

NEW FAMILY LAW ISSUES
IN
MACAO'S RETURN TO CHINESE SOVEREIGNTY*

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I
INTRODUCTION

My purpose at this forum is to introduce you to some of the most significant innovations that have been brought into the Macanese Family Law System a few years ago. Macao Civil Code, in force in the territory since November 1, 1999, announced already its imminent return to Chinese sovereignty.

The chosen reformed topics, which I will be briefly and diachronically presenting, are the following ones: models of marriage, matrimonial assets regimes and agreements, separation from bed and board and divorce, with a particular concern for divorce by mutual consent¹.

In addition, in order to enable a better understanding of the main subject and due to the fact that Macao has been re-united with China in December 20, 1999, I shall previously introduce you to the principle “One Country, Two Systems”, which

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1 Part III.

will be followed by a summarized description of the fundamental features of Macao Legal System that characterize it as a Civil Law structure².

II MACAO LAW SYSTEM

1. MATERIALIZATION OF THE PRINCIPLE “ONE COUNTRY, TWO SYSTEMS”³

According to the Chinese Constitution (PRCC), special administrative regions enjoy a “high level of autonomy” from the Central Government (article 31). The People’s National Assembly (PNA), in harmony with the principle “One Country, Two Systems”⁴, approved the establishment of Macao Special Administrative Region (MSAR), directly subordinated to the People’s Central Government and endowed with a basic law. Macao Basic Law (MBL)⁵, “a constitutional document elaborated by the

2 Part II.

3 Main references: Albert Chan, *The concept of “one country, two systems” and its application to Hong Kong*, in Boletim da Faculdade de Direito, Universidade de Macau, ano VI, nº 13, 2002, pages 121 to 139; Francisco Gonçalves Pereira, *O processo negocial da Declaração Conjunta – Uma abordagem preliminar*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 11, 2001, pages 63 to 88; Francisco Gonçalves Pereira, *A Constituição Chinesa, a Lei Básica, a autonomia de Macau*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 11, 2001, pages 175 to 183; Jeong Van Chong, *A Lei Básica da RAEM e a concretização do princípio “um país, dois sistemas”*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 12, 2001, pages 95 to 107; Liu Gaolong, *The Legal Status of Macau Special Administrative Region*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 11, 2001, pages 97 to 105; Liu Gaolong, *Definição do regime “um país, dois sistemas” na Lei Básica de Macau*, in Boletim da Faculdade de Direito, Universidade de Macau, ano VI, nº 13, 2002, pages 141 to 155; Paulo Cardinal, *A questão da continuidade dos instrumentos de Direito Internacional aplicáveis a Macau*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 11, 2001, pages 93 to 96; Pedro Ferreira, *Os limites de Macau no contexto da Região Administrativa Especial da República Popular da China após 1999*, in Boletim da Faculdade de Direito, Universidade de Macau, ano V, nº 12, 2001, pages 109 to 119.

4 Deng Xiaoping was the one who firstly coined the expression “one country, two systems”, in January 1982. Later, in December of the same year, “a new Constitution of the PRC was enacted” (Albert Chan, cited article, page 123). Article 31 of PRCC “contemplates the establishment of special administrative regions of the PRC, which may practice social systems different from other parts of China” (same piece, page 123). The Sino-Portuguese Joint Declaration, signed in 1987, regulated the implementation of the principle to the future special administrative region of Macao.

5 Approved by the PNA in March 31, 1993, to be in force in December 20, 1999.

People’s National Assembly, which is the supreme organ of politic power in People’s Republic of China”⁶, defines the applicable system to the special administrative region, conferring executive, legislative⁷and independent judicial powers, including that of final adjudication. Such autonomy does not apply to issues concerning defense and external relations (MBL, articles 2, 11, 12, 13 and 14). Furthermore, in MSAR the socialist system and politics do not apply: the capitalist system and the previously existing way of life remain unmodified for fifty years (article 5 of MBL, which establishes a fundamental principle of maintenance of Macao’s way of life, with various and relevant consequences, namely the principle of the continuity of the legal system, basically unaltered⁸).

According to these principles and the Basic Law, Macao legal system, including the “Great Codes” of Macao laws, in which you may find the most expressive part of its statutory laws, the main source of law by the way, are guaranteed to be in force in the territory for fifty years.

MBL, as well as Macao’s most important Law Codes, were prepared during the designated “transition period”, which went from 1988, some time after the Joint Declaration was signed by the People’s Republic of China (PRC) and Portugal in April 1987, until the handover took place in December 1999.

Macao was governed by Portugal for over four centuries: at first as a colony, more recently as a territory of China under Portuguese administration⁹. Portuguese sovereignty was also, inevitably, expressed through the official laws applicable in the territory until its return to China.

Concerning the first mentioned principle, if you allow me the liberty of adapting it to what strictly concerns law in PRC, and having in consideration the different legal systems simultaneously in force in Mainland China, in Hong Kong Special Administrative Region (HKSAR) – a Common Law system – and in MSAR – a Civil Law system –, I’d rather refer to it as the “one country, three systems” principle.

Thus, the fundamental recognition of the principle “One Country, Two Systems” (OCTS) also reflects the recognition of different law systems valid in one

6 Jeong Van Chong, cited article, page 98. (Translated quotation).

7 The laws enacted by the Legislative Assembly of MSAR, as well as the regulations adopted by the Government of MSAR, shall not contradict the Basic Law.

8 Paulo Cardinal, cited article, page 94.

Jeong Van Chong refers to this principle as the “principle of maintenance of stability and prosperity”, one of the five fundamental principles of the Basic Law, according to the author, being the other four the “principle of sovereignty”, the “principle of high degree of autonomy”, the “principle of progressive development of democracy” and the “combination of the principles of flexibility and standardization” (cited article, pages 99 to 101). (Translated quotations).

9 This legal status of Macao was recognized by the Portuguese Constitution of 1976 and stipulated by the Organic Statute of Macao.

same sovereign state. The OCTS, according to Albert Chan, “(...) is not a federal system because there is nothing in the national constitution, which provides for a formal division of power between the national government and the provincial, municipal and SAR governments. (...) All in all, the Basic Law establishes in the SAR political, legal, social and economic systems that are very different from those in force in Mainland China. Hence the expression ‘one country, two systems’. (...) Both the OCTS model and the federal model mentioned above are models of autonomy. The strength of the OCTS model is that the degree of autonomy enjoyed by the SAR is in fact much higher than that enjoyed by member states of federal states”¹⁰.

Time and history will tell us how it did work, in due course. In the meantime, we have the chance to live a unique experience, in political, social, economical, legal and cultural terms in general, which, from my point of view, cannot be described otherwise than amazingly challenging and potentially enriching.

2. A CIVIL LAW SYSTEM¹¹

Before its return to China, a Civil Law system was already applicable in Macao. The Civil Code in force until then was the 1966 Portuguese Civil Code that, by all means, continues to be valid in Portugal. MSAR laws have been mainly prepared during the above mentioned transition period and represent, according to the precedent way of life and the capitalist system, a continuity of the past laws naturally adapted to the actual needs of the region and its people. Hence, MSAR legal system has been inevitably inspired in the Portuguese law being, for historical reasons and due to its main characteristics, part of the Civil Law model as well.

“When does the label *Civil Law* apply to a system?” one may ask. Allow me to answer this question by enouncing some of the dominant features of Macao legal system, in particular:

- The fact that we can find its foundations in Roman law and in written law, in general and abstract written rules, this is to say rules that apply to a non-determined number of persons and situations, rules that are neither individual, nor concrete.
- The fact that statute law is its main source of law, with a written “constitutional

10 Albert Chan, cited article, pages 126, 127, 133 and 134.

11 Main references: Carlos Alberto da Mota Pinto, *Teoria Geral do Direito Civil*, 3ª edição actualizada, Coimbra Editora; K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, third edition, Oxford University press; Paula Nunes Correia, *O sistema Jurídico de Macau: uma perspectiva de direito comparado*, in *Repertório do Direito de Macau*, Faculdade de Direito, Universidade de Macau, 2007 (pages 17 to 34)

document”¹², Macao Basic Law, at the top of the hierarchy. In Civil Law systems case law is not normally considered formally, directly or primarily, a source of law. Nevertheless, the decisions of the courts, as well as legal theory, are indispensable elements to the system.

- The fact that it is a codified law¹³ – a very significant part of its statutes is collected in codes: the Civil Code, the Code of Civil Procedure, the Commercial Code, the Criminal Code, the Code of Criminal Procedure, among several others. Macao Civil Code (MCC), in what concerns its external structure, follows, just like the Portuguese Civil Code of 1966 (PCC), the German Civil Code or *Bürgerliches Gesetzbuch* (BGB). Therefore, Macao Civil Code is divided into five books: the first book, called “general part”, consists of general rules applicable to the different branches (or sub branches or parts, if one prefers) of civil law¹⁴; the following four books make, altogether, the “particular part” containing, each one, special rules related to the four different branches within the civil law branch itself, this is to say law of obligations (book two), law of property (book three), family law (book four) and law of succession (book five).

- The fact that we distinguish between private and public law¹⁵. Within private law we have what we call common or general private law and special private law: the former is formed by the civil law branch, mainly expressed, in what concerns statute law, in the Civil Code, being civil law the one that “(...) regulates the everyday life of the ordinary man”¹⁶; the latter consists basically of commercial law and part of labor law. The common or general private law rules, or the civil law rules if one prefers, are subsidiary applied to the different branches of special private law whenever there is no special rule applicable, namely to commercial law. This fact alone underlines the nuclear importance of civil law within Civil Law systems.

- The fact that Christian moral, values, principles or ideas related to or linked with justice, have a strong expression and meaning in the legal system¹⁷.

12 *Vide* footnote 6.

13 Although the codification is not a constant feature of this model, but rather a tendency, if I may say so. Legal systems of Northern Europe do not have civil codes like the *Code Napoléon* or the BGB. According to Zweigert & Kötz criterion, the Nordic legal family is independent from the Romanic and the Germanic legal families (*apud* Zweigert & Kötz, *op. cit.*, pages 276 to 285).

14 We are now referring to civil law as a branch of law, not to Civil Law (in capital letters) as a model of law distinguishable from the Common Law.

15 According to a generally accepted criterion, private law regulates relationships established between private persons, as well as those established between public and private persons, as long as the former act as private (without *ius imperium*). The remaining relationships fall within the public law. See Carlos Alberto da Mota Pinto, *op. cit.*, pages 28 and 29.

16 *Apud* Carlos Alberto da Mota Pinto, *op. cit.*, page 44. (Translated quotation).

17 This last feature alone is not exclusive of Civil Law systems, of course.



III

NEW FAMILY LAW ISSUES IN THE MACANESE CIVIL LAW SYSTEM¹⁸

MCC, approved by the Decree-Law number 39/99/M, of August 3, is in force in the territory since November 1, 1999¹⁹. As previously mentioned, family law is regulated in the special part of the Code, in its fourth book to be more precise, according to its Germanic structure.

Beforehand, allow me to remind you about the restricted dimension of this study, limited in double, if I may say so: on one hand, I'm just focusing on part of the stated novelties; on the other hand, I am simply making a generic and summarized description of the matters that I have chosen for this presentation.

1. MODELS OF MARRIAGE²⁰

Before the handover took place in December 20, 1999²¹, there were two models

18 Main references: Francisco Pereira Coelho e Guilherme de Oliveira, *Curso de Direito da Família*, Vol. I, *Introdução, Direito Matrimonial*, 3ª edição, Coimbra Editora, 2003; Guilherme de Oliveira, *A Reforma do Direito da Família de Macau*, in *Boletim da Faculdade de Direito, Universidade de Macau*, ano III, nº 8, 1999, pages 161 to 169; Manuel M. E. Trigo, *Lições Preliminares de Direito da Família e das Sucessões*, (segundo as aulas ao 4º ano do Curso de Direito em Língua Portuguesa no ano lectivo de 1999-2000); Luís Miguel Urbano, *O Código Civil de Macau de 1999*, in *Boletim da Faculdade de Direito, Universidade de Macau*, ano III, nº 8, 1999, pages 37 to 49; João Gil de Oliveira, *Regime de participação nos bens adquiridos*, in *Boletim da Faculdade de Direito, Universidade de Macau*, ano III, nº 8, 1999, pages 171 to 181; Adriano Miguel Ramos de Paiva, *The Patrimonial Consequences of Divorce in (the) Macao (Special Administrative Region of the People's Republic of China) under the New Legal Regime of Participation*, in *Papers for the International Conference on Divorce: Causes and Consequences*, sponsored by the ISFL and CUPL, July 19-20.2004, Beijing, pages 331 to 342; Paula Nunes Correia, *Divorce in Macao*, in *Papers for the International Conference on Divorce: Causes and Consequences*, sponsored by the ISFL and CUPL, July 19-20.2004, Beijing, pages 310 to 321; Paula Nunes Correia, *Marriage in China within the Civil Law – Marriage in Macau* in *Cadernos de Ciência Jurídica*, vol.1, including *Actas do Seminário sobre Problemas de Direito Regional da China*, Faculdade de Direito, Universidade de Macau, 2005 (pages 67 to 91).

19 Decree-Law number 48/99/M, of September 27, has extended the delay, from October 1 initially, to November 1, 1999.

20 For further detailed information, see Manuel M. E. Trigo, *op. cit.*, page 169 and subs..

21 Although the Civil Code of Macao came into force in November 1, 1999 (article 1 of the Decree-Law 48/99/M, September 27), article 27, a transitory norm of the Decree-Law 39/99/M, August 3, which approved the Code, provides that catholic marriages celebrated until December 19, 1999 are recognized by the law in what concerns their validity and efficacy.



for marriage: civil and catholic marriage. The matrimonial system in force was, at the time, an optional civil marriage system, according to which the fiancés can freely choose between civil and religious matrimony, both producing civil juridical effects. Besides, both civil and catholic marriages were admitted as two different models: one ruled by civil law and the other ruled by canonic law (one possible category of the optional civil marriage system).

In addition, marriages that had been celebrated in Macao, following the Chinese usages and customs and until May 1, 1987, in the terms of the law then in force, could have been registered at the civil registry office, if authorized by the registrar, until November 1, 2000²². This fact made the matrimonial system in force at a certain stage a *sui generis* optional civil marriage system, in the terms of our prior description, or a multi optional civil marriage system.

However, the existing system did not seem to be an adequate answer to Macao's people needs. Actually the Catholics only represented about 5% of its population. Furthermore, there was also a demand for respect towards the various existing religions in the territory, which also claimed for equal treatment. Thus, at present Macao's matrimonial system may be classified as a mandatory civil marriage system, in which only civil marriage is admitted. Nevertheless, once religious freedom is recognized in a country where such system is adopted, this doesn't prevent the couple engaged from marrying according to their own religious rites, provided that only civil matrimonies produce juridical effects.

At present, as I have just said, there is only one model of marriage in Macao: an obligatory civil form, according to which matrimony is celebrated and regulated in the terms of the civil law [article 1490 of MCC²³ and article 106 and subsequent of the Code of Civil Registry (CCR)]²⁴.

Yet, the law still foresees the possibility of marriages being celebrated in the future not only in the presence of the registrars, but also in the presence of religious priests in terms of a special law, as long as they match the requirements for a valid matrimony according to the civil law (article 121 of the CCR). If this ever happens, the system will then change to an optional civil marriage system. I precisely mean "change", and not "go back" to an optional civil marriage system, as in such case civil and religious matrimony will simply be two different ways²⁵ of celebrating

22 According to articles 5 and 7 of the Decree-Law 59/99/M, October 18, which approved the Code of Civil Registry of Macao.

23 All articles mentioned from now on, if not indicated otherwise, belong to MCC.

24 Note that marriages between two foreigners can be celebrated in Macao in the presence of the respective consular agents, in the terms provided by the national law of any of the parties (article 130 of the CCR).

25 And not two different models, as above mentioned, as it used to be before December 20, 1999.

marriage, with a common regime and civil juridical effects (another possible category of this system).

2. MATRIMONIAL ASSETS REGIMES AND AGREEMENTS²⁶

2.1. MATRIMONIAL CONVENTIONS

In what matrimonial agreements²⁷ are concerned, there have been significant changes in the law system.

Until October 31, 1999, there were two possibilities regarding the future matrimonial assets regime²⁸ for those who were going to get married: either they would declare nothing prior to the wedding, or they would settle the issue by celebrating a convention beforehand. Once married, their previous choice became irrevocable. In the first situation, in the silence of the parties, it would be applicable the supplementary legal assets regime, by then the partnership of acquests regime. In case the parties preferred to choose by themselves the assets regime²⁹, the second option, they could do so by celebrating a pre-nuptial convention: they could then choose either one of the three assets regimes typified in the law, or freely stipulate on the issue, within the limits of the law. The chosen regime would become effective after marriage, unless it was an invalid, a non-effective, or a forfeited³⁰ pre-nuptial convention, being in such case also applicable the supplementary regime. In any circumstance, that was an irreversible situation once it came into effect, as mentioned before: the principle of immutability of pre-nuptial conventions and of legal assets regime was then binding³¹.

In the terms of the new Civil Code, those who intend to get married still have the possibility to choose by themselves the assets regime by celebrating a pre-nuptial convention, or by default, in case they do not celebrate any convention before the

26 For further detailed information, see João Gil de Oliveira and Adriano M. R. de Paiva, articles cited.

27 The registration of these conventions is regulated in the CCR (article 139 and subs.).

28 Refer to the next point for a brief description of the possible legal assets regimes.

29 Unless one of the spouses, or both were over sixty years old, or the marriage had been celebrated without being preceded by the relevant proceedings, announcing its celebration (article 1720 of PCC). In such cases the marriage was necessarily, imperatively, considered under the regime of separation. Note that this previously existing limitation regarding the spouses' freedom of choice of the matrimonial assets regime has been abolished by the new Code.

30 This would happen if the marriage was not celebrated within the delay of one year.

31 With few exceptions.

wedding. In the last eventuality, and just like before, it will become applicable the supplementary legal assets regime, yet with an important difference: that regime is now the participation in acquests regime (*participação nos adquiridos*, in Portuguese, *participation aux acquêts*, in French). Besides, and here comes another significant dissimilarity, the above-mentioned principle of immutability, concerning both pre-nuptial conventions and legal assets regimes, is not valid anymore. We now have matrimonial conventions, which can either take place before, or after the wedding: we have pre-nuptial and post-nuptial conventions. Unlike before, spouses may now, by celebrating a post-nuptial convention: 1- Modify a pre-nuptial convention; 2- Celebrate, for the first time, a matrimonial convention, namely with the intention of replacing the supplementary legal assets regime in force; 3- Alter a previous post-nuptial convention (article 1578).

2.2. MATRIMONIAL ASSETS REGIMES

Matrimonial assets regime is the set of rules and regulations that define the property on the couple's assets, that is to say, its partition among the common possessions, the husband's possessions and the wife's possessions³².

Before MCC came into force, there were three legal assets regimes: partnership of acquests, general partnership and separation. The former was, as already mentioned, the supplementary legal regime, the one applicable in case there was no pre-nuptial convention, or in case that convention existed but had become invalid, non-effective or forfeited (article 1717 PCC).

Presently, there are four legal assets regimes: other than the three previously indicated, there is now the so-called participation in acquests regime, which, in addition, has become the supplementary legal regime (article 1579).

Here is a very brief description of each of the legal assets regimes:

- General partnership or communion (article 1609) – The possessions in common include all the spouses' assets, present and future, as long as they are not excluded by the law³³;
- Separation (article 1601) – Each spouse maintains the ownership and fruition of all his/her present and future assets, including to freely have the use of them, except when the law provides otherwise;
- Partnership or communion of acquests (article 1603) – Each spouse maintains

32 Francisco Pereira Coelho e Guilherme de Oliveira, *op. cit.*, page 517.

33 Examples of non-communicable assets: some values received as indemnification or from insurance; clothing and other objects personally and exclusively used by the spouse; diplomas and correspondence; family souvenirs of reduced economical value.

the ownership and fruition of the assets that belonged to him/her before the wedding, or before the eventual adoption, later on, of the stated regime while married³⁴ (personal assets); each spouse becomes holder in communion with the other spouse of the assets acquired by any of them while the regime lasts, as long as not excluded by the law³⁵ (common assets);

• Participation in acquests (article 1582) – According to the model that has been adopted in Macao, each spouse has the ownership and fruition not only of the assets that belonged to him/her before the wedding, or before the eventual adoption, later on, of the stated regime while married, but also of the assets subsequently acquired, including to freely have the use of them, except when the law provides otherwise. When this regime ceases, either because marriage has come to an end, or due to the fact that the spouses have celebrated a post-nuptial convention, there is a mechanism that has been established to somehow compensate the spouse who, while the regime lasted, had a minor patrimonial growth: the law gives him/her a right known as “credit in the participation” in order to attain the equality in terms of value of the patrimonial growths originated in marriage.

We may roughly say that this new supplementary legal regime is a mixture between two legal assets regimes: separation and partnership of acquests. While the regime lasts, it works as if it were a separation regime, conferring the inherent freedom and flexibility regarding the assets administration and power of disposition; when the regime ceases (by dissolution or annulment of the marriage, by declared absence, by its modification through the celebration of a post-nuptial convention, or by means of a judicial separation of assets) or, if better, is in itself dissolved, the law intends to give each of the spouses, or ex-spouses, a patrimonial value similar to what he or she would have gained in case they had been married under the regime of partnership of acquests. The idea that lies behind this new regime is to reconcile and protect two different kinds of interests: formerly, individual initiative, economical freedom and autonomy, therefore the fluidity of juridical commerce in general, by assuring that the goods will circulate more freely; later on, solidarity in marriage, and consequently protection of family interests, through the conferment of the above-mentioned credit in the participation – after all, marriage is sharing, participating and contributing for a life in common, being just fair to compensate the spouse who, at the end, appears as the most sacrificed, weaker or simply less fortunate, by equilibrating both spouses’ possessions and, in this manner, granting each one a way of living according to their family standards.

34 Through the celebration of a post-nuptial convention.

35 Other than the examples referred in footnote 33 as non-communicable assets, we may now add, among several others, the goods and values inherited or received by donation while the regime lasts.

Once again, the new supplementary legal regime tried to give a more efficient answer to the specific needs of Macao's population, which, apart from other relevant considerations, is characterized by a great and constant mobility, in particular between the region and Mainland China. Moreover, the proximity with Hong Kong, influenced by the British Common Law, also advised, to a certain extent, more independence of the spouses in their patrimonial or non-personal relationships. In brief, Macao now combines two different assets regimes: the previously in force model of communion of acquests, compelling in PRC as well as in Portugal, and the separation regime of Hong Kong³⁶.

Finally, I would like to add that the supplementary legal regime presently in vigor has been inspired in foreign models, according to which there is a tendency to introduce communitarian ideas in separation regimes, in particular in the French *participation aux acquêts*³⁷. The regime is, for instance, known in some South American countries, Sweden and Spain, "(...) being also, basically, the supplementary regime of the German Law."³⁸ Comparative Law becomes thus a non-dispensable device when it comes to legal systems' development, in particular to the production of new laws.

3. SEPARATION FROM BED AND BOARD OR LEGAL SEPARATION³⁹

Having in consideration Macao society where the presence of various different religions is noticeable, among which Catholics represent a rather low percentage of its population, separation from bed and board had become a meaningless institute, or practically. As a result, the lawmaker simply eradicated it from the new Civil Code, giving also a clear indication of his preference for divorce when things go wrong in matrimony.

The only legal separation still possible according to the new regulations is the one strictly concerning the couple's assets. This is a judicial separation⁴⁰ that only occurs by litigation: any of the spouses who is in danger of suffering a significant loss due to the other spouse's bad administration, may ask for the judicial separation of assets (article 1624, paragraph 1), as well as, starting in November 1, 1999, in case of absence without news from the other spouse for more than three years (same

36 João Gil de Oliveira, cited article, page 173.

37 João Gil de Oliveira, cited article, page 172.

38 João Gil de Oliveira, cited article, page 172. (Translated quotation). For further detailed information on the issue, see also Adriano M. R. de Paiva, cited article.

39 For further detailed information, see Manuel Trigo, *op. cit.*, page 109 and subs..

40 This separation is regulated in article 1028 and subs. of the Code of Civil Procedure (CCP).

article, paragraph 2)⁴¹. Once this legal separation of assets is obtained, the effect is the adoption, from then on, of the separation of assets regime (article 1626)⁴². A modification in the relationship is thus effective, strictly concerning the assets: there are no modifications in what personal effects of matrimony are concerned.

In spite of the eradication of legal separation, those who, by the time the new Code came into force, were already separated from bed and board, or going through a judicial procedure to obtain a legal separation in the terms of the provisions previously in force, are still protected by those rules (article 32 of the Decree-Law number 39/99/M)⁴³.

Despite the deep weakening⁴⁴ that the stated separation from bed and board causes to the matrimonial relationship, it does not dissolve marriage. The only two causes for dissolution of matrimony are, as we are well aware of, death and divorce⁴⁵.

In those countries where divorce is not admitted, separation from bed and board appears as the best way, actually the only way to legally solve a marital crisis. In this sense, legal separation tends to be an enduring situation, often referred as the “Catholics’ divorce”⁴⁶. Differently, wherever divorce is admitted, the maintenance of such separation is only conceivable as one of the possible solutions to solve the crisis, but not the best one under the circumstances. In such case legal separation is

41 Alternatively, the other spouse may request for divorce (divorce by litigation, being one of the three possibilities of divorce due to rupture of life in common). *V. infra*, footnotes 54 and 55. In case of absence without news, a curator may be assigned to administrate the absent’s possessions and/or it may be declared the presumed death of the absent in case seven years have passed from the day of his/her last news (articles 89 and subs. and 100 and subs.).

42 However, due to the mutability of the legal assets regime that has been consecrated in MCC, the spouses may now agree to revoke this regime and either choose to go back to the previous one, or to adopt any of the other assets regimes.

43 For the pending procedures, the previous procedural rules are applicable (Decree-Law number 55/99/M, article 2, paragraph 2). In terms of substantive or non-procedural regulations, article 1794 and subs. of PCC are applicable.

44 In what concerns personal effects, the duties of cohabitation and assistance, except for alimony, are extinguished; on the contrary, the duties of fidelity, respect (at least its negative side) and cooperation are maintained. For further detailed information on the marital duties, see Francisco Pereira Coelho e Guilherme de Oliveira, *op. cit.*, page 386 and subs.; Paula Nunes Correia, *Marriage in China within the Civil Law – Marriage in Macau*, cited article. In what assets are concerned, separation from bed and board has the same effects as if marriage had been dissolved. Briefly, we can say that only those effects that are absolutely essential to marriage are maintained, those without which marriage is not even conceivable.

45 On its turn, marriage can be extinguished either by dissolution or by annulment.

46 Francisco Pereira Coelho e Guilherme de Oliveira, *op. cit.*, page 604.



regarded as a short-lived situation, as a mere preparation for divorce⁴⁷.

Separation from bed and board comes to an end, either because marriage is dissolved – by death of one of the spouses or by its conversion into a divorce⁴⁸ – or because spouses are reconciled.

Finally, and just like divorce, separation from bed and board or legal separation also admits two models: by mutual consent and by litigation⁴⁹.

4. DIVORCE

4.1. CONCEPT AND MODELS

Regarding the dissolution of matrimony by divorce, Macao admits, just like before, two possibilities: by mutual consent and litigation⁵⁰ (article 1628, paragraph 1).

Divorce by mutual consent is agreed and requested by both spouses, without having to state any causes for it. The request can either be made through the judicial court or, since November 1, 1999 and in case the couple doesn't have any children under eighteen years old, through the registry office (article 1628, paragraph 2, as well as article 1630, paragraph 2). Therefore, there are now two types or categories of divorce by mutual consent: judicial divorce and registry divorce⁵¹.

Divorce by mutual consent is integrated by two constitutive elements: one private element, consisting in the spouses' agreement on the divorce, and one public element, having as a base the homologation of the agreement by the judge or by the registrar. From this perspective, divorce by mutual consent is a complex act⁵².

47 This was the situation in Macao before the new Civil Code came into force and still is the case in Portugal.

48 Here is a clear indication of a preference for divorce, rather than for legal separation. Any of the spouses may request for this conversion: at any time, in case both ask for the conversion; two years after the legal separation has passed in *rem judicata*, if only one of them wants the conversion, unless the other spouse has committed adultery, for in such case the delay does not apply (article 1795-D PCC).

49 *V. infra*, next point.

50 Comparing the models of divorce in Common Law and in Civil Law, I would say that divorce by litigation has a great deal in common with fault divorce. For further detailed information, see Paula Nunes Correia, cited article on *Divorce in Macao*.

51 Article 204 and subs. of the CCR regulate divorce whenever the divorce suit takes place at the registry office.

52 Manuel Trigo, *op. cit.*, page 134. The agreement on divorce, on the other hand, integrates the following arrangements: on alimony to be paid to the spouse in need, on parental responsibility related with minor children, and on the destination of the family residence. Even though these are eventual and complementary agreements, whenever they are necessary they become essential, since divorce won't be granted if there is no agreement on these issues or in case they are not protective enough of the children's interests, or of one of the spouse's interests.

Divorce by litigation is requested at the judicial court, by one spouse against the other⁵³, based on a specific cause (any of the causes foreseen in articles 1635 and 1637, *ex vi* article 1628, paragraph 3). Taking into account the different possible causes, we also have two types of divorce by litigation: by breach of marital obligations due to fault and by rupture of life in common. In the first eventuality, divorce may be granted in case there has been a violation, due to fault, of any of the five marital legal obligations born with marriage, that is respect, fidelity, cohabitation, cooperation and assistance. Furthermore, this violation has to be serious, reiterated and to impair the possibility of life in common (article 1635). In the second contingency (referred to as rupture of life in common), divorce may be granted in any of the three following situations: separation of spouses for two consecutive years; absence, without news from the absent, for at least three years; mental disturbance of the other spouse, when it lasts for more than three years and, due to its seriousness, impairs the possibility of life in common (article 1637)⁵⁴.

In every divorce procedure, no matter what model, there is always at least one attempt to reconcile the spouses. In case of a failed reconciliation attempt in a divorce by litigation, the judge shall try to obtain the spouses' agreement for a mutual consent. Furthermore, the spouses can, at any moment of the procedure, switch from a divorce by litigation to a mutual consent one (article 1629). Thus, when it comes to divorce, legal preferences become very clear: marriage, if the choice is to be made between marriage and divorce *tout court* (article 1629, paragraph 1); divorce by mutual consent, in case reconciliation is not possible and the choice is to be made between one of the two models of divorce (same article, paragraph 2). When marriage is inevitably broken, we shall, at least, try to make divorce the least dramatic as possible, avoiding public exposure of the family drama and somehow mitigating the pain of the actors primarily involved in the scene, this is to say spouses and children, in particular minor children.

In what concerns the legal reform, we can probably say that, unlike divorce by mutual consent, the modifications brought into divorce by litigation have not really affected its structure. They were, to a certain extent, "minor" changes in general thought to reduce or remove some previously existing difficulties in order to "facilitate" divorce. It is, for instance, the case in the decreasing of the delays required

54 The fact that divorce by litigation always opposes one spouse against the other becomes very clear and specific when it comes to the capacity to file for a divorce suit (article 1640): in case of breach of marital obligations due to fault, the capacity belongs to the offended spouse; in case of separation of spouses, any of the spouses can request for divorce against the other; in case of absence without news, the request has to come from the spouse who invokes the absence; finally, in case of mental disturbance, the spouse who invokes the other spouse's mental disturbance has the capacity to request for divorce.

55 For further detailed information, see Paula Nunes Correia, cited article on *Divorce in Macao*.

to grant divorce whenever there has been rupture of life in common, following the general modern tendency: from six to two consecutive years, when a separation of spouses occurs; from four to three years, in case of absence without news; from six to three years, if it is proven that the mental disturbance of the other spouse, due to its seriousness, impairs the possibility of life in common [articles 1637 and 1781, paragraphs a), b) and c), of MCC and PCC respectively, before the modifications that have, in the meantime, been introduced by the Law 47/98, of August 10, in PCC⁵⁵]. Regarding this last possibility, it has also been removed another previously existing limitation, which consisted in denying divorce whenever it was presumable that it would significantly aggravate the defendant's condition. Nevertheless, it has been maintained the obligation, for the spouse who has requested for divorce in such case, to compensate the mentally disturbed defendant for moral damages (pain and suffering) caused by divorce (article 1647, paragraph 1)⁵⁶.

From now on and to end with, mainly due to the time constraint and the fact that there have been important modifications in it, I'll be just focusing on the reformation of divorce by mutual consent.

4.2 DIVORCE BY MUTUAL CONSENT: REQUIREMENTS

Technically speaking, we should only refer to “causes” when we're dealing with a divorce by litigation. Nevertheless, even if the spouses do not have to reveal a cause to obtain a divorce by mutual consent, some requirements or conditions do exist in such eventuality.

4.2.1. JUDICIAL DIVORCE BY MUTUAL CONSENT

This first category of divorce by mutual consent depends on three sorts of conditions:

- A previous one, consisting in a certain duration of marriage, one year at least (article 1630, paragraph 1)⁵⁷;

55 This Law also reflects the modern tendency in the general decreasing of the delays, which have also been significantly reduced in Portugal and regarding both models of divorce. The previously existing limitation subsequently mentioned in the text has also been eradicated in Portugal when this Law came into force. *V.* also footnote 57.

56 For further detailed information, see Manuel Trigo, *op. cit.*, pages 141 and 142, and Paula Nunes Correia, cited article on *Divorce in Macao*, page 317 and subs..

57 This delay is thought to avoid precipitation or premature choice for divorce, also reflecting a legal preference towards marriage. It has also been decreased, since it used to be of three years. Note that this delay no longer subsists in Portugal, ever since Law 47/98 has abolished the previously required period of three years.

- A necessary one, which is the spouses' agreement or the mutual consent on divorce (articles 1628, paragraph 2 and 1630, paragraph 1);
- An eventual, but normal one⁵⁸, consisting in the spouses' agreement on the following issues: alimony owed to the spouse in need, parental responsibility in what concerns their minor children, and the destination of the family residence [article 1630, paragraph 2 and article 1242 of the Code of Civil Procedure (CCP)]. The agreement, on these same issues, is also required for the time the divorce suit is pending (article 1630, paragraph 3).

Judicial divorce by mutual consent may follow a more elaborated procedure, called common procedure, or a simplified one⁵⁹. It follows a common procedure in case there are minor children in common, or even if there aren't any, if during the time the first conference takes place, in which the judge must try to reconcile the spouses, he/she is not convinced that reconciliation is not possible. In this eventuality, the judge shall call the spouses for a second conference and try to reconcile them once again (articles 1631, 1632 and 1633, paragraph 2)⁶⁰. Divorce follows a simplified procedure when there are no minor children in common and the spouses have achieved to demonstrate to the judge, during the first conference, that reconciliation is undoubtedly impossible (articles 1631, 1632, paragraph 1, *a contrario sensu*, and 1633, paragraph 1).

4.2.2. REGISTRY DIVORCE BY MUTUAL CONSENT

This second type of divorce by mutual consent, which has been introduced by the new Civil Code of 1999⁶¹, depends on the following circumstances:

58 Refer to footnote 52.

59 Pending divorce suits by the time the new CCP came into force in November 1, 1999, were regulated by the relevant rules previously in force. The procedure for divorce by mutual consent was then different. Presently it is regulated in article 1242 and subs. of CCP.

60 If the spouses persist in their intention to divorce, the duty of cohabitation is suspended from the first conference on (article 1631, paragraph 4). In what concerns personal effects of marriage, spouses are reciprocally bound by the obligations of respect, fidelity, cohabitation, cooperation and assistance (article 1533). Note that the obligation of cohabitation is the only one to be suspended. This suspension is more like an anticipation of certain effects of divorce. For further detailed information, see Paula Nunes Correia, cited article on *Divorce in Macao*.

The second conference, during which the judge will try to reconcile the spouses once more, shall take place within three to six months after the first conference (article 1632, paragraph 1).

61 Articles 1630 to 1633, which regulate about the requirements and procedure for judicial divorce by mutual consent, are applicable to this other type of divorce by mutual consent (please refer to article 1634, paragraph 1). Furthermore, in this case divorce follows a special procedure in the terms of the CCR (articles 204 to 207), being also applicable (*ex vi* article 205, paragraph 3 CCR) some procedural rules that apply to the former category (articles 1243 to 1246 CCP).

- Two previous conditions: one also consisting in a certain duration of marriage, one year at least, to which we must now add the inexistence of minor children of the couple (articles 1630, paragraph 1 and 1628, paragraph 2);
- A necessary condition, consisting in the spouses' mutual consent towards divorce (articles 1628, paragraphs 1 and 2 and 1630, paragraph 1);
- An eventual, but normal condition⁶²: the spouses must agree on the alimony owed to the spouse in need, as well as on the destination of the family residence, being these agreements in force during and after the divorce suit (article 1630, paragraphs 2 and 3 and article 1242 CCP).

This category of divorce by mutual consent, following the modern tendency, has been implemented to make things easier and faster, reducing at the same time the workload on judicial courts, as long as there are no minor children in common involved. Just like the previously mentioned category, registry divorce by mutual consent may follow a simplified procedure or a more elaborated one, a common procedure, depending on whether there are only one or two conferences, respectively, to attempt the spouses' reconciliation. The simplified procedure is, in this category, far more frequent than the common one⁶³. The second conference only occurs, exceptionally, in case the spouses have not achieved to convince the registrar, during the first conference, that reconciliation between them was, without doubt, impossible (article 1632, paragraph 1, *ex vi* article 1634, paragraph 1).

A decision made by the registrar has the same effects as the one made by the judge on identical matter (article 1634, paragraph 2). There is appeal of the decision of the former to the judicial court in the first instance (articles 207, 231 and subsequent of the CCR).

IV CONCLUSION

I do hope having achieved to provide an overview on these few, although relevant aspects of the recent reform on family law in Macao. I also expect that my brief exposition has been, somehow, capable to convey the idea that these new rules and regulations, which were inspired in modern tendencies and ideologies, were duly matured and especially, but inevitably, adapted to Macao's society.

62 *Supra* footnotes 52 and 58.

63 The procedure for a registry divorce by mutual consent is regulated in articles 1631 to 1633, *ex vi* article 1634, paragraph 1 MCC, in articles 204 to 207 CCR, and in articles 1243 to 1246 CCP, *ex vi* article 205, paragraph 3 CCR.

This was a rather profound and, in my opinion, a generally well achieved reform. Just to give you a closer idea of its dimension, other than the small number of topics briefly presented today, the following matters have also been object of reformation: *de facto* union, proceedings of marriage, spouses' debts, affiliation, alimony and adoption. Besides, medically assisted reproduction is on the menu from then on⁶⁴.

Practically every aspect of family law has been submitted to some kind of modification, which, by all means, is not surprising. After all, being an area with a deep institutional nature, this branch of the law, in particular, has to adjust itself to the specificities of each society. That explains why family law is so different from country to country, and simultaneously broadly justifies the necessity to share those existing diverse viewpoints and feelings for the sake of its continuous improvement. Hence, I sincerely thank ISFL for having, once more, given us such opportunity: a testimony that family law is very much alive, allowing, in addition, an important step forward towards harmony and harmonization, hopefully to a better world as well.

64 Within the chapter dedicated to affiliation, there is a whole new section titled “assisted procreation”, comprehending a total of six provisions (from article 1723 to article 1728). I would just add that, except for one of them, to be more specific, for article 1725 that regulates the presumption of paternity in a *de facto* union in case of medically assisted procreation, I totally agree with the contents of the remaining articles and applaud the regulation of such complex and delicate matters. For a critical opinion on the cited article 1725, see Paula Nunes Correia, *Da Presunção de Paternidade na União de Facto em caso de Procriação Medicamente Assistida*, in *Boletim da Faculdade de Direito, Universidade de Macau*, ano VII, nº 16, 2003, pages 15 to 29.



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