, num. especial, 1997, pp. 27 ss.

⁵² *Idem*.

It is quite obvious that only from the XIX century onwards had the Portuguese legal system begun to exercise an overall influence on Macau and on the formation of Macau's legal culture. The influence was more by way of imposition than voluntary adoption. Although the Portuguese government at that time also took into consideration some customs and traditions of the local people, the law as a whole was not drafted according to values and needs of Chinese citizens. The result of such a transplantation was of course not satisfactory for them. According to the basic theory of legal transplant, this phenomenon (the moving of a rule or a system of law from one country to another, or from one people to another) is one of the two strangest paradoxes law has shown (another one is that "people's law can be regarded as being special to it and indeed a sign of that people's identity").⁵³ So on the one hand, there is truly an occurrence of legal transplant in Macau while on the other hand, as has been mentioned before, Macau has existed as an important port connecting Asia and Europe for more than 300 years, and both international and commercial transactions within Macau have been abundant, and these activities were basically regulated by a set of sophisticated rules. In this sense, transplant of the Portuguese Civil Code and Commercial Code into Macau had a positive impact. The Portuguese Civil Code of 1867 and Commercial Code of 1888, as a heritage of Roman law and XIX century French legal science, indeed provided Macau with a set of modern tools for the civic and commercial life of its people.

The current Macau Civil Code is the successor of 1966 Portuguese Civil Code, which was applied in Macau in 1967. The latter is one of the last civil codes issued by states on the European continent and it is also a learning and borrowing experience from other countries' codifications. Formally, it took the German Civil Code as its model and, therefore, the 1966 Portuguese Civil Code is divided into five Books: a General Part, Law of Obligations, Law of Things, Family Law and Law of Succession. Materially, solutions adopted by this code are closer to other European countries like France, Italy and Spain.⁵⁴ This civil code was amended in 1977 and the amendments were applied to Macau also in the same year.

Since the middle of the 19th century, Portuguese codes have been applied in Macau in two ways. One is direct application, and the other is with some reservation or amendments according to local customs and the traditional Chinese legal culture. Legal rules are transplanted easily and are

⁵³ Watson, Alan, *Legal Transplants, An Approach to Comparative Law*, Virginia, 1974, p. 22.

⁵⁴ See Io Cheng, Tong, "Law of Things in the Macau Civil Code: An Extension of the Romano-Germanic System Built Upon the Classical Concept of Ownership", *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*, Verlag Berlin Heidelberg, 2009, pp. 51 and 52.

accepted (of course, this was the only choice) into the system without great difficulty. Therefore, in this critical period, we may conclude that Portuguese law was transplanted to Macau.

However, in the spiritual context, the story is different. It is really difficult to identify a Macau legal culture, which the whole community accepts as its own identity, after penetration of Portuguese law.

The Portuguese settled in Macau and opened a port in the middle of the 16th century. After that for more than 4 centuries, the Portuguese brought to Macau not only their literature and fine arts but also a way of life in general and the legal system in particular. However, in view of the strong basis of the traditional Chinese legal culture, it was very difficult for Portuguese legal elements to penetrate into and be absorbed by the Chinese community. From the moment (the 16th century) the Portuguese law was brought in by the Portuguese until it became dominant in Macau in the 19th century, there were numerous and drastic changes in the history of mankind.

4. A European flower planted in Asian soil also needs water: the process of Macau legal localization (1974-1999)

If the early days of colonial rule were the critical moment for a legal transplant to occur (it did occur), we could characterize the last phase of colonial rules (1974-1999) as the critical moment for the formation of a Macau legal culture.

In 1974, there was a great reversal of Portuguese external policies because of the anti-colonialist Carnation Revolution.⁵⁵ After this revolution, a constitutional amendment in 1974 proclaimed the right of self-determination which led to independence of all Portuguese colonies, Macau included. Portugal promulgated an Organic Statute of Macau (*Estatuto Orgânico de Macau*) in 1976, which granted a high degree of autonomy to its territory in the Far East, like a father offering a wedding ring to his ready-to-wed daughter. A few years later, in 1979, Macau was recognized as a “Chinese territory under Portuguese administration.” After four rounds of talks, “the Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Question of Macau” was officially signed in April 1987.

⁵⁵ The Carnation Revolution was a left-leaning military coup which started on 25 April 1974, in Lisbon, Portugal that effectively changed the Portuguese regime from an authoritarian dictatorship to a democracy after two years of a transitional period known as PREC or On-Going Revolutionary Process, characterized by social turmoil and power disputes between left- and right-wing political forces.

In fact, starting from 1974, thanks to the revolution, the Portuguese Government of Macau had a good opportunity to construct the basis for a unique legal culture, but it was the core political concern of neither the government, nor the legal community existing at that moment. The most significant step was promulgation of the Organic Statute (1976), which was an important act at the political level.

Another important moment was in 1987, after the “Sino-Portuguese Joint Declaration” was signed. In order to match the new identity (no longer a colony of Portugal) and to prepare for the handover, the most important agenda for the Macau society was localization of the legal system (*localização jurídica*), the language (*oficialização da língua chinesa*), and government functionaries (*localização dos funcionários e agentes públicos*).⁵⁶ In a broad sense, all the three areas of localization were inter-related, but for the purpose of our paper, the following analysis focuses only on localization of the legal system.

During this period, Macau hoped to transform the former legal system (based on the five Portuguese codes and the traditional Chinese rules) into a new one, finally leading to a unique legal culture of Macau. To achieve this goal, the process of Macau’s legal localization followed some basic principles. Firstly, the localization process should be a preparation for the future application of Basic Law and secondly, to make sure that the former Macau legal order remained in force, the mixed nature of Macau’s legal system continued to be the unique feature of Macau’s legal culture. Thirdly, the move towards localization matched the local situation of Macau. With its resident community comprising mainly of ethnic Chinese people, Macau has had its own historic and cultural background, social life and sense of values that is different from Portugal. So one of the objectives of localization was to transfer the intrinsic values in Macau law into the new Macau social values, with the former originating from Portugal and the latter having evolved from the traditional Chinese culture.

At that time, the Portuguese Government of Macau was not the only player in the political life of Macau, though it was the decisive factor in case of a large number of related issues; *inter alia*, the development of a unique legal culture for the future Special Administrative Region, on lines similar to what the British had done in case of Hong Kong.⁵⁷ Nevertheless, the

⁵⁶ Tongpeng, Sun, “Uma reflexão sobre a Localização Jurídica de Macau”, *Revista de Administração Pública de Macau*, Direcção dos Serviços de Administração e Função Pública, num. 42, 1998, p. 1005.

⁵⁷ In fact, the task of building a legal culture for Hong Kong might be easier than that of building one for Macau, because it is conventional to view that the most determinant factor of the whole legal culture in Common Law jurisdictions is the judiciary, while for Continental Law jurisdiction, the determinant factor is more the legislature and legal scholars.

attention of the whole government and the society was focused upon a very specific direction: localization. In fact, there was nothing wrong with such an orientation in general. Within the particular area of legal localization, the political players were doubtlessly allowed to prepare or develop a legal culture for Macau. However, interpretations of most social and political players (whether expressed by Chinese officials,⁵⁸ or Portuguese officials,⁵⁹ or legal professionals,⁶⁰ or local born politicians,⁶¹ etc.) about legal localization were mostly interpretations in the *stricto sensu*: the preparation of a set of hardware indispensable for the minimum functioning of a locally based judicial system.

In fact, it would be totally unfair if we conclude here that in the transition period, nobody was aware of the importance of constructing a legal culture (unique or not) for Macau. In several social sectors (e.g., students were sent to Portugal, a local law school was established, and law textbooks originally in Portuguese were translated into Chinese), efforts were continuously made for the development of Macau law. At the intellectual level, the legal advisor of the legislative assembly Sun Tongpeng, in a retrospective study about the Macau legal localization process, had clearly pointed out the distinction between legal transplant and the formation of a legal culture.⁶² The implication was that a Macau legal culture was not yet established. We of course agree with the author in this respect. The pity is, such kind of exclams or urges could hardly change the mind of policy makers, nor could awaken the consciousness of common people.

⁵⁸ For example, Ambassador Kang Jimin, who lead the Chinese part of the GLC, had pronounced during a meeting that legal localization is “the checking of inventory, the classification, the revision, the translation (into Chinese) and the adoption of the law applicable in Macau”. See Hanqiang, Huang and Zhiliang, Wu, *Panorama de Macau*, Fundação Macau, 1996, p. 528.

⁵⁹ For example, Bruxo, Jorge, “Macau em Transição”, *Revista de Administração Pública de Macau*, Direcção dos Serviços de Administração e Função Pública, num. 41, 1998, p. 680, which reduced the problem of legal localization to legislative localization.

⁶⁰ See In Fong, Chio, “A Localização dos Quadros Jurídicos de Macau, Reflexão e Perspectivas, in Administração”, *Revista de Administração Pública de Macau*, Direcção dos Serviços de Administração e Função Pública, num. 42, 1998, p. 1013, which paid a lot of attention to the situation of local people occupying legal posts in the government and the legal profession.

⁶¹ The legislator Ng Kuok Cheong has extended the range of legal localization to the “divulgation of law to the local society of the people”, yet such an extension is still in the formal level of law. See Kuok Cheong, Antonio Ng, “A Localização da Legislação no Período de Transição, in Administração”, *Revista de Administração Pública de Macau*, Direcção dos Serviços de Administração e Função Pública, num. 28, 1995, p. 307.

⁶² See Tongpeng, Sun, “Uma reflexão sobre a Localização Jurídica de Macau”, *Revista de Administração Pública de Macau*, Direcção dos Serviços de Administração e Função Pública, num. 42, 1998, p. 1010.

Visions determine accomplishment! After more than 20 years of effort, we could say the objectives set forth by Chinese and Portuguese politicians in the transition period have been generally accomplished; almost all leading positions in the Macau government are occupied by Chinese citizens with Macau residency; almost all important legal documents (namely, the Macau Basic Law, the Civil Code, Penal Code, Commercial Code, Civil Procedure Code, Penal Procedure Code, Administrative Procedure Code, Labor Law, etc.) are in both Chinese and Portuguese, all legislations produced after the handover are elaborated in both languages, a great majority of judicial positions (judges of courts in three instances and prosecutors at all levels) are occupied by Chinese citizens with Macau residency, the legislature (together with the administrative power) is able to react to claims of the residents, and most important of all, there is an independent judicial system, which many nations only achieved through decades of struggle and sacrifices of life and blood.

Looking at the process retrospectively, we may easily conclude that things could have been done better. However, if we look at the history in the right perspective, nobody could have predicted whether things could really have been done better or worse. What has gone has gone. We do not intend to pass judgment on the overall effect of such a process of localization, nor do we intend to ignore, upgrade or degrade the great achievements accomplished by the participants. What matters is that in the last moments of the transition period (1999), a long process of legal transplant finally came to an end and Macau had a relatively complete and operational legal system.

III. IN SEARCH OF A LEGAL CULTURE AT PRESENT AND IN THE PAST: - IS THERE A GHOST INSIDE THE MACHINE?

1. *Prologue: the target of our search*

In the long life span of a person, no one can avoid searching for something, say, love or the meaning of life. Yet such searches in life sometimes lack a target, and a search without a target is destined to be a blind search with no result. The search for a legal culture could not have been such a blind search.

In a broad sense, legal culture can of course be described as a part of the general culture, which in itself is still a vague concept. In a cultural and social context, law is generally one of several factors interacting with each other to form the grand social framework; legal activities are no different from any other social activity, and the concept of legal culture is totally open. Nonetheless, in a more technical or dogmatic sense, the concept of law, materialized in the form of a normative text, is mainly a language system;

activities of most legal professionals (judges, lawyers, and scholars, etc.) can be characterized as interpretation.⁶³

In the following discussion, we intend to distinguish law (and thus legal culture) in the broad sense and in strict sense, and focus our discussion on the latter. To start with, and for the purpose of target setting, we would like to quote again the notion of legal culture introduced at the beginning of this paper: “*the framework of intangibles within which an interpretative community operates, which has normative force for this community...and which, over the longue durée, determines the identity of a community as community*”.

In line with this notion but with one small adjustment, the following concepts are taken to be the target or concrete indicators of our search for a legal culture of Macau: a) a framework of tangibles and intangibles; b) an interpretative community; and c) the identity of a community as a community.

2. *Has a legal culture ever existed in the past of Macau?*

A. *A possible Chinese legal culture*

As we have shown in previous discussions, 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 the Qing dynasties are of course a part of the Macau legal history. Nevertheless, this part of the legal history of Macau has had no basic impact on the current Macau law, like the same set of rules has left no influence on the current legal system in Mainland China.

As a process of cognition, the interpretation of law is of course 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. The problem is, the influence of such a spiritual culture contributes only to the so-called “fore-understanding”⁶⁴ in the process of interpretation, and most important of all, it has little influence on the legal text, which constitutes the material base of

⁶³ For a comprehensive exposition on the relation between law and language and the process of interpretation, see Rüthers, Bernd, *Rechtstheorie*, translation by Ding Xiao Chun, Wu Yue, Law Press China, 2005, p. 71.

⁶⁴ In a sense even broader than the context of law described by Larenz, Karl, *Methodologia da Ciência do Direito*, 3a ed., Tradução de José Lamego, Fundação Calouste Gulbenkian, 1997, pp. 457 ss.

the past or current Macau legal framework, and is the starting point of legal interpretation.

Finally, it must be noted that in ancient Chinese traditions and history, the concept of a legal profession and a legal community with distinctive identity never existed.

B. A possible Portuguese legal culture

Since the settlement and self governance of the Portuguese in Macau in the XVI century, Portuguese law, though still in the “*Época das Ordenações*” at the moment, had already been brought in. It is undeniable that for a very long period, the Portuguese law was applicable only to a population which represented a minority. Even after the seizure of control in the XIX century, when the Qing Dynasty lost its jurisdiction over Macau, the Portuguese law in force in this city and, in principle, applicable to all its citizens, was hardly known to the residents of Chinese origin, mainly due to the language barrier.

The fact that the Portuguese law in XIX and XX centuries was little known to or recognized by Chinese citizens, who were in an absolute majority in Macau, does not change the reality that Portuguese law was the law in force and was applicable at that moment. On the other hand, from a systemic point of view, Portugal being a European country and deeply influenced by Roman law, a relatively complete legal framework (including a judicial system, various legal professions, and rich with cases and legal literature) was built for the “Portuguese Metropolis” and its colonies overseas.

In the eyes of most legal professionals (or anyone who discusses matters in a rational way) in the last century, Portuguese legal traditions and culture were and are the only legal culture for Macau, though one may argue that it is not proper for Macau. Why not? The cases from Portugal were the only case-references for Macau courts; the doctrines or academic references used by legal professionals (and later in legal education) were books or essays mostly written by Portuguese scholars in Portugal; the government functioned with Portuguese law and in the same pattern as in their home land; and the legal profession was almost exclusively comprised of Portuguese professionals.

It can be reasonably inferred that during this period, if there was a legal culture in Macau, it was the Portuguese legal culture. This legal culture was of course not designed to address the interests and the particular social reality of Macau because it was a product of an imposed legal transplant.

After the handover in 1999, with the process of legal localization, the original Portuguese legal sources were reviewed and transplanted into local sources. Most legal literatures have since been translated into Chinese and are being used as teaching materials by universities. Legal positions in the judiciary, in liberal practice and in government departments are mostly occupied by local residents with Chinese nationality.

However, after entering the XXI century and with a new political and legal status, it is not so easy for this old city to declare that the originally Portuguese legal culture has automatically changed its face and become the Macau legal culture. As stated above, a legal culture is a “framework within which an interpretative community operates,” and the two most important elements, legal writings and past cases providing support to the interpretative activities, are gradually moving away from our legal reality.

3. *The possibility of becoming an “isolated island” of law and a machine without a ghost*

A. *The theory of “isolated island” of law*

In continuation to our discussion in the previous paragraph, it is not without reason to worry about the possibility of the Macau legal order turning into a so-called “isolated island” of law.⁶⁵

As we have shown, the main sources of law in Macau are compiled into a number of codes (*inter alia*, the Civil Code, Penal Code, Commercial Code, Civil Procedure Code, Penal Procedure Code, Administrative Procedure Code, and Property Registration Code, etc.), and almost all of them have been transplanted from the corresponding Portuguese legal sources. In the past, the legislative and interpretative support for this legal system has come from Portuguese legal writings and Portuguese court cases (*jurisprudência*). However, as time goes by and the political situation changes in the whole of Europe, Portugal and its law shall move towards a direction of unification with other European countries and in this process, the Portuguese legal tradition is obviously not in a dominating position. Since legal writings and court decisions generally follow the footsteps of positive law, the future development of Portuguese law shall at least be less beneficial to Macau.

⁶⁵ This concept is inspired by the phenomenon of isolation of a language or a dialect, which circulates within a small population, surrounded by other strong languages and lost links to its affinities or origin. History has proven that in most cases, a language or dialect under such a situation is not far from extinction.

Apart from the Portuguese legal culture once dominant in this city, there has been no other legal culture in the past or in the present. Hong Kong legal practices have been and continue to impact Macau legal practices, but they have been very far from constituting part of a culture or changing the direction and physiognomy of the Macau legal culture. Chinese law is, in itself, undergoing a process of modernization, westernization and in a certain sense, localization. And according to the constitutional guarantee, the main sources of Chinese law shall not apply to Macau in the visible future. Legal research in such a big country is developing very fast, the language is common, and research results from the mainland surely do serve as references, but this kind of impact does not enter immediately into the Macau legal culture. Its effect shall be remote and requires a long process of absorption by the Macau legal community.

While the Macau law preserves the original physiognomy of Portuguese legal tradition and is not able to trigger independent regeneration, it seems quite possible that Macau law shall turn into an isolated island of law. History has already shown us that the final destiny of a language⁶⁶ under such circumstances is pessimistic.

B. *The “status quo” as a machine without ghost or with too many ghosts?*

As we have seen in previous discussions, after the process of localization, the hardware of the Macau legal framework, a legal machine functioning for years, has basically been examined (passing the political test framed by the Joint declaration and Basic Law) and polished (being adapted at its minimum to the local reality), and is ready to continue its service.

Over a period of (last) ten years, the functioning of such a machine has been continuously tested by the legal community and by the society in general. Although we foresee the possibility of Portuguese legal culture going far from us, it is still in a future tense, and the future is always uncertain.

At the current moment, we believe the Macau legal system is still a machine with a ghost. The ghost behind it continues to be the Portuguese legal writings and Portuguese courts' decisions of the past. The link established between the Portuguese legal tradition and the Macau legal system is dependent on several key factors: a) legal education with Portuguese origin; b) bilingualism; and c) the cognition of the legal community.

⁶⁶ For the topic of law seen as a language, see the work of Peng-Hsiang, Wang, *Recht, Semantik und Objektivität*, in C. Bäcker/S. Baufeld (Hg.), *Objektivität und Flexibilität im Recht*, ARSP, Beiheft 103, S. 60-71.

a. Legal education

Legal education in Macau bears the twin functions of a professional education and an academic education. It started in the late 1980s with a law program taught in Portuguese language. The teaching staff as well as teaching materials were directly imported from Portugal and after a long effort, the first batches of students graduated in the mid 1990s. This created the basic conditions for the opening of a program of law in Chinese, which started in 1996. The course structure was almost identical to the Portuguese syllabus, and the teaching materials used in this program were translated versions of those used in the Portuguese program. The situation changed only in the XXI century, and after the handover of Macau. Since then, local academics have started preparing their own textbooks and young teachers are beginning to grow at a fast pace; a masters program taught in Chinese and English has begun. However, compared to the abundance of Portuguese legal literature, local production is still premature and seems impotent in influencing the professional community. Thus the current Macau legal system is still closely linked to Portuguese legal culture.

b. Bilingualism

Since the process of localization began, legislations have generally been published in both languages. Currently Chinese is increasingly being used in public administration (in residents' daily life, Portuguese has never been widely used). However, the Portuguese language is still widely used in judicial proceedings where the influence of the Portuguese legal system and principles continues to be greatly reflected. The judicial system is widely regarded as independent and reliable. In Macau, major legislations currently in force are available in both the official languages. As mentioned in the previous paragraph, most existing doctrinal research materials also come from Portuguese academics.⁶⁷ For those who are not familiar with either Portuguese or Chinese, access to Macau laws and regulations becomes quite difficult. There are some English translations available (the Commercial Code, some banking and insurance laws and IPR legislation), in an effort to make the laws more accessible to foreign investors. However, understanding English translations of Macau laws is still a challenge for people familiar with Common Law terminology; specialists' advice is usually essential.⁶⁸

⁶⁷ Therefore, for the best understanding of Macau's legal system, Portuguese is still the main language.

⁶⁸ However, the legal profession in Macau is small and has had limited exposure to large scale international projects and transactions of the type that are ongoing and planned in the region. Accordingly there is also a need for advice from international law firms who have worked on similar types of projects and are familiar with the issues and risks that arise.

The insistence on bilingualism in the legal area permits direct usage of Portuguese legal materials in Macau. In this sense, the coexistence of the Sino-Portuguese bilingual legal language in Macau society is not only a unique phenomenon in its legal culture, but also the most challenging issue for the future of the Macau legal system.

c. Legal practice

Legal practices in Macau are a crucial element in verifying whether there is a legal culture in Macau. Although constructed under the Portuguese legal tradition, the Macau legal system, as a matter of fact, is deeply planted in an essentially Chinese society, which is absolutely divergent from a society with a full-bodied Portuguese culture. Being aware of the possibility of cultural conflict, the Joint Declaration offered the answer, in theory, that: “the legislation in Macau should be based on the Macau society; represent the interests of the majority of Macau residents; according to the Chinese culture and tradition”.⁶⁹

However, the key factor in legal practice is always human. For a long period, the legal profession in Macau had been dominated by overseas Portuguese and locally-born Portuguese. There were no law schools in Macau until 1988; all legal professionals were graduates from Portuguese law schools. In 1962, validity of the *Portuguese Judicature Statute of the Overseas Territories* was extended to Macau. Under the Statute, the bachelors of law graduating from Portuguese law schools could become practicing lawyers after they were registered in the court in Macau which was responsible for supervising their practice.

With the increase in the number of practitioners in the legal profession, and in view of repeal of the above statute by the Portuguese legislature in 1984, the Macau government decided to adopt Portuguese traditions followed by the professionals. The government provided general guidelines for the legal profession. Specific matters, such as the *Practice of Law* and the *Protection of Lawyers' Interests* were addressed by the bar association, composed of practitioners of law. Therefore, the Macau governor enacted the *Estatuto do Advogado* (Lawyers' Statute) in the form of a decree, which was amended in 1992 and again in 1995. After that, the Macau governor enacted another decree in 1992, and in 1995, the *Código Deontológico* (Lawyers' Deontological Rules) and the *Código Disciplinar dos Advogados* (Disciplinary Code for Lawyers) were proposed. These were submitted for ratification by the Macau Lawyer's Association. These three legal documents established the basic framework for subsisting of the legal profession in Macau.

⁶⁹ See Joint declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the question of Macau.

According to the record of the Lawyers' Association in November 2009, there are 182 registered lawyers in Macau.⁷⁰ In the early 1980s, many bachelors of law who were native Portuguese came to Macau to earn a living, and later many of them became government officials. In the 1990s, when the economy in Macau started growing rapidly, some of these government officials resigned and entered the legal profession again. Among these Portuguese lawyers practicing in Macau, some were registered in the Portuguese Bar Association, in accordance with Portuguese Law and were under its supervision, but others were not. Compared with the first years after the return of Macau, legal practices in Macau have made huge progress. In the year 1999, when Macau returned back to China, only 85 lawyers were registered in the only functioning association of lawyers. Localization of judicial officials in Macau developed even faster than the development of legal practitioners as localization of judicial officials was enhanced by the government, whereas lawyers are independent professionals.

It is true that with the process of localization, legal profession and legal practice are gradually being dominated by Chinese residents, but this change has hardly affected the presence of the Portuguese legal culture in this system, since most professionals were educated under the influence of Portuguese legal culture.

C. *Interim conclusion*

Base on the above analysis, we shall affirm that the current Macau legal system is neither a machine without a ghost nor a machine with too many ghosts. The legal culture behind this system is still Portuguese in nature. Nonetheless, it is very probable that the ghosts are expelled and more are not generated. Thus it may become an isolated island, or it may be absorbed by another strong neighboring culture, be it the culture of Hong Kong, or the Mainland, or even Taiwan.

IV. THE FORMATION OF A UNIQUE LEGAL CULTURE FOR MACAU: A STILL ON GOING PROCESS AND A CHALLENGE FOR THE NEAR FUTURE

1. New elements favoring the formation of a new legal culture

In our previous discussions, we concluded that the Portuguese legal culture is still the ghost the current Macau legal machine is living with. Suppose nothing new was added to legal sources after the handover and

⁷⁰ Static source, Associação de Advogados de Macau, *available at its official website*, visited on November 28th, 2009.

nothing new shall be added in the future. Then in theory, it shall be possible for us to rely on the relics of the Portuguese legal culture. Nevertheless, the truth is, in any legal system, new elements are added every moment to existing ones, and if all components of the system do not respond to the changes within a reasonable time, after a critical point, an outburst shall occur and the original balance shall be broken. The Macau legal system is no exception. In fact, as early as the early XX century, when the legal transplant first reached a high pitch, new elements had already been added to the Portuguese law (for example the “Código dos Usos e Costumes dos Chinas de Macau” of 1909) and they were applied to Macau. However, those new elements were in fact sporadic and occasional and not strong enough to cause qualitative change. On the other hand, the political environment at that time also did not permit any attempt (only in a hypothetical sense) of this nature.

Social change in Macau is now taking place faster than ever before, and the political environment is at least not hostile to a re-evaluation of the current system (for example, the Macau government set up the Law Reform Office and the Law Reform Consultative Committee in 2005). In order to avoid the situation of an “isolated island of law,” the development of a unique Macau legal culture is crucial and urgent.

A unique legal culture is possible only when there are elements that make it unique. It is far too early to determine how big is the effect of heritage of Confucianism in the minds of Macau residents (regardless of their birth place) who have been brought up in an environment completely exposed to western values. Nevertheless, apart from intangible and hard-to-measure elements, there are still other concrete elements which bring new challenges to the existing legal system and favor or even trigger outrage for a new legal culture. We have identified four of them: a) the Basic Law of Macau SAR; b) commercial dominance; c) globalization; and d) the development of legal research ability in the Mainland.

a. The Basic Law of Macau Special Administrative Region

After 1999, the most important element determining the destiny of Macau legal order in the future Special Administrative Region of China was *The Basic Law of the Macau Special Administrative Region of the People's Republic of China*, a national legislation of quasi-constitutional nature, adopted by the National People's Congress (NPC) on 31 March 1993 which became effective on 20 December 1999. In accordance with Article 31 of the Constitution of the People's Republic of China,⁷¹ and Chapter I (General

⁷¹ Constitution of the People's Republic of China, Article 31 reads, the state may establish special administrative regions when necessary. The systems to be instituted in special

Principles, Articles 2-11) of Macau Basic Law,⁷² Macau has special administrative region status under the famous “one country, two systems” policy. The system guarantees that China’s socialist economic system will not be practiced in Macau and that Macau will enjoy a high degree of autonomy in all matters except foreign and defense affairs until at least 2049, i.e. fifty years after the handover. Thus the previous economic, legal and social systems are preserved automatically.⁷³

The enforcement of Macau Basic Law added at least two new elements to the future legal culture of Macau. On the one hand, the Basic Law has really granted Macau a high degree autonomy, while on some occasions, especially when entering into international or regional agreements, there is exercise of some power by the central government.⁷⁴

On the other hand, compared to the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, there are several special provisions which are worth our attention. Firstly, Chapter IV, Section 7 (Articles 101 and 102 included), which is the special point in the Macau Basic Law. Unlike Portugal, PRC doesn’t recognize double nationality. To solve the nationality problem of the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges and procurators in Macau, Article 101 provides that these people must “uphold the Basic Law of the Macau Special Administrative Region of the People’s Republic of China, devote themselves to their duties, be honest in performing official duties, swear allegiance to the Macau Special Administrative Region and take an oath to this effect in accordance with

administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.

⁷² Basic Law, Article 11 reads, “In accordance with Article 31 of the Constitution of the People's Republic of China, the systems and policies practiced in the Macau Special Administrative Region, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be based on the provisions of this Law. No law, decree, administrative regulations and normative acts of the Macau Special Administrative Region shall contravene this Law”.

⁷³ Ghai, Yash, “The Basic Law of the Special Administrative Region of Macau: Some Reflections”, *The International and Comparative Law Quarterly*, vol. 49, num. 1, January, 2000, pp. 183-198.

⁷⁴ Basic law, Article 138 reads, “The application to the Macau Special Administrative Region of international agreements to which the People's Republic of China is a member or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. International agreements to which the People's Republic of China is not a party but which are implemented in Macau may continue to be implemented in the Macau Special Administrative Region. The Central People's Government shall, as necessary, authorize or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements.”

law”.⁷⁵ There is no similar provision in Hong Kong Basic Law. Secondly, the provision, as defined in Article 7 of the Macau Basic Law, regarding the ownership of land and natural resources, land and natural resources within Macau “shall be State property, except for the private land recognized as such according to the laws in force before the establishment of the Macau Special Administrative Region”; Hong Kong Basic Law does not provide for this exception. This can be attributed to their respective different histories. Land and natural resources have always been state property in Hong Kong. However, this is not the case in Macau. There is land of the Church, as well as land granted to local landlords by the Chinese Qing Empire and recognized by the Portuguese government as being under private ownership. Thirdly, clauses about economic policies in Hong Kong and Macau Basic Law are divergent, mainly because of divergence of their respective geographical positions and economic conditions. The tourism industry, with gambling as its central feature, has a long history in Macau and is also a crucial pillar of the local economy.⁷⁶ Gambling is legalized in Macau by government’s special permission (this part is analyzed in detail later). Also, the Basic Law provides that the Macau SAR shall “practice an independent taxation system,” and “the taxation system for franchised businesses shall be otherwise prescribed by law”.⁷⁷ This clause provides for the possibility that the legislative organ can make laws on gambling according to the Basic Law and this is also an important factor in confirming legality of gambling in Macau. However, Macau has never been an international financial centre like Hong Kong. The Hong Kong Basic Law provides that the government of the Hong Kong SAR shall “provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre”.⁷⁸ Fourthly, there is also a difference in the clause about the Office of the Chief Executive. Hong Kong Basic Law provides that “the Chief Executive of the Hong Kong Special Administrative Region shall be a Chinese citizen of not less than 40 years of age who is a permanent resident of the Region with no right of abode in any foreign country and has ordinarily resided in Hong Kong for a continuous period of not less than 20 years”,⁷⁹ while there is no similar provision in Macau Basic Law. This is also attributed to the special historic background of Portugal-Macau relations. More than one hundred thousand Macau residents hold Portuguese passports, which means they hold nationality of Portugal and the right to be permanent residents of Portugal. If “with no right of abode in any

⁷⁵ Basic Law, article 101.

⁷⁶ National People's Congress' decision on the foundation of the first session of the Macau Special Administrative Region Government, the Legislative Council and the judicial organs.

⁷⁷ Basic Law of Macau, Article 106.

⁷⁸ Basic Law of Hong Kong, Article 109.

⁷⁹ Basic Law of Hong Kong, Article 44.

foreign country” was put as the precondition, more than a quarter of Macau residents would have been deprived of the right to being elected.

In any sense, the constitutional guarantee of Macau Basic Law for “two systems” concretized by preservation of original legislations, as well as the different treatment given to the two SARs, are the most important foundations for the formation of a unique legal culture. This shall also be the greatest challenge for the Macau legal community in terms of their profession.

b. Commercial dominance

Generally speaking, business law is the product of development of the commodity economy. Modern Business Law was mainly derived from medieval Italian businessman customary law and gradually extended to France, Germany, Spain and Portugal with the development of maritime trade. Macau Business Law refers to behavioral norms of Macau’s commercial activities and commercial relations resulting there from.

After the Portuguese permanently settled in Macau, both Chinese and Portuguese merchants flocked to Macau, and then it became an important transit point for Portuguese trade on at least three routes.⁸⁰ At the same time, Macau became an important trading post.⁸¹ As already mentioned, Macau was still governed by the Chinese Empire at that time, so traditional Chinese rules were applied (including the rules on relative business).

In the 19th century, Portuguese laws began to be transplanted in Macau gradually, while at the business level, only the Edict and Lex were applied. Before promulgation of the Macau Commercial Code in 1999, Macau business law was the extension of Portuguese commercial law, which was not a separate legal mechanism but the collection of several legal areas. At that time, the Macau Business Law was constituted of the 1888 Portuguese Commercial Law, and the 1901 Portuguese Limited Corporation Law. However, amendments of the above rules and some other new legislations did not extend to Macau.

After the first half of the XX century, Macau’s economy changed drastically. As Hong Kong gradually developed into a world financial centre,

⁸⁰ The first one is the Macau-Malacca-Goa-Lisbon; the second one is the Guangzhou-Macau-Nagasaki and the last one is the Macau-Manila-Mexico.

⁸¹ Macau was a center of activity for Catholic missionaries, as it was seen as a gateway for conversion of the vast populations of China and Japan. Jesuits had first arrived in the 1560s and were followed by Dominicans in the 1580s.

its impact reached Macau also. The most remarkable influence was in the banking sector. Some commercial banks with branches in Hong Kong started opening their sub-branches in Macau. Since there were no sophisticated banking rules in Macau at that time, operations of the banking industry generally followed the Hong Kong model. On the other hand, in the trading area, since most business transactions were with Hong Kong, Macau traders had no choice but to follow a set of trading rules introduced by their Hong Kong partners. Last but not the least, since the real estate market in Hong Kong was very sophisticated and many of the investors were from Hong Kong, real estate transactions also absorbed some of the features of Hong Kong Law. As a matter of fact, in the commercial area, Hong Kong commercial rules deeply penetrated into Macau's legal system.

Another sector which experienced the impact of commercial dominance on law is the gambling or the so-called gaming industry. Gambling in Macau has been legal since the 1850s when the Portuguese government legalized this activity in the colony. From then on, Macau has been known worldwide as the "Monte Carlo of the Orient," and gambling has become a significant part of its economy. Gaming Law plays an important role in Macau's legal culture. However, it is not considered a separate branch of law in the traditional sense. Instead, it is a transversal gathering of a range of legal rules related to gambling; the relative clauses are included in Constitutional Law, Administrative Law, Tax Law, Company Law, Contract Law and Criminal Law.⁸²

Firstly, the regulation of gaming is premised on Administrative Law concepts which are similar to other Civil Law jurisdictions.⁸³ After the transfer of sovereignty, the Government of the Macau SAR embarked on a major overhaul of the gaming sector, by opening the sector to various operators so as to generate competition.

Secondly, the law provides that gaming concessionaires must be public companies, to which special rules apply, in addition to the general rules stated in the Macau Commercial Code 1999, as amended. There are also specific rules in Company Law related to promoters of gaming companies.

Thirdly, from the perspective of Contract Law, gaming and betting are contracts which may or may not generate civil or natural obligations for

⁸² In this manner, issues of public law as well as private law are of relevance for gaming.

⁸³ Gaming is based on the concept of administrative concessions (and sub-concessions), supervision of concessionaires, and powers of government intervention.

the concerned parties. The 1999 Macau Civil Code⁸⁴ has specific regulations for gaming and betting from the perspective of the law of obligations,⁸⁵ which consists of an article in Chapter XIII, Gaming and Betting, of Title II, of Contracts in Special, Book II, The Law of Obligations),⁸⁶ which states that gaming and betting generate natural obligations except in sports competitions and where the law provides otherwise.⁸⁷

Finally, from the perspective of Criminal Law, there are specific criminal offences related to gaming;⁸⁸ other Criminal Law matters are covered by broader laws.⁸⁹ In addition, general laws on prevention and repression of money laundering and financing of terrorism through casinos apply.

Since Portuguese colonial authorities had a tradition of respecting the customs and traditions of the people living in places that they had colonized, they took no action to stop gambling. Hence gambling continued to prosper, and this was then reflected in the legal system of Macau. As mentioned above, gambling constitutes a part of Macau's unique culture as hitherto developing particular gaming laws and regulations to govern the gambling industry continue to be reflected in the legal system of the island. They affect legal practices (as well as minds) of the lawyers and other practitioners and eventually the life of the people in Macau. After the handover, owing to the opening of market to foreign investors and the economic development of China, the gaming industry has developed at a rapid pace. As foreign investors familiar with another legal family walk in and the rhythm of economic activities accelerates, laws related to this sector are facing a big challenge.

⁸⁴ The 1999 Macau Civil Code is an updated and "localized" version of the 1966 Portuguese Civil Code, which, in turn, has been heavily influenced by the 1896 German Civil Code, reflecting the turn to the German influence that took place in Portuguese legal scholarship from the beginning of the 20th century.

⁸⁵ Understood as relations between persons (creditor and debtor) arising not only as a result of contracts but also of torts, restitution, and other sources.

⁸⁶ This article reads, 1. Gaming and betting shall be sources of civil obligations whenever special laws provide to such effect, and, as well, in sports competitions in relation to those persons taking part in them; otherwise, if lawful, gaming and betting merely shall be a source of natural obligations. 2. If there has been fraud in its execution, the contract shall not produce any effect to the benefit of a person who practiced it.

3. Special laws on matters regulated in this chapter shall not be affected.

⁸⁷ For a comprehensive discussion on this contract, see Trigo, Manuel, "Dos Contratos em Especial e do Jogo e Aposta no Código Civil de Macau de 1999", *Nos 20 anos do Código das Sociedades Comerciais – Homenagem aos Profs. Doutores A. Ferrer Correia, Orlando de Carvalho e Vasco Lobo Xavier*, vol. III, Coimbra Editora, 2007, p. 370 ss; also Io Cheng, Tong, *International Encyclopaedia Laws, Macau Contract Law*, 2009, p. 168 ss.

⁸⁸ See Law 8/96/M, of July 22nd, and Law 9/96/M, of July 22nd.

⁸⁹ The Penal Code and the law on Organized crime.

Influence of commercial dominance on the legal system needs attention of the legislature as well as legal scholars dedicated to formation of a Macau legal culture.

c. Globalization⁹⁰

Many scholars have observed that the era of globalization of law will inevitably follow globalization of economy.⁹¹ Globalization is foremost an economic process.⁹² It is also a political event, as is evident from the spread of democratic principles and human rights in many nations; many human rights violations are no longer treated as domestic affairs. “Globalization is causing, and is being reinforced by, a world-wide convergence of economic and political values that portend a possible, though distant, future world in which human beings will look upon themselves as part of a single humane civilization comprised of a single human race”.⁹³ Law has been important in managing the global economy and may acquire greater importance with respect to globalization.

The 20th century can be characterized as the “century of transition.” As a result of the two World Wars, two “worlds” were formed and a third joined them during the period of worldwide de-colonization that followed. Membership of the United Nations increased from fifty states in the 1950s to 188 states in the late 1990s. The established world order, with “east-west” and “north-south” divides, entered a period of transition in the 1990s with the collapse of the Soviet Union. This new period has been labeled “world

⁹⁰ Though scholars and states commonly endorse this notion, the precise definition still remains unclear. An early description of globalization was penned by the American entrepreneur-turned-minister Charles Taze Russell who coined the term “corporate giants” in 1897. However, it was not until the 1960s that the term began to be widely used by economists and other social scientists. It had achieved widespread use in the mainstream press by the later half of the 1980s. Since its inception, the concept of globalization has inspired numerous competing definitions and interpretations.

⁹¹ See, Mistelis, Loukas A., “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations”, *Int’l L.*, num. 34, 2000, p. 1055.

⁹² The origins of globalization can be traced back to the writings of Wendell Wilkie and the Club of Rome. These early formulations, however, occurred prior to the collapse of Bretton Woods and the development of the new global communication technology. See Gordon Walker, Gordon and Fox, Mark, “Globalization: An Analytical Framework”, *Ind. J. Global Legal Stud.*, num. 3, 1996, p. 375. “Globalization” should be distinguished from “internationalization,” the guiding force of the twentieth century. See Delbruck, Jost, “Globalization of Law, Politics, and Markets—Implications for Domestic Law: A European Perspective”, *Ind. J. Global Legal Stud.*, num. 1, 1993, p. 9. See also, Mistelis, Loukas A., “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations”, *Int’l L.*, num. 34, 2000, p. 1057.

⁹³ Scita, Alex Y., “Globalization and the Convergence of Values”, *Cornell int’l l. J.*, num. 30, 1997, p. 429.

disorder”.⁹⁴ Countries arising out of the remnants of the Soviet Union immediately confronted a number of serious political and economic problems. Each had to wrestle with issues of sovereignty and democracy, succession in international treaties, and, in some cases, civil wars or other internal or international armed conflicts.

Since then, accompanied by the global flow of technologies and capital, globalization of law has become a complicated movement all over the world. Legal rules and regulations have become transnational, and are gaining more and more influence on the global stage. Legal globalization is considered an important part of the globalization process. To some scholars, globalization of legal rules can be reached in four ways: 1) globalization of localism; 2) localized globalization; 3) cosmopolitan; and 4) protection of common heritage of human kind.⁹⁵ However, according to the author’s point of view, the cosmo-political way of realizing the goal is overlapped by the means of protection of the common heritage of human kind.

The first issue being challenged, global governance and international rule of law, at the very first beginning of this conception,⁹⁶ has a close relationship with formation of modern national states. It is generally accepted that rule of law is the common module of governance in modern civilized countries, as well as the method of legitimate construction of modern national states. Hence, despite the challenges to the conception of legal globalization, the generally accepted fact is that problems caused by globalization cannot be well solved within the framework of traditional sovereignty of nation states; they can only be solved under coordination of the global network.

The second way to address the legal issues of globalization is localization of global legal rules. Localization means rules and regulations of modern prospering international organizations, such as the United Nations, the World Trade Organization, and other international institutions, are admitted or accepted by Member States. Through this process, global laws can become parts of domestic laws, especially in areas of international human rights laws and laws related to economic sectors.

Thirdly, similar to the method stated above, local laws can also be spread to the international level and then become globalized laws and

⁹⁴ See Mistelis, Loukas A., “Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations”, *Int’l L.*, num. 34, 2000, p. 1055.

⁹⁵ Santos, S., *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed., London: Butterworths, 2002, pp. 178-182.

⁹⁶ Sampford, C., “Reconceiving the Rule of Law for a Globalizing World”, Spencer Zifcak (ed.), *Globalization and the Rule of Law*, New York, Routledge, 2005, pp. 21 and 22.

regulations in the form of international treaties and protocols. The *Lex Mercatoria* (law of merchant), for example, transcended national borders and proliferated through all European countries during mediaeval times and was accepted by many countries even before being merged into domestic laws effectively governing many countries all over the world. However, it is interesting that the *lex mercatoria* is being codified by the UN at present in order to draft a treaty to unify legal regulations of Member States.

In recent years, economic development, democratization and globalization have resulted in increased number of legal transplants, particularly in developing countries and regions. Most major legislations in the developing world now have a foreign component. Most countries simply cannot engage in international commerce or expect international investment without moving their legal regimes toward common standards. It has become very difficult to be seen as having an acceptable record in areas such as human rights, protection of the environment and anti-corruption efforts without importing some foreign or international models. Numerous programs sponsored by governments, foundations, and international institutions have actively encouraged these processes.⁹⁷

Obviously, economic globalization has accelerated globalization of legal rules and culture. The phenomenon of globalization has played an important role in changing of legal rules worldwide, and has become the prime driver of formation of new legal cultures across the globe.

The process of globalization is continuing in almost every facet of the modern society and the impact of international law continues to grow in areas previously regulated by domestic laws. Increased transnational links between government agencies have led public international law scholars to analyze transplants.⁹⁸ Legal globalization implies individual nation states must observe global governance norms and respect the UN Charter and other important international regulations, besides recognizing fundamental human rights principles accepted by the international community as a whole. Unless nations comply with the peremptory norms (*jus cogens*) of international law, they cannot face up to international organizations and may be subject to international community's condemnation and sanctions. According to the Basic Law, Macau can join international organizations as a part of China, but it has to comply with rules and regulations that the particular

⁹⁷ Carothers, "The Many Agendas of Rule-of-Law Reform in Latin America", Domingo, Pilar and Sieder, Rachel (eds.), *Rule of Law in Latin America: The International Promotion of Judicial Reform*, num. 4, 2001, pp. 5-11.

⁹⁸ Miller, Jonathan M., "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", *Am. J. Comp. L.*, num 51, 2003, p. 841.

organization requires its members to follow. Localization of international law implies its transplantation in the local legal system. Although transplantation of international rules is highly restrained by the scope of sovereignty of individual nation states, global norms are being adopted increasingly in domestic laws because of economic pressures. Nation states are voluntarily conducting legal transplantations by joining and ratifying international conventions and other forms of international law. Thirdly, globalization of local laws has given birth to a new type of legal transplantation that only applies to some particular states, regions or special sectors, crossing the barriers of national sovereignty and territorial boundaries and spreading to the rest of the world. The *lex mercatoria* is the most striking example of this. This kind of transplantation falls neither in the scope of state sovereignty, nor in the jurisdiction of supranational authorities, which do not exist in the modern international society. This otherwise inconceivable free transplantation of legal rules can be realized only in the context of economic globalization.

Legal transplantation in Macau has not been confined to importation of original Portuguese law and common legal elements. It has been affected by some recent new driving forces also. The situation of Macau changed magnificently after its return to China; the original forced transplantation of legal rules, i.e. the first *Practice of Law* and other legal regulations mentioned above, have changed to new enacted rules that represent the new trends of development of the legal culture being nurtured in Macau.

With its special geographically important location, Macau has consistently acted as the frontier of globalization and a considerable number of rules and regulations have been challenged and changed according to the international proliferation of values and other issues on which there is common consensus. One of the most visible instances of the new kind of transplantation in recent years has been incorporation of a great deal of public international law because of opportunities and pressures from abroad.⁹⁹ As Macau has joined some of the international organizations, the region has adopted many of global rules and regulations, especially the World Trade Organization's strict standards. Thus the transplantation of legal rules is now transforming into a more voluntarily way, which contributes to a more unique and self-contained system of law in Macau.

⁹⁹ See Miller, Jonathan M., "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process", *Am. J. Comp. L.*, num. 51, 2003, p. 847.

d. Legal research in the Mainland

Today, in a basically globalized world, access to information is far easier than in the past. It implies that legal knowledge could be diffused easily through the Internet or other means of communication. However, since law and legal studies are presented in the form of text, they are accessible only to those who are able to use the language in which they are written. In the 1990s, legal studies in China entered a whole new era. Legal materials (including academic works and legislations) from all over the world were translated into Chinese, and comparative studies covered most of the major legal families. The development of legal research in China has been an important factor for the formation of Macau's legal culture because it is an obvious fact that neither the laws and regulations currently in force nor the legal knowledge supporting interpretation of law is an isolated and self-sufficient system. Like any other legal system existing in the present day world, the Portuguese legal system and legal culture inherited by Macau is in itself the product of continuous succession and importation of other legal knowledge. Considering that all jurisdictions under the Continental Family present their major laws in the codified pattern, and the fact that legal research in Mainland China is gradually covering most of the major exporters of legal knowledge (e.g., Roman law, German law, French law, Anglo-American law, etc.), the output of this research shall of course be useful for the formation of Macau's legal culture.

Here the only problem is the detail. Because activities of legal professionals address interpretation of a particular legal provision or text, an overall understanding of the legal system (sometimes taken as a sociological phenomenon) is not sufficient for them to get a safe result of interpretation.

2. The foundation of the future legal culture: - Debates regarding the role of the "status quo"

For some new born countries, the building of a legal system normally implies a process of voluntary legal transplant. As far as the case of Macau is concerned, what is in front of us is not the question of constructing a legal system out of nothing. The only thing needed is a "legal culture" with certain characteristics which is capable of supporting the functioning of the system and of reacting to the ever changing social needs.

As we have affirmed in previous discussions, the current legal culture supporting the functioning of the current legal machine is the Portuguese legal culture. The formation of a new culture, particularly when relying on an infrastructure inherited from the past, could never be totally free; even in the extreme case of revolution, a clear departure from the past is

impossible.¹⁰⁰ However, in recent years, for various reasons (academic or political), a kind of opinion has emerged in the Macau society advocating a re-evaluation of the role played by Portuguese legal culture in Macau laws¹⁰¹ in the past and at present. There are writers proclaiming that implementation of Portuguese “colonial rules” in Macau, as well as the Portuguese culture, has never replaced the local Chinese culture, nor the social and economic life of the Chinese in Macau. So, in their opinion, the Portuguese law and the legal culture are “strange, and even heterogeneous”.¹⁰²

We have no objections about the way these authors look at Macau history because despite historical records being the same, people may always look at history from different angles. The criticism of the current legal system falling behind social development is another topic which we do not want to address here. The only point we would like to make is about the role played by the Portuguese law and the Portuguese legal culture, in the past and at present.

Even at this point, we shall not make a simple assertion that the observation of these authors is incorrect because that may not be the truth. The only point we want to emphasize is that those authors are not looking at legal culture in a dogmatic way. As we have stated several times, legal culture for us is “*the framework within which an interpretative community operates, which has normative force for this community...*”. And an undeniable fact is that, in the Macau community, past and present, Portuguese legal culture is the only one which demonstrates a “normative force”.

Perhaps only in this sense could we explain why the Portuguese legal culture was the only legal culture existing in the last century in Macau, and is the main legal culture accepted by the current legal community. This legal culture shall, together with other new elements, be the foundation of the future.

¹⁰⁰ See Berman, H. J., *Law and Revolution—The formation of the Western Legal Tradition*, Harvard University Press, 1999, pp. 1 ss.

¹⁰¹ For example, a PhD candidate strongly criticized the view that identifies Portuguese legal culture as Macau legal culture (See Qingyang, Wang, *The Road of Commercial Law of Macau, PhD thesis of the Macau University of Science and Technology*, dated September 20th, 2009, p. 8); a writer declared in a local newspaper that the influence of Portuguese characteristics of Macau law was enlarged by propaganda (Leng Feng, in *Sou Pou*, 30 October 2009); a legislator continuously criticized that Macau law has fallen behind social and economic development, and the current legal system is under-developed or outdated (See Ng Choi Kun, Intervention before the agenda of the day, submitted to the general meeting dated November 26th, 2009 of the Macau Legislative Assembly).

¹⁰² Xie, Gengliang, “The Legal Transplants, Legal Culture and the Development of Law: Critical Thinking of the Present Legal System of Macau”, *Journal of Comparative Law*, issue 5, 2009.

Although it may be true that Chinese residents in the early colonial period hardly knew of the existence of the Portuguese law, or recognized it otherwise, after more than thirty years since the movement of localization and ten years since the handover of Macau to the Peoples' Republic of China, the life of Macau residents is still guided largely by the Portuguese legal and administration system. The ideas they have about starting a company, soliciting a public service, complaining about an official, employing a lawyer and filing a court case, undertaking a real estate transaction, marriage, inheritance, complaining about an employer, etc., are all based on Portuguese law and administration. Apart from this system and culture, there is in fact no other system and culture as dominant as it is; it cannot really be substituted without causing intolerable social and economic chaos. If the existing legal system and legal culture were to be done away with today, it would not be the scholars or intellectuals who would object; it is the "common people", or the civil and economic society, which would object because of substantial disruption to life it will cause.

In fact, so as to prove our conclusion, we would like to examine two cases of legislative activity. One is the Macau Civil Code, and the other is the Macau Commercial Code. In the process of localization, the legislators of these two important legal instruments have adopted totally different philosophies. While those of the Civil Code chose to maintain the structure and content of the 1966 Civil Code, provisions of the Commercial Code are mostly an innovation, though the main reason was that the original Commercial Code was really too old.

For the case of Civil Code, since the XIX century, the 1867 Portugal Civil Code had already been applied to Macau. Until the handover in 1999, the 1966 Portuguese Civil Code was the general civil law in force in Macau, and in the legal localization process, more than 80% of the rules contained in the Portuguese Civil Code were adopted by the new Macau Civil Code. Therefore, it would be fair to say that the Macau Civil Code inherited both structure and content of the 1966 Portuguese Civil Code. Structurally speaking, the 1966 Portuguese Civil Code, as a consequence of a notable inclination of Portuguese legal literature towards the Pandect School, is similar to the BGB¹⁰³ (with five books, namely, General Part, Law of Obligations, Law of Things, Law of Family and Law of Succession). The General Part, which is one of the remarkable characteristics of Germany Civil Code in the Civil Law system, is in fact a complicated structure. It

¹⁰³ See Io Cheng, Tong, "Law of Things in the Macau Civil Code: An Extension of the Romano-Germanic System Built Upon the Classical Concept of Ownership", *One Country, Two Systems, Three Legal Orders-Perspectives of Evolution*, Verlag Berlin Heidelberg, 2009, pp. 51 and 52.

contains general provisions for all branches of law (e.g., rules about the interpretation and application of law); provisions supposedly common to other parts of the Code (e.g., juristic transactions, things, etc.) and rules of the conflict of law. Nonetheless, materially speaking, the 1966 Portuguese Civil Code (and the subsequent Macau Civil Code) has shown another *faceta*. Many of the solutions and provisions, particularly in the Book of Law of Things, are directly inherited from its predecessor (Civil Code of 1867), from French Law and from the Italian Civil Code. The most impressive features of the Portuguese Civil Code of 1966 and the Macau Civil Code of 1999, distinguishing themselves from the Germanic family and approximating to their Latin neighbors, are: adoption of *consensus parit proprietatem* in the transfer of ownership; the importance given to the regimen of *pactum in contrahedo* (*contrato-promessa*); and the subjective approach of the concept of possession and the conservative attitude towards marriage.

Almost ten years have passed since the handover and yet criticism of the Civil Code has been rare. Instead, quite recently, the Macau Civil Code was eulogised recently by the Dean of Faculty of Law, University of Coimbra, who said that this law does not innovate for the sake of innovation but takes into account the social reality. The Dean went on to describe it as an advanced Code, which places Macau Special Administrative Region among the leading team of civil law codifications. The Code unequivocally affirms that “law, being a culture, evolves in a process where the present dialogues with the past in the preparation of the future”.¹⁰⁴

On the contrary, the Macau Commercial Code, in its preamble, declared that “Not disregarding the continuity of current legal regulation, and respecting our legal tradition, as arising from doctrine and jurisprudence, the Commercial Code, while drawing inspiration and teachings from the most up-to-date commercial legislation of jurisdictions in the Roman-German tradition, and especially those with which our legal system has greatest affinity, has not failed to take into account the teachings of Anglo-Saxon legal systems, given the position of Macau in the Asia-Pacific region”.¹⁰⁵

“In an innovative manner, the Code specifically regulates the commercial enterprise and the various legal transactions of which it can be the object. It establishes a right of ownership over the enterprise, a right that

¹⁰⁴ Santos Justo, A., “A Codificação do Direito Civil e As Questões do Nosso Tempo”, *Segunda Conferência Internacional sobre “As Reformas Jurídicas de Macau no Contexto Global” Nos 10 Aniversário da Região Administrativa Especial de Macau*, December 10th, 2009, STDAM Auditorium, University of Macau.

¹⁰⁵ Commercial Code, translation by Godinho, Jorge A. F., *Legal Affairs Bureau of the Macau Special Administrative Region*, 2004, p. 1.

is more than, and different from, the various rights which confer upon the subject powers over each and every good which is part of it at any given moment.” It covers up the loops to protect against unfair competition. It is also an innovation of the Commercial Code in creating negotiable instruments as a general category

However, soon after its enforcement in 2001, strong social demand transformed into political pressure and forced the government to make a quick amendment to the Commercial Code which was recently promulgated. What makes it more surprising is that the amendments made are mostly targeting the innovated parts.

According to our reading, resistance of the society against innovation of the Commercial Code clearly manifests the fact that people are accustomed to a conventional way of doing business, and a sudden change of law can arouse resistance. However, contrary to our interpretation, there are opinions attributing the amendment of Commercial Code to the outdated nature of legal science.

3. Principles and measures pertinent to the formation of Macau legal culture

A. General concerns

In the previous discussions, we have clearly shown that a unique legal culture is not yet established in Macau, and the formation of such a culture is certainly important and very urgent for the Macau society. Since it is not yet fully established, there is still room for us to take action and make the process more rational and smooth. For this purpose, we have determined several principles and specific measures to help policy-makers and other possible participants in this process.

B. Principles governing the formation of Macau legal culture

In fact, in the discussion about localization, we have already pointed out three guiding principles. We believe that even at this stage, these three principles adopted for localization are still inspiring for the establishment of a legal culture, although some adjustments should be made both in the name and in the content.

a. Principle of conformity to the Macau Basic Law

Macau Basic Law is the para-constitutional guarantee of the present and future Macau legal system which is the material structure for development of a legal culture, and it has really brought in new elements:

Firstly, as stated in the Joint Declaration, the Basic Law of the Macau SAR enjoys the fundamental status among all laws and rules previously in force in Macau; any that contravene the Basic Law are deemed to be void. Furthermore the Basic Law was drafted and ratified by the central legislative body of the mainland. According to its prescription, the Basic Law is actually the constitutional law of Macau, and thus controls the direction of legal development in Macau in the future.

Secondly, from the perspective of treaty application, Macau was not entitled to rights of concluding international treaties generally, i.e. the central government decides which treaty shall apply to Macau. International treaties ratified by China do not automatically apply to the SAR but are subject of review by the central government. Once it is decided to apply a treaty ratified by the Mainland government to Macau, it becomes a part of Macau legal system. Through this treaty selecting procedure, Macau legal culture is effectively influenced by the other legal system.

Here we would like to reiterate that the guarantees provided in Articles 5 and 8 of this law assure that legal life after the handover shall not be subject to sudden change.

b. “Theory of possession” in the development of legal culture

In explaining which original rules left behind by the Portuguese should be preserved for the future by the Macau society, one scholar expressed “consensus that there must be some common character among different legal systems and cultures, mainly the common norms in human society that regulate the relationships among people in a commodity society”.¹⁰⁶

In principle, we could agree with that assertion. Nevertheless, even so, policy makers and legal professionals may still be faced with a difficult question: even when some norms are common to the human society, they always appear in different forms and develop into a bundle of corollaries. Therefore it will be extremely difficult to identify whether a particular provision really corresponds to a “common norm”.

For us, the guiding principle for selection of existing legal rules and legal theories shall be “the theory of possession”; a theory inspired by the

¹⁰⁶ Jian, Mi, “The Confrontation and Combination of East and West Culture: the Future of Macau's Legal System”, *Jurist*, vol. 5, 1994.

objective approach of possession in civil law invented by R. Jhering.¹⁰⁷ According to this author, when a person has the physical control of a thing, he is not required to prove that he has the intention to possess. It is the one who would like to challenge his possession that has the burden of proof. Adopted as a principle guiding the formation of legal culture of a jurisdiction mounted by legal transplant, we shall express this theory in the following way: “for a jurisdiction built upon legal transplant, existing legal rules and legal theories should be preserved unless they are proven to be not suitable for the society or not corresponding to the common norms of the human society”.

The logic of our theory is that for a jurisdiction built upon legal transplant, legal rules and legal theories are normally borrowed from another jurisdiction which has worked with this set of rules for years. Specifically in Continental Law jurisdictions, important legal rules are usually codified and, therefore, a change of one rule may cause a chain reaction in the whole system.

The idea of this principle is fully reflected in the following norms:

[A]fter the establishment of the Macau Special Administrative Region, the laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, save for whatever therein may contravene the Basic Law or subject to any amendment by the Macau Special Administrative Region legislature.¹⁰⁸

The laws, decrees, administrative regulations and other normative acts previously in force in Macau shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macau Special Administrative Region in accordance with legal procedures.¹⁰⁹

Before the handover, the same principle was identified by several legal scholars as “the principle of continuity”,¹¹⁰ and yet the word “continuity” denotes only the phenomenon. The reason for the continuity of such a system is that sudden change of a *status quo* is not favorable for stability of the society.

¹⁰⁷ See von Ihering, Rudolph, *La Voluntad en la posesión*, trad. of Adolfo Posada, Reus, 2003 (reprint), p. 34.

¹⁰⁸ Joint Declaration of the Government of the People’s Republic of China and the Government of the Republic of Portugal on the Questions of Macau, Annex I, point III, paragraph II.

¹⁰⁹ The Basic Law of the Macau SAR, article 8.

¹¹⁰ Costa, Alberto, “Continuidade e mudança no desenvolvimento jurídico de Macau á luz da Declaração Conjunta Luso-Chinesa”, *Revista Jurídica de Macau*, vol. I, 1988, p. 53; Gonçalves Pereira, Francisco, “Declaração Conjunta, modelo de transição e reforma da Administração”, *Revista Administração*, num. 11, vol. IV, 1991, p.77ss; Oliveira, Jorge, “A Lei Básica e o Princípio da Continuidade do Ordenamento Jurídico de Macau”, *O ordenamento Jurídico de Macau no Contexto da Lei Básica*, Associação dos Advogados de Macau, 1991, p. 30 ss; Cardinal, Paulo, “O Regime da Advocacia no Contexto da Lei Básica”, *O ordenamento Jurídico de Macau no Contexto da Lei Básica*, Associação dos Advogados de Macau, 1991, pp. 69 ss.

c. Principle of respecting the social life of the people

When discussing localization, we have affirmed that Macau has a historic and cultural background, social life and sense of values different from Portugal. So one of the objects of localization is to transfer the intrinsic value in Macau law to the new social values; the former originates from Portugal while the latter evolves from the traditional Chinese culture. This objective is obviously not totally achieved. Therefore, the same principle must be insisted upon in the future to form a Macau legal culture.

C. *Measures pertinent to formation of Macau legal culture*

a. Strengthening the force of legal education

It is recognized that in the changed post-colonial world of the erstwhile Common Wealth, a new legal education was required to bridge the gaps in knowledge between domestic legal science and overseas jurisdictions and their respective principles and norms. When quasi-colonialism was coming to an end in Macau, lawyers noticed that there was a need to acquire detailed understanding of conceptual frameworks underpinning the traditional Macau legal system and its more recent manifestations.

Generally speaking, legal education can be categorized into two forms; one is the elite education (or vocational education) and the other is popularization of legal knowledge. As mentioned, the Portuguese canonicalization resulted in a lack of Macau citizens' own legal concepts, and also separated legal vocational education from the society.

Compared with legal education in other areas, there is a remarkable feature in Macau legal teachings, namely, the trend of internationalization. We are very pleased to note that elite legal education in Macau began to develop in the 1980s, with the creation of the Faculty of Law of the University of Macau. Currently it offers law degrees and masters programs conducted in Chinese and Portuguese languages, which can be adapted to the bilingual Macau, and can provide support for Chinese citizens in Macau society to participate in legal practices.¹¹¹ The teaching of law at the bachelor degree level is basically within the Roman-German tradition. It also offers two masters and postgraduate programs in English; one in EU, international and comparative law, and the other in international business law. Both are indicative of a positive response of the Macau legal education system to the new trend of globalization and recognition of the need for international

¹¹¹ The objective of the Bachelor Programs is to prepare jurists who are familiar with Macau S.A.R. legal system, as stated in the Website of Macau University, <http://www.umac.mo/fll/>.

integration. In addition, it offers PhD programs in law, which open a new era of local elite legal education in Macau, purporting to educate jurists who are qualified to conduct theoretical research and teach in Macau Law, as well as knowledgeable and qualified legal professionals.¹¹² The Faculty of Law has played a very important role in localization of Macau law and jurisprudence, and it has also produced the great majority of bilingual judges, procurators, and jurists of the civil service of Macau S.A.R. The peculiar historical background makes the Macau legal system, as well as the Macau society in general, quite open to the world and to the global trends. So the education system in Macau is also open to all methodologies and substantial issues related with contemporary legal trends and evolution of legal thought. Furthermore, the teaching of subjects mostly adopts a multicultural approach, with diversified backgrounds of the teaching staff. This globally focused legal education, as well as the interdisciplinary legal study is the crucial force in the formation of legal culture, although it is going to be over a long period [NOT SURE]. Under such conditions, lawyers have learned to think as global citizens with greater self-reflective consciousness and a wider range of knowledge and understanding of the local situation and the special characteristics of the Macau society.

Despite the positive progress made by Macau in legal education, we must point out that the current model is still insufficient in several aspects; training of bilingual jurists is gradually weakening and in case of education at the postgraduate level, which started out relatively late, the academia is not able to provide enough academics for regeneration of the system.

It is expected that improvement in these two aspects shall contribute a great deal to the formation of a Macau legal culture.

b. Urgent construction of a cases data base

Both for legal practice and legal research, the most important raw materials are the court decisions. Without these cases, no one can predict the attitude of the courts on particular matters, and no one can be sure about how a particular legal norm is applied. Therefore, in any sophisticated jurisdiction, past cases are always an important source of reference. We could surely conclude here that without the publication and study of local cases, there would never be a local legal culture.

Currently, only cases in the Court of Second Instance and the Court of Final Appeals are published and accessible to the public. The problem is, the number of cases handled by these two courts at the higher level are very limited; most of the cases end in the first instance. Therefore, open access to

¹¹² <http://www.umac.mo/jll/>.

cases in the first instance is in fact a very important move for the formation of a Macau legal culture.

c. Promotion of legal research

In the past, legal education mainly concentrated on training of qualified professionals. Legal research was not encouraged for a long time. However, one of the characteristics of Continental Law is the role played by legal scholars. Therefore, without legal research, a legal system loses an important force for its regeneration and development.

d. Create conditions for legal critics

Judges in Continental Law jurisdictions have almost absolute powers in a case; the only control, even though on a moral level, is the critiques of their decisions written and published by legal scholars. It is a pity that this indispensable component of our legal machinery is missing in the case of Macau.

V. CONCLUSION

In 1748, Montesquieu wrote in *L'Esprit des Lois* (The Spirit of Laws)¹¹³ that political and civil laws should be tailor-made for each nation, and that it would therefore be a great coincidence should they fit another people equally well.¹¹⁴ Montesquieu argued that the spirit of each nation's law should closely reflect the type of government, geography and climate as well as religion, history and culture. A similar view could also be seen in F. V. Savigny.

However, in contrast to the above, perhaps the reality of the spread of laws over the world (recognized in earlier transplants) can be attributed to the fact that they were, for the most part, imposed in the era of colonialism. Expansion of European powers through wars and conquests to the rest of the developing world (including the Chinese Empire) was primarily responsible for transplantation of their laws to countries in Asia, Africa, North America and Latin America. As early as the XIV Century, Macau became one of the first colonial sites established on the land of China.

¹¹³ de Secondat, Charles, Baron de Montesquieu, *The Spirit of the Laws*, 1748. Montesquieu states, "*Law in general is human reason, inasmuch as it governs all the inhabitants of the earth; the political and civil laws of each nation ought to be only the particular cases in which this human reason is applied. They should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another.*"

¹¹⁴ See Berkowitz, Daniel *et al.*, "The Transplant Effect", *Am. J. Comp. L.*, num. 51, 2003, p. 188.

From then on, the status of Macau was in a complex situation. The first problem it had to deal with was the impact of effectiveness of Portuguese laws and regulations on Macau, as well as the perturbations it brought to social life of the local Chinese people, owing to the differences in culture and customs. In a long process of integration, the originally imposed legal culture was nurtured with different cultural values.

After its handover by Portugal to China, several new elements were added to the Macau legal system, which challenged policy-makers and participants in these networks to form a new legal culture.

Without doubt, the starting point of the process of formation of a Macau legal system and culture is the transplanted legal system made up of rules and codes which orient Macau lawyers to perceptions that are closer to those prevailing in continental Europe, and generally a civil law system way of legal reasoning.

However with enactment of the Basic Law of Macau, such a legal culture is bound to move towards another direction. That is to say, the traditional “five Codes” of Portuguese origin which form the basis of Macau legal culture shall nest themselves beneath the roof of the Macau Basic Law, instead of the abrogated Organic Statute and Portuguese Constitution. On the other hand, coexistence of the Sino-Portuguese bilingual legal language in Macau society is not only a unique phenomenon in its legal culture, but also the most controversial choice in the future Macau legal system.

Furthermore, the gambling industry constitutes an indispensable base for Macau’s economy, and is gradually forming a unique culture. It urges the government to develop a set of gaming laws mature enough to ensure healthy functioning of the industry. This is a challenge to the legal community, but it shall also enrich the legal culture to be formed.

Finally, in the new era of globalization and economic development, internal legal rules and regulations cannot describe the whole of the legal system of Macau. Influence from the outside world shall of course determine the track and fate of our future legal system and legal culture.

At this point of time, all one can say is that it is far too early to paint a molded picture of a “legal culture” in an era of continuous change, more so in an energetic place like Macau.