

Direito da Família nas Ordens Jurídicas de Moçambique, Macau e China é uma publicação que resulta dos estudos e contribuições de Professores e estudantes das Faculdades de Direito da Universidade Eduardo Mondlane e da Universidade de Macau, apresentados no 13.º Seminário conjunto realizado em Abril de 2019 em Maputo no âmbito do protocolo de cooperação académica entre as duas Faculdades.

As reflexões aqui publicadas versam sobre questões de grande relevância jurídica e social para Moçambique, Macau e China e constituem um valioso contributo não só para a disseminação do saber jurídico dos territórios envolvidos, mas também como uma plataforma para o desenvolvimento da ciência jurídica nas duas latitudes normativas.

A presente publicação, marca igualmente o assinalar dos 20 anos de cooperação académica entre a Faculdade de Direito da Universidade Eduardo Mondlane e a Faculdade de Direito da Universidade de Macau, celebrados sob o lema 20 Anos Partilhando o Saber Jurídico.

Ao longo desses 20 Anos testemunhamos o compromisso de se estabelecer e fortalecer um diálogo científico e académico permanente, estável e profícuo, no sentido de promover e aprofundar o debate jurídico entre as duas Faculdades e a profundidade com que os diferentes temas aqui publicados são tratados revela o empenho dos participantes na materialização desse desiderato.

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Maputo, Abril de 2022
Almeida Machava



DIREITO DA FAMÍLIA NAS ORDENS JURÍDICAS DE MOÇAMBIQUE, MACAU E CHINA



UNIVERSIDADE
EDUARDO
MONDLANE

FACULDADE DE DIREITO

DIREITO DA FAMÍLIA

NAS ORDENS JURÍDICAS DE
MOÇAMBIQUE, MACAU E CHINA

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ÍNDICE

PREFÁCIO

A RELEVÂNCIA DAS RELAÇÕES FAMILIARES E DOS INTERESSES DA FAMÍLIA NA LEI DO JOGO E O PRINCÍPIO DA IGUALDADE
Manuel Trigo

PLURALISMO JURÍDICO E AS RELAÇÕES JURÍDICO-FAMILIARES
Luís Filipe Sacramento

CRIANÇA E FILIAÇÃO VS IGUALDADE NAS RELAÇÕES DE FAMÍLIA
Amaldo Ablão Mondlane

INSEMINAÇÃO ARTIFICIAL E ADOÇÃO NAS RELAÇÕES HOMOSSEXUAIS:
BREVE ANÁLISE JURÍDICA
Alberto Januário Hewa Nkutumula

O CONFLITO DE IGUALDADE DOS DIREITOS REPRODUTIVOS ENTRE OS CÔNJUGES:
O MARIDO TEM TAMBÉM DIREITOS REPRODUTIVOS?
Jiang Yi Wa

SUPERIOR INTERESSE DA CRIANÇA E O DIREITO DA FILIAÇÃO
Manuel Didier Malunga

IMPEDIMENTOS MATRIMONIAIS:
REGIME JURÍDICO E BREVE REFLEXÃO SOBRE QUESTÃO CONEXA EMERGENTE,
NO ÂMBITO DO
SISTEMA JURÍDICO VIGENTE EM MACAU
Paula Nunes Correia

A OBRIGAÇÃO DE PRESTAÇÃO DE ALIMENTOS A MENORES E
CRIANÇAS E A EXCLUSÃO SOCIAL.
Shakila Nuro Caiado e Deisy Ribeiro

EFEITOS DO CASAMENTO QUANTO AOS BENS DOS CÔNJUGES, COM ESPECIAL
INCIDÊNCIA EM MATÉRIA DA EXECUÇÃO
(ALGUMAS DECISÕES JUDICIAIS)
Mário Augusto Silvestre,

A SITUAÇÃO JURÍDICA DOS UNIDOS DE FACTO NO EXERCÍCIO DA ACTIVIDADE
EMPRESARIAL
Almeida Machava

MACAO'S MARITAL PROPERTY SYSTEM:
A CHRONICLE OF THE ROAD TO SUCCESSFUL AUTONOMY
Leong Cheng Hang

06
11
38
66
78
88
106
115
126
136
151
160

PREFÁCIO

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MACAO'S MARITAL PROPERTY SYSTEM: A CHRONICLE OF THE ROAD TO SUCCESSFUL AUTONOMY

Leong Cheng Hang

Docente da Faculdade de Direito de Macau

RESUMO

O nascimento de um diploma estruturante e fracturante com a magnitude de um Código Civil resulta invariavelmente de um conjunto de razões. Esse conjunto de razões repousa em factores variegados, multi-frontes e da mais variada natureza: razões sociais, culturais, religiosas e, não raro, mundividenciais estão sempre no étimo fundante de um Código Civil. O Direito da Família do Código Civil de Macau de 1999 não constitui, neste conspecto, excepção. Fruto de linhas de intersecção históricas e culturais (reunindo no seu seio culturas diametralmente opostas entre si - a cultura colectivista oriental e a cultura individualista ocidental, sempre em busca de harmonização), o Direito da Família de Macau avoca especialidades jurídicas que (temos presente) não se verificam (ou verificaram) noutras latitudes geográficas. O presente artigo traça, de forma detida, essas linhas de evolução que animaram o Direito da Família de Macau nos últimos séculos, dando conta das linhas de convergência e de divergência com a peculiar realidade social da Região Administrativa Especial de Macau. Nesta senda, a autonomia patrimonial dos cônjuges (e os regimes de bens a ela adjacentes) constitui o núcleo irradiador deste artigo, não deixando de se delinear (ainda que a traço grosso) os desafios futuros que o Direito da Família de Macau deverá arrostar nos tempos mais próximos.

Palavras-Chave: Direito da Família de Macau; Confucionismo; Código Civil de Macau de 1999; regimes de bens; autonomia patrimonial dos cônjuges

I. INTRODUCTION

Civil law represents the unity of value rationality and formal rationality gradually formed by specific historical and cultural traditions. Marriage and family law is a condensed reflection of the ethical and moral orientation of families of a given region. Influenced by legislative traditions, customs, and other ideological

"culture" has been defined by scholars as "the inheritable characteristic that a human group has learned, and we call it 'culture'".¹²

The rule of four hundred years enabled the Portuguese government to establish a legal system in Macao that originated in Portugal. This means that Portugal has brought the tradition of continental law into Macao. The *Civil Code of Macao* is a typical example of this tradition. The laws in the history of Macao generally include the laws and traditional rituals of the Ming and Qing dynasties in China, the laws of Portugal, the laws enacted by the Portuguese overseas colonies, and the local laws designated by the Portuguese Macao government legislatures. The extension of Portuguese law in Macao was completed on a continuous basis since 1849. In 1897, Portugal extended its *Civil Code* to Macao, but it had reservations about the family and marriage provisions that did not conform to Chinese customs; in 1909, laws and regulations on family and inheritance were issued in accordance with Chinese customs.¹³ In the centuries-old colonial history, the basic framework and foundation of the current legal system in Macao came from Portuguese law, but it cannot be said that Macao law has been replaced by Portuguese law, especially in the process of law application. After an in-depth investigation and study of Macao society, the well-known Portuguese legal and social scholar Boaventura de Sousa Santos pointed out that: The so-called Macao law is a pluralistic mixture of laws which combines Portuguese law, the law of the Portuguese Macao government, customs of South China especially Macao, and certain laws in Hong Kong (namely economic law, accounting law and commercial law) into one.¹⁴ Some scholars have argued that Macao residents were accustomed to resolving disputes based on customs rather than relying on modern Portuguese law¹⁵ are as follows: "First of all, Macao has been a Chinese society. The values and living habits of the vast majority of residents have been incompatible with the values and living habits of the Portuguese. Therefore, a substantial part of the Portuguese law transplanted to Macao could not be recognized by the general public in Macao"; "second, Macao was in Portuguese-speaking legislation. The first text of the current law was in Portuguese. Although the law enacted by the Legislative Assembly and the Governor had a Chinese translation, it still failed to change the situation in which Portuguese was the main legal language"; "third, Macao before the reunification had no independent judicial power for a long time; Macao was a legal precinct of Portugal and at the departmental level in the judicial organization, and both appeals and protests were tried in Portugal, the cost of which was very expensive".¹⁶ Therefore, the integration and conflicts in the development of Portuguese law in Macao reflect that the law is not just a piece of paper; it is a rule evolved from customs and has legal effect. The development

12. Geoffrey J. Martin, *All Possible Worlds: A History of Geographical Ideas*, trans. Cheng Yinong and Wang Xuemei, Shanghai Century Publishing House, 2008, p.249.

13. J. A. Oliveira Rocha, On the Feasibility of the Legal System in Macao, included in *Administration*, Volume 4, Issue 3/4 (Total Issue 13/14), 1991, pp.777-789.

14. Mi Yetian, *Civil and Commercial Law of Macao*, Beijing: China University of Political Science and Law Press, 1996, p.9 & p.21.

15. For instance, in China (Macao's motherland and *alma mater*), dispute resolution (namely Mediation) has been seen as a way ensuring social order through social harmony; see about the foundations of the Constitution of China, in French language, Xiao-Ying Li-Kotovtchickhine, "Pragmatisme juridique et rôle de la Constitution en Chine post-Mao", *Revue Internationale de droit comparé*, 2018 (3), (2018): 446 ff.

16. Shi Tongbiao and Hu Rong, Integration of Mainland and Macao Legal Cultures under One Country, Two Systems, included in *Journal of Guizhou University*, 2010, Issue 1, pp.28-31.

of law not only depends on the law itself but also originates from the soil of legal culture".¹⁷

As for the legal marital property system in Macao, the common property system and the separate property system are obviously a continuation of legal tradition. The marital property system of the continental law system has a profound historical origin. In terms of the source, it originated from the trousseau system in ancient Rome and the common management system and common property system in the medieval Germanic law. The trousseau system in the "sine manu" marriage under the ancient Roman *jus gentium* (law of nations) is the earliest autonomous marital property system in the world. It was formed in the late Roman Republic period and the early imperial period (1st century BC to around AD 1). After AD 476, the Roman Empire was destroyed, replaced by Germanic states. Later in the Germanic tribal law era, a common management system was implemented, and later a common property system was developed.

The common property system embodies the features of a family treated as a whole, conforms to the essential characteristics of a marital life community, and is conducive to protecting the rights and interests of the economically weaker (often the wife) of a couple, achieving the *de facto* equality of husband and wife family status. However, all property between husband and wife is owned jointly. This *one-size-fits-all* approach obliterates the multi-channel nature of marital property sources and the personal attributes of certain property. The pursuit of extreme equality may result in substantial inequality.

The separate property system is the product of the doctrine of separate conjugal personalities. In the United Kingdom, the birthplace of the marital property system in the Anglo-American legal system, after the establishment of the feudal

system following Norman Conquest in the 11th century, the property annexation system (not strictly a marital property system) was implemented.¹⁸ After the establishment of the "peculium system" in the 16th century code, the marital property system began to change towards the separate property system of modern significance. Husband and wife each own property and share the cost of family life. It is a milestone in the rise of women's status in history. However, in many countries of the continental law system, especially the eastern countries, the separate property system violates the purpose of marriage establishment, and the relationship between husband and wife is materialized, away from the traditional ethical standards for husband and wife.

Among the legal marital property systems recognized by countries around the world as well as derived from the habits of ancient Rome and Germanic peoples and the precedents of the Anglo-American legal system, the common property system and the separate property system are the most common, and the development trend is a mixed marital property system.

17. Amanda Stallard, "Joining the Culture Club: Examining Cultural Context When Implementing International Dispute Resolution", *Ohio State Journal of Dispute Resolution (OHIO ST. J. DISP. RESOL.)* 17 (2001-2002): pp. 463 ff.

18. Lin Hsiu-Hsiung, *Research on Marital Property System*, China University of Political Science and Law Press, 2001, pp.26-29 & pp.49-50.

IV. CHARACTERISTICS OF PRESENT LEGAL SYSTEM

In 1999, the *Civil Code of Macao* abandoned the simple common property system or separate property system when determining it an alternate system for the

legal marital property system. To a certain extent, the aforementioned property systems conceivably intermingle each other tough. The marital property system is thus a product of diversification.

For example, the system of property acquired in common was determined as the alternate property system in the legal property system stipulated in the *Civil Code of Macao* 1966. The basic principle of this property system is that the property acquired by either spouse before marriage is such spouse's own personal property. Moreover, the property acquired during the duration of the marriage relationship is hailed as common property. In other words, there is the common property of both husband and wife, including the property acquired by the two married persons and the remuneration arisen from their respective labor force. Additionally, there is also property of each spouse, such as personal property owned before marriage and property acquired by inheritance or donorship after marriage (meaning: such property ought not become common property due to the marriage of the party or the adoption of the system of property acquired in common). This means that on the basis of acknowledging personal property, the common property concept of "uniformity" in the general common property system was abandoned, and the personal property scope was broadened.

Another example is the *Civil Code of Macao* enacted in 1999. It establishes the sharing of acquired property as the alternate property system for the legal marital property system. The so-called sharing of acquired property has been enacted on the basis of recognizing that both spouses retain ownership and income rights for all property in the present and future. Meaning: on the basis of acknowledging personal property, one can say that the shortcoming of "incompatibility" of marital property was abolished under the separate property system. This systems curtails legal features of the common property system, limits the ownership of property added during the application of the system, and gives the party with less property yielded during the existence of the marriage relationship the right to claim the difference. This system is the inheritance of the "doctrine of separate conjugal personalities" in the late Roman law. Its idea is that both husband and wife should have independent and equal family status and legal status. It also reflects the core contract spirit of the Western law tradition. In Chinese traditional culture, the tradition of signing a property system agreement between husband and wife did not exist, and the independence of property between husband and wife was also considered to hinder the maintenance of emotional relationship between husband and wife. Therefore, the acceptance of the marital property sharing system and related concepts is still a challenge for Chinese couples.

Family is a community formed by various legal subjects such as parents, children, spouses, brothers and sisters. Husband and wife are the core members of a family.

The relationship between husband and wife is the core relationship in a family. It is the starting point for kinship and the source of all kinship. In family property relations, the marital property relationship is one of the most important, and it is the indispensable material basis and guarantee for the common life of marriage. Today, with the rapid development of the market economy, marital property has already entered the circulation field, and legal acts of property with third parties occur. The property relationship between husband and wife is not only related to the equality of husband and wife and the harmony of marriage and family, but also closely related to the legal rights and interests of third parties, thus affecting the safety of the social economy. Therefore, the contemporary family kinship law is paying more and more attention to the regulation of the marital property system.

V. THE MEANING OF AUTONOMY AND INTERVENTION IN MACAU LAW MARITAL PROPERTY

I. INTRODUCTION

Autonomy and intervention have always been competing in the history of private law development. The development history of the marital property system is the history of a interplay between autonomy and intervention. The marital property system in the *Civil Code of Macao* embodies the spirit of autonomy without any hint of hindrance. Through various provisions, the principle of autonomy is regulated and duly implemented.

First, the respect for and protection of private rights in marital property in the *Civil Code of Macao* has been received;

Second, the autonomy within the marital property system embodied in the *Civil Code of Macao* equates to restricted autonomy.

In the field of marital property system, restraint on autonomy and intervention can be gauged. When autonomy may affect the public order or make the property system unfair, intervention will appear to restrict such autonomy; when intervention imposes restrictions on the freedom of the spouses or cannot follow the pace of social and economic development, autonomy will serve as a supplement; when there is a problem with autonomy, intervention will appear again, and the final solution will be exported.

ii. Law Restraint

1. REASONS FOR MODESTY

The particularity of family property relations mainly lies in the fact that family property relations is based on family identity and involve the scope of identity law. However, from the perspective of regulating property relations, family property relations cannot be separated from the adjustment by property law.

Restraint can be understood literally as humility and self-restraint. Since Japanese criminal law scholars first put forward the concept of "restraint of criminal law", the criminal law restraint has been supported by more and more criminal law scholars, and has become a basic criminal law concept and criminal law principle guiding the direction of the criminal law reform movement in contemporary countries. Later, the public law departments such as constitutional law studies and administrative law studies also gradually accepted the concept of "restraint", and the principle of restraint gradually evolved into a principle of public law. Although the marital property relationship in marriage is based on private law, it also shows a lot of public law characteristics and assumes some public law functions.

Marriage and family law is mainly identity law, which regulates the personal relationships and property relationships among people with specific kinship identities. Special human relations between husband and wife, parents and children, and brothers and sisters are not created and do not exist for utilitarian purposes, and the property relationship derived from kinship identities does not reflect direct economic purposes. It mainly reflects the requirements for kin to live together and their family functions, with a distinct "public law" order and social security and social welfare color. The protection of the "weak" and the "altruistic" value orientation are directly incorporated into the relationship of rights and obligations. The group characteristics of marriage and family determine that the marriage law cannot be completely individual-based. It must weigh up the interests of the husband and wife community and the family community¹⁹, which is completely different from the individualism in ordinary justice.

Based on the particularity of family property relations, family property relations are mainly adjusted by the self-relationship of marriage and family. Therefore, non-contracted property division during the duration of a marriage should not only play the normative and guiding role as the basic law of property, but also maintain certain restraint and rationality in the face of family property relations, giving respect and humility to the married couple and family relations themselves in the process of adjusting family property relations. Appropriate trade-offs and institutional avoidance must not be less.

19. Ma Yinan, Protection of the Weak in Marriage and Family Law, from *Studies in Law and Business*, 1999, Issue 4, pp.14-16.

Judging from the current regulations on property division in Macao, the family property legislation has chosen the attitude of "application first" in marital property adjustment (Article 1624, *Civil Code*). It is not only because of the deep influence of the traditional inherent law that attached more importance to family than individual interests, but also because of the different ethical rules in the private and public spheres. In the private sphere and the public sphere, family is the standard of division. Family members in the private sphere are connected based on natural biological emotions, not purposeful interests. Altruism always constitutes the main rule of their ethics. Love, blood and family relationships can make everyone tolerate each other's shortcomings to a large extent, and can even make them tolerate each other's infringement.

Members in the public sphere are connected based on an instrumental need. Under the control of self-interest rules, people haggle over every penny and state power is required to closely monitor the public sphere.²⁰ Therefore, the law adopts double standards for the protection of rights in the public and private spheres by only punishing violations that occur in the public sphere and adopting an evasive attitude toward infringements in the private sphere. Only when a marriage comes to the end will the infringed property rights and interests receive attention and protection²¹. This is obviously not in line with the principles of fairness and justice²².

20. Zhou Anping, Jurisprudential Analysis of Domestic Violence, from *Journal of Nanjing Party Institute of CPC and Nanjing Administration Institute*, 2005, Issue 6, pp.37-39.

21. Questões de justiça distributiva estão habitualmente na génese da referência à obrigação natural de contribuir para as despesas emergentes do trem de vida comum no seio da união de facto. Obrigação natural que impende sobre os unidos de facto na vigência da união para-familiar. Sem pretensões de exaustividade, isso explica-se porque: i) as obrigações naturais ligam-se frequentemente à discussão entre o Direito e a Moral (a tese da diferença (Menezes Cordeiro) e a tese da separação (Hart) poderiam servir de exemplo ao intenso debate Hart-Dworkin que dominou, neste ponto, uma parte do Sec. XX) ii) ao regime jurídico das obrigações naturais subjaz a um vincado princípio de justiça distributiva (e não justiça comutativa). Quer-se uma igualdade na repartição dos sacrifícios para fazer face aos encargos da vida em comum, e não um (atípico) enriquecimento sem causa de um unidos de facto à custa do outro; ver António Menezes Cordeiro, "Das obrigações naturais: Direito ou Moral", in: *O Direito*, Ano 141.º (2009), III, Coimbra, Almedina, 2009, pp. 505-537/Rui Cardona Ferreira, "O debate Hart-Dworkin", in: *O Direito*, 145.º (2013), IV, Coimbra, Almedina, 2013, pp. 817-845/José Carlos Brandão Proença, "As obrigações naturais no pensamento e no ensino de Ribeiro Faria", in: *Scientia Iuridica*, Tomo LXVI, N.º 345, Setembro-Dezembro de 2017, pp. 403 e ss/Mafalda Miranda Barbosa, "Obrigações naturais. Notas a propósito do acórdão do Supremo Tribunal de Justiça de 19 de Dezembro de 2006", in: *Boletim da Faculdade de Direito*, LXXXIX, 2013, pp. 903 e ss/No direito italiano (cujo regime jurídico inspirou o Código Civil de Portugal e, depois, o de Macau) (L. Balestra, "Le obbligazioni naturali nel pensiero di Michele Giorgiani", in: *Rivista Trimestrale di Diritto e Procedura Civile*, 2011, pp. 396 e ss/no direito francês (cuja influência do *Code Napoléon* de 1804 foi determinante, mesmo no seio das famílias jurídicas de inspiração romano-germânica, Maud Coudrais, "L'obligation naturelle: une idée moderne?", in: *Revue Trimestrielle de Droit Civil*, Volume 3, 2011, pp. 453 e ss. Na jurisprudência portuguesa, para efeitos de consulta, e, *mutatis mutandis*, Acórdão do Supremo Tribunal de Justiça de 31 de Março de 2009 (João Bernardo) e Acórdão do Tribunal da Relação de Lisboa de 4 de Fevereiro de 2010 (Teresa Pais), ambos disponíveis em www.dgsi.pt.

22. Considerações de justiça distributiva têm estado na base de intensa litigância judicial em Portugal, mormente em torno da união de facto; ver Acórdão de Uniformização de Jurisprudência do Supremo Tribunal de Justiça n.º 7/2017, que uniformizou jurisprudência no sentido de que: "O membro sobrevivente da união de facto tem direito a pensão de sobrevivência, por morte do companheiro, beneficiário do sector bancário, mesmo que o regime de segurança social aplicável, constante de instrumento de regulamentação colectiva de trabalho, para que remete a Lei n.º 7/2001, não preveja a atribuição desse direito". Este aresto foi recentemente anulado por Maria João Romão Carreiro Vaz Tomé, "O direito à pensão de sobrevivência do (ex-) cônjuge e do "viúvo de facto" - Ac. de Uniformização de Jurisprudência n.º 7/2017 de 11.5.2017", in: *Cadernos de Direito Privado*, n.º 61, Janeiro-Março 2018. Esta discussão doutrinal fez "correr rios de tinta" em Portugal (ver João Pires da Rosa, "Ainda a união de facto e a pensão de sobrevivência", in: *Lex Familiae - Revista Portuguesa de Direito da Família*, n.º 3, (2005/2006), pp. 111-115/Rita Lobo Xavier, "União de facto e pensões de sobrevivência", in: *Jurisprudência Constitucional*, n.º 3, 2004, pp. 16-24/Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*. Coimbra, Almedina, 2017, pp. 713 e ss/Telma Carvalho, "A união de facto: a sua eficácia jurídica", in: *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977*, vol. I, pp. 221-255.

2. MODESTLY RESTRAINING

Since ancient times, China has had the concept that "law should not intervene with domestic troubles". Parents have autonomous management of family affairs. Therefore, the law has always been retreating from disputes among family members. "Even an upright official finds it hard to settle a family quarrel" is a true portrayal of the alienated attitude of the society towards such disputes. However, the fact that the law does not directly interfere with the specific matters of the marital property relationship does not mean that it does not pay attention to the field of family property relations. If the property interests of family members are seriously out of balance, the law cannot be indifferent. Therefore, if necessary, the law can intervene with the field of family property relations for reasonable reasons, but such intervention must be moderate.

In Macao, no matter which marital property system you choose, it is generally not allowed to unilaterally divide the common property of the couple during the normal duration of the marital relationship. However, in some special cases, according to Article 1624 and Article 1625 of the *Civil Code of Macao*, when a spouse has suffered considerable damage due to mismanagement of property by the other party, such as a private transfer, sale of the property owned by the spouse, splurge and waste of family property, and failure to pay for family living expenses, while the other party has no willingness to dissolve the marriage relationship, the spouse should be allowed to terminate the original property system and divide the property, and change the distribution of property within the marriage to protect the property interests of the parties to the marriage and creditors.

The property division system breaks through the common property theory of traditional civil law and provides the possibility to change the existing mode of marital property system. That is, under normal circumstances, a spouse is allowed to split the common property without dissolving the communal relationship. It is moderate restraint in the field of family property relations.

Autonomy is the respect of the marital property system for personal will, while intervention is to safeguard the interests and balance of the whole society. Autonomy and intervention are like the two ends of a ship, the marital property system. If either side is too heavy, the ship may sink easily.

The evolution from the ancient law to the modern law is a change "from status to contract" proposed by the British legal history scholar Maine. The marital property system is a mirror that reflects the relationship between husband and wife and beliefs, prejudices, etc., rather than a simple legal system. The change "from status to contract" is the general development direction of the marital property system from the traditional society to the modern society. In the period of Roman law, patriarchy ran through the whole family law, and the resulting husband authority dominated the relationship between husband and wife. Under this identity relationship, the marital property system and this identity relationship advanced and retreated together, controlling the

subordination of property through the subordination of identity. When husband authority slowly gave way to the development of women's status, the problem of property relations hidden behind gradually became apparent. After women accept property, questions such as whether they can preserve their management and disposition rights and for how long, have been gradually taken seriously by the law after the awareness of equality was aroused. Social law has the consciousness of intervention, while civil law is accompanied by the value of freedom. What exists between them is a complementary relationship.

The development of the marital property system in the *Civil Code of Macao* reflects the interplay between autonomy and intervention.

In March 1849, Macao Governor Amaral drove away the Chinese Customs and pushed over the Chinese flag hanged before the port, eliminating the final symbol of the Qing government's control over Macao, and taking possession of the actual colonial jurisdiction over Macao. After that, Macao entered the colonial era. Previously, Macao's marital property system was no different from that of mainland China,²³ but after that, Macao entered a new historical period, and our main research has begun there.

This was the marriage system in Macao during the period of colonial governance, and the Portuguese people continued to follow the Portuguese system, while the Chinese in Macao followed the Chinese traditions.

iii. Before 1999 Civil Code

1. THE OPEN PORT OF MACAU

Macao is a magical land. The Portuguese people in Macao for more than 400 years have not worn out the Chinese traditions there²⁴. Instead, they have protected a certain part of the characteristic Chinese traditions in a special historical period. Macao is more traditional than the Chinese mainland and more European than Hong Kong. This combination of Chinese and Western cultures has created a culture of inclusiveness and adaptability in Macao, resulting in justice under this multiculturalism.

Portugal flourished in the 14th century and began to expand outward in the early 15th century. In 1557, the Portuguese officially started to live in Haojing (now Macao), opening an extraordinary page for the history of Macao. Since the

23. Zhou Anping, *Jurisprudential Analysis of Domestic Violence*, from *Journal of Nanjing Party Institute of CPC and Nanjing Administration Institute*, 2005, Issue 6, pp.37-39.

24. In the United States of America doctrine, Hugh T. Scogin, Jr. "Civil Law" in *Traditional China: History and Theory*, *Civil Law in Qing and Republic China*, Palo Alto, California, Stanford University Press, (1994): 36-39. (outlining a sort-of comprehensive historical account on the importance of Confucian "Rites" and customary law in Chinese imperial history which are of utmost relevance to understand Macao's legal history too, since most of the citizens living on that tiny territory were mostly Chinese from 1573 onwards).

16th century, the Portuguese people have called this city whose name means God by the name of Macao. For the Chinese, she was the place which the Chinese emperor had conditionally given to foreign barbarians. The conditions included that foreigners might not put Chinese on trial or make rulings regarding Chinese.²⁵ After the port opening in Macao, although the Portuguese were only allowed to reside there, they established *feitorias* or commercial strongholds according to their traditional form of colonial rule. Although nominally for commercial use, in fact the *feitorias* or commercial strongholds combined commercial, military and diplomatic functions into one. This was not the beginning of the colonization of Macao, but only during the *Leal Senado* period. From the establishment of the *Leal Senado* in 1583 to the promulgation of the *Providências Régias* in 1783, for a total of 200 years, it was the period of Portuguese internal autonomy in the history of Macao. During this period, the Ming and Qing governments had the sovereignty of Macao, and the Portuguese living in Macao managed the affairs under the management of the *Leal Senado*. In order to survive, the Portuguese in Macao followed the policy of "dual loyalty". Nominally, they accepted the governance of the Portuguese royal family. In essence, they were strictly restricted by the Ming and Qing governments. This unique historical process of Chinese and Western element combination has created Macao's great compatibility with Eastern and Western cultures, including the acceptance of the duality of law and the recognition of the diversification of cultural forms of marriage and family.

At that time, the personal jurisdiction principle was the main applicable principle of Portuguese law²⁶, applicable to all "native" residents of the kingdom.²⁷ "Native" refers to a person born in the kingdom and whose father is a Portuguese.²⁸ At that time, there were such a group of Portuguese people in Macao, so they were governed by Portuguese law. Portuguese law also compares baptism to birth, so that a person who has accepted baptism in the kingdom (Christian) is also a native, thus expanding the scope of its legal effects. According to these principles, the personal legal relationship between foreign residents (such as residents of Macao) is outside the scope of Portuguese law, so foreign residents continue to apply their own laws. This provided favorable conditions for Macao to retain Chinese customs and rules, forcing Macao to find its own living space in the slits between Chinese and Western cultures. Since even the most "important" political issue can be compromised, other issues will be more "negotiable".

2. COMPATIBLE OF LAW

Portuguese law and the Chinese law in Macao are compatible with each other. It is the manifestation of the legal personal jurisdiction principle and the principle

25. António Manuel Hespanha, Law and Justice Under Multicultural Structure, included in *Administration*, Volume 7, Issue 23, 1994, No. 1, Macao Public Service Administration, p.155.

26. "The personal jurisdiction principle (or principle of emphasis on kinship, namely iussanguinis) applicable to this law is combined with another principle based on the idea that the issue of legal validity is similar to the scope of the king's political power (judicial power)." Included in Antonio Manuel Hespanha, *Introduction to the History of the Legal System in Macao*, Macao Foundation, 1996, p.32.

27. Antonio Manuel Hespanha, *Introduction to the History of the Legal System in Macao*, Macao Foundation, 1996, p.31.

28. Antonio Manuel Hespanha, *Introduction to the History of the Legal System in Macao*, Macao Foundation, 1996, p.31.

of combination between law and territorial sovereignty. It is not that Portuguese people did not want to unify Macao's norms with their law. Instead, they wanted to settle down on the land of the Celestial Empire where "under the sky, nothing isn't the king's land", so they needed the Ming and Qing governments to grant them autonomy to "build houses and cities and dominate rivers and seas as if they were a nation" for more than 300 years. It was not until 1887 that the *Sino-Portuguese Treaty of Peking* was signed, preliminarily determining the political and legal status of Macao. In addition to their dormant ambitions, such duality of law was also their compromise.

During the Portuguese residence period, Macao returned the legal issues among Chinese to the local laws and jurisdiction of Macao for adjustment.²⁹ This move is also unique in world history. Even by the signing of the *Sino-Portuguese Treaty of Peking* in 1887, giving the Portuguese the right to "permanently live in and manage Macao", it does not mean that they really had the right to manage Macao. The management of Macao still relied heavily on China. Therefore, later they had scruples even in the implementation of colonial rule in Macao. They also had to consider the attitude and interests of the Qing dynasty and be careful about matters related to the Chinese in Macao. For Portugal, if Macao could not serve China's interests, it would lose the value and significance of its existence. The Portuguese and Chinese in Macao overcame internal differences and disputes as much as possible, laying the foundation for today's diversified Macao with both Chinese and Western cultures, ancient and modern, elegant and vulgar.

This special historical background has created the current Macao society and maintained a relatively harmonious social environment. In the hearts of most Macao residents, it is not always black and white. Macao is like a transformer, buffering the differences in thoughts, cultures, religious beliefs, values and customs of residents from China, Portugal and other regions.

3. THE ORIGIN OF MACAO MARRIAGE SYSTEM

In such a social environment, Macao law is quite inclusive of marriage recognition. For example, before the implementation of the *Civil Code of Macao* in 1999, there existed and the law recognized Catholic marriages. According to the *Code of Canon Law*, marriage is an intentional act achieved by an irrevocable agreement between a man and a woman for the purpose of a marriage relationship established by the close combination of all life. Its purpose is to naturally pursue the interests of spouses and the reproduction of heirs.³⁰ It can be seen that Catholic marriage is a kind of agreement and sacrament, which is different from marriage in the usual sense, but in Macao which is dominated by oriental culture, it is recognized and protected by law.

29. "The first *Leal Senado* in 1583 determined that the procurator-general should exercise judicial power over the Chinese in addition to normal duties. In any case, the jurisdiction over Chinese residents in 1587 no longer belonged to the Portuguese authority. The first *Judges' Charter* of December 16, 1587, had similar provisions on the criminal jurisdiction of the Macao Chief Justice. According to the charter, the Chief Justice has civil and criminal jurisdiction, but has no right to intervene in the jurisdiction of local officials in Macao over the internal relations of Chinese residents." Included in Antonio Manuel Hespanha, *Introduction to the History of the Legal System in Macao*, Macao Foundation, 1996, p.41.

30. Mi Yetian, *Civil and Commercial Law of Macao*, China University of Political Science and Law Press, 1996, p.162.

The Macao Chinese Court established in 1917 is a sign that the Portuguese government recognized the social customs of the Chinese residents in Macao. When the application of the *Portuguese Civil Code* was officially extended to Macao in 1868, the part concerning family, marriage and integration was not applied in Macao at the same time, but the continued application of local Chinese customs was retained. Several decades later, the Portuguese formulated the *Chinese Customs Code* based on the customs in Macao and neighboring areas, and issued an order on June 17, 1909 to enact and implement this code as a supplement to the marriage and family related sections of the *Civil Code*.

The promulgation of this code indicates that the Portuguese government officially recognized that the Chinese in Macao could enjoy rights and assume obligations with respect to family and inheritance in accordance with the customs and customs³¹ reflecting their own cultural traditions.³² Although this code was abolished on July 24, 1948 by Decree No. 36978, this does not imply that the marital relationship established by local Chinese in Macao according to traditional Chinese customs was not recognized by law. On the contrary, the above-mentioned Decree No. 36978, while abolishing this code, explicitly recognized that the marriages in local Chinese and Chinese descents established with their own religious ceremonies also had all the civil effects.³³ The Portuguese knew that in the traditional Chinese society, "the conflict among customs, unwritten laws, traditional rules, ethical codes and the 'man-made' laws enacted by the authorities formed the focus of the 'law' in Confucian philosophy. Although the Legalism had considerable influence in the Ming and Qing dynasties, the Confucianism³⁴ still had a long-lasting influence on Chinese politics and legal thoughts³⁵, and more importantly, great influence on Chinese society in the mode of legal thought."³⁶

The conflict and blending between cultures are always along with the intercourse between nations, evolving from spiritual culture to material culture, and then to spiritual culture again. In the process of mutual tolerance of Chinese and Western cultures in Macao, the Chinese culture developed from an active position to a passive position. Taking the development of the marriage law system in Macao for example, the Chinese customs gradually fell out of the coverage of legal

31. In Portuguese doctrine, António Manuel Hespanha, *Panorama Histórico do Direito Chinês. O Pensamento Jurídico*, Macau, Faculdade de Direito da Universidade de Macau, (1994-1995): 9 ff. (acquiescing the face value of Confucian «Rites» and customary practice in Imperial China).

32. Mi Yetian, *Civil and Commercial Law of Macao*, China University of Political Science and Law Press, 1996, p.163.

33. Mi Yetian, *Civil and Commercial Law of Macao*, China University of Political Science and Law Press, 1996, p.163.

34. «The Chinese imperial magistrate believed that the code was only one source of law. Aside from statutory law (fa), Confucian concepts, such as 'qing li', were commonly used as the yardstick for magisterial adjudication. The word 'qing' has the literal meaning of 'human compassion'. The word 'li' (literally meaning 'reason'), when used in Chinese traditional scriptures, denoted the Confucian reasoning model (which was commonly captured in the concept of tian-li)»: Peter C.H. Chan, "The Enigma of Civil Justice in Imperial China, A Legal Historical Enquiry", *Maastricht Journal of European and Comparative Law (MJoECP)*, 19 (2012): 317-337.

35. As asserted by local doctrine: «It is quite obvious that both the Ming Dynasty and Qing Dynasty had jurisdiction over Macau for a long time. Chinese residents in the area followed their own customs and were ruled by the Guangdong government under the Imperial law. The written laws of the Ming and Qing dynasties are of course a part of the Macau legal history (...) as a process of cognition, the interpretation of law is of course influenced by a number of internal and external factors. The Chinese way of thinking, influenced by Confucianism, still has its impact on the whole of East Asia in general, and Macau in particular»; (emphasis and italics added); Tong Io Cheng/Wu Yanni, "Legal Transplants and the on-going formation of Macau legal culture", *Saidat Law Review*, 1 (2), p. 643.

36. António Manuel Hespanha, Law and Justice Under Multicultural Structure, included in *Administration*, Volume 7, Issue 23, 1994, No. 1, Macao Public Service Administration, p.153.

system, and in modern times many Western legal ideas, such as mandatory monogamy, sexual equality and other ideas that originated from the West, were accepted and pursued. Besides, the subsequent introduction of Portuguese laws almost had the Chinese cultural elements completely removed from the laws of Macao. This is the legal culture of Macao, the ideology and embodiment that is used by the national society or country to standardize the social activities and relations. The tendency of the conflict and blending between the Chinese and Western legal cultures in Macao was going from Portugal to China, and Macao had to face the gradual all-round opening-up under the specific historical background in the world. This is a process that the Chinese traditional legal culture was comprehensively impacted and was forced to reform, but it was also a favorable opportunity for the modernization of China's legal system.

The conflicts between Chinese and Western legal cultures are mainly embodied in the following aspects: Firstly, the Chinese legal system was based on the small-scale peasant centered natural economy, which was highly closed and almost excluded all commercial elements. This had a completely different orientation from the Western legal system that experienced the vigorous development of the liberal capitalism. Therefore, the traditional Chinese system cannot adapt to normal international intercourse. Secondly, the traditional Chinese culture is rooted in "ritual", which affects the Chinese legal system and makes it look

more like a moral culture; on the contrary, the Western legal culture reflects the material society more than the spiritual culture. This is just the main difference between Chinese and Western legal cultures. On the eve of the Revolution of 1911, some scholars pointed out that "the essence of Chinese culture rests with spirit while the essence of Western culture rests with form."³⁷ However, it has been proved that the greatest force that promotes the development of human society in modern times comes from material civilization, although such civilization is a product of spiritual civilization to certain extent. However, it is the most fundamental, active and even the most aggressive, after all. A very controversial aspect of the *Civil Code* 1867 is marriage. Traditionally, the norms of marital relations belonged to the scope of ecclesiastical law. However, in the

preparation of the *Civil Code*, it was proposed that civil marriage could be applied in addition to Catholic marriage. After nationwide debate, this proposal was finally adopted.³⁸ The guiding ideology of this code is "everyone deals with their own affairs, with their freedom not damaged."³⁹ This extends autonomy to the idea of culture respecting, and such idea combines maximum individual interests with benefits of the whole society. Adoption of such liberalistic idea by the legislators and the integration of traditional practice with this idea in Macao was a compromise in morality, ethics and justice. This code did not lay stress on pure economic interests weighing, but attached greater importance on "other

37. Mi Yetian, *Legal System of Macao and Continental Law System*, China University of Political Science and Law Press, 1996, p.5.

38. Yan Xuelian, A Preliminary Study on the Marriage System and Management in Macao During the Colonial Governance Period, included in *Study on History of Macao*, Issue 11, November 2012, Macao History and Culture Research Society, p.161.

39. Yan Xuelian, A Preliminary Study on the Marriage System and Management in Macao During the Colonial Governance Period, included in *Study on History of Macao*, Issue 11, November 2012, Macao History and Culture Research Society, p.161.

interests of different natures, especially family".⁴⁰

In the legal system of Macao, laws on marriage can be traced back to 1948. Order No. 36978 of July 24, 1948 abolished the *Chinese Customs Code* in the legal system of Macao, which code was promulgated by an order on June 17, 1909 and recognized the legal effect of some customs of the Chinese residents in Macao with respect to relatives and inheritance.

The abolition of the code was, on one hand, because of the evolution of Chinese customs during the Revolution of 1911, especially the promotion of sexual equality, which made it necessary to update the laws; on the other hand, once the legislation of Macao could not keep up with the legislation of the Chinese Mainland, the Chinese living in Macao might suffer inconvenience or loss of interest due to the implementation of the *Chinese Customs Code*.

After that, all Chinese residents and non-Portuguese Chinese descents born in Macao were bound by the laws on relatives and inheritance in the Chinese civil law system. Order No. 36978 recognized that marriages of Chinese descents established with their own religious ceremonies had all the civil effects. That is to say, the marriages established under the "Chinese customs" were legally recognized, and such marriages were so named accordingly.

On November 25, 1966, the *Portuguese Civil Code* was promulgated by Decree No. 47344, and the *Portuguese Civil Code* of 1987 was abolished when the new code was formally implemented. "This code drew on the achievements of the *German Civil Code* and the *Italian Civil Code* in several aspects such as code system, civil law system and ideology, adapted to the social and political situation and economic requirements at that time, and had great significance in the development history of the legal system of Portugal."⁴¹ Before the return of Macao in 1999, this was the main basis of the civil law of Macao.

However, after the promulgation of Decree No. 14/87/M on March 16, 1987, the *Civil Registration Code* came into force and the marriage established according to Chinese customs was no longer recognized after May 1, 1987. According to the provisions of this code, marriages established only in accordance with Chinese customs did not have any legal effect, and were not recognized by law. However, a marriage established in Macao before May 1, 1987 could be registered so long

40. Yan Xuelian, A Preliminary Study on the Marriage System and Management in Macao During the Colonial Governance Period, included in *Study on History of Macao*, Issue 11, November 2012, Macao History and Culture Research Society, p.161. During the period when the *Civil Code 1867* was effective, some other laws on marriage were enacted to supplement or modify some of the provisions of the code. For example, it was agreed on July 18, 1886 to formulate a regulation on marriage, death and birth registration in Macao so that Westerner and foreign Chinese who were not Catholics could have a regulation to follow for registration of marriage, death or birth. The new regulation was implemented since August 1 of the same year, and the registration was made at Civil Service Office for Chinese. (*Gazette of Macao*, No. 29, July 22, 1886.) On June 12, 1902, the *Convention on Legal Conflicts and Jurisdiction of Divorce and Separation*, the *International Convention on Marital Conflict*, and the *Convention on Minor Guardianship* were signed in The Hague. The *Divorce Law*, adopted on November 3, 1910, established the divorce system in the legal order of Portugal; the *Family Law* adopted in December 1911 stipulated that the marriage system was limited to civil marriages, and provided clauses in favor of children born in wedlock; mandatory civil registration system was established on February 13, 1911; the law enacted on July 25, 1940 stipulated to include the *Vatican Deed* as local law, and confirmed that Catholic marriages had the same effect as civil marriages, but an effective Catholic marriage could not be broken by divorce. (Yan Xuelian, A Preliminary Study on the Marriage System and Management in Macao During the Colonial Governance Period, included in *Study on History of Macao*, Issue 11, November 2012, Macao History and Culture Research Society, p.161.)

41. Feng Xinming, *Panorama of Hong Kong and Macao's Civil Law*, Economic Science Press, 2007, p.15.

as it could be proved that the marriage was established in accordance with Chinese customs. This was a respect for history.

Before the implementation of the new *Civil Code* in 1999, both Catholic marriages and civil marriages were recognized in Macao. At that time, Catholics could choose civil or Catholic marriages, and either form of marriage they chose was legally effective. At the same time, non-Catholics could choose civil marriages only, but such marriage had the same legal effect as Catholic marriages.

However, no matter in a Catholic marriage or a civil marriage, both parties to the marriage must have the capacity to marry required by civil law. In order to make this requirement practical, the law stipulated that if the marriage capacity of the parties to the marriage had not been proved by the director of civil registration administration, priests were not allowed to preside over the ceremony of the Catholic marriage of the parties.⁴² Besides, records of the marriage kept by the parish must be transcribed to the civil register. Otherwise, the marriage could not be invoked.⁴³

In addition, both civil and Catholic marriages should be subject to Article 1523 and subsequent articles of the *Civil Registration Code* of Macao, and other provisions on marriage registration; marriages in both forms could be canceled through divorce in civil court for the same reasons and under the same legal provisions.

The Portuguese government in Macao promulgated the first *Civil Registration Code* of Macao in 1983 and the Family Policy Framework Law in 1994, both of which regulated the marriage system in Macao.

iv. After 1999 Civil Code

1. INTRODUCTION

In Macao, after the implementation of the *Civil Code 1999*, the provisions on marriage were mainly contained in the *Civil Code*, the *Civil Registration Code* and the *Civil Procedure Code*.

The *Civil Code* and the *Civil Procedure Code of Macao* were the same as the corresponding codes of Portugal, but with the applicability extended to Macao. For example, the old *Civil Code of Macao* was the *Civil Code* of Portugal 1966 that came into force in Macao in 1968, and the old *Civil Procedure Code* was the *Civil Procedure Code* of Portugal 1961 that came into force in Macao in 1963. The old *Civil Registration Code* formulated locally in Macao came into effect as late as

42. Article 1596 and subsequent articles of the *Civil Code of Macao 1966*, and Article 122 of the *Civil Registration Code of Macao*.
43. Article 1669 of the *Civil Code of Macao 1966*, and Article 134 and subsequent articles of the *Civil Registration Code of Macao*.

1987. All the three codes came into effect on November 1, 1999 after amendment. The *Civil Code* was the basic law on the marriage system in Macao, while the other two were mainly supplements to the *Civil Code* in terms of marriage related provisions.

2. THE DEVELOPMENT OF LAW AND THE VIEW OF MARRIAGE

(1) Narrowed legal marriage modes

Due to the difference in cultural histories, there are different purposes and even natures of marriages in different places or individuals, leading to different legal definitions of marriage. With unique history, this land of Macao tolerated a variety of different marriage and family concepts and modes with a comprehensive attitude.

After the new *Civil Code of Macao* provided a new legal framework for marriage, the new *Civil Registration Code*, approved by Decree No. 59/99/M on October 18, 1999, unified the legal system of marriage, especially in terms of premise and effectiveness; now there are no longer two modes of marriage, that is civil marriage and Catholic marriage, but only the standard marriage mode based on civil law. However, the idea of marriage as a sacrament still takes an important position among Catholics. In addition, although Catholic marriage is not a legal form of marriage in Macao at present, it is still very important in the minds of Catholics in Macao. The supplementary provisions on marriage in Catholicism are supporting provisions for civil marriage after the change of the legal marriage form in Macao. In other words, Catholic marriage still exists in Macao, but as a traditional marriage form derived from religious customs it needs to be established through religious procedures stipulated by Macao parish of Catholic Church based on civil marriage.

In recent years, Macao has rapid economic and social development. The enhanced social intercourse and population mobility has created favorable conditions for free choice of people. These social changes are essentially a cultural change, that is a transformation from traditional culture to modern culture. Marriage is just one of the cores of culture. Therefore, in a discussion on the marriage law in Macao today, the growing cohabitation phenomenon has to be taken as a background.

Many people in Macao choose cohabitation instead of marriage, and the divorce rate in Macao is also increasing year by year. According to the data of statistics bureau, 3,842 marriages were registered in 2018, 1.1% lower than that in 2017. The median ages of first marriage of men and women were respectively 29.2 and 27.6 in 2018, which were respectively 0.4 and 0.1 year older as compared with the previous year. There were 1,544 divorce registrations, 65 more than that in 2017; uncontested divorce agreed upon by both parties accounted for 94.2%.⁴⁴ statistic data show that the divorce rate in Macao has increased year by year, with a

44. Data source: Statistics and Census Service of Macao, <https://www.gov.mo/zh-hant/news/274680/>, searched on March 24, 2019.

total increase of more than 300% in the past 20 years.⁴⁵ The rise in divorce rate is caused by the change of traditional marriage values and the transformation of family structure to a great extent. In recent years, women's labor participation rate has increased, their economic status has improved, the inequality between men and women has been mitigated, and women's awareness of independence has been continuously enhanced, which has become another cause for the high divorce rate. At the same time, occupational structure in Macao has changed in recent years. The phenomenon of dual career couples and the multi-shift work system lead to less time for couples to get along and communicate with each other, more marriage problems that cannot be solved timely, and thus higher divorce rate. Many people believe that the traditional marriage system is being challenged.

(2) Liberalization of Marriage Impediments

In many European countries, the two foundations of marriage, that is opposite sex and two persons, are tending to collapse.

In Macao, young people choose their spouses based on more and more practical standards, and have greater independence and initiative in the manner of spouse choosing. Their criteria change from superficial to deep, and they pay close attention to marriage quality as well as stability. Their attitude towards extramarital affairs tends to be more tolerant while it still shows highly obvious traditionalism. The current legal system can be hardly liable for the lower marriage rate and higher divorce rate. However, some people blame that easy reason for divorce is a key factor for the end of marriage. This opinion is obviously untenable. Easy reason for divorce is an embodiment of the human orientation of laws, and divorce tends to be less reason-based. Marriage should be free combination in nature.

Although maintenance of marriage has always been one of the main objectives of marriage legal system, it is doubtful whether the system can and actually need to play such a role. Moreover, there is an inherent contradiction in the divorce system, that is, on one hand it needs to maintain the continuance of marriage, but on the other hand it must ensure smooth ending of marriage.

In consideration of the actual needs, marriage law will also explore the regulation of property rights when cohabitation relationship collapses, because property is one of the most important legal consequences of a broken relationship.

Both traditional concepts and governments advocate maintenance of marriage system whenever possible, as it provides potential stability for the society and creates the most favorable environment for healthy growth of children. Although many single-parent families and unmarried couples can raise their children as well as normal families, marriage is still the most stable foundation for child raising, which is still a consensus at present.

More and more people now support the view of American researchers that "the marriage today is no longer on the premise of lifelong partner."⁴⁶ Dr. Warwick

45. Data source: <http://www.hkcnahk/content/2018/1008/713481.shtml>, searched on March 24, 2019.

46. Bai Zhongyan, *Social Problems in the Western World*, Joint Publishing, 1983, p.499.

women to increase their investment in marriage, notably by having children. In this way their investment is protected. Furthermore, men are restrained as well. They dare not divorce easily because of the high costs.⁵² Autonomy and intervention in marital property lie in the grey area. Because even in the system of contractual spousal property, there are still some grey problems. First of all, in a marriage, both spouses can manage their marital property through contractual agreement, whereas there are two practical problems: first, in a male-dominated family, the husband is likely to force his wife to give "consent"; second, although it is a contractual agreement between both spouses, it is bound to a double-edged sword, which can not only promote the harmony of marriage, but also weaken the marriage relation. Nevertheless, the purpose of the marital property system is not to promote marriage but to protect the benefit relationship behind in such a way of life.

Nowadays when you can "divorce as long as you want", the legal norms with regard to marital property have reduced the compensation for the weak relatively, because in this circumstance, people are less invested in marriage than they would be in a system that does not allow divorce or grants only fault divorce. Marriage relation becomes freer, and therefore marital property relationship is freer. The law needs not to be biased towards the weak. As marital autonomy develops, the law can provide more freedom, so long as the most basic guarantee can be provided, but the interests of children must be protected.

On the protection of the interests of women, if the society does not have a sound, or even worse, has no mechanism of enforcing legal responsibilities (such as the responsibility of maintenance), divorce is likely to leave women who are old or no longer have ability to bear children, or are lack of ability to live independently

in a life which is not guaranteed. Medieval law recognized both the right of a woman to be separated from her husband but still supported by her husband, and the right of an abused woman to be separated from her husband but still supported by her husband⁵³. The literature on family economics emphasizes that the private value of marriages has declined in societies where women have better work opportunities and where social security networks are tightly intertwined, and therefore the stability of marriage has also declined.⁵⁴ The husband acquires less benefit from the marriage, so he is less invested in the marriage to make great efforts to preserve the marriage. The wife's increased economic independence, whether because she has more market income or because she has more social income, reduces her willingness to make great efforts to improve the marital discord.⁵⁵

52. Refer to Richard A. Posner: *Sex and Reason*, Translator: Su Li, China University of Political Science and Law Press, the 2002 Edition, p330.

53. Richard A. Posner, *Sex and Reason*, Translator: Su Li, China University of Political Science and Law Press, the 2002 Edition, p333.

54. Richard A. Posner, *Sex and Reason*, Translator: Su Li, China University of Political Science and Law Press, the 2002 Edition, p335.

55. See Joho McDonald and Zane A. Spindler, *Benefit - Induced Female Sole Parenthood in Australia*, 1973 - 85, Australian and economic papers. - Wiley-Blackwell, ISSN 0004-900X, ZDB-ID 2075830. - Vol. 27.1988, 50, p.1-p19; See Jan H. M. Nelissen and Piet A. M. Van den Akker, *Are Demographic Developments Influenced by Social Security?*, 9 Journal of Economic Psychology 81, p99-p106, 1988. The increase in social security and welfare projects has increased the trend toward divorce.

Judge Richard A. Posner deemed: "The greater the consequences of a contract, the more procedures are required to guarantee that the two parties understand what kind of relation they are entering."⁵⁶ But now that the consequences of marriage are becoming less and less significant, there is no need to cling to some outdated rules about marital property. The marriage system tends to be free, therefore, the marital property system also tends to be freer. The mission of law is to guarantee the autonomy of marital property to the greatest extent while giving necessary protection to the interests behind marriage and family.

Macao's marital property system is not very open. As the combination form of families in the 21st century gets diversified, Macao's marital property system has not made special provisions for it. Therefore, Macao's marital property system only regulates marital property under some old principles, and does not modify in relation to some new phenomena, which is still relatively conservative compared with other countries that have taken account of the property issue on same-sex marriage.

56. Richard A. Posner, *Sex and Reason*, Translator: Su Li, China University of Political Science and Law Press, the 2002 Edition, p325.