



Prosecution or Mediation: Perpetrator-Victim Negotiation in Macau and the Way Forward

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INTRODUCTION

The main sources of criminal law in Macau are the ‘Penal Code’, ‘Penal Procedure Code’, separate criminal law, accessory criminal law, and international treaty (de Figueiredo Dias, 2021).¹ The Penal Code of Macau was introduced on November 14, 1995 and went into effect on January

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¹ Many separate criminal laws are being executed in Macau, such as ‘Organized Crime Act’, ‘Prevention and Repression of Money Laundering Crimes’, ‘Prohibition of Illicit Production, Trafficking and Consumption of Narcotic Drugs and Psychotropic Substances’, and ‘Combat the Crime of Human Trafficking’. Meanwhile, there are many accessory criminal laws in effect, such as ‘Road Traffic Act’, ‘Prevention, Control and Treatment of Infectious Diseases’, ‘Copyright and Related Rights System’, and ‘Domestic Violence Prevention and Combating Act’.

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1, 1996,² while the Penal Procedure Code of Macau was passed on September 2, 1996 and came into force on April 1, 1997.³ After Macau's return to Mainland China on December 20, 1999, these two decrees have continued to take effect in Macau pursuant to Article 19 of the Basic Law of the Macau Special Administrative Region. For the last two decades or so, the criminal law system in Macau has maintained a similar legislative framework to Portugal—Macau's former colonizer—with distinctive characteristics of the continental legal system remaining.

In colonial times, only courts played a role in the judiciary. Despite the establishment of the Public Prosecution Office (the Prosecution Office) following the adoption of the Basic Law of Judicial Organization of Macau in 1991, the Prosecution Office in Macau was regarded as an extension of the Portuguese Public Prosecution Office. After the handover of Macau, the Basic Law of Judicial Organization (Law No. 9/1999) was amended to stipulate that 'the Prosecution Office is the only judicial organization to exercise the prosecutorial functions conferred by law',⁴ which requires that the Prosecution Office 'fulfill judicial responsibilities and undertake judicial tasks for assisting judges with finding out the truth'.⁵ This is consonant with the *ex officio* principle that shapes and underpins the criminal justice system in Macau, in which prosecutors are legally obligated to promote the legitimacy of criminal proceedings.⁶ In particular, the Prosecution Office must lay charges against an accused person when there is clear and sufficient criminal evidence collected during the investigation period.⁷ This means that Macau prosecutors have a very limited power of *nolle prosequi*—a prosecutorial decision to not proceed with a criminal charge. As stressed by Gao Jialing, a legal expert from the Macau Legal Translation Office, Macau employs a criminal law system based on the *mens rea* principle and the discretion of prosecutors

² Decree-Law n.º 58/95/M, Approves the Criminal Code. Retrieved from <https://bo.io.gov.mo/bo/i/95/46/codpencn/declei58.asp>.

³ Decree-Law n.º 48/96/M, Approves the Code of Criminal Procedure. Retrieved from <https://bo.io.gov.mo/bo/i/96/36/codpropencn/declei48.asp>.

⁴ Decree-Law n.º 9/1999, Approves the Basic Law of the Judiciary Organization. Retrieved from https://bo.io.gov.mo/bo/i/1999/01/lei09_cn.asp. Article 55, Basic Law of Judicial Organization (Law No. 9/1999).

⁵ Article 42, Basic Law of Judicial Organization (Law No. 9/1999).

⁶ Article 37, Criminal Procedure Code (Law No. 48/96/M).

⁷ Article 265, Criminal Procedure Code (Law No. 48/96/M).

is strictly regulated to the point that only minor offences and violations can be dealt with lightly through a diversionary and non-judicial process (Gao, 1997).

In Macau's current criminal justice system, when there is evidence of criminality, the accused can be exempt from trial proceedings in only three ways. Namely: (1) acquittal archiving; (2) suspension of proceedings; and (3) withdrawal of the complaint/private charge brought by the claimant (victim). Acquittal archiving refers to non-prosecution of venial misdemeanours.⁸ The Prosecution Office may suggest to the judge that the case file be archived should the prosecutor be satisfied with all legal prerequisites of an acquittal. The suspension of proceedings applies generally to crimes punishable by up to three years imprisonment, in which the Prosecution Office may impose mandatory orders and rules of conduct on the accused person in lieu of filing a formal criminal charge to have the case heard at court. Depending on the circumstances surrounding the accused's behaviours in the community, the criminal proceedings may be resumed or terminated after the suspension period ends. The exemption by complaint withdrawal, on the other hand, concerns the incidents involving semi-public crimes and crimes of private prosecution.⁹ In these self-initiated legal actions, the accused person will not be indicted if the complainant or private prosecutor withdraws the complaint or private charge during the investigation period with the permission of the Prosecution Office.¹⁰

These three diversionary approaches are not implemented through *plea negotiation*, which is not mentioned in Macau's criminal law. Yet, they are ordinarily carried out with the consent of the prosecutor upon the consensus of the perpetrator and the victim. In this regard, these procedures display reconciliation as part of the case processing mechanism. In practice, however, acquittal archiving and the suspension of proceedings are hardly used. While there are approximately 4000 cases prosecuted annually in Macau, there are approximately no more than ten cases handled by means of the suspension of proceedings system, and

⁸ Article 262, Criminal Procedure Code (Law No. 48/96/M).

⁹ The criminal law of Macau contains a large number of accusations for semi-public cases. Among 185 accusations in the Penal Code, more than 30 are semi-public cases, such as theft and injury to bodily integrity.

¹⁰ Article 40, Criminal Procedure Code. (Law No. 48/96/M).

there is often no record of acquittal archiving.¹¹ The most common way to exempt criminal responsibility appears to be through the complainant's withdrawal of their complaint. Every year, there are approximately 3000 such cases.¹² Against this backdrop, this chapter focuses mainly on the suspension of proceedings system and complaint withdrawal. Both systems involve a certain degree of private communication (or negotiation) between the perpetrator and the victim, with the effect that criminal proceedings are suspended or terminated. Yet, they do not necessarily involve bargaining or negotiation on charges and sentences as seen in some other continental jurisdictions, and this pattern of practice shows a stark contrast to the plea-based case dispositional schemes currently utilized in Mainland China, Taiwan, and Hong Kong.

This chapter first examines the status quo of the suspension of criminal proceedings and complaint withdrawal in terms of their legislative settings, discursive dimensions, and practical traits. Our analysis goes on to highlight the challenges facing the process of perpetrator-victim reconciliation in these programmes. It indicates that among the identifiable issues, the lack of communication channels is most detrimental to meaningful and effective negotiation between the parties affected by the offence. It then suggests that a formal mediation system presided over by prosecutors be constructed to widen the scope of criminal cases settled through reconciliation. Doing so would likely improve judicial efficiency and better assist the accused with their acceptance of fault and reparation of harm as well as reintegration into society.

¹¹ Macao Special Administrative Region Procuratorate, Retrieved November 3, 2023, from https://www.mp.gov.mo/zh_tw/standard/Statistical_data.html.

¹² For example, in 2020, 4449 cases were filed by the Public Prosecutor's Office, 6 cases were suspended, and 2929 cases of quasi-public and private crimes were filed due to the withdrawal of the claimant. In 2021, 4315 cases were filed by the Public Prosecutor's Office, and 5 cases were suspended. The number of semi-public and crimes of private prosecution cases filed because the litigants did not pursue criminal responsibility was 3306.

THE SUSPENSION OF PROCEEDINGS

The suspension of proceedings system in Macau is akin to reprieve prosecution systems or conditional non-prosecution systems that have prevailed in continental legal systems.¹³ Situated between formal prosecution and acquittal archiving, the suspension of proceedings takes place where the following conditions are met: (1) there is clear and sufficient evidence of criminality; (2) the act is serious enough to warrant a prosecution based on the perpetrator's circumstance, the severity of criminal behaviour, and the public interest; and (3) probation is appropriate with relevant mandatory orders and rules of conduct being imposed on the accused. If the accused successfully fulfils their obligations during the probation period, the Prosecution Office will no longer prepare the indictment. However, the breach of probationary conditions by the accused will result in the prosecution being resumed (Chen, 2012).

The suspension of proceedings system in Macau originates from Portugal, but in application it differs significantly. The Portuguese Criminal Procedure Code established the suspension of proceedings system in as early as 1987. Based on the statistics released by the Portuguese Prosecutor General's Office, there were 31,766 cases dealt with through the suspension of proceedings system in 2022 nationwide.¹⁴ Among them, 14,948 cases were suspended at the investigation stage and 16,818 cases were suspended at the summary proceedings stage. In contrast, from the return of Macau to Mainland China (1999) to the end of 2022, only 39 cases were handled via the suspension of proceedings with an average of less than 2 cases per year, compared to approximately 4000 cases

¹³ In reprieve prosecution systems or conditional non-prosecution systems, the Public Prosecution Office will not prosecute the criminal suspect whose behaviour has constituted a crime when the circumstances are relatively minor, with conditions and deadlines. Instead, they decide whether to terminate the proceedings according to the performance of the accused. If the criminal suspect fulfils the additional conditions within the time limit, the public prosecution organ will no longer bring a lawsuit against them. If a criminal suspect fails to fulfil their obligations within the prescribed time limit, a lawsuit shall be instituted.

¹⁴ The prosecutor's comprehensive report (2022), 178, Retrieved November 3, 2023, from https://www.ministeriublico.pt/sites/default/files/documentos/pdf/ramp_2022_final.pdf.

prosecuted to trial in Macau annually.¹⁵ Perceptibly, the suspension of proceedings has yet to play a major role in Macau's diversionary justice. Three contributing factors seem to stand out.

First, the procedure design of the suspension of proceedings process is unsympathetic to the prosecutor. As stipulated in Article 263 of the Penal Procedure Code, the application of the suspension of proceedings requires the consent of all parties concerned, including the accused person, the complainant, and/or the victim. The complainant must declare their intention to become an assistant (and be qualified to become an assistant) during the prosecution stage.¹⁶ More importantly, the accused and the complainant (assistant) and/or victim must personally, freely, and clearly give consent to the suspension of proceedings on the basis that they are aware of the legal consequences of criminal proceedings being suspended, the period and conditions of probation, and relevant mandatory orders and rules of conduct imposed on the perpetrator. In many respects, these stipulations speak to the importance of negotiated justice dispersed between individuals affected by criminal behaviours, and reflect a restorative function of criminal justice.

In reality, however, the victims (particularly those of public crimes) appear to be unwilling to become assistants (Yao & Gao, 2011). This could be due to the victim being uncomfortable with the idea of facing the perpetrator as it is likely to bring back memories of past traumas. A more plausible explanation perhaps is that victims lack confidence that negotiated and restorative justice will address their needs and interests. Therefore, the necessity of obtaining the consent of all parties has become a practical impediment to the application of the suspension of proceedings. Even if consent is successfully acquired, the prosecutor needs

¹⁵ Public Prosecutions Office of the Macao Special Administrative Region, Retrieved September 11, 2023, from https://www.mp.gov.mo/zh_tw/standard/Statistical_data.html.

¹⁶ In Article 58 of the Criminal Procedure Code, the assistant has the status of assisting the procuratorate, and their participation in the proceedings shall be subordinate to the activities of the procuratorate. In particular, the assistant has the following powers: (a) to participate in the investigation or preliminary examination, to provide evidence, and to request measures deemed necessary; (b) make a complaint independent of the prosecution (in cases where criminal proceedings are not possible without a private prosecution, the auxiliary may file a complaint independently even if the public prosecutor does not file a complaint); and (c) appeal against a decision affecting them, even if no appeal has been filed by the Public Prosecutor's Office.

to make a recommendation to the judge, who will then exercise the decision-making power as to whether the criminal proceedings should be suspended. As the whole process of seeking consent can be time-consuming and laborious, it is not uncommon that the Prosecution Office opts to go with the criminal prosecution, allowing the case to be decided by the court, which renders the practice of the suspension of proceedings nominal, if not entirely meaningless.¹⁷

Second, compared to its Portuguese counterparts, the scope of the suspension of proceedings is rather limited. In Article 263 of the Penal Procedure Code, it is provided that the crimes to be handled through the suspension of proceedings should be punishable by fine or a maximum imprisonment of no more than three years. In this light, the suspension of proceedings process can only be applied to misdemeanours. This is because crimes punishable by more than three years imprisonment in Macau's criminal law are generally seen as serious indictable offences which have a relatively high need for crime prevention.¹⁸ Here, the term 'maximum imprisonment' refers to the maximum sentence that can possibly be imposed on a convicted individual, rather than the specific penalty that is handed down by the judge in a particular case.¹⁹ Notably, the Penal Code of Portugal increased the required maximum sentence to five years under the suspension of proceedings in 1998.²⁰ The rationale behind this change is that by lowering the application threshold, the suspension of proceedings gets to reach a wider cohort of criminal cases deemed to have lesser degrees of culpability and severity. This way, Portuguese courts are arguably given more time and resources to handle more serious criminal cases. While Macau has yet to follow suit, whether

¹⁷ *Ibid.*, 8.

¹⁸ Macau Penal Code, Article 48, paragraph 1. If having regard to the perpetrator's personality, living conditions, acts before and after the commission of the crime, and the circumstances of the crime, the court considers that mere condemnation of the facts and the threat of imprisonment are appropriate and sufficient to achieve the purpose of punishment, it may suspend the execution of a sentence of imprisonment not exceeding three years.

¹⁹ In terms of institutional application of the suspension of proceedings, there are still some issues that have remained unaddressed by the legislature: (1) how to understand the maximum imprisonment in the event of crime coherency and (2) is it necessary to increase the required maximum abstract sentence to five years. These two issues have not been sufficiently examined theoretically and practically in Macau.

²⁰ Amendment of the Code of Criminal Procedure, Decree-Law n.º 59/98 of Portugal.

making the suspension of proceedings a more broadly applicable practice would increase cost-efficiency and the productivity of case disposition is certainly worth contemplating.

Third, although the suspension of proceedings is devised in view of rehabilitation and reparation of harms caused by crimes, it has long lacked an effective communication channel for the perpetrator and the victim to restore the broken relationship. There is a gap between what the programme can achieve in practice and what the programme is expected to achieve under the aegis of restorative justice.²¹ In particular, the suspension of proceedings is not an effective way for the accused person to express their remorse or apologies. Neither is it one where the victim can speak about their traumatizing experience or express their needs so that effective and targeted solutions for harm reparation can be sought (Yao & Gao, 2011). The Portuguese scholar J. Figueiredo Dias claimed that the suspension of proceedings is not a truly consensual process, but simply the consent of one or more subjects of litigation expressed on the suggestions or statements made by other subjects of litigation (de Figueiredo Dias, 2011). Except for the Domestic Violence Prevention and Combating Act, Macau has not established a mechanism conducive to positive dialogue, communication, and negotiation between perpetrators and victims.²² In many cases, opinions of the perpetrator parties are unilaterally solicited rather than being expressed in a free manner.²³ Without the genuine opportunity to admit mistakes, repent, and make up for the loss and damage incurred by the victim, the suspension of

²¹ Public Prosecutions Office of the Macao Special Administrative Region, Retrieved September 11, 2023, from https://www.mp.gov.mo/zh_tw/standard/Statistical_data.html.

²² Article 29, Domestic Violence Prevention and Combating Act. In the conciliation conference, during the suspension of proceedings, the examining judge may, at the request of the Prosecutor's Office, the suspect, the victim, or the auxiliary, convene a conciliation meeting between the suspect and the victim, with the aim of making the suspect aware of the inaccuracy of his conduct and giving him the opportunity to express remorse and obtain forgiveness from the victim.

²³ Article 263, Macau Criminal Procedure Law. If the offence is punishable by imprisonment for a maximum of not more than three years, even if it is punishable by a fine, or if the offence is punishable by a fine only, and if the following are true, the Public Prosecutor may recommend to the examining judge that by imposing mandatory orders and rules of conduct on the suspect.

proceedings is unable to properly attend to the victims' priorities and its philosophy premised on restorative justice is doomed to fail.

THE COMPLAINT WITHDRAWAL PROCESS

In Macau, criminality is classified as a public crime, a semi-public crime, or a crime of private prosecution, depending on the severity of the criminal behaviour and the specific complainant (victim) (Li, 2015). The prosecution of public crimes is a statutory obligation the Prosecution Office must discharge, whereas the prosecution of semi-public crimes is brought on the condition that the complainant enters a complaint.²⁴ Compared to public crimes, semi-public crimes warrant less serious levels of criminal responsibility, which, to some degree, resembles misdemeanours in most common law jurisdictions (e.g. the US and Australia). Defined in the Penal Code under a range of categories, semi-public crimes include *inter alia* simple offenses to physical integrity (Article 137), simple theft (Article 197), fraud (Article 211), property damage (Article 206), minor subtraction (Article 241), defamation (Article 174), and publicity and slander (Article 177). At the bottom of this criminality ladder are crimes of private prosecution. They refer to criminal acts that can only be dealt with upon legal action brought by the victim (private prosecutor). Ordinarily, it starts with police investigation before the case is handed over to the Prosecution Office. The Prosecution Office is in no position to initiate a criminal charge, and here their role is to notify the victim of the findings of investigation so that the private prosecutor can make an informed decision on entering a complaint on their own.

The victims of semi-public crimes and crimes of private prosecution can renounce their right to make a complaint.²⁵ But as soon as the victim makes a complaint, police will need to immediately inquire about the victim's intention to pursue the perpetrator's responsibility should the incident involve semi-public crimes or crimes of private prosecution. However, providing a statement of complaint does not necessarily mean that the victim has exercised their right to provoke private prosecution, which must be explicit and clear. If the victim expresses a desire to hold

²⁴ Semi-public crimes refer to Simple Offenses to Physical Integrity (Article 137), Simple Theft (Article 197), Fraud (Article 211), Damage (Article 206), Minor Subtraction (Article 241), Defamation (Article 174), Publicity and Slander (Article 177).

²⁵ Article 180 (1), the Macau Criminal Code.

the perpetrator criminally liable, police need to send the victim's statement to the Prosecution Office to officially open a case.²⁶ Notably, the law sets out an implied form of waiver of complaint and private prosecution. Article 61 (2) of the Penal Code stipulates that if the victim starts a civil action to seek damage or compensation, the right to complain regarding a criminal matter is deemed to have been waived. If that is the case, then the victim can no longer make a complaint or initiate a private charge.

Still, parties involved in the cases of semi-public crimes and crimes of private prosecution are granted relatively greater procedural autonomy. That is, the victim is allowed to withdraw the complaint at any point with the consent of judicial authorities.²⁷ A withdrawal made during the investigation period requires leave from the Prosecution Office, whereas a withdrawal made during the instruction or trial period should be approved by the investigating judge or the presiding judge respectively.²⁸ In the latter scenario, the judge ought to notify the accused about the victim's withdrawal so that the accused can declare whether they object to the withdrawal of prosecution within the prescribed time frame. In practice, it is common for the victim to submit a written statement of their intention to withdraw to judicial authorities, who will then immediately file the statement and notify the accused to comment on the withdrawal statement. In addition, the victim may also make a retraction statement in the form of a private document, which will then be filed into the case dossier for the accused to express their views on.²⁹ If the suspect does not object to the withdrawal of the complaint, the judicial authorities will give approval to the withdrawal in accordance with Article 108 (2) of the Macau Criminal Code and Article 40 of the Macau Criminal Procedure

²⁶ Article 39, Macau Criminal Procedure Code. The Public Prosecutor's Office shall, *ex officio*, take any measures which it considers necessary for the discovery of the truth and which are within its competence, participate in all proceedings in which a private prosecutor is involved, lodge complaints together with the private prosecutor, and appeal independently against the decision.

²⁷ Article 40, the Macau Criminal Procedure Code.

²⁸ Article 268, the Macau Criminal Penal Procedure Code. The purpose of the instruction is to provide judicial verification of the decision to file a complaint or investigation in order to decide whether to bring the case to trial.

²⁹ Article 40, Macau Criminal Procedure Code.

Code, thus declaring that the proceeding is no longer legitimate and filing it.

If the withdrawal is known during the investigation, it is approved by the Prosecutor's Office. If it is known during the instruction trial or trial, it shall be approved by the investigating judge or the presiding judge respectively. If the withdrawal is made during an instruction trial or a trial, the judge who has the authority to give approval shall notify the suspect that they may declare within the statutory period whether or not they object to the withdrawal. The participation of the prosecutor's office in criminal proceedings is terminated when the withdrawal of a complaint or private prosecution is recognized.

In many cases, the complainant puts forward certain conditions in the withdrawal statement, claiming that the complaint or private prosecution is revocable should the perpetrator meet the conditions (Leal-Henriques & Santos, 1995). This is, however, at odds with the legal principles. The Penal Code outlines that the withdrawal of a complaint or private prosecution is deterministic and cannot be accompanied by conditions, nor can it be given up or withdrawn without reservation (Leal-Henriques, 2014). The same is true for the 'no objection' decision made by the accused. Leal-Henriques, a Portuguese scholar in Macau, aptly pointed out that unlike renunciation being a purely unilateral act, retraction is inherently a legal act of both parties, and its legal effect hinges on the agreement of the aggrieved person and the accused (Leal-Henriques, 2014). That said, if the accused does not object to the withdrawal of complaint or private prosecution, the judge will have to approve the withdrawal in accordance with Article 108 (2) of the Penal Code and Article 40 of the Penal Procedure Code. After the withdrawal, no further complaint or private prosecution is allowed.

The Macau Prosecution Office filed a total of 8047 cases as of 2022. Among these, there were approximately 3000 cases involving semi-public crimes or crimes of private prosecution where the complaint or private prosecution was withdrawn by the victims.³⁰ This high rate of withdrawal is attributable, in part, to the relatively simple procedure and easier operation of complaints and private prosecution. Perhaps a more significant reason is that Macau is a small and highly organic society. Covering an

³⁰ Procuratorate statistics for the year 2022. Retrieved November 3, 2023, from https://www.mp.gov.mo/zh_tw/standard/Statistical_data_detail/article/lgn4hwoo.html.

area of 32.9 square kilometres and having only a population of approximately 660,000, Macau is geographically narrow, densely populated and has the characteristics of an ‘acquaintance society’. Due to historical reasons, numerous ethnic groups, classes as well as multiple languages, cultures, and values have taken root in this small city. Diverse, complex, and heterogeneous societies are prone to social unrest and disorder, but Macau is harmonious and stable, which is divergent from other similar societies which tend to be laden with frequent political disputes and social contradictions.³¹ In particular, there is an assortment of associations in Macao, covering all aspects of society, including politics, corporations, workers, women, returned expat Chinese, social welfare, education, students, culture and art, medical and health care, sports, religion, clan, and so on (Lu, 2008). At present, there are over 3000 communities officially registered in Macau, with an average of 200 members for each community. This structure is known as ‘small government, big society’ (Huang, 2016). Clearly, civil society functions as the cornerstone of social harmony and stability in Macau, promoting group unity and social trust, integrating different social classes, values, and concepts, and alleviating social confrontation and tension. It plays a pivotal role in maintaining social harmony and promoting political stability in Macao (Sun et al., 2006).

A considerable number of the withdrawal cases in Macau were intervened by social actors (e.g. lawyers or concerned third parties) who energetically function as facilitators of communication and mediation between perpetrators and victims. This is demonstrated by the parties’ preference for the use of out-of-court settlement as the prime approach to resolving the dispute (Jiang, 2010). Out-of-court settlement is not new in civil law, but its popularity in Macau’s criminal process is representative of the city’s long-existing culture as a highly interconnected ‘acquaintance society’. In many cases involving semi-public crimes and crimes of private prosecution, the perpetrator and the victim appear to be neighbours or colleagues, or even family relatives (Sun, 2018). As semi-public crimes and crimes of private prosecution display a low degree of culpability, harms caused by these crimes are generally trivial. Hence it is not uncommon

³¹ The Social Security Situation in Macao Has Remained Stable and Sound. Government portal of the Macao Special Administrative Region of the People’s Republic of China. Retrieved November 3, 2023, from https://www.gov.mo/zh-hant/news/893944/?utm_source=link%26utm_medium=share.

that the victim often does not prefer the involvement of judicial authorities, as judicial intervention may lead to greater costs, expenses, and time. In the eyes of victims, the judicial intervention in an ‘acquaintance society’ may not necessarily play out as the best protection for victims. Rather, it is adverse to the reconciliation, reparation, and restoration of social relations conducive to an effective means of dispute resolution accepted by both the victim and the perpetrator (Li, 2009).

Like many plea-based dispositional measures in common law and continental countries, the withdrawal of complaint or private prosecution entails the perpetrator’s admission of wrongdoing, the victim’s forgiveness and the abandonment of the trial process. More specifically, a victim’s consideration of withdrawing the complaint and private prosecution revolve around two factors. First, it must be shown that the accused is willing to accept full responsibility and apologize to the victim for what they did. Second, the perpetrator agrees to make compensation for loss and injury caused by the crime (Tang, 2020). While it is imperative for the perpetrator and the victim to engage in productive conversations to discuss the impact and consequences of the crime, the Penal Procedure Code provides no guidance on the scope, form, and means of such negotiation. Foremost, it is not mandated that the prosecutor be present. This is compounded by the fact that the negotiation process and the content of settlement are not judicially supervised. Neither prosecutors nor judges are legally obligated to ensure that the outcomes of negotiation comply with the legal rules, public order, and social norms. This hand-off setting leaves concerned parties with no option but to take initiative to reach out to each other. In a better case scenario, parties retain the criminal lawyer to mediate and serve as a bridge for the perpetrator and the victim to exchange their opinions. However, the dearth of a regulatory or supervisory body makes the process of complaint withdrawal an informal practice of criminal justice, which is likely to beget a greater risk of undermining the integrity of the criminal process due to judicial authorities conceding the power of law enforcement to private parties on the ground.

SHOULD A FORMAL CRIMINAL MEDIATION SYSTEM BE ESTABLISHED?

As discussed above, the suspension of proceedings and complaint withdrawal are two common trial-avoiding measures in Macau’s criminal justice system. Both initiatives are devised to avoid the formal processing

of an offender by the criminal justice system and advance a consensual form of justice. Yet, both initiatives also lack a working mechanism in favour of communication and negotiation between the perpetrator and the victim to talk about what happened, how they were impacted, and how the harm can be repaired. This makes the notion of plea-based case disposition in Macau almost void. The only exception perhaps is the use of mediation as prescribed in the Domestic Violence Prevention and Combating Act. Passed in 2016, the Domestic Violence Prevention and Combating Act provides that during the suspension of proceedings the judge may convene the mediation meeting between the accused and the victim at the request of the Prosecution Office.³² The objective of mediation is to make the accused aware of the harm caused by their wrongdoing and to provide an opportunity for the accused to express remorse so that the victim can offer forgiveness. Nevertheless, this negotiation process applies exclusively to the cases involving intimate violence offences, which makes Macau one of the few civil law jurisdictions that has yet to establish a general criminal mediation system for fostering victim-perpetrator reconciliation. However, both from a cultural perspective and considering its actual judicial practices, a formal criminal mediation system should be established in Macau's criminal justice system.

First, this omission is unfortunate as Macau has a profound cultural foundation fit for plea-based restorative justice to thrive. For long, people in Macau have regarded familial and social harmony as the ideal social substructure (Yao, 2019). Particularly the philosophy of Confucius that promotes ritual, virtue, and benevolence has a significant bearing on everyone's social life and way of thinking. In a highly interpersonal society, people are more cautious about resorting to litigation and judicial processes when dealing with contradictions and conflicts (Ma, 2018). Instead, 'face-saving' turns out to be a priority concern (Ma, 2018). This is also illustrated by a heavy use of mediation as an approach to dispute resolution in civil matters in Macau. Therefore, when it comes to criminal matters, the introduction of mediation, as some scholars maintain, 'will demonstrate the respect for well-endorsed Chinese culture and Confucian philosophy, which can reflect the harmonious coexistence of culture, philosophy and law in the Macau legal system' (Robalo, 2016). In this context, there are always victims who are reluctant to face perpetrators

³² Article 29, the Domestic Violence Prevention and Combating Act.

as adversaries. Hoping to settle the dispute in a peaceful fashion through negotiation, some victims prioritize apology and compensation over retaliation and punishment, while some defendants strive to temper sentences and restore relationships by actively making up to victims affected by their acts (Chen & Ge, 2006). On a larger scale, mediation has long been widely adopted by countries with a civil law system, such as France, Germany, Portugal, and the like. In these systems the will of perpetrators and victims to privately resolve criminal matters through non-judicial processes is respected, which has morphed into an essential component of case disposition in their criminal justice systems.³³

Second, the judicial practices of Macau's criminal justice system are not merely punitive-oriented. The Penal Code stipulates that 'punishment and security measures are aimed at protecting legal interests and reintegrating the perpetrator into society'.³⁴ This suggests that penalty in Macau is assigned a dual purpose. On the one hand, it focuses on retribution, deterrence, and community protection to punish the deserving. On the other hand, it champions correction, rehabilitation, and social integration to promote public harmony. Therefore, although the *ex officio* principle requires prosecutors to engage in the pursuit of criminal cases, and, if necessary, submit the case for trial through the exercise of their prosecutorial power (Carvalho & de Processo Penal, 2015), not every criminal case is heard at court. This, therefore, explains the application of the suspension of proceedings and complaint withdrawal at the prosecutor's discretion as ways of performing restorative functions of criminal justice in Macau. While more work is certainly needed to improve the rehabilitative and corrective elements of these diversionary initiatives, they have laid a solid institutional foundation for the criminal mediation system to take shape. In a more practical sense, heavy-handed legal actions, including prosecution, sentencing, and imprisonment, are antithetical to the idea of reintegration, reform, and rehabilitation. Under normal circumstances, tensions between the perpetrator and the victim (and the society more generally) will not be mitigated by simply having the perpetrator go through nerve-racking criminal proceedings. As people are increasingly exposed to alternative justice schemes that are less tense, decorous, and procedurally rigid, the conventional style of prosecution,

³³ *Ibid.*, 16.

³⁴ Article 40 Macau Criminal Law.

trial, and sentencing is likely to lose its momentum and gradually give way to more consensual approaches to criminality.

THE MEDIATION SYSTEM WITH THE ‘MACAU CHARACTERISTICS’

If a mediation system is discursively and institutionally warranted, then what should it entail? Indeed, Macau has instituted a number of trial-avoiding schemes, demonstrating a lenient perspective on criminal justice. Despite this, they are largely insufficient to nurture a meaningful interaction between the accused and the victim to materialize the conditions of restorative and negotiated justice. The lack of communication platforms has unsurprisingly resulted in relatively low application rates of the suspension of proceedings and complaint withdrawal, which leads us to consider a structural overhaul of these diversionary programmes in hopes of pursuing more efficacious reconciliation between the parties involved in the dispute.

In Portugal, for example, criminal mediation (or reconciliation) is an informal procedure wherein the perpetrator and the victim may reach a consensus on criminal responsibility and compensation by means of negotiation under the auspices of a neutral third party (Yu, 2015). Contextually, mediation in Portugal applies to crimes associated with minor injuries, victims’ complaints, and private prosecution.³⁵ Covering predominately petty crimes, Portuguese criminal mediation is not applicable to crimes punishable by more than 5 years of imprisonment, sexual assault crimes, corruption, and bribery, crimes in which the victim is under 16 years old, and crimes where the summary procedure is applicable. A characteristic feature of criminal mediation in Portugal is that the mediation process is carried out by a third party. For example, the Minors Protection Act states that mediation in cases involving juvenile offences ought to be conducted by the General Council for Reintegration (DGRS)—an auxiliary institution under the leadership of the Ministry of Justice. Guided by the ‘minimum intervention principle’, DGRS is tasked with the overall supervision of juvenile crime cases, the application of mediation, and most importantly the facilitation of juvenile offenders’ integration into society (Long, 2011). Operationally, mediation is

³⁵ Article 2, Portuguese Law No. 21/2007, Criminal Mediation System.

conducted by a professional arbiter, who, according to the Portuguese Law No. 21/2007, must have received proper training in mediation skills with relevant legal, managerial, and psychological knowledge. The mediator should also meet the strict requirements of age, degree, professional experience, and language competence among others.³⁶ The final decision-making power, however, lies with the prosecuting and judicial authorities who get to decide how the case should be disposed of on the grounds of a particular mediation outcome.

From a utilitarian perspective, Portugal's criminal mediation system has paid heed to the offender's need for rehabilitation; but it has yet to achieve the goal of efficiency. Apart from reducing the workload of judges, mediation by a third party increases the burden placed on already limited judicial resources. In this process, a mediation specialist is essential. It takes years of training to become a capable intermediary with the requisite experience, techniques, and skills. The fact that mediation is a mandatory approach to dealing with petty offences has oftentimes resulted in extra costs. Relatedly, it was found that mediation has also given rise to (undue) delays in case management by holding multiple perpetrator-victim meetings compared to a one-off trial that determines the case outcome.

In view of these drawbacks, it may not be unreasonable to license an existing law enforcement agency to fulfil the role of mediator for two reasons. First, the law enforcement agency (often as the handling officer of the case) is well equipped with first-hand information about the facts, circumstances, and evidence of the case. Second, the law enforcement agency has the required authority to regulate the mediation process and the power to execute the settlement agreement reached by the perpetrator and the victim. Having said that, in the context of Macau's criminal justice system a suitable candidate is the prosecutor. As stipulated in the Penal Procedure Law, the prosecutor in Macau not only presides over and supervises the investigation but also assumes the responsibility for discovering and collecting evidence in relation to the case. In cases where there is strong evidence of a crime and the specific perpetrator is identifiable, the Prosecution Office is authorized to initiate a formal charge against the suspect, and, more crucially, to oversee the entire criminal process with a full grasp of the circumstances of the case. This prosecutor-led model has

³⁶ Portuguese Law No. 21/2007, Criminal mediation system.

made prosecutors a dominant and decisive player in almost every aspect of the criminal justice system. As such, a new mediation system in Macau, like many plea-based case dispositional measures in continental jurisdictions, can be better operated by prosecuting agencies which have the legitimacy and authority to effectuate mediation in the interest of the parties' needs as well as efficiency. Able to suggest solutions in light of the circumstances of the case, the prosecutor is often accepted by parties as the impartial arbitrator not least because the judicial official is believed to be 'a person who upholds fairness without favouring and showing bias towards anyone in the exercise of his/her power' (Lu & Liang, 2011).

This way, prosecutors are in a better position to encourage voluntary negotiation between the perpetrator and the victim. Procedurally speaking, the proposed mediation process should start with the reconciliation meeting attended by all relevant parties, including legal representatives, as organized and supervised by the case-handling prosecutor. During this process, the prosecutor should have acquired the particulars of the case, understood the victim's demands, and recorded the offender's repentance and acceptance of criminal responsibility. Once a settlement agreement is formed, the prosecutor needs to review its content to evaluate the legality and enforceability of the settlement agreement and ensure that mediation has not been fruitless (He, 2016).

As prosecutors are state agencies with authorized power to implement criminal law, they are generally afforded with latitude to make discretionary decisions as to how a criminal matter should be dealt with. This means the prosecutor may decide to (not) endorse mediation according to the specific circumstances of the case. In Portugal's criminal mediation procedure, for example, the mediator may assess the prospect of success in terms of settlement before setting up the meeting. In the event of parties unwilling to engage in negotiation (or where there are other thorny obstacles to mediation), the prosecutor may stay the proceedings and switch to a criminal trial (Yu, 2015). A successful mediation process should normally entail certain procedural norms and standards as follows:

The consent of parties. The legitimacy of mediation rests upon the consent of the parties involved. Put differently, the voluntariness of parties is a prerequisite for an enforceable settlement agreement, which only arises where both parties get to make choices in the exercise of their free will (Su, 2005). This resonates with plea bargaining where guilty pleas should be made voluntarily, knowingly, and intelligently because it is said to reflect the concept of contractual freedom by which parties enter the

agreement understanding their rights and obligations, as well as the legal consequences (Wang, 2013a, 2013b). Along the same lines, settlement between the perpetrator and the victim in criminal mediation should be deemed a free-willed ‘contract’ as a way of dispute resolution. Here, the perpetrator should be willing to admit their criminal liability and compensate for the victims’ losses in exchange for exemption from the execution of a penalty. The victim will then give up their right to request a trial of the perpetrator to obtain the restitution as soon as possible.

The endorsement of prosecutors. As the arbitrators in the mediation process, the prosecutors’ endorsement of perpetrator-victim settlement is crucial to the finalization of criminal cases. Without judicial checks and balances, the prosecutor should discharge the responsibility of reviewing the content of the settlement agreement, making a proper analysis of its authenticity, legality, and feasibility. Regarding semi-public crimes, the settlement agreement should play a similar role as the out-of-court settlement widely used in the complaint withdrawal: the victim revokes the complaint, with the prosecutor verifying the content of mediation and archiving the case as a result. In cases involving the suspension of proceedings, the prosecutor then ought to confirm the settlement agreement, monitor the implementation of the agreement conditions, and follow up on the perpetrator’s performance under compulsory orders and rules of conduct, if any. Should the perpetrator violate the settlement agreement or breach relevant mandatory orders and rules of conduct, the responsible prosecutor is sanctioned to rescind the suspension of proceedings decision, triggering the resumption of criminal prosecution.

In constructing a mediation system with Macau’s characteristics, the procedural settings should go hand in hand with the substantive framework—namely, the scope and content of mediation. Across most jurisdictions around the globe, criminal mediation is almost always limited to petty crimes, such as misdemeanours and juvenile offences. While the element of reconciliation is not invisible in serious crimes, Macau’s mediation system should remain reserved for semi-public crimes and crimes of private prosecution. If a further specification on the categories of petty crimes falling within the purview of mediation is called for, it is then sensible to define them by the length of possible sentence. One example for reference is the use of criminal mediation in France where the applicable crimes are set as those with the fixed-term imprisonment of no more than two years (Wang, 2013a, 2013b), including *inter alia* offences of minor property damage, family court cases, and public order offences.

This arrangement appears to be in line with the composition of criminality in Macau, where most semi-public crimes and crimes of private prosecution do not trigger the heavy punishment of imprisonment.

More pragmatically, in the current judicial ambience of Macau, criminal cases suitable for mediation could have the following conditions: (1) petty crimes with a fixed-term imprisonment of no more than three years—with the exception of crimes of domestic violence prescribed in Law No. 2/2016, for which the maximum penalty shall be fixed-term imprisonment of no more than five years, and crimes with a penalty of fine or may be subject to a fine; (2) crimes related to familial relations (e.g. between parents and children); (3) juvenile crimes; and (4) negligent crimes. This is because the aforementioned crimes are said to cause minor personal and social harms. This paves the way for criminal mediation to take place as in those cases perpetrators may have not been physically or mentally developed and are hence unable to judge right from wrong, or the perpetrators' subjective malice is minor to the point that the perpetrator can be readily forgiven by the victim. In this regard, criminal mediation serves essentially as an alternative to criminal prosecution and trial of individuals committing petty crimes. It enables those perpetrators to be exempt from criminal liability and receive proportionate punishment while preparing to assume active responsibility for harm reparation and compensation as set out in the settlement agreement (Wang, 2013a, 2013b).

Considering this, the content of mediation should also consist of the perpetrator's acknowledgement of wrongdoing, apology to the victim, and compensation for property loss or damage, to say the least (He & Liu, 2009). For instance, in crimes involving acquaintances or family members, apology and repentance from the perpetrator is instrumental to reconciliation as well as forgiveness from the victim. There is no doubt that obtaining the understanding of the victim is key to the success of mediation, which further determines whether the goals of rehabilitation and crime prevention can be materialized on the ground. The willingness of the perpetrator to admit guilt and take responsibilities has a positive effect on offenders' social integration (Mao, 2015). On a relevant note, perpetrator's apology and repentance can often be demonstrated by restitution for (substantiated) losses associated with the offence, such as damage to property, or medical expenses. In most instances, whether the perpetrator could be forgiven by the victim depends largely on whether the victim is satisfied with the perpetrator's reparative effort (Chen, 2018).

The prosecutor is thus expected to review the content of the settlement agreement. Tests that can be run to assess the legality and viability of the agreement may include: (1) whether the agreement is entered by the parties voluntarily and knowingly in the exercise of their free will; (2) whether the agreement is lawful and seeks to pursue the aims of rehabilitation and crime prevention; (3) whether mandatory orders and rules of conduct are appropriate to the circumstances of the case; (4) whether the restitution is reasonable and in the public interest; and (5) whether the agreement contains improper arrangements, such as penalties that deprive personal liberty, violations of human dignity, and malicious circumvention of legal rules. If upon the examination a specific agreement is deemed unreasonable and unjustifiable, the prosecutor should be able to exercise their discretion to make amendments or request that the parties make changes accordingly. For example, where the restitution is set excessively high, the prosecutor should have the power to modify the amount in question in accordance with the compensation standards and the principle of equity as stipulated in the Civil Code of Macau. It follows that the prosecutor may then invalidate the settlement agreement if the parties refuse to accept the modification or refuse to make the amendments as requested.

CONCLUSION

Criminal law is the last line of defence in society. Strict enforcement of criminal law, characterized by criminal prosecution, trial, and punishment, represents a State's stern approach to crime. However, criminalization should only be relied upon as a last resort given the negative impact on individuals that indictment, conviction, and imprisonment bring in their wake. In other words, criminal law ought to be applied cautiously to manifest its 'modesty'—e.g. where there are other laws sufficient to deal with a certain unlawful act, criminal law should not apply; where there are diversionary programmes sufficient to hold the perpetrator accountable for wrongdoing, prosecution and judicial proceedings should be refrained from; and where there are lenient sanctions sufficient to serve the sentencing aims, harsh sanctions should not be applied (Zhang, 1995). In this chapter, we examined a number of trial-avoiding mechanisms and the way they are operationalized to reflect the 'modesty' of Macau's criminal law. Introduced to divert petty offenders from the criminal justice system, these trial-avoiding mechanisms manifest themselves

in the praxis in ways such as the suspension of criminal proceedings and withdrawal of complaint by victims whose rights and interests are affected by transgressions. However, the realization of this modest aspect of criminal law is shaped by various factors—namely, whether the perpetrator accepts their obligations, whether the victim is willing to forgive and forget, whether a settlement agreement is reached in the public interest and also reflects the needs and expectations of all parties involved, among others.

In particular, the analysis of Macau's trial-avoiding justice schemes indicates that there is hardly a plea-based case dispositional system as there is in Mainland China, Taiwan, and Hong Kong. Where the prosecutor decides to suspend the criminal proceedings and the victim decides to withdraw the complaint, the law remains ambiguous as to whether the perpetrator is required to submit guilty pleas to the criminal charges. The focus of the diversionary practices tends to be on the reconciliation between the perpetrator and the victim to justify the stay of prosecution and judicial proceedings. Yet, our analysis also speaks to the reality that the suspension of criminal proceedings and complaint withdrawal have both saddled with the lack of a meaningful platform for the perpetrator and the victim to engage and discuss the effects of the offence.

This leads us to suggest that Macau introduce a mediation system to rationalize and catalyse its diversionary initiatives in the criminal process. Not only will it promote the 'modesty' of criminal law by creating a formal pathway for petty perpetrators to be discharged from criminal liability, but it is likely to enhance the quality of criminal reconciliation by generating case outcomes in alignment with the principles of legality, transparency, and accountability. Besides, establishing a mediation system in Macau is in line with a recent global trend of developing restorative justice as an alternative to conventional justice premised on deterrence and denunciation. From the perspective of a 'harmonious society', mediation in criminal cases is reasonably expected to yield a better effect on rehabilitation and crime prevention since the mediation process is, more or less, a process of education (Zhou, 2017). While a guilty plea is not required, it can help perpetrators better understand the harm caused by their offending behaviour, and prompt the perpetrator to make amends for the restoration of the relationship with the victim. It can, in turn, facilitate the perpetrator's integration into society to start a new life as a law-abiding citizen. On a more practical note, mediation used for semi-public crimes and crimes of private prosecution is likely to reduce the

workload of judicial organs and further improve the efficiency of criminal proceedings. This is possibly more sustainable if prosecutors function as the mediator as opposed to a third party who lacks the necessary power and authority to oversee and enforce the settlement agreement.

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