

THE LAW OF MACAU AND ITS LANGUAGE:
A GLANCE AT THE REAL “MASTERS OF THE LAW”

Salvatore Casabona

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THE LAW OF MACAU AND ITS LANGUAGE: A GLANCE AT THE REAL “MASTERS OF THE LAW”

Salvatore Casabona*

Abstract

This article discusses the biligualistic legal system in Macau. The discussion begins with the outline of the history of the Macanese bilingualism. The author then examines the crucial distinction between the language in the law and the law in the language. By analogy to European Community and other bilingual legal systems, this article identifies the characteristic of Macanese multilingualism. This article concludes with suggestions about a new approach and the role of universities in resolving the matter.

I. INTRODUCTION

My experience as a comparatist in Macau reminds me of the “*accommodation method*” rooted in the Jesuit missionary activity, an activity aimed at diffusing Christianity all over the world and addressing complex religious and cultural challenges.

Matteo Ricci used to adapt himself (“*accomodare*”¹) to the Chinese context, dressing as a Confucian monk, learning Chinese language and philosophy and overall finding similarities and harmonies in classical Chinese texts with Christian teachings. Similarly, this author attempts to consolidate a methodological

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¹ To be precise, Ricci’s application of Valignano’s “gentle way” in China has been referred to as “accommodation method”. See M. Ricci, *Lettere, Ricci to Girolamo Benci, Nanchang*, 7 October 1595, in 2 LIBRI, FONTI RICCIANE: DOCUMENTI ORIGINALI CONCERNENTI MATTEO RICCI E LA STORIA DELLE PRIME RELAZIONI TRA L'EUROPA E LA CINA (1579-1615) at 269 (Pasquale M. d'Elia ed., 1942-1949); M. Ricci, *Della entrata della Compagnia di Gesù e Cristianità in Cina*, in STORIA DELL'INTRODUZIONE DEL CRISTIANESIMO IN CINA, FONTI RICCIANE: DOCUMENTI ORIGINALI CONCERNENTI MATTEO RICCI E LA STORIA DELLE PRIME RELAZIONI TRA L'EUROPA E LA CINA 482 (Pasquale M. d'Elia ed., 1942-1949).

approach to Macau, a jurisdiction which possesses a unique social and historical context.

A foreign observer in Macau immediately has two impressions: a multi-layered scaffolding of the society and of its legal system, and a sense of a continuous and not always foreseeable movement of change.

From a legal perspective, the new Macanese status of Special Administrative Region (SAR) of the People's Republic of China² surely represents to a non-Chinese scholar something new in comparison with the contemporary western legal landscape, but also something difficult to thoroughly understand through the mere use of the "conceptual lens" of the jurists.³

The Macau SAR stems from the principle "one country, two systems"⁴ that allows two different systems to co-exist within one nation: Macau (and Hong Kong) under the previous capitalist system and the mainland China under its socialist system.⁵

² XIANFA art. 31 (1982) ("The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.") (China). See IEONG WAN CHONG, "ONE COUNTRY TWO SYSTEMS" AND THE MODERN CONSTITUTIONAL SCIENCE 199 (Jeong W. Chong ed., 1996); LIN FENG, CONSTITUTIONAL LAW IN CHINA 145 (2d ed. 2000).

³ See Herbert S. Yee & Sonny S. H. Lo, *Macau in transition: The Politics of Decolonization*, 31 ASIAN SURVEY 905 (1991); MING K. CHAN & SHIU-HING LO, HISTORICAL DICTIONARY OF THE HONG KONG SAR AND THE MACAU SAR (2006); IGNAZIO CASTELLUCCI, LE GRANDI TRADIZIONI GIURIDICHE DELL'ASIA [THE MAJOR LEGAL TRADITIONS IN ASIA] 165 (2009) (relation between the new political environment after the handover of Macau to China and the Macanese legal system).

⁴ See WANG ZHEN-MIN, "UM PAÍS, DOIS SISTEMAS" E A LEI BÁSICA DE MACAU ["ONE COUNTRY, TWO SYSTEMS" AND THE BASIC LAW OF MACAU] 33-34 (2008) ("O objectivo inicial do princípio 'Um país, dois sistemas' era resolver a questão de Taiwan."); IEONG WAN CHONG ET AL., "ONE COUNTRY, TWO SYSTEMS" AND THE MACAO SAR 259 (2004); Wang Yingjin, *Estudos sobre "Um país, dois sistemas" nos últimos 20 anos retrospectiva e perspectiva [Retrospective and Perspective Studies of "One Country, Two System" in the Last 20 Years]*, XVII ADMINISTRAÇÃO [ADMIN.] 449 (2004); Lok Wai Kin, *A Propósito dos Factores Básicos da bem Sucedida Aplicação de "Um país, Dois Sistemas" em Macau: Em celebração do 5º Aniversário da Região Administrativa Especial de Macau [The Purpose of the Basic Elements for Successful Implementation of "One Country, Two Systems" in Macau: In Celebration of the 5th Anniversary of Macao SAR]*, XVII ADMINISTRAÇÃO [ADMIN.] 1095 (2004); Jeong Wan Chong, "Um País, dois Sistemas": Elevar o Nível da Prática Mediante a Prática ["One Country, Two Systems": Raising the Level of Practice by Practice], XVIII ADMINISTRAÇÃO [ADMIN.] 981 (2005); Qi Pengfei, *A Vantagem Económica e a Vantagem Política da "Nova Macau" e o "Modelo de Macau" de "Um país, Dois Sistemas" [The Advantage and Economic Policy of "New Macau" and "Macau Model" of "One Country, Two Systems"]*, XVIII ADMINISTRAÇÃO [ADMIN.] 1085 (2005).

⁵ See Deng Xiaoping (邓小平), Deng Xiaoping Lun Yiguo Liangzhi (邓小平论一国两制) [Deng Xiaoping on "One Country, two Systems"] 74 (2004) ("People who advocate bourgeois liberalization hope that the mainland will become capitalist or 'totally westernized'. Our thinking on this question should not be one-sided. If we don't attach equal importance to both aspects, it will be impossible to keep the policy of 'one country, two systems' unchanged for several decades.").

This principle, celebrated as a “creative masterpiece”⁶ by Deng Xiaoping, is the foundation of the “Basic Law” of Macau.⁷ It is expressed in a kaleidoscopic bundle of sub-principles related to each other: the principle of state sovereignty⁸; the principle of high degree of autonomy⁹; the principle of maintaining prosperity and protecting private property¹⁰; and the principle of proceeding to democracy systematically¹¹.

On the one hand, the above shows that the relationship between Mainland China and Macau seems to be deeply and clearly entrenched in the Basic Law after the Sino-Portuguese Joint Declaration defined the time scheduled for solving the Macau handover to China;¹² on the other hand, in the perspective of the evolution of the Macanese legal system, it is contended that section 5

⁶ Deng Xiaoping (邓小平), Deng Xiaoping Wenxuan (邓小平文选) [Selected works of Deng Xiaoping] 59-60 (1993).

⁷ AOMEN JIBEN FA (1993) (Mac.); see IEONG WAN CHONG, ANOTAÇÕES À LEI BÁSICA DA RAEM [NOTES TO THE BASIC LAW OF THE SAR] 45 (2005); WANG ZHENMIN, “UM PAÍS, DOIS SISTEMAS” E A LEI BÁSICA DE MACAU (2008); *The Basic laws: problems and perspectives*, 2002 MAC. L.J. (SPECIAL ISSUE); Ho Heng Man, *International Law and National Law: Some New Thoughts about Macau Basic Law*, 10 CADERNOS DE CIÊNCIA JURÍDICA 83 (2009). For an historical perspective of the debate about the Basic Law, see Rao Geping, *A Lei Básica e a Construção duma Sociedade Harmoniosa em Macau* [The Basic Law and the construction of a harmonious society in Macau], XIX ADMINISTRAÇÃO [ADMIN.] 977 (2006), Chio Heong Ieong, *Quatro temas sobre a Lei Básica* [Four Themes of the Basic Law], XIX ADMINISTRAÇÃO [ADMIN.] 1007 (2006).

⁸ AOMEN JIBEN FA art. 1, § 1 (1993) (“The Macao Special Administrative Region is an inalienable part of the People’s Republic of China.”) (Mac.); *id.* art. 12, § 2 (1993) (“The Macao Special Administrative Region shall be a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government.”).

⁹ *Id.* art. 2, § 1 (1993) (“The National People’s Congress authorizes the Macao Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.”).

¹⁰ *Id.* art. 6, § 1 (1993) (“The right of private ownership of property shall be protected by law in the Macao Special Administrative Region.”); *id.* art. 8, § 1 (“The laws, decrees, administrative regulations and other normative acts previously in force in Macao shall be maintained, except for any that contravenes this Law, or subject to any amendment by the legislature or other relevant organs of the Macao Special Administrative Region in accordance with legal procedures.”).

¹¹ See *id.* art. 3, § 1 (“The executive authorities and legislature of the Macao Special Administrative Region shall be composed of permanent residents of Macao in accordance with the relevant provisions of this Law.”); *id.* art. 4, § 1 (“The Macao Special Administrative Region shall safeguard the rights and freedoms of the residents of the Macao Special Administrative Region and of other persons in the Region in accordance with law.”); see also IEONG ET AL., *supra* note 4, at 259 (“Democracy implies that a society operates scientifically, equitably, coordinately and progressively. . . . Therefore, democracy could not be achieved in one jump. Based on profound historical reasons, current social factors and the political demand of people of all levels of the society, together with their democratic consciousness and their enduring ability, etc., the pursuit of democracy must be advanced systematically and in accordance with domestic conditions, especially in the areas of design and improvement of the political system, so as to serve the needs for stable development in social and economic aspects.”).

¹² Joint Declaration of the Government of the People’s Republic of China and The Government of the Republic of Portugal on the Question of Macao, April 13, 1987, China-Port., <http://bo.io.gov.mo/bo/i/88/23/dc/en/Default.asp>. [hereinafter *Joint Declaration*].

of the Basic Law (“The socialist system and policies shall not be practiced in the Macau Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged *for 50 years*”) (emphasis added) should not be seen as a mere and simple legal rule.

Notwithstanding the expressed political willingness of not changing the policies for the SARs of Macau and Hong Kong even beyond that period,¹³ it appears clear to me that section 5 of Macau Basic Law has a nature of a “*metanorm*” – belonging more to the political discourse rather than to a legal one. It could be objected that also in the western legal tradition countries, despite absence of an express “*expiration date*” of the law such as that stated in the aforementioned section 5, persistence of a certain juridical solution is linked to political willingness. However, the cited provision of the Basic Law affects not only a single norm, institute or a branch of the system, but an *entire* legal system, with its legal tradition and philosophy, culture and reasoning, values and founding principles.

Deng Xiaoping once said, “to make sure the (SARs) policy remains unchanged for 50 years and beyond, we must keep the socialist system in the mainland unchanged”.¹⁴ However, at present, Mainland China’s legal system is undergoing rapid legal reforms,¹⁵ of which its long term political and economic effects will be impossible to predict.¹⁶

¹³ Concerning the reasons for the specifying a period of 50 years, Deng Xiaoping says, “. . . This proposal . . . was based on China’s realities. China has set itself the ambitious goal of quadrupling its GNP in two decades . . . and of reaching a level of comparative prosperity. Notwithstanding the foregoing, China will still not be a wealthy or developed country. Therefore, that is only our first ambitious goal. It will take another 30 to 50 years after that China to become a truly developed country and to approach – but not to surpass – the developed countries. If we need to follow the policy of opening China to the rest of the world until the end of this century, then 50 years later, when we are approaching the level of the developed countries, we shall have more reason to follow it. It is in China’s vital interest to keep Hong Kong prosperous and stable. When we gave the figure of 50 years, we were not speaking casually or on impulse but in consideration of the realities in China and of our need to development.” DENG (邓小平), *supra* note 5, at 24, 70, 53 (2004).

¹⁴ See *id.* at 72.

¹⁵ Tong Io Cheng & Wu Yanni, *Legal Transplants and the On-going Formation of Macau Legal Culture*, 1 ISAI DAT L. REV. 619, 645 (2011), available at <http://isaidat.di.unito.it/index.php/isaidat/article/viewFile/19/82> (“Chinese law is, in itself, undergoing a process of modernization, westernization and in a certain sense, localization.”); see also THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES (Guanghua Yu ed., 2011); CHINA’S LEGAL DEVELOPMENT (J.R. Oldham ed., 1986); CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES (J.A. Cohen ed., 1970).

¹⁶ A. Dicks, *The Chinese Legal System: Reforms in Balance*, 119 CHINA Q. 540 (1989). As regards the reciprocal influences between Chinese legal system and Macanese one, see Mi Jian, *Significado do Sistema Jurídico de Macau como Ponto de Referência do Sistema Jurídico da China: O Caminho da Evolução do Direito sob um Sistema Jurídico Plural* [Significance of the Judicial System of Macao as a Landmark of the Legal System of China: The Way of Evolution of Law in a Multiple Legal System], 1 PROSPECTIVAS DO DIREITO [PERSPECTIVES ON LAW] (1997), available at <http://www.dsaj.gov.mo/iis/EventForm/OutFname.aspx?Fname=perspectiva/issued3/pg4p.doc>.

Just thirty years ago, Prof Victor Li of Stanford University, stated, “not having a substantial legacy of law and lawyers, contemporary Chinese society has assigned many functions which are handled by law in the United States to non legal organs”.¹⁷ Chow further commented “although a western concept of the rule of law failed to take root in China, China’s rulers did use law as an instrument of social control”,¹⁸ and that “China has made important progress in establishing rights of the individual as protection against the type of mindless persecution of innocent victims. . . . China has also made particularly significant strides in enacting new laws in the area of commercial and business law, intellectual property, administrative litigation and reform of the judiciary”.¹⁹

It is clear from the above that there is a noticeable level of uncertainty concerning the future of Macau. If this uncertainty can be easily managed through the categories of politics and diplomacy, it will be more difficult to manage through the category of the law: lawyers work well when the winds of political changes cease and settle.

From a comparative perspective, one of the most interesting aspects of the Macanese legal system is represented by its bilingualism: that it is – paradoxically – either the expression of the abovementioned legal uncertainty, or the potential instrument to consolidate and strengthen the Macanese model.

In my opinion, there are at least four reasons for the interest: 1. The effort to translate all previous laws from Portuguese to Chinese heralds a historic moment of change which resulted in the construction of a new legal system; 2. the Macanese bilingualism is also of great interest because it intersects with the *local* and *peculiar* legal culture (differentiated somehow from the dominant Portuguese model); 3. Multilingualism in the legal systems has always been an engaging challenge and fascinating opportunity for the comparatist to experiment the efficacy and efficiency of the methodological luggage of comparative law; 4. Finally, multilingualism imposes the scientist to an accurate study on the special relation between law and the language.

II. HISTORICAL OUTLINE OF THE MACANESE BILINGUALISM

The purpose of this section is to trace the origin of bilingualism in the Macanese legal system that appears to slowly recognize new

¹⁷ VICTOR H. LI, *LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES* 95 (1978).

¹⁸ DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 63 (2d. 2009).

¹⁹ *Id.* at 64-65.

formal spaces to Chinese language.²⁰ Considering that even after the promulgation of “Estatuto Orgânico de Macau”²¹ in 1976 translations of documents of public administration were rare and in any case not compulsory, it shall be necessary for 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, in 1987 to serve as the starting point of this process.²²

According to this political and diplomatic act, two principles – apart from the preservation of the *status quo* of the Macanese legal system²³ – emerge: 1) the Chinese as a *principal language*²⁴ for legislators, public administration and the judiciary;²⁵ and 2) the centrality of the right of access to justice.²⁶

In 1988, an office for legal translation had been created,²⁷ and in the October of that year, a first common Portuguese – Chinese legal glossary had emerged.²⁸

²⁰ See Maria Trigo, *Reflexões Sobre a Política Linguística de Macau* [Reflections on the Language Policy of Macao], V ADMINISTRAÇÃO [ADMIN.] 473 (1992); António Manuel Macedo de Almeida, *Os grandes desafios da localização da justiça em Macau* [The Major Challenges of the Location of Justice in Macau], V ADMINISTRAÇÃO 703 (1992), available at <http://www.library.gov.mo/macreturn/DATA/P5/index.htm>; Chio In Fong, *A localização das leis de Macau* [The Locations of Laws in Macao], V ADMINISTRAÇÃO 729 (1992); Eduardo Nascimento Cabrita, *O Bilinguismo Jurídico: Condição e Garantia da Autonomia e Identidade de Macau* [Bilingualism of Law: A Prerequisite and Guarantee of the Autonomy and Identity of Macau], VII ADMINISTRAÇÃO [ADMIN.] 667 (1994) [hereinafter Cabrita, *Bilingualism*], Eduardo N. Cabrita, *Tradução Jurídica: Instrumento Nuclear da Autonomia Jurídica: Política de Macau e Condição Necessária para o Cumprimento da Declaração Conjunta* [Legal Translation: Core Instruments for Independence of the Judiciary: Politics of Macau and Condition Required for the Implementation of the Joint Declaration], 16 ADMINISTRAÇÃO [ADMIN.] 343 (1992) [hereinafter Cabrita, *Translation*].

²¹ Under the regime of *Estatuto Orgânico de Macau*, the constitutional powers to make laws, scrutinize public expenditure and make amendments to the organic statute are vested by the Legislative Council of Macau SAR.

²² *Joint Declaration*, *supra* note 12.

²³ *Joint Declaration*, *supra* note 12, art. 2(4) (“The laws currently in force in Macao will remain basically unchanged. . .”).

²⁴ On this aspect, see also considerations in the next paragraph.

²⁵ *Joint Declaration*, *supra* note 12, art. 2(5) (“In addition to Chinese, Portuguese may also be used in organs of government and in the legislature and the courts in the Macao Special Administrative Region.”).

²⁶ *Joint Declaration*, *supra* note 12, annx. I(V) (“The Macao Special Administrative Region shall, according to law, ensure . . . the right to have access to law and court.”); see also Decreto-Lei no 39/93/M (Regulation Admin., July 26, 1993) (Reiterated from another perspective by the preamble: “[i]mporta ainda assegurar a realização de ações de divulgação do Direto de Macau junto da população, visando uma generalização do conhecimento dos princípios jurídicos fundamentais, bem como do regime de direitos, liberdades e garantias.”).

²⁷ Despacho n. 8/GM/88 [Order no. 8/GM/88] (Jan. 13, 1988) (Mac.).

²⁸ See Sergio de Almeida Correia & Pedro Horta e Costa, *Por um Política de Tradução Jurídica e Produção Legislativa Bilingue no Actual Contexto do Período de Transição* [The Policy and Legal Translation of Legislative Bilingual Production in Current Context of Transition Period], III ADMINISTRAÇÃO [ADMIN.] 134 (1990) (“glossário básico português-chinês e chinês-português; declaração de equivalências”).

Apart from the regime of publishing all Macanese statutes both in Chinese and Portuguese,²⁹ Chinese had been recognized as a co-official language in Macau since 1991,³⁰ and was subsequently anointed in the form of the bilingualism system under section 9 of the Basic Law.³¹

Besides the Basic Law, some Decrees have been passed to implement the principle of bilingualism in the public administration³² and the Macanese legal system as a whole.³³ Decrees have also been issued to modify the codes (civil³⁴, criminal³⁵ and administrative³⁶) that allow for multilingualism.

In general, legal translation and bilingual law making appears to be strategically thought through as a powerful instrument to realize the “one country, two system” principle, heading in the direction of a linguistic and cultural harmonization between Macau and Mainland China and thus strengthening the Chinese collective identity.

However, if we pass from “law in the books” to “law in action”³⁷, and from political challenges to the *real* and *daily* application of

²⁹ Decreto-Lei n. 11/89/M (Jan. 20, 1988) (Mac.).

³⁰ Decreto-Lei n. 455/91 (Dec. 31, 1991) (Mac.); see Nicolau Xavier Júnior, *Estatuto oficial da língua Chinesa* [Official Status of the Chinese Language], VII ADMINISTRAÇÃO [ADMIN.] 653 (1994).

³¹ AOMEN JIBEN FA art. 9 (1993) (“In addition to the Chinese language, Portuguese may also be used as an official language by the executive authorities, legislature and judiciary of the Macao Special Administrative Region.”) (Mac.).

³² Decreto-Lei n. 5/98/M (Feb. 2, 1998) (Regulamento de materia como comunicações oficiais, arquivo, normalização e validade de documentos e logotipos) (Mac.); see Kuok Sio Lai, *Falar Sobre os Modelos Bilingues dos Ócios em Macau* [Discussion on the Models of Bilingual Offices in Macau], XIV ADMINISTRAÇÃO [ADMIN.] 1009 (2001), Sheng Yan, *Falando Novamente sobre a Questão da Linguagem nos Documentos Oficiais em Língua Chinesa* [Review of the Question of Official Documents in Chinese Language], XIV ADMINISTRAÇÃO [ADMIN.] 657 (2001).

³³ The art. 5(3) of the Decree regulates cases of contrast between the two language versions: “No caso de se verificarem divergências de sentido entre as versões de um acto normativo, adopta-se um sentido admitido por ambas, tendo em conta as regras normais de interpretação da lei ou, não sendo tal possível, aquele sentido que melhor se coaduna com os objectivos prosseguidos pelo acto.” Decreto-Lei n. 101/99/M (Dec. 13, 1999) (adoption of the regime of official language) (Mac.).

³⁴ CÓDIGO DE PROCESSO CIVIL, art. 89 (Port.) (“Língua a empregar nos actos: 1. Nos actos processuais utiliza-se uma das línguas oficiais. 2. Quando tenha de intervir no processo pessoa que não conheça ou não domine a língua de comunicação, é nomeado, sem encargo para ela, intérprete idóneo, ainda que a entidade que preside ao acto ou qualquer dos participantes processuais conheçam a língua por aquela utilizada; o intérprete presta juramento de fidelidade.”).

³⁵ CÓDIGO DE PROCESSO PENAL, art. 82 (Port.) (“1. Nos actos processuais, tanto escritos como orais, utiliza-se uma das línguas oficiais do Território, sob pena de nulidade. 2. Quando houver de intervir no processo pessoa que não conhecer ou não dominar a língua de comunicação, é nomeado, sem encargo para ela, intérprete idóneo, ainda que a entidade que preside ao acto ou qualquer dos participantes processuais conheçam a língua por aquela utilizada. 3. É igualmente nomeado intérprete quando se tornar necessário traduzir documentos em língua não oficial e desacompanhados de tradução autenticada. . . .”).

³⁶ See CÓDIGO DE PROCEDIMENTO ADMINISTRATIVO, art. 78 (Port.) (Publicidade da sentença e acórdão de provimento); *id.* art. 93 (Decisão).

³⁷ N. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

principles and rules, the picture of the Macanese bilingual legal system is somewhat blurred.

In the early nineties, Cabrita found that no judge in the Macanese court spoke Chinese;³⁸ only a few lawyers inscribed in the *Associação de Advogados de Macau* spoke Cantonese and even less were able to write in Chinese. For the most part, public officials were able to speak Cantonese but not write in Chinese.³⁹

Today the situation has changed. As recently pointed out by Dr. Jorge Neto Valente, President of the Macanese Bar Association, in 1999, only 6 out of 87 lawyers had Chinese as their mother tongue; in 2011, the number had arisen to 57 out of 231 lawyers registered in the Association, and the situation of trainee lawyers was even better.⁴⁰ A similar increase can be seen in the case of judges with Chinese as their mother tongue.

Despite impressive efforts regarding the translation program launched in 1989, several difficulties still remain in transposition work not only due to very deep grammatical syntactic, stylistic and structural differences between Portuguese and Chinese,⁴¹ but also

³⁸ Cabrita, *Translation*, *supra* note 20, at 385.

³⁹ See Rui Manuel de Sousa Rocha, *Um País Dois Sistemas Políticos, Um Território, Vários Sistemas Linguísticos* [*The Politics of One Country, Two Systems: One Territory, Multiple Language System*], V ADMINISTRAÇÃO [ADMIN.] 483, 490-92 (1992).

⁴⁰ Jorge Neto Valente, Presidente da Associação dos Advogados de Macau [President of the Association of Lawyers of Macao], Address at the Official Opening Ceremony of the Judicial Year (Oct. 19, 2011) (transcript available at http://202.175.15.151/aam/portuguese/DAAJ_2011_PT.pdf) [hereinafter *Discurso*]; see also Tong Io Cheng, *supra* note 15, at 639-40.

⁴¹ See Eduardo Cabrita, *A Tradução Jurídica em Macau: Uma Lei Bilingue Para dar Voz aos Direitos* [*The Legal Translation in Macau: A Bilingual Law Giving Voice to the Rights*], 2 PERSPECTIVAS DO DIREITO [RIGHT WAY] (1996) (“É, aliás, possível enunciar uma grelha sintética das dificuldades encontradas neste domínio: a) Termos distintos em direito português para os quais apenas existe um termo em direito chinês. Esta situação obriga a distinções artificiais ou a alterações significativas do conteúdo das expressões usadas em chinês para reflectir a diferença de conceitos tão importantes como revogação e anulação em direito civil; b) Termo único em português, com várias acepções, ao qual correspondem diversos termos técnicos em língua chinesa; c) Termo com equivalente chinês com sentido bastante mais amplo ou bastante mais restrito do que em português; d) Termos relacionados entre si com equivalências imperfeitas em chinês. É difícil reflectir em chinês, por exemplo, a distinção entre difamação e injúria; e) Conceito técnico-jurídico em português, ao qual corresponde em chinês linguagem comum, ou pouco precisa, sem conteúdo jurídico consagrado; f) Conceitos com equivalentes consagrados, mas diferentes, no direito da R.P.C. e de Taiwan; g) Conceitos com equivalente técnico em chinês usado no direito da R.P.C., mas que são em Macau designados por expressões comuns sem conteúdo jurídico; h) Conceitos abordados na doutrina jurídica chinesa, ou na análise de sistemas jurídicos estrangeiros, mas que não são usados em textos legais; i) Conceitos, ou designações, sem equivalência em chinês, obrigando à tradução literal, a uma tradução descritiva-explicativa ou à agregação artificial de caracteres com sentido técnico específico em chinês; j) Tradução de expressões típicas do jargão jurídico como “lavar auto” ou “baixa assinado”, que têm de ser reconstituídas para adquirir sentido em chinês; l) Tradução de frases de estrutura complexa com características inexistentes na língua chinesa.”); see also T.A. Cheng, *A Sintaxe do Cantonês e das Línguas Românicas* (*Estudio Contrastivo* [Comparative Studies of the syntax of Roman Languages and Cantonese]), II ADMINISTRAÇÃO [ADMIN.] 405 (1989); Salvatore Mancuso, *Language and Law: the Issue of Bilingualism in Macau Legal System*, 5 CADERNOS DE CIENCIA JURIDICA 66 (2008) (“The

because of an urged increase in the quality of statute law and case law (which was steered by the increase in the number of lawyers and judges with Chinese as their mother tongue).

Furthermore, in respect of the “*localization*” process of the Macanese legal system⁴² and the consequent desire to find a strong local legal identity distinguished from the Portuguese heritage, it emerges that there is not only a certain resistance exerted by the Macanese legal community in metabolizing the new bilingualism system, but also a persistent dominance of Portuguese legal culture.⁴³

Nevertheless, the Macanese legal system still appears to be more of a *diglossic* society than bilingual system for two reasons: first, Portuguese and Chinese are predominantly used in different social situations (one for administration and governance; and another for the community’s everyday language); second, Portuguese and Chinese are mainly spoken by different ethnic groups.⁴⁴

Scholars have cited the risks of such situations, with one Professor Gambaro usefully pointing out that, “The bilingualism of law in the books is frail if it is not supported by a community of people who speak the two languages”.⁴⁵

In Macau, this appears to be the case. Indeed, on the surface, if viewed from a dominant point of view, the Macanese legal system appears to stretch between the formal dimension of the bilingualism and the substantial reality of *diglossia*. However, despite this kind

extreme difference in conceptual terms between Chinese and Portuguese must be recalled to fully understand the situation. While Portuguese, as well as any western language, is a descriptive language where each word identifies an object or an action, Chinese has a completely different approach. In Chinese words are made by joining pictograms; each pictogram is a syllable, and each pictogram has its own tone even if the sound may be the same of other pictograms, and to each tone corresponds a different meaning.”), Tong Io Cheng, *supra* note 16, at 625 (“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.”).

⁴² For a socio political approach, see Richard Louis Edmonds & Herbert S. Yee, *Macau: From Portuguese Autonomous Territory to Chinese Special Administrative Region*, 160 CHINA Q. 801 (1999).

⁴³ Tong & Wu, *supra* note 15, at 649. (“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.”).

⁴⁴ On the diglossic nature of the Hong Kong legal system, see Miguel Santos Neves & Rui Daniel Rosário, *A Política Linguística em Hong Kong [The Language Policy in Hong Kong]*, I ADMINISTRAÇÃO [ADMIN.] 43, 46 (1988) (“Hong Kong è, pertanto, uma sociedade mais diglòssica do que bilingue.”). For the same matter in Macau, see *Cabrita, Translation, supra* note 20, at 354 (“Em Macau, o português è desde o século XVI a língua da administração, existindo contudo um grande afastamento entre a comunidade chinesa e um ordinamento jurídico que ignorava e com a qual limitava os contactos ao m ímo impostos pelo cumprimento de obrigações legais, ainda a í recorrendo no contacto com a Administração a um intermediário normalmente macanense.”). See generally Rui Manuel de Sousa Rocha, *supra* note 39.

⁴⁵ Antonio Gambaro, *Interpretation of Multilingual Legislative Texts*, 11.3 EJCL 1 (2007), available at <http://www.ejcl.org/113/article113-4.pdf>.

of institutional “strabismus”, it does not change the crucial fact that the real “*masters of law*”⁴⁶ in the Mekanese legal system are still those lawyers who speak Portuguese, who studied the Portuguese legal system, and consequently those who are most acquainted with Portuguese legal categories and taxonomy. Obviously, the crucial matter at hand, or the better question to ask, is not “who” the masters of law are, but rather, if we adopt a socio-political perspective, *how does or should one become* a master of law. In a more strict legal perspective the real question becomes *how can the system of bilingualism in Macau be improved*.

Apart from understandable reasons linked to power relationships for the maintenance of the intellectual supremacy on the legal system⁴⁷ and not considering “path dependency dynamics” (related to an unwillingness to leave the comfortable confines of the well known monolingual system),⁴⁸ this paper will now discuss the previously mentioned “institutional strabismus” from the perspective of the peculiar relation between law and language.

III. THE *LANGUAGE IN THE LAW* AND THE *LAW IN THE LANGUAGE*: A CRUCIAL DISTINCTION

At this point, this author seeks to clarify a distinction that appears to be important for (i) better understanding the issue concerning the relation between law and language, and (ii) trying to avoid dangerous overlaps between perspectives, arguments and conceptual grids.

It is necessary to maintain a well separated distinction between issues concerning multilingualism as “*language in the law*” and “*law in the language*”. The former concerns the right to have access to justice (and in general to the legal system) in its own language; the latter concerns the peculiar relation between law and language and its

⁴⁶ R.C. VAN CAENEGEM, JUDGES, LEGISLATIONS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 67 (1987).

⁴⁷ Cabrita, *Bilingualism*, *supra* note 20, at 672 (“Se é obvio que o chinês assumirá na RAEM um papel preponderante, o estatuto de língua oficial atribuído ao português pelo do artigo 9 da Lei Básica, e a realidade objectiva de Macau, fazem prever que, apesar de um previsível declínio da sua influência social, o conhecimento da língua portuguesa será um elemento precioso para o funcionamento da Administração Pública nos primeiros anos subsequentes à transferência de poderes. A reconstituição de processos administrativos, e a clarificação de situações jurídicas definidas antes da transferência de poderes, exigirão sempre a consulta dos documentos elaborados exclusivamente em língua portuguesa e insusceptíveis de tradução generalizada.”).

⁴⁸ Discurso, *supra* note 40 (“Recorrentemente, esconjura-se o bilinguismo como fonte de todos os males, ou desvia-se a atenção dos sectores menos atentos para causas imaginárias, quando não mesmo se faz apelo à ignorância e ao preconceito.”); *see also* Tong Io Cheng & Wu, *supra* note 15, at 648 (“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.”).

problematic reflections at the moment of translation or at the moment of multilingual law making processes.⁴⁹

As for issues in the category of “language *in the law*”, it is important to recognize the other language(s), spoken in a certain territorial context, as the “official language”. From this stems a bundle of rights such as the right to legal equality and efficacy of all versions of the documents having legal value, the right to have access to justice and administrative institutions and procedures in its own language, and the right to have an interpreter in case of necessity.⁵⁰

Arguments in favor of recognizing and maintaining a certain language as the “official language” are permitted by legal and socio-political considerations, with the aim to impose or preserve a certain language.⁵¹

At any rate, it is always necessary to look out for confusion between the different categories. Some examples are as follows:

The statement – “[Q]ue embora a língua chinesa e a língua portuguesa sejam ambas línguas oficiais da RAEM, a língua chinesa tem prevalência. A língua chinesa é a língua principal e a língua portuguesa é acessória.”⁵² – is well based on a decision of the Second Session of Eighth Legislature of National People’s Congress of the People’s Republic of China. Despite this strong

⁴⁹ See E. Ioriatti Ferrari, *Lingua e Diritto in Europa: Multilinguismo, Pluralismo Linguistico e Terminologia Giuridica Uniforme nel Diritto Europeo dei Contratti* [Language and Law in Europe: Multilingualism, Linguistic and Legal Terminology in the Uniform European Contract Law], 2005 DIRITTO PUBBLICO COMPARATO ED EUROPEO [COMPARATIVE PUBLIC L. & EUROPE] 1549 (2005).

⁵⁰ Zhu Lin, *A Situação da Língua Chinesa nas Sentenças Judiciais de Macau: Duma Perspectiva dos Direitos Fundamentais* [The Situation of Chinese Language in Court Rulings of Macau: From the Perspective of Fundamental Rights], XX ADMINISTRAÇÃO [ADMIN.] 159, 160, 177-78 (2007).

⁵¹ Kang Jiming, *O caminho de retorno de Macau à mãe-pátria* [The Path of Return of Macao to its Motherland], XVI ADMINISTRAÇÃO [ADMIN.] 539, 542 (2003) (referring to a meeting of the “Grupo de Ligação” between Portuguese and Chinese: “Imprevisamente, o Chefe da delegação portuguesa chegou a colocar-me esta pergunta: “Vocês tocam sempre na mesma tecla. Trata-se de uma questão política ou técnica?” Respondi dizendo: “É, a mesmo tempo, uma questão política e técnica. Pela política entende-se que a língua chinesa é uma das cinco grandes línguas reconhecidas pelas Nações Unidas. O seu não reconhecimento num território tão pequeno como o de Macau constitui uma discriminação de uma Nação em relação a outra Nação, sendo assim, como é que vocês podem falar na igualdade entre as Nações? Pela técnica entende-se que a população de Macau, para qualquer coisa de carácter burocrático, tem de usar a língua portuguesa, o que lhe cria grandes inconveniências e incómodo.”); see also Nuno Calado, *Algumas Reflexões em torno do Bilinguismo Oficial* [Some reflections of the Official Bilingualism], 3 PERSPECTIVAS DO DIREITO [RIGHT WAY] 45, 50 (1997) (“Por outro lado, a decisão de adopção de um modelo de bilinguismo oficial é uma decisão política, dos poderes públicos, pelo que naturalmente a estes incumbirá um dever especial de promover e incentivar o ensino, a utilização e a divulgação das línguas oficiais, competindo-lhes ainda, em colaboração com os demais agentes culturais, adoptar políticas activas de valorização do estatuto dessas línguas.”).

⁵² An English translation is provided as follows: “. . . [A]lthough Chinese and Portuguese are both official languages in Macau SAR, the Chinese takes precedence. The Chinese language is the main language and Portuguese language is an accessory.” LEONG WAN CHONG, *supra* note 7, at 45.

backing, however, it runs the risk – if taken uncritically – to be evaluated as a mere legal rule, easily applicable like any legal rule, while representing not only the sharp expression of a certain and somehow understandable political position, but also the gap between political willingness and the present reality of the Macanese legal system whereby the Portuguese is still the real working language of the jurists.⁵³

Similarly, it happens when it is affirmed that: “[article 9 of Basic Law] *demonstra espressamente . . . que a língua chinesa ocupa o principal lugar. É compreensível que em território chinês se use a língua chinesa e que esta seja a principal língua usada. Há pessoas que consideram isto uma discriminação em relação à língua portuguesa. Acho que esta opinião é incorrecta. Uma lei de um certo país prescrever claramente que os órgãos locais de uma sua região administrativa especial podem usar uma língua de outro país, já é ser muito flexível, e atender às circunstâncias reais. Como é que se pode dizer que é uma discriminação e que não se dá a importância à língua portuguesa. . . .*”⁵⁴

Apart from some scientific replies that could be done to these statements, it seems that these arguments are proper in the context where the crucial theme and the important challenge is the recognition of bilingualism as a right; a context where the reasoning of the politics (including social and historical considerations) is welcome and understandable.⁵⁵

⁵³ For interesting observations in this matter, see S. Mancuso, *supra* note 41, at 63 (“It should be noted that during the first year after the handover the political will to affirm the Chinese sovereignty over the Macao territory brought the Government to draft almost all the legislative texts in Chinese, and then having them roughly and badly translated into Portuguese without any possibility for the Portuguese community to intervene to change or ameliorate the translation. The phenomenon has produced a group of laws (most of them still in force) hard to use either for Portuguese and Chinese legal professionals, in the first case due to the bad language used, and in the second due the fact that the Chinese people who drafted the law were neither jurist nor people having a legal background.”).

⁵⁴ AOMEN JIBEN FA art. 9 (1993) (Mac.) (“[T]he Chinese language occupies the chief place. It is understandable that Chinese language is used in the Chinese territory and that it is the main language used. Some people consider this as discriminatory against the Portuguese. I think this view is incorrect. A law of a certain country that allows local bodies of their special administrative region to use a language of another country is already being very flexible. How can you say that is discrimination and that does not give importance to the Portuguese language?”); XIAO WEIYUN, CONFERÊNCIA SOBRE A LEI BÁSICA DE MACAU [CONFERENCE ON THE BASIC LAW OF MACAO] 67-68 (2000); Nuno Calado, *Tradução Jurídica: Experiência e Perspectivas* [Legal Translation: Experience and Prospects], VIII ADMINISTRAÇÃO [ADMIN.] 73, 85 (1995).

⁵⁵ Mancuso, *supra* note 41, at 58-59 (“Although the wording of art. 9 of the Basic Law seems to give prevalence to the Chinese language, however Article 1 paragraph 2 of Decreto-Lei n. 101/99/M ascribes to them the same dignity being both valid means of expression of any legal act. According to Article 2 of the same Decreto-Lei all bills must be submitted to the Legislative Assembly drawn up in one of the two official languages accompanied with the translation into the other, and the drafting of legal documents in most of the cases is made using the Portuguese.”).

Nonetheless, reasoning about an efficient implementation of a multilingual system necessitates a change of perspective. Declarations of principle and the cultural temptation of politics to exalt at the “local” ideal are not enough.

In this respect, commentators are often careful to distinguish between “formal equality” (“*igualdade formal de estatuto*”) and “substantial equality” (“*igualdade material de estatuto*”) of different languages.⁵⁶ Other commentators speak of an *illusion* of bilingualism with reference to the Macanese system.⁵⁷

Despite the rhetoric about multilingualism or bilingualism, the relation between law and language is quite peculiar.⁵⁸ It therefore follows that matters regarding the “law in the language” deserve to be addressed with a different point of view.

⁵⁶ Sergio de Almeida Correia, Pedro Horta e Costa, *Por uma Política de Tradução Jurídica e Produção Legislativa Bilingue no Actual Contexto do Período de Transição* [Production by a Policy of Legal Translation and Bilingual Legislative Production in the Current Context of the Transitional Period], III ADMINISTRAÇÃO [ADMIN.] 140, 141 (1990) (“[U]ma coisa é afirmar que, num plano abstracto, ambas as versões possuem o mesmo valor e potencialidades na sua aplicação, e outra, bem diferente, é assegurar essa possibilidade na prática.”); see SAM HOU FAI, President of the Court of Final Instance, Address at the Official Opening Session of the Judicial Year (Oct. 20, 2011) (transcript available at <http://www.court.gov.mo/pdf/Discurso2010P.pdf>) (“... são inadequadas quer a solicitação de preceder-se a uma alteração fundamental dos grandes códigos ou de opor-se a qualquer alteração, Quer o apelo para que os tribunais passem utilizar plenamente a língua chinesa, ou que voltem a utilizar a língua portuguesa a curto prazo ignorando as realidades de Macau, uma vez que, em última análise, o que sai prejudicado é o interesse global da RAEM e o próprio funcionamento da justiça.”).

⁵⁷ Cabrita, *Translation*, *supra* note 20, at 359 (“A oficialização da língua chinesa não envolve um processo de sucessão de línguas oficiais mas sim o desencadear de um conjunto de acções que, sem pretender criar um ilusório paraíso do bilinguismo que em lado algum existe, possibilite que o exercício dos direitos dos indivíduos relativamente à Administração não dependa da língua em que os mesmos são invocados, que a lei possa ser invocada e aplicada em qualquer das suas versões e nos tribunais exista igualdade, não só quanto à lei que é aplicada, mas também quanto à possibilidade de exercício de direitos processuais e à plena consciência dos fundamentos e sentido das decisões judiciais.”).

⁵⁸ See Cândida da Silva Antunes Pires, *Língua e Ciência Jurídica. Da Formulação do Direito à Transposição Linguística. Dívidas e Perplexidades*, 5 PERSPECTIVAS DO DIREITO (1998) (“Não apenas, e antes de mais, porque um e outra são *fenómenos sociais*, universais e necessários, que levariam a dizer, para a língua, o que se diz acerca do direito: *ubi societas, ibi . . . verbum*. Qualquer sociedade cria, quer a sua língua de comunicação, quer o seu direito regulador; ambos estes produtos da vida social, nascidos da mesma sociedade são, tanto na sua origem como no seu devir, acolhendo o pensamento de Carbonnier, *fenómenos costumeiros*, no sentido de que exprimem hábitos. A prática da língua e a prática do direito provêm ambas de um comportamento popular submetido a uma moldagem científica apropriada. O uso determina a língua e foi durante muito tempo, se acompanhado da convicção da sua obrigatoriedade, fonte do direito, pelo que, em certo sentido, ambos são seus “filhos”, mantendo entre si uma relação fraternal. Do mesmo passo, pode afirmar-se sem hesitações que direito e língua são, ambos, *fenómenos normativos*. O direito é um sistema de normas e a língua, com todas as suas regras gramaticais, também o é. Será de resto, por isso mesmo que um e outra, enquanto aspirando ao respeito das suas normas, potenciam reacções de sentido contrário, de rejeição, de violação. Acresce que, numa apreciação que creio nada encerrar de contraditório, o direito e a língua, enquanto sistemas, são essencialmente *evolutivos*: a língua tem vida, o direito também; ambos são impermeáveis à cristalização, em ambos existem elementos transmissíveis e elementos que se transformam. *Tradição e actualização* são traços comuns, associados, do património linguístico e do património jurídico, que não estão conservados em museus, mas “vivem” nos lares, nas assembleias, nas ruas.”).

What happened in Europe, and what seems to me to be what is happening in Macau, is an excessive importance given to multilingualism (with its elements of culture defense and “political” considerations) and – at the same time – an undervaluation of the special relation between law and language. This happens because there is a widely shared conviction (a sort of “normative optimism” or illusion) that, *each law is, after all, translatable* from one language to another.⁵⁹

Unlike physics, biology and other sciences, the difficulties presented in thinking, elaborating and organizing legal terminology are explained by an absence of equivalence and correspondence between the specialized words used in the different local legal cultures and an “object” of the external world. In more simple terms, pens, elephants, cars, and so on actually exist in the physical world, regardless of cultural traditions and terminologies. This means that an object such as a “pen”, which is expressed in different words according to different linguistic traditions (“penna” in Italian, “stylo” in French, “caneta” in Portuguese. . . .), can also easily (in the form of an hypothetical general agreement) be called a common and unique name that crosses terminology differences. This is possible because that “object” (pen, elephant, car and so on) already exists in the physical world.

The same does not happen in the world of law. In the legal world, the law forms its reality through the instruments of language and communication such as trusts, contracts and property. These instruments do not belong to the physical world, but are expressions and creation of a *specific legal culture, routed in a certain society in a certain historical moment*.⁶⁰ Accordingly, the meaning of legal terms cannot be separated from their relation with legal system in which that term and taxonomy was generated.

When transposing this consideration to the context of legal translation, two things quickly become apparent: first, the importance to avoid a too confident and “relaxed” use of neologisms and explanatory forms; and second, the importance to pay maximum attention to the translation’s trap led by the terrible attractiveness of the “assonances”.

Some examples, picked up from the common law-civil law *dialogue*, could help to clarify this thought. Generally speaking, legal concepts like the French “*propriété*” or the Italian “*proprietà*”,

⁵⁹ See P. W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. 47 (1986); ORDINARY LANGUAGE AND LEGAL LANGUAGE (B. Pozzo ed., 2005).

⁶⁰ Tong Io Cheng, Associate Professor, University of Macau, address at the First Seminar on Law and Social Science, Legal Education with Macau Characteristics 162 (2007) (“[W]e must notice that positive law itself, even in the operational level, is not comprehensible through pure logical deduction. The application or interpretation of law at least involves certain cultural ingredients.”).

or the Portuguese “*propriedade*” are basically founded in the ancient Roman idea (*dominium ex iure Quiritium*) of an exclusive and absolute power exercised by a person on a corporal thing (a “*dominative version*” of the idea of property). Unlike this view, the essence of Anglo-American property law does not simply hold that there is a right vested in a subject, nor that there is any simple relationship between a person and an object. Instead, property in England is still linked to the medieval and feudal idea of “*eminent domain*”, where all lands belong to the sovereign, who used to grant time limited (*estate*) tenures on the land to his vassals, in return for services of different nature. The aftermath of this different diachronic stamp is that today English property is conceived as a legal relation between persons and not things, a *bundle of rights* (or claims), privileges, powers and immunities (“*relational version*” of the idea of property).⁶¹

The above explains why it could turn out quite dangerous and superficial to translate (without any critical advice or specialized comments) the term “*property*” under totally different concepts like the French “*propriété*” or the Italian “*proprietà*”.

Similar observations are possible in respect of the law of contract and obligations. The English term “*contract*” immediately reminds a common law lawyer of the idea of a necessary *bargain*, the object of which is named “*consideration*” or a reciprocal detriment and benefit between parties. *Consideration* thus constitutes the essential element of the institute, without which it is impossible to speak of the *existence* of a contract. However, in civil law systems, lawyers call “*contratto*”, or “*contrat*”, or “*contrato*” legal relations without any reciprocal and mutual bargain, like donation.

For an Italian lawyer the “*contratto unilaterale*” (ex art. 1333 Italian civil code) is a bilateral or plurilateral contract with obligation *only upon one party, the promisor*. This use differs from the common law use of the term “*unilateral contract*” only if the offeror contemplates, not from the creation of mutual premises to perform a future obligations, but from the dependence of his own promise upon the offeree’s performance of an act. The word “*unilateral*” does not refer to the unique obligation of the contract (like in Italy), but to the *remained* obligation to perform (by the offeror) – an obligation that arises after the offeree has performed the act requested.⁶²

However, the problem of translation does not decrease if we consider the assonances also inside the same legal tradition. Despite literal proximity between Italian “*rescissione*” and French

⁶¹ W.N. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923).

⁶² The concept arguably plays a large and useful part in commercial transactions, see *Carlill v. Carbolic Smoke Ball Company*, [1893] 1 Q.B. 256 (Eng.) (the classic case of unilateral contract).

“*rescission*”, it is not possible to translate one term into the other and vice versa. According to the French Civil Code, *rescission* is a particular case concerning the action of nullity, used when a contract is affected by *dol*, *violence* or *erreur* (article 1117 of French Civil Code). This differs from the Italian private law where *rescissione* is a remedy that is implemented or, in the case of a contract, stipulated under unfair conditions (to save someone from suffering a serious personal injury, as long as it is known to the other party) (article 1447 Italian Civil Code), or if is assumed to be a significant disproportion (*ultra dimidium*) between the performance of one party and the one of the other (as a result of the state of need of one of the parties) (article 1448 of Italian Civil Code).⁶³

To make the picture more complete, it should be noted that legal translation not only involves a deep inspection of the relation between a certain term and the related concept in different legal cultures, but also the relation between a certain concept (of property, liability, contract and so forth) and the *related and contextualized system of concepts*. For example, because the English Property Law has fully taken on its “modern” physiognomy in a period antecedent to the development of the idea of contract, some legal relations that are ruled by English common law contract in civil law countries are governed by the complex instruments of the property law. This is the reason why the circulation of immoveable goods happens in England in the form of a formal unilateral act (named “deed”) and not in the form of a contract (one with no “real effect” in that legal system).

Again, it is knowledge and awareness of the legal systems involved – the more technically precise the better – that provides more accurate and more effective translations.

Certainly, a lack of correspondence between concepts developed in one system and concepts developed in another jurisdiction will possibly create a situation where there are insufficient terms with equivalent legal meanings. Take for example the common-law terms “consideration”, “trust”, “estoppel”, or “undue influence” that do not have any semantic equivalent in Italian. In these cases, either neologism⁶⁴ or keeping the original word (with an explanation) can

⁶³ In this respect also the comparison with common law is eloquent – the term “rescission” in common law indicates an equitable remedy for cancellation of a contract in case of a pre-contractual fault. See generally B. Pozzo, *Harmonizing of European Contract Law and the Need of Creating a Common Terminology*, EUROPEAN REV. PRIVATE L. 756 (2003).

⁶⁴ Esin Örü ü, *Interpretation of Multilingual Texts in the UK, Report to the XVIIth International Congress of Comparative Law*, ELECTRONIC J. COMP. L. 19-20 (2006) (“The rules suggested by Weston – an one time translator in the Secretariat of the Council of Europe in Strasbourg and Senior Translator in the Registry of the European Court of Human Rights – in order of precedence, are first, a word-for-word translation if ‘this yields a functional equivalent’; ‘a non-literal translation representing a functional equivalent in the TL’; ‘a word-for-word or non-literal translation that represents a semantic

serve as possible solutions for the translator, but in such cases a higher degree of attention and cultural inspection will be required.

The aforementioned examples seem to eloquently demonstrate the perils of a non-specialized translation, and in particular a legal translation not supported by the fundamental know-how of comparative law.

The “*comparative interpretation*” applied to the translations appears like an extraordinary instrument for overcoming the overly simplistic and useless idea of a legal translation like a *mere relation between different names given to institutions*. Comparison of law is not a mere “nuance” of the foreign law.⁶⁵ The mere juxtaposition of different rules could say little or nothing about the reality of things. Comparison of law is a science that serves as a “cutting edge” observation of the foreign reality (not only statutes, but also judicial cases and reasoning, scholar’s opinion and so on) for finding the *real* (and not cosmetic) similarities and differences among legal systems and trying to offer explanations for such.

Having stressed this point of view, this author confesses that he is not in complete agreement with everything that is used to distinguish between two different contexts and functions of legal translation.⁶⁶ The first one – “*tradução de leis*” – should have the purpose of realizing a mere and not technical information of the law, in a context where the law is not in force anymore or in the case of foreign law taught in a comparative perspective. The other one – “*tradução legislativa*” – should be instrumental in implementing a multilingual legal system, like the Macanese system, where all official languages have the same legal value and efficacy.

In fact, there must exist a technical and extremely precise translation of the law (either it is in force or not, either municipal or alien law, either applied daily or taught in the University) or there is no reason for translation work. “Merely” informative (or only formative) translations have no place in the legal world.

In making such a statement, this author has not forgotten the experiences of places such as Belgium where, despite a provision for

equivalent but is not the label of a functionally equivalent referent in the TL culture (because there is none)’, ‘transcription’; and finally, ‘neologism’ . . . Neologisms are the last resort in any translation activity in law and translators generally refrain from creating neologisms.”).

⁶⁵ Nuno Calado, *supra* note 54, at 73 (1995): “A tradução de leis é, no primeiro dos sentidos apontados, uma actividade que qualquer tradutor, seja ou não jurista, pode fazer. É vulgar aparecerem traduções, nas mais variadas línguas, de leis de diferentes Estados, mormente das mais relevantes em termos de estudos de Direito Comparado. Em todas as escolas de Direito são utilizadas versões traduzidas de leis de outros Estados, que obra de profissionais da tradução, quer de juristas com conhecimento dos idiomas em causa. Estas traduções têm, obviamente, um carácter meramente informativo e formativo, sendo utilizadas para fins académicos ou científicos, sobretudo nos casos de leis estruturadoras e mais relevantes dos diversos ordenamentos jurídicos. . . .”

⁶⁶ See generally *id.*

three official languages (French, Dutch and German), only two of the languages, French and Dutch, are used for the formal publication of statutes, while the third, German, only has an “*informative*” function for the German-speaking citizens. Nevertheless this disparity is well justified by the fact that the language German is spoken by less than 1% of the population.

VI. THE PECULIARITY OF MACANESE MULTILINGUALISM: ITS UNIQUENESS COMPARED WITH THE LINGUISTIC PLURALISM OF THE EUROPEAN COMMUNITY AND OTHER BILINGUAL LEGAL SYSTEMS

In this section, this author attempts to briefly go across other experiences of multilingual legal systems. The purpose is to compare Macanese bilingualism with a transnational experience of multilingualism, such as that implemented in the European Union, and national bilingualism, such as that implemented in Canada.

This comparison gives rise to a more complete picture in regard to certain common problematic aspects and different methodological approaches.

A. The European Union multilingualism takes part in the challenges of other multilingual systems, such as preservation of the national/ethnic identities and peculiarities and access to justice in the own national language.⁶⁷ However, these challenges represent a crucial part of the process of integrating the European Private Law.⁶⁸

⁶⁷ Consolidated Version of the Treaty on European Union art. 55, Mar. 30, 2010, 2010 O.J. (C 83) 45 (“1. This Treaty, drawn up in a single original in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which will transmit a certified copy to each of the governments of the other signatory States. 2. This Treaty may also be translated into any other languages as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their territory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council.”); Declaration on Article 55(2) of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C83) 344 (“The Conference considers that the possibility of producing translations of the Treaties in the languages mentioned in Article 55(2) contributes to fulfilling the objective of respecting the Union's rich cultural and linguistic diversity as set forth in the fourth subparagraph of Article 3(3). In this context, the Conference confirms the attachment of the Union to the cultural diversity of Europe and the special attention it will continue to pay to these and other languages. . . .”); see also EEC Council Regulation n. 1 Determining the Languages to be Used by the European Economic Community, Oct. 6, 1958, 1985 O.J. (C 17) 385. See generally N. Urban, *On Legal Language and the Maintenance of Cultural and Linguistic Diversity*, EUROPEAN REV. PRIVATE L., 51 (2000); N.N. SHUIBHNE, EC LAW AND MINORITY LANGUAGE POLICY: CULTURE, CITIZENSHIP AND FUNDAMENTAL RIGHTS 29 (2002); A. Fenet, *Diversité Linguistique et Construction Européenne*, 37 REV. TRIM. DR. Eur 235, 246 (2001); B. Pozzo & V. Jacometti, LE POLITICHE LINGUISTICHE DELLE ISTITUZIONI COMUNITARIE DOPO L'ALLARGAMENTO: REDAZIONE, TRADUZIONE E INTERPRETAZIONE DEGLI ATTI GIUDIZIARI COMUNITARI E IL LORO IMPATTO SULL'ARMONIZZAZIONE DEL DIRITTO PRIVATO EUROPEO [THE LANGUAGE OF POLITICAL INSTITUTIONS AFTER ENLARGEMENT:

Harmonization of contract law at the European level is perceived as a necessity for clearing the so called *non tariff barriers* to the unification of the EU common market.⁶⁹ However, many obstacles are still found in the discrepancies between European legal terms and national ones.

Some of these discrepancies among several linguistic versions are the result of translation made by non-specialized translators – translators who possess no expertise on different legal traditions, categories and concepts. Other discrepancies reveal that the language of uniform private law produced at EU level by communitarian directives or regulations is, or can be, different from the language of internal law.⁷⁰ This is not because of mistakes made in translation, but because of the differences between legal categories and taxonomies used by the EU legislators, and those elaborated and applied by different legal systems under the EU Community.

This is illustrated in a European Directive⁷¹ that was passed ten years ago. It required “good faith” to serve as the factor for assessing the character term of “*unfair*”⁷² in contracts between a professional supplier or seller⁷³ and a consumer⁷⁴. Civil lawyers wondered which model of “good faith” the European legislator was referring to: the French subjective concept of “*loyauté*”, or the

EDITORIAL, TRANSLATION AND INTERPRETATION OF COMMUNITY LEGAL ACTS AND THEIR IMPACT ON HARMONISATION OF EUROPEAN PRIVATE LAW] (2006) (Ita.).

⁶⁸ Viola Heutger, *Legal Language and the Process of Drafting the Principles on a European Law of Sales*, ELECTRONIC J. COMP. L., Oct. 2008, at 6, 13 (2008) (“Standardization of legal language within the EU will help widen integration.”).

⁶⁹ J. Basedow, *A Common Contract Law for the Common Market*, 33 C. MKT. L. REV. 1169 (1996).

⁷⁰ Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 30, 2010, 2010 O.J. (C 83) 171 (“To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.”).

⁷¹ Council Directive 93/13/EEC, Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

⁷² Council Directive 93/13/EEC, art. 3, § 1, Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, 31 (“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.”).

⁷³ Council Directive 93/13/EEC, art. 2(c), Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, 31 (“[S]eller or supplier” means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned”).

⁷⁴ Council Directive 93/13/EEC, art. 2(b), Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, 31 (“[C]onsumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession.”).

German objective one of “*Treu und Glauben*”, which provided certain criteria for judges to determine the content of “good faith” in different factual situations. On the other hand, common law lawyers, who were rather reluctant to accept a concept that is quite as malleable as that of “good faith” and who were unfamiliar with their tradition, feared to undermine the coherence, certainty and predictability of the “our Lady Common Law”.

In this respect, Teubner spoke about the “legal irritant” effect stemming from the European Uniform Law.⁷⁵ The richness of the language and complexity of the European system risks to make thin the distinction between the domain of the translation and the domain of the interpretation.⁷⁶ This happens because legal translation at EU level necessarily involves an inspection in the *national legal cultures* in which each legal language is deeply embedded.

The legal term has to be linked to a certain scheme, to a specific taxonomy so as to make sense: “The signification of terms, in the sense of their ‘semantic value’, is determined by tradition and by the jurisprudence, that is to say by the stratification of interpretations which have been acknowledged”.⁷⁷

In complicating the picture of European multilingualism, there is the descendant process of implementation of the European Directives by each country in their own legal system – a process that always expresses the European varieties and complexity of legal cultures and values.⁷⁸

Vertical divergences and horizontal divergences are the expressions and aftermath of a sort of strabismus and gap between law – both at European and national levels – and its language. Vertical divergences are the divergence between communitarian private law and domestic private law. Horizontal divergences are the divergence among different legal systems in the implementation of the same EU Directive.

⁷⁵ G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Differences*, 61 MODERN L. REV. 11 (1998).

⁷⁶ K. Cunningham, *Translating for a Larger Union: Can We Cope with More than 11 Languages?* (Sept. 20, 2007) ALBAGLOBAL, <http://www.albaglobal.com/article-print-149.html>; S. Sarcevic, *Problems of Interpretation in an Enlarged European Union*, in R. SACCO ET AL., *L'INTERPRÉTATION DE TEXTES JURIDIQUES RÉDIGÉS DANS PLUS D'UNE LANGUE* [INTERPRETATION OF LEGAL TEXTS WRITTEN IN MORE THAN ONE LANGUAGE] 239 ss (Torino, Harmattan, Italia., 2002); V. Heutger, *Law and language in the European Union*, 3 GLOBAL JURIST FRONTIERS 1 (2003).

⁷⁷ G. Ajani, “Coherence of European Private Law” and Multilingualism: Two Opposing Principles?, 2007 INT'L BUS. L.J. 493, 497 (2007).

⁷⁸ Heutger, *supra* note 68, at 7 (2008) (“Furthermore, the implementation process of European Directives offers a wide range of linguistic interpretations and opens the door to different uses of language. When comparing the German and Austrian civil codes, for example, it can immediately be observed how different both legal languages are, even in areas that derive from the same European Directives.”).

Having said that, multilingualism in Europe seems to be either an ontological necessity for European political and social integration, or a structural obstacle to the harmonization process of contract law which requires a unified language.⁷⁹ This paradox puts the legal integration dynamics at EU level continuously under stress.⁸⁰ However, scholars believe that mostly at this stage of EU Law evolution, *uniformity of legal terminology* still represents an essential *prerequisite* of harmonization, uniformity, and unification of the law.

What is of major interest to this discussion is the new methodological strategy implemented after the decline of a top down and “rule oriented” approach to the unification of law,⁸¹ paradigmatically expressed by the project of a European Civil Code.⁸²

The so-called *Common Frame of Reference* promulgated by the European Commission⁸³ shares with several academic projects

⁷⁹ See M. J. Campana, *Versus a Langage Juridique Commun en Europe?*, EUR. REV. PRIVATE L. 37 (2000); S. Van Erp, *Linguistic Diversity and a European Legal Discourse*, ELECTRONIC J. COMP. L., Sept. 2003, at 1; N. Urban, *One Legal Language and the Maintenance of Cultural and Linguistic Diversity?*, EUR. REV. PRIVATE L., 51 (2000).

⁸⁰ See generally R.L. CREECH, LAW AND LANGUAGE IN THE EUROPEAN UNION: THE PARADOX OF A BABEL “UNITED IN DIVERSITY” (2005).

⁸¹ *Communication on a More Coherent European Contract Law: An Action Plan*, at 42, COM (2003) 68 final (Feb. 12, 2003) (“[T]here is a tendency towards a preference for an opt-in system, a set of transnational rules which, at the discretion of Member States might also be chosen by parties to purely domestic contracts. It is suggested that the first phase should be the unification of legal terminology”); *Communication on European Contract Law and the Revision of the Acquis: The Way Forward*, at 8, COM (2004) 651 final (Oct. 11, 2004) (“[I]t is important to explain that it is neither the Commission’s intention to propose a “European civil code” which would harmonize contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.”); see also M. Hesselink, *The European Commission’s Action Plan: Towards a More Coherent European Contract Law?*, EUR. REV. PRIVATE L. 397 (2004).

⁸² *Communication on European Contract Law*, para. 1(2), COM (2001) 398 final (July 11, 2001) (“The Parliament stated that harmonisation of certain sectors of private law was essential to the completion of the internal market. The Parliament further stated that unification of major branches of private law in the form of a European Civil Code would be the most effective way of carrying out harmonization with a view to meet the Community’s legal requirements in order to achieve a single market without frontiers.”); see TOWARDS A EUROPEAN CIVIL CODE (Hartkamp et al. eds., 1998) (discussing issues concerning civil law in Europe). The project of an European Civil Code was supported by a detailed discussion of leading representatives of academic world: the “Pavia Group” published its EUROPEAN CONTRACT CODE: PRELIMINARY DRAFT (2001) based on the work of the Academy of European Private Lawyers. See G. Gandolfi, *Pour un Code Européen des Contrats*, 1992 REVUE TRIMESTRIELLE 707 DE DROIT CIVIL (1992); COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000); STUDY GROUP ON A EUROPEAN CIVIL CODE, <http://www.sgecc.net> (last visited July 19, 2012); A.M. López Rodríguez, *Towards a European Civil Code Without a Common European Legal Culture? The Link Between Law, Language and Culture*, 29 BROOK. J. INT’L L. 1195 (2003-2004); Heutger, *supra* note 76.

⁸³ *Communication on a More Coherent European Contract Law: An Action Plan*, COM at 2 (2003) 68 final (Feb. 12, 2003) (“This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like “contract” or “damage” and of the rules that apply for example in the case of non-performance of

launched without any formal legitimation by the Communitarian Institutions⁸⁴ a common vision and a unique aim: a lingering *bottom up* effort – which is reflected in discussions of academics and policies at both the European and the national level – in elaborating, assessing and settling a common *legal terminology*⁸⁵, and providing

contracts. A review of the current European contract law *acquis* could remedy identified inconsistencies, increase the quality of drafting, simplify and clarify existing provisions, adapt existing legislation to economic and commercial developments which were not foreseen at the time of adoption and fill gaps in EC legislation which have led to problems in its application. The second objective of the common frame of reference is to form the basis for further reflection on an optional instrument in the area of European contract law.”); *id.* at 16 (“A common frame of reference, establishing common principles and terminology in the area of European contract law is seen by the Commission as an important step towards the improvement of the contract law *acquis*. This common frame of reference will be a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law. This frame of reference should meet the needs and expectations of the economic operators in an internal market which envisages becoming the world’s most dynamic economy.”); see Heutger, *supra* note 76; Viola Heutger, *A More Coherent European-wide Legal Language*, EUROPEAN INTEGRATION ONLINE PAPERS, Mar. 23, 2004, at 1; Elena Ioriatti, *A Methodological Approach for a European Restatement of Contract Law*, GLOBAL JURIST, Apr. 10, 2010, art. 4; Christian von Bar, *A Common Frame of Reference for European Private Law: Academic Efforts and Political Realities*, ELECTRONIC J. COMP. L., May 2008, at 1.

⁸⁴ See, e.g., W. Van Gerven, *Casebooks for the Common Law of Europe: Presentation of the Project*, 4 EUR. REV. PRIV. L. 67 (1996); CASEBOOK.EU, <http://www.casebooks.eu/welcome> (last visited July 19, 2012); COMMON CORE OF EUROPEAN PRIVATE LAW, <http://www.common-core.org> (last visited July 19, 2012).

⁸⁵ On legal terminology, see FALSI AMICI E TRAPPOLE LINGUISTICHE [FAKE FRIENDS AND LANGUAGE TRAPS] (Silvia Ferreri ed., 2010); *La Lingua del Legislatore: Modelli Comunitari e Attuazione Negli Stati Membri* [Language of the Legislature: Community Design and Implementation in the Member States], II RIV. DIR. CIV. 561 (2004) (Ita.); MAURIZIO GOTTI, SPECIALIZED DISCOURSE. LINGUISTIC FEATURES AND CHANGING CONVENTIONS (2003); INTERPRETAZIONE E TRADUZIONE DEL DIRITTO (Elaine Ioriatti Ferrari ed., 2008); B. Pozzo, *Harmonization of European Contract Law and the Need of Creating a Common Terminology*, 11 EUR. REV. PRIV. LAW 754 (2003); Barbara Pozzo, M. Timoteo (edited by), *Europa e linguaggi giuridici*, Milano, 2008; Elaine Ioriatti Ferrari, *Lingua e Diritto in Europa: Multilinguismo, Pluralismo Linguistico e Terminologia Giuridica Uniforme nel Diritto Europeo dei Contratti* [Language and Law in Europe: Multilingualism, Language and Terminology Legal Pluralism in the Uniform European Law of Contracts], 4 DIRITTO PUBBLICO COMPARATO ED EUROPEO 1549 (2005) (Ita.); Andrea Ortolani, *Le Lingue del Diritto: Nuove Prospettive in Tema di Traduzione e Interpretazione del Diritto Plurilingue* [The Language of the Law: New Perspectives in the Field of Multilingual Translation and Interpretation of the Law], 2003 RIV. CRIT. DIR. PRIV. 203 (2003); Olivier Moretau, *L'anglais Pourrait: Il Devenir la Langue Juridique Commune en Europe?*, in LES MULTIPLES LANGUES DU DROIT EUROPÉEN UNIFORME 153 (Rodolfo Sacco & Luca Castellani eds., 1995); S. Sarcevic, *Problems of interpretation in an enlarged European Union*, L'INTERPRETATION DE TEXTES JURIDIQUES RÉDIGÉS DANS PLUS D'UNE LANGUE 239 (Rodolfo Sacco ed., Torino 2001); Rodolfo Sacco, *Riflessioni di un Giurista sulla Lingua* [Reflections of a Lawyer on Language], 1996 RIV. DIR. CIV. 57. (1996); RODOLFO SACCO, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 34 (2001); R. Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171 (2001); Rodolfo Sacco, *Traduzione Giuridica*, IV Digesto 721; Ruth Sullivan, *The Challenges of Interpreting Multilingual Multijural Legislation*, 29 BROOKLYN J. INT'L L. 985 (2003-2004); Nikolaus Urban, *One Legal Language and the Maintenance of Cultural and Linguistic Diversity*, 8 EUR. REV. PRIVATE L. 51 (2000); P.G. Monateri, 'Cunning Passages': *Traductology, Comparison and Ideology in the Law and Language Story*, SSRN (Oct. 30, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496822; S. Van, *European Private Law: A European Standing Committee on Legal Terminology as a Next Step?*, ELECTRONIC J. COMP. L., July 2005, at 1; Heutger, *supra* note 68, at 6.

definitions of concepts in order to help and develop a uniform and coherent use of language.

B. The Canadian bilingualism reflects not only the presence of two lingual communities, but also the coexistence of different legal systems in the same national territory (“*bijural*” system): the civil law system in Quebec province, where normative acts are written in French; and the common law system in the other Canadian provinces, where the vehicular technical language is English.

According to the known scheme of the multilingual system, the Canadian legal system expresses its own “*language in the law*” in a diversified bulk of rights and guarantees under the crucial profile of the “*law in the language*”.⁸⁶ Some features deserve to be highlighted.

Problems of coordination between different languages and legal traditions in creating an *advanced standardization of legal terminology* have been detected, such as problems in finding or creating French equivalent terms for common law concepts. The research of equivalence, that is synthesized with the acronyms C.L.E.F. (*Common Law en Français*) and D.C.A. (*Droit Civil en*

⁸⁶ See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 16 (U.K.) (“(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada; (2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick; (3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French; 16.1(1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct cultural institutions as are necessary for the preservation and promotion of those communities.; (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to subsection (1) is affirmed.”); *id.* § 17 (“(1) Everyone has the right to use English or French in any debates and other proceedings of Parliament. (2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.”); *id.* § 18 (“(1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative; (2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.”); *id.* § 19 (“(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament. (2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.”); *id.* § 20 (“(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where (a) there is a significant demand for communications with and services from that office in such language; or (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French. (2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.”).

Anglais)⁸⁷, was jointly conducted by universities, research institutes and the Canadian Department of Justice.⁸⁸

The Canadian government, after having used a “unilingual drafting / translation” approach for over a century, has addressed matters regarding the drafting of legal texts by opting for a “bilingual drafting”.⁸⁹ In the Legislation Section of the Department of Justice, a team of an Anglophone and Francophone drafters are assigned the job to prepare the two language versions of all bills under the guidelines, directives and review of the Chief Legislative Counsel and the Deputy Chief Legislative Counsel, both respectively representing one of the two official linguistic groups and one of the two Canadian legal systems.

The previously mentioned approach affects not only the full binding effect of the two language versions, but also the equality of the versions.⁹⁰ It is necessary to briefly outline some considerations:

a. In the perspective of the “language in the law”, multilingualism, regardless of the model that is being implemented,⁹¹ has been used as a principle of defense for local and national identities – for each State belonging to a certain transnational institution, as it happens in the European Community; or for different

⁸⁷ See generally Emmanuel Didier, *La Traduction Juridique en Europe. Etat et Perspective de la Common law en Français (CIEF) et du Droit Civil en Anglais (DCA)*, in LES MULTIPLES LANGUES DU DROIT EUROPÉEN UNIFORME 37 (Rodolfo Sacco & Luca Castellani eds., 1999); EMMANUEL DIDIER, *LANGUES ET LANGAGES DU DROIT : ÉTUDE COMPARATIVE DES MODES D'EXPRESSION DE LA COMMON LAW ET DU DROIT CIVIL, EN FRANÇAIS ET EN ANGLAIS*, (1990).

⁸⁸ See *Law of Property and Estates*, NAT'L PROGRAM FOR INTEGRATION OF BOTH LANGUAGE IN JUSTICE COMPONENT, www.pajlo.org/en/dictionary.php; see also *Liste D'Outils Linguistiques: Pour la Traduction Juridique au Canada*, CTTJ, http://www.cttj.ca/Documents/Outilspourlatraductionjuridique_copiemaitresse_.pdf (setting out a list of internet, digital and hardcopy sources).

⁸⁹ Co-drafting practice has been used since 1978.

⁹⁰ Donald L. Revell, *Authoring Bilingual Laws: The Importance of Process*, 29 BROOK. J. INT'L L. 1085 (2003-2004).

⁹¹ Pedro Pereira de Sena, *Direito Linguístico: Direitos e Deveres nas Palavras da Lei*, V ADMINISTRAÇÃO, 385 (1992); Nuno Calado, *Algumas Reflexões em Torno do Bilinguismo Oficial*, 1 PERSPECTIVAS DO DIREITO 45 (1997) (“Bilinguismo perfeito (impõe que, no âmbito respectivo, qualquer das línguas oficiais é susceptível de ser utilizada indiferentemente, sendo, sempre e em todas as circunstâncias, assegurado por um meio adequado, nomeadamente a tradução ou interpretação, a informação ou comunicação na outra língua oficial); bilíngue impróprio, ou de monolinguismo sequencial (é aquele em que havendo alternativa entre ambas as línguas oficiais, e sendo escolhida uma delas como língua procedimental, apenas essa é utilizada em todo o procedimento); bilinguismo imperfeito (no qual, apesar de existirem duas línguas oficiais, uma delas prevalece sobre a outra em termos estatutários ou, mesmo havendo estatuto de co-oficialidade, a prevalência decorre do uso ou das circunstâncias sócio-linguísticas, engendrando-se, porém, instrumentos ou meios de tornar acessível o procedimento na língua preterida).”).

legal traditions which insists on the same national system, as in Canada; or, finally, for different socio-ethnic groups, as in Macau.⁹²

b. All multilingual systems recognize the importance of producing juridical documents *without any linguistic influence* coming from the other linguistic versions, but from the language that historically dominated the country's legal and administrative environment. For example, French in Belgium, English in the Canadian Federation, German in Switzerland, and so forth. In respect of the Macanese experience, many authors underline not only the lingering presence of Portuguese legal model as general frame of cultural reference,⁹³ but also the direct and persistent influence of Portuguese jurists in "supporting" Chinese translators⁹⁴. This approach could contradict the principle of *equality* of the two languages, triggering a phenomenon of prevalence (despite formal bilingualism) of the Portuguese culture and, consequently, of the Portuguese language version over the Chinese version of the law. It will be shown below that this depends on a disconnection between the Chinese language and a legal *local* culture rooted in Macau.

c. Compared to other jurisdictions that use the multilingual legislation method,⁹⁵ two elements seem to distinguish the Macanese experience from other experiences: socio-linguistic balance between different official languages, and the connection between legal languages and peculiar legal cultures.

Generally speaking, apart from the peculiarity of EU transnational legal system, multilingualism is the result of a historical process of recognition of the special identity rights – rights to have access to the legal system in one's own language – by the majority of population in favor of the minority who speaks a different language. The Macanese experience witnesses exactly the contrary.

Due to this historical premise, today the Macanese community reclaims, through bilingualism, not only a legal system of rules understandable by the majority of population, but also a legal system

⁹² Zhu, *supra* note 50, at 163 (2007) ("Do ponto de vista dos direitos humanos, o direito à língua implica com frequência a proteção dos direitos das minorias num contexto da existência de uma língua predominante numa determinada sociedade, nomeadamente a defesa do direito de usar a sua língua e de assistência de um intérprete.").

⁹³ Cabrita, *Bilingualism*, *supra* note 20, at 667.

⁹⁴ Mancuso, *supra* note 41, at 61 ("In general, the role of the Portuguese jurist is to help the Chinese translators in the understanding of the legal text when they do not know the words or understand their meaning, *but in such a case they tend inevitably to insert in the translated text the reading of the original text given by the particular Portuguese jurist.*" (emphasis added)).

⁹⁵ Apart from Canada, Finland (where the official languages are Finnish and Swedish), Switzerland (where the official languages are German, French and Italian) and Belgium (where the two main languages are French and Dutch) are also multilingualist countries.

with specific “localized” Macanese features⁹⁶ distinguishable from the Portuguese original matrix.

By analyzing the previous findings, this author seeks to further identify the other peculiarities of the Macanese bilingualism, such as the detachment between the language used for the translated Chinese work and a beneath and related legal culture.

Simplifying the complexity and diversity of multilingual legal systems, the more similar the cultural roots shared by communities speaking different languages, the easier and more precise the legal translation. For example, Switzerland is a multilingual system with the languages of German, French and Italian. Despite legal concepts being expressed in the different languages, the *civil law* legal background is commonly shared. On the other hand, there are many serious translation problems in some of those multilingual systems. For instance, under the Canadian system, texts of law are written in different languages but refer to different legal cultures, such as *common law* or *civil law*.

Within this general framework, Macau, once again, is an exception.

As highlighted by many scholars and commentators, Macau does not have a proper *local legal culture* not only because the Portuguese legal system has, for centuries, represented the main model of reference (at least for the formalized and expressed rules), but also because of the recent existence of an institutionalized local system of education for lawyers which enables the development and spread of an authentic and independent Macanese legal taxonomy, tradition, and jurisprudence.⁹⁷

⁹⁶ Cheng & Wu, *supra* note 15, at 639-40 (“[T]he 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, or Portuguese officials, or legal professionals, or local born politicians, 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.”).

⁹⁷ Nuno Calado, *supra* note 54, at 84; Cheng & Wu, *supra* note 15, at 640 (“[A]t 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. 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 exclaims or urges could hardly change the mind of policy makers, nor could awaken the consciousness of common people.”); Gonalo Xavier, *Traduo e Bilinguismo: Reflexos na Traduo do Direito*, V ADMINISTRAO 757 (1992/1993) (“[S]endo o direito uma disciplina cientifica e ao mesmo tempo um corpo de regras que condicionam o comportamento humano na sociedade e estabelece padres de actuao das instituies, necessariamente reflecte a formao intelectual, os costumes, as aspiraes e as referncias culturais do seu autor material, como pessoa, individualmente, e como membro de uma colectividade que comunga de um passado histrico-cultural homogneo. Este aspecto constitui um dos obstculos de dimenses

Thus, the legal translation from Portuguese to Chinese is rather peculiar in the panorama of multilingual systems. If the translation concerns normative texts that refer to technical and “tangible” fields involving “factual” elements (such as pollution standards of industries, allowed quantity of chemical preservative, regulation about casino’s activities, and so forth), many problems may arise in words which imply legal concepts, and in particular, in the Portuguese terminology which is suitable for expressing *abstract* legal concepts.

In this latter case, while there may be in existence a Portuguese legal terminology which corresponds to the basic legal concepts, there may be none in the Macanese context. The reason is as follows: either because, as previously emphasized, such a terminology does not exist under the Macanese legal culture, or the Chinese language used in Macau by translators is not connected to the Chinese legal culture of mainland.⁹⁸

Thus, the conceptions shared by Macanese scholars about legal translation work are both interesting yet problematic: “*a tradução de leis em vigor envolve uma permanente busca de equilíbrio entre a indispensável fidelidade à versão original e a inteligibilidade do texto chinês. Por outro lado nunca se pode perder de vista que o nosso objectivo é traduzir para chinês o Direito de Macau e não produzir direito chinês a partir de uma vaga influência portuguesa.*”⁹⁹

V. PROVISIONAL CONCLUSIONS FOR A NEW APPROACH AND RENEWED METHOD, AND THE ROLE OF UNIVERSITIES

Drawing conclusions from what has emerged so far, this author seeks to propose some summarizing remarks.

1. The above examined experiences of multilingualism have demonstrated the extreme peculiarity and not comparability of the

profundas que tem impedido uma autêntica reconstituição do sistema jurídico de matriz portuguesa em língua chinesa. . . .”).

⁹⁸ Cheng & Wu, *supra* note 15, at 642 (“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. . . . 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” in the process of interpretation, and most important of all, it has little influence on the legal text, which constitutes the material base of the past or current Macau legal framework, and is the starting point of legal interpretation.”).

⁹⁹ An English translation is provided as follows: “[T]he translation of laws in force involves a constant search for balance between the necessary fidelity to the original version and intelligibility of Chinese text. On the other hand, never lose sight that our goal is to translate into Chinese law and not produce Macau Chinese law from a vague Portuguese influence.” Cabrita, *Translation*, *supra* note 20, at 377.

Macanese bilingualism with other multilingual jurisdictions. Indeed, it is admissible to learn from other consolidated experiences which serve as general or generic models of reference;¹⁰⁰ however, it is incorrect to consider those multilingual systems as paramount and paradigmatic model of uncritical imitation through not enough meditated borrowings.¹⁰¹

2. For multilingualism to work, it is crucial to share common principles, concepts, ideas, and worldviews to support the domestic and global coherence of the translation.¹⁰² This is to preserve the legal system's logic, comprehensibility and intelligibility, and to guarantee the practical applicability by lawyers. In this respect, universities are able to play a crucial role because of their cultural richness and plurality of expertise. Moreover, universities have an intrinsic quality to propose themselves as "*social glue*" in regard to the diversities that characterize every society, and to present themselves as "*neutral actor(s)*" in respect of the partiality of the political arena.

The pivotal position of universities is their abilities to express themselves in at least three distinct aspects, compared to the institutional role in the formation of jurists.¹⁰³

a. As shown in other main experiences of multilingual legal systems examined above, the scientific community gives a propulsive thrust in enhancing and ensuring more consistency and efficacy to the legal translation, increasing the quality of drafting, simplifying and clarifying existing provisions, and proposing definitions and abstract concepts. All these are results of highly qualified and multidisciplinary research, which also include a wide process of consultation with institutions and stakeholders.

b. As shown above, what intensifies the role of universities in the Macanese legal system is the urgent necessity to elaborate a "localized" legal culture, using, and not misusing,¹⁰⁴ the methodological and diversified instruments of comparative law.

¹⁰⁰ Gary M.C. Ngai, *Pluralismo Social e Cultural em Macau: O Impacto no Período de Transição* [Social and Cultural Pluralism in Macao: The Impact on the Transition Period], III ADMINISTRAÇÃO [ADMIN.] 715, 722 (1990) ("O processo do bilinguismo, inserido no processo de locação, foi tratado satisfatoriamente, em territórios como o Canadá, Singapura e Hong Kong, donde Macau poderá extrair alguma lição.").

¹⁰¹ See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

¹⁰² See generally *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITION* (Pierre Legrand & Roderick Munday eds., 2003); Gérard-René de Groot, *Law, Legal Language and the Legal System: Reflections on the Problems of Translating Legal Texts*, in *EUROPEAN LEGAL CULTURES* 155 (Pierre Legrand ed., 1996).

¹⁰³ See *Discurso*, *supra* note 40 (importance and strategic role of legal education); Ho Chio Meng, Prosecutor of the Macao SAR, Address at the Opening Ceremony of the Judicial Year 2011/2012 (Oct. 19, 2011) (transcript available at <http://www.mp.gov.mo/pt/int/2011-10-19p.htm>).

¹⁰⁴ Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 *MODERN L. REV.* 11 (1974).

Despite the debate, as exaggerated by ideological and political considerations,¹⁰⁵ that the evolution of Macanese legal system imposes a neutral and cultured point of view, this author seeks to highlight that legal translation *is not* a mere relation between different names given to institutions. Rather, it is a deep reciprocal inspection of the related legal cultures that constitute the precondition for the development of any effective multilingual legal system.¹⁰⁶

c. It is clear that only jurists with a *specific education program* can judiciously and professionally cope with the difficulties stemmed from legal translation.

Universities should propose and offer to Macanese students courses of legal language programs, which include comparative methodology and techniques of legal translation, according to the different kinds of legal information that require translation. A multidisciplinary approach is crucial for the preparation and development of students as professional *legal translators*.

Having said that, it is relevant to add to the list one that is formulated by Professor Tong Io Cheng concerning the “concrete elements which bring new challenges to the existing legal system and favor or even trigger outrage for a new legal culture”¹⁰⁷ – the potential of the University of Macau in driving legal changes and implementing real legal bilingualism under the University’s expertise and prestige.

3. This paper is an attempt to cope with different declinations of the relationship between language and law. The use of a common language is seen to be a result of a precise strategy of governance or resistance by a certain social group, even if it is on a self conscious level. This social group is called the “*masters of law*”.

Based on the above, the socio-political conceptual grid to observe and understand the multilingual legal systems remains an important point of view.

¹⁰⁵ Paulo Cardinal, *Determinantes e Linhas de Força das Reformas Legislativas em Macau*, XI ADMINISTRAÇÃO 385, 393-94 (1998) (“Macau encontra-se rodeado de várias praças fortes de comércio regional e mundial. . . . Por esta razão, não é possível a Macau manter-se arredo e pronunciadamente divergente, no que respeita ao direito, deste poderosos vizinhos. De contrário, a captação de investimento externo resultará mais difícil e morosa. . . . [A] matriz predominante é a da Common law, que, inclusivamente, estendeu a sua influência a áreas jurídicas das zonas económicas especiais da PRC, e também ao Japão. . . . Sob pena de um isolamento pernicioso da economia de Macau face ao contexto envolvente, uma linha de força das reformas legislativas a empreender neste bloco do direito dos negócios, é a da aproximação, sem perda de identidade, designadamente mantendo a opção codificação, às soluções da common law e, ainda, às soluções da RPC.”).

¹⁰⁶ Calado, *supra* note 54, at 85 (“Sem essa linguagem própria não é possível existir uma cultura jurídica local que para isso tem de ser expressa, também, na língua mais falada na sociedade que o Direito visa regular.”).

¹⁰⁷ Cheng & Wu, *supra* note 15, at 651.

Nevertheless, focusing on matters stemming from “legal terminology” (the law *in the language*), the reasons of preservation of a common heritage and cultural peculiarities should be placed in the background for highlighting the peculiarity of the relation between language and law. In this regard, comparative methodological approach and analysis are called upon to give readers insight, enhancing the coherence and efficacy of the translation, and mostly, guaranteeing the real “*transposition*” from a certain legal conceptual system expressed in a certain language to another.