

Julio César Rivera *Editor*

## The Scope and Structure of Civil Codes

This detailed analysis of the content and configuration of civil codes in diverse jurisdictions also examines their relationship with some branches of private law as: family law, commercial law, consumer law and private international law. It analyzes the codification, decodification and recodification processes illuminating the dialogue between current codes – and private law legislation in general – with Constitutions and International Conventions.

The commentary elucidates the changing requirements of civil law as it shifted from an early protection of patrimony to a support for commercial and contractual law. It also explains the varying trajectories of civil law, which in some jurisdictions was merged with religious legal tenets in its codification of familial relations, while in others it was fused with commercial law or, indeed, codified from scratch as a discrete legal corpus. Elsewhere, the volume provides material on differing approaches to consumer law, where relevant legislation may be scattered across numerous statutes, and also on private international law, a topic of increasing relevance in a world where business corporations have interests in multiple jurisdictions (and often play one off against another).

The volume features invited contributions from leading scholars in the field of private law brought together for an in depth analysis of the current regulatory attitude in this field of the law in jurisdictions with diverse legal systems and traditions. In current times we are witnessing the adoption of diverging regulatory solutions. Through the analysis of the past and present of private law regulation, the volume unveils the underlying trends and relevance of the codification method across the world.

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The Scope and Structure of Civil  
Codes

32

Julio César Rivera *Editor*

# The Scope and Structure of Civil Codes

 Springer

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Julio César Rivera

Editor

# The Scope and Structure of Civil Codes

 Springer

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and Universidad de San Andrés  
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## Preface

This work has its genesis in the Second Thematic Congress of the International Academy of Comparative Law, held in Taiwan in May 2012.

The subject matter of this Congress was “Codification”, and the subject of the panel regarding the civil codes was: “*The scope and structure of civil codes. The inclusion of commercial law, family law, labor law, consumer law*”.

The essays that make up this volume are based on the National Reports presented in the panel, but are not necessarily identical, for the subthemes have been reformulated; considerations, arguments and conclusions from the debates that took place at the Congress were incorporated and minor or accessory details that may not result interesting for the audience were suppressed.

Hence, the comparatist paper *The Scope and Structure of Civil Codes* opening this volume is not a mere reproduction of the General Report presented at the Congress, but it is a re-elaboration written in light of the essays from all the collaborators. Nevertheless, the essay makes reference to the National Reports, specifically for countries that did not present contributions for this volume. The National Reports will be published by Taiwan University.

An original work has been shaped from this material seeking to respond questions ranging from the philosophical, political or economic justification for legislation under the form of civil codes, to essentially practical matters such as the content of contemporary codes and their relation with the rest of the national and supranational legal frameworks.

The comparatist analysis allows to envision that countries often offer similar and on occasions totally diverse solutions to the same problems; and yet this is not an impediment to begin by noting a conclusion: the announced death of the codes has not occurred, and on the contrary its survival is seen in the countries that adopted codification as a method of legislative expression during the nineteenth and twentieth centuries, as well as in the growing interest it attracts in countries that are getting closer to world markets. Furthermore, even countries whose tradition and peculiar

legal culture do not adhere to the codification method use alternative methods that result in an approximation to that product, the code, that has quite accurately been qualified as one of the most important fruits of the human spirit.

Buenos Aires, Argentina

Julio César Rivera

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As editor of this volume, I am grateful to each and every author of the works that are included herein. Particularly I am obliged to acknowledge Prof. Maxeiner's contribution, whose initiative made possible the support from Springer publishing.

Further, I would like to express my gratitude to Laura Piedrahita, a lawyer who has been for years collaborating with my research works, and whose excellent performance in the English language allows me to overcome the shortcomings in that field.

Likewise I must acknowledge the support of Eleonara Bianchi, lawyer and public translator in English, who also revised my papers before and after the Taiwan Congress.

And fundamentally, I would like to manifest my appreciation to the International Academy of Comparative Law for having honored me with the responsibility of performing as General Reporter for the panel that explored the theme developed in this book.

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## Part I

# A Comparative Approach to the Scope and Structure of Civil Codes

## Chapter 4

# Codification in China: The Special Case of Macau

Augusto Teixeira Garcia, Dan Wei, Paula Nunes Correia,  
and Tong Io Cheng

**Abstract** This essay entitled **Codification in China: the special case of Macau** is a result of a national report, or preferably a regional report, prepared by a team of four law professors of the University of Macau, to be presented at the IACL Conference held in Taiwan, in May 2012. Being the main issue the Codification of Private Law in Macau, Civil Law (or general Private Law) and Commercial Law are, for such reason, the main targets. Although non-codified, Labor Law and Consumer Law are also part of the theme. Family Law, even though not separately codified, is also highlighted, mainly due to its recognized “institutional” nature and susceptibility to transformations occurred within the society. Finally, the unique situation of Macau, as a Special Administrative Region of China, with its particular relevance in every field – namely political, economic, social, cultural and of course legal – is duly emphasized as well.

**Keywords** Legal pluralism • Macau Basic Law • Macau Civil Code • Commercial law codification

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#### 4.1 Macau Special Administrative Region of People's Republic of China

Macau, just like Hong Kong, is a Special Administrative Region (SAR) of People's Republic of China (PRC).

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",<sup>1</sup> approved the establishment of Macau Special Administrative Region (MSAR), directly subordinated to the People's Central Government and endowed with a basic law. Macau Basic Law (MBL),<sup>2</sup> "a constitutional document elaborated by the People's National Assembly, which is the supreme organ of political power in People's Republic of China",<sup>3</sup> defines the applicable system to the Special Administrative Region, conferring executive, legislative<sup>4</sup> and 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 policy are not applicable: the capitalist system and the previously existing way of life remain unmodified for 50 years (article 5 of MBL, which establishes a fundamental principle of maintenance of Macau's way of life, with various and relevant consequences, namely the principle of the continuity of the legal system, basically unaltered.)<sup>5</sup>

Therefore, in accordance with these principles and the Basic Law, Macau legal system is guaranteed to be in force in the territory for 50 years.<sup>6</sup>

Macau Basic Law, as well as the Codes of Macau, were prepared during the designated "transition period", which went from 1988, sometime after the Joint

<sup>1</sup>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, "The concept of 'one country, two systems' and its application to Hong Kong", *Boletim da Faculdade de Direito, Universidade de Macau*, VI, no. 13, 2002, 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" (Albert Chan, "The concept", page 123). The Sino-Portuguese Joint Declaration, signed in 1987, regulated the implementation of the principle to the future Special Administrative Region of Macau.

<sup>2</sup>Approved by the PNA in March 31, 1993, to be in force in December 20, 1999.

<sup>3</sup>Teong Van Chong, "A Lei Básica da RAEM e a concretização do princípio 'um país, dois sistemas'", *Boletim da Faculdade de Direito, Universidade de Macau*, V, no. 12, 2001, page 98.

<sup>4</sup>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.

<sup>5</sup>Paulo Cardinal, "A questão da continuidade dos instrumentos de Direito Internacional aplicáveis a Macau", *Boletim da Faculdade de Direito, Universidade de Macau*, V, no. 11, 2001, page 94. Teong 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" ("A Lei Básica da RAEM", 99–101).

<sup>6</sup>Counted from the moment when MBL came into force, of course.

Declaration was signed by the People's Republic of China and Portugal back in April 1987, until the return of the territory to Chinese sovereignty in December 20, 1999.

Macau was governed by Portugal for over four centuries: although a Portuguese colony, Macau gained later the status of Chinese territory under Portuguese administration.<sup>7</sup> Portuguese sovereignty was also, inevitably, expressed through the laws officially enforceable in the territory.

Thus, the fundamental recognition of the principle "One Country, Two Systems" (OCTS) also reflects the recognition of different law systems valid in one 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."<sup>8</sup> Being so, having in consideration the essence of the OCTS principle which also implies the recognition of different legal systems simultaneously in force in Mainland China (Chinese legal system), in Hong Kong Special Administrative Region (Hong Kong legal system, part of the Common Law family) and in Macau Special Administrative Region (Macau legal system, a Civil Law structure), one may rather refer to a "one country, two systems, three legal orders" principle.

#### 4.2 Codification of Private Law: Brief History

Prior to the present Civil Code, Macau was governed by the Portuguese Civil Code dated from 1966 (still in force in Portugal, by the way), enforceable in the territory since 1967 (*Portaria no. 22869*).

The first Portuguese Civil Code, the designated *Código de Seabra* dated from 1867, was extended to Macau as well (*Decreto Régio de 18 de Novembro de 1869*).

Very briefly, the 1966 Portuguese Civil Code is clearly influenced by the *BGB*, therefore follows the Savigny plan. Otherwise, its ancestor, the Portuguese Civil Code dated from 1867, in spite of being influenced by the *Code Napoléon*, "uses an original systematization" departing from man as a subject of rights. The *Código de Seabra* also suffers the influence of the Austrian Code and the Prussian "Allgemeines Landrecht".

<sup>7</sup>This legal status of Macau was recognized by the Portuguese Constitution of 1976 and stipulated by the Organic Statute of Macau.

<sup>8</sup>Albert Chan, "The concept", 126–127, 133–134.



Despite the mentioned extensibility of the Portuguese Codes to Macau, it is important to note that many local usages and customs, mainly in family, succession and commercial issues, were preserved. As a matter of fact, the above cited *Decreto Régio* in 1869 determined the preservation of the Chinese usages and customs in Macau in certain cases [article 8.º, § 1.º, b)]. In 1909, a Code on the usages and customs of the Chinese of Macau was approved (*Decreto de 17 de Junho*). Nonetheless, other usages and customs could be applied beyond the usages and customs established in the 1909 Code. There was a Counsel formed by six Chinese with the mission to help the judge to determine which usages and customs were applicable. The 1909 Code was in force until 1948. However, marriages that had been celebrated in Macau, following the Chinese usages and customs and until May 1, 1987,<sup>9</sup> 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, 2000.<sup>10</sup> Though, this delay has in fact been extended up until presently, as it has also been provided that such delay may be prolonged by dispatch from the Director of the Justice's Office.<sup>11</sup>

The Civil Code of Macau was enacted in August 3, 1999, to be in force in October 1, 1999 (decree-law no. 39/99/M). However, its enforceability was later postponed to November 1, 1999 (decree-law no. 48/99/M).

The Civil Code of Macau was enacted in a very particular political, sociological and economic context. Actually, this Code was prepared to respond to the specific needs of the Macanese people during a limited period of time, 50 years, in view of Macau's return to Chinese sovereignty, which happened in December 20, 1999, although granting the continuity with the previous *status quo*. Therefore, until 2049 the previous capitalist system and way of life shall remain unchanged (MBL, article 5).

In what Labor Law is concerned, labor contract is typified in Book I, Title II, Chapter VI of the Civil Code (article 1079). The Code determines the submission of labor contract to special legislation (article 1079, paragraph 2). Among the latter, and within special Private Law, we would highlight the following: the general regime on labor relationships (*Lei das Relações de Trabalho, Lei no. 7/2008*); the regime on non-resident workers contracts (*Lei da contratação de trabalhadores não residentes, Lei no. 21/2009*); the regime on labor accident (*Lei no. 40/95/M*).

As mentioned before, Macau is a Civil Law system. Moreover, ours is also a generally codified law. With regard to Obligations Law, Property Law, Family Law

<sup>9</sup>Until the moment the previous Code of Civil Registry, approved by the Decree-Law 14/87/M, March 16, came into force.

<sup>10</sup>Article 5, paragraph 1 of the Decree-Law 59/99/M, October 18, which approved the Code of Civil Registry of Macau.

<sup>11</sup>Article 5, paragraph 2 of the Decree-Law 59/99/M. Provided that the matrimony in accordance with the Chinese usages and customs was celebrated until May 1, 1987, of course. Actually, such matrimonies are still being recognized by official dispatch, once no special law has yet been adopted. See Sou Kin Fong, "Casamento segundo os Usos e Costumes Chineses", in *Contribuições Jurídicas sobre a União de Facto e Direitos sobre a Terra em Macau e Moçambique, Universidade de Macau*, 2011, 41–45.

and Succession Law (i.e., general or common Private Law, or Civil Law if one prefers) they are mainly codified in the Civil Code (*Código Civil*). In what special Private Law is concerned, the same applies to our Commercial Code (*Código Comercial*) with reference to Commercial Law. Otherwise, Labor Law is not codified, such as Consumer's Law.

Taking into consideration that Commercial Law and Consumer's Law will be developed later on, we will mainly restrict, at this point, to Civil Law (or general private law).

Civil Law is essentially codified in our Civil Code (*Código Civil*), as already stated. Although beyond Private Law, we cannot omit our Civil Procedure Code (*Código de Processo Civil*), our Civil Registry Code (*Código do Registo Civil*), our Real Estate Registry Code (*Código do Registo Predial*) and our Notary Code (*Código do Notariado*). Other than the codes, we do have non-codified legislation on various Civil/Private Law issues, such as: the regime on author's rights and other connected rights (*Regime Jurídico do Direito de Autor e Direitos Conexos*); the regime on general contractual provisions (*Regime Jurídico das Cláusulas Contratuais Gerais*); the special regime on minors' protection (*Regime Educativo e de Protecção Social de Jurisdição de Menores*); the Land Law legislation (*Lei de Terras*). With a particular importance for Macau, we must still mention that, in spite of being typified in our Civil Code, contracts on gambling and betting are regulated in special legislation. *Lei no. 16/2001*, contains the regime on gambling in casinos; *Lei no. 5/2004*, regulates the credit concession for gambling and betting in casinos.

Finally, with regard to Private International Law, conflict norms are included in our Civil Code (Book I, General Part, Title I, Chapter III, article 13–62).

### 4.3 Actual Status of Codification

#### 4.3.1 Contents of the Macau Civil Code

The very first article of our Civil Code establishes that written laws are immediate sources of law (article 1, paragraph 1). The same article (paragraph 3) determines that international conventions applicable in Macau prevail over ordinary written laws. Uses are only taken into consideration when a written law determines so, provided that they are not against the good faith principles (article 2). Courts are allowed to decide according to equity as long as a written legal disposition accepts it, or in certain terms when there is an agreement between the parties (article 3).

Judicial decisions, custom and doctrine or legal theory are not (formally) recognized sources of law.

We do not have Contract Codes, or Obligations Codes, or Family Codes. Issues on Contract Law, Obligation Law or Family Law are essentially contained in the Civil Code, or in the Commercial Code in what Contract Law is concerned.

Following the “Savigny plan”, within the Roman-Germanic or Civil Law model, our Civil Code, just like its ancestor, the Portuguese Civil Code dated from 1966, on its turn inspired in the *BGB*, is divided (like the Roman *Pandectas* or *Digesto*) into five books: Book 1 – General part; Book 2 – Law of Obligations; Book 3 – Property Law; Book 4 – Family Law; Book 5 – Law of Succession.

Book 1, or General part, comprehends two titles: in the first title, chapters 1 and 2 are on sources, enforceability, interpretation and application of law, both applicable to Private and Public Law, while chapter 3 is on Private International Law conflicts; the second title, based on the concept of juridical relationship (as the whole Code, by the way), is divided according to the four elements of the juridical relationship – persons, object, juridical facts and warranty – being applicable in general to the four different species of civil juridical relationships which are especially regulated in the four following Books of the Code, that is obligation, property, family and succession juridical relationships.

Therefore, the remaining four Books form, altogether, the Special part of the Code corresponding, each of them, to one of the different species of civil juridical relationship. Moreover, and except for the third Book on Property Law, each of the other three Books comprehends one first part with general regulations on the juridical relationship especially concerned, as well as one special part containing special regulations on the concerned relationship.

Hence, Book 2, on Obligations Law, contains one first title on obligations in general, as well as one second title on contracts in special. This second part of the second Book contains the regulation on 14 typified contracts.

In Book 3, on Property Law, due to the special features of our property right (*mütter recht*) and the remaining real rights, there is a different organization: its first title is on possession, its second title is on property right and the other three titles are on *iura in re aliena*, on the so called *direitos reais de gozo*, or “limited property rights”.

Book 4, on Family Law, also starts with general regulations applicable to the family juridical relationships in general, followed by the regulation, in particular, of marriage, affiliation, adoption and alimony.

In Book 5, on Succession Law, its first title is also dedicated to succession in general, followed by the regulation of succession in special, either legal succession, or voluntary succession by means of a will or testament (taking into account that a contract on succession is, in principle, void).

### 4.3.2 Commercial Law

There is a Commercial Code in Macau enacted in 1999 by Decree-Law no. 40/99/M, of 3 August, in force since the 1st November 1999. The first Portuguese Commercial Code has been enacted in 1833<sup>12</sup> and basically followed the model of the French

<sup>12</sup> Approved by the Decree of 18 September of 1833 and entered in force on 14 January 1834. See António Menezes Cordeiro, *Manual de Direito Comercial*, 2nd ed. (Coimbra: Almedina, 2007), 88 ff.

Commercial Code. Soon it attracted major criticism<sup>13</sup> and was replaced in 1888<sup>14</sup> by the enactment of the new Commercial Code. Contrary to the former one, this last Commercial Code was enacted in Macau and has been in force until late 1999, when it was replaced by the new Commercial Code.<sup>15</sup>

Starting in the nineteenth century some of the original contents of the Commercial Code (e.g., bankruptcy, commercial registrar, bill of exchange) have been repealed and displaced from the Commercial Code into autonomous laws (*decodification*). In what relates to company law the major modification refers to the enactment of Law of 11 April 1901 (known as *Lei das Sociedades por Quotas*),<sup>16</sup> which introduced in the Portuguese legal system the private limited liability company, based in the German law of private limited companies (*Gesetz betreffend die Gesellschaft mit beschränkter Haftung – GmbH – 20.4.1892*).<sup>17</sup> Contrary to what happened in Portugal, many of the laws related with commercial matters, both before and after the 25 April 1974, were not extended to Macau, therefore a gap between the two legal jurisdictions was created that kept growing.

If we consider the Commercial Code of 1888 and the LSQ we have a synopsis of the Macau commercial law and its roots as of 1999. As a matter of fact if the Commercial Code of 1833 was a direct offspring of the French Commercial Code, the Commercial Code of 1888, although the basic notion was still the “acte de commerce”, has had as its main source the Italian Commercial Code of 1882,<sup>18</sup> and thus has been influenced both by French and Italian legal theory. LSQ on the other hand followed the German model of the private limited liability company, the *GmbHG* of 1892, opening the door of the Portuguese commercial law to the influence of the German legal theory.<sup>19</sup>

As said during the so called localization process, the Commercial Code of 1888 has gone under a profound reform that concluded in the enactment of the new Commercial Code, which has come into force on 1st November 1999.

<sup>13</sup> Menezes Cordeiro, *Manual*, 92 ff.

<sup>14</sup> The Code was approved by the (*Carta de Lei*) Law of 28 June 1888, and entered in force on 1 January 1889.

<sup>15</sup> Enacted by Decree-Law no. 40/99/M, of 3 August, published in BOM (Macau Official Gazette) 31/1999, of 3 August, to become in force on the 1st October 1999, which was deferred to the 1st November 1999 by Decree-Law no. 48/99/M, of 27 September, published in BOM 39/1999, of 27 September as amended by Law no. 6/2000, of 26 April, published in BOM 17/200, of 27 de April, and by Law no. 16/2009, of 28 July, published in BOM 32/2009, of 10 August.

<sup>16</sup> From now on LSQ.

<sup>17</sup> A. Ferrer Correia, *Lições de Direito Comercial*, Reprint (Lisboa: Lex, 1994) page 34.

<sup>18</sup> It was also influenced by the Spanish Commercial Code of 1885 (Menezes Cordeiro, *Manual*, page 96). Nevertheless Spanish legal theory has no relevant influence in Portuguese legal theory and the authors kept their allegiance with the French and now also, and mostly, Italian legal theory. This last influence is quite obvious in one of the most important legal works on the Commercial Code of 1888, the Commentary on the Commercial Code by Luís da Cunha Gonçalves, *Comentário ao Código Comercial Português*, 3 vols. (Lisboa, 1916, 1918).

<sup>19</sup> Erik Jayme, *100 Jahre BGB und die lusophonen Länder*. Translated by M. Malheiros, *Revista da Ordem dos Advogados* 57. (vol. II, 1997).

The Commercial Code is divided in four books: Book I which title is “The exercise of a commercial enterprise in general”, is the general part of the code and rules the acquisition of the merchant or entrepreneur condition, special obligations of entrepreneurs, representation in the exercise of the enterprise, liability arising from the exercise of the enterprise, which contains a chapter for product liability, negotiation of the enterprise (e.g., sale, lease) and a basic set of rules on competition law and a comprehensive set of rules on unfair competition; Book II is named “Exercise of a collective enterprise and co-operation in the exercise of an enterprise” and contains company law, which previews the four common types of companies in Civil Law countries, unlimited liability companies, limited liability “partnerships”, private limited companies and joint stock companies, and other association or cooperation contracts, e.g. Economic Interest Grouping, association in participation (association en participation, stile *Gesellschaft*) and consortium contract; Book III contains the discipline of a long list of special commercial contracts, those we could call the classic commercial contracts, e.g., commission contract, carriage contract, commercial pledge contract, but also those so called modern contracts, e.g., franchising, leasing, factoring, independent guarantee, etc. and is named “External activity of an enterprise”; finally Book IV which title is “Negotiable Instruments”, contains a general discipline for negotiable instruments and the discipline of Bill of Exchange, Promissory Notes and Checks as resulting from the Geneva Conventions.<sup>20</sup>

The Commercial Code brought back to its rules of trade related matters that have been out of it, either because they were dislocated or because they have never been within the code, aimed at putting back in the natural place of the system matters related with the legal discipline of commerce, following a path that Karsten Schmidt, considering the situation in Germany since the mid 1980s, named of re-codification of commercial law.<sup>21,22</sup>

<sup>20</sup>The Geneva Conventions on Bill of Exchange and Promissory Notes and on Checks has been entered into force in Macau in the late fifties after Portugal withdraw the reservation it has made to its enforcement in the then called Ultramarine Provinces, the former colonies. The discipline of these conventions has been transported to the new Commercial Code, as such, since the People’s Republic of China has informed the UN Secretary-General of the maintenance of their application in Macau, after 1999: that is after PRC resumed the administration of Macau.

<sup>21</sup>Karsten Schmidt, *Handelsrecht*, 5th ed, revised (Colônia/Berlim/Bona/Munich: Carl Heymanns Verlag, 1999) page 46.

<sup>22</sup>“Il Codice Commerciale tedesco: dal declino alla ri-codificazione (riflessini sulla riforma del HGB)”, *Rivista di Diritto Civile* 711–724 (XLV, no. 6, 1999, Parte Prima). The expression re-codification comes as challenge to the opposite idea of *decodificazione*, of Natalino Irti [*L’età della decodificazione*, Milão, 1979; this A. (“L’età della decodificazione” vent’anni dopo, in *Rivista e società*, 1999, page 193) seems to have reformulated his ideas, according to Diego Corapi, “L’unificazione parziale del codice di commercio e del codice civile in Brasile”, *Rivista di Diritto Commerciale*, 802, footnote 1 (no. 11–12, 2002)]; this book *di dimensioni piccole, ma di grande peso* (idem, ibidem), has raised the reaction of Zweigert-Puttfarcken, *Allgemeines und Besonderes zur Kodifikation*, in *Festschrift Zajtay*, 568 ff (1982), *apud* K. Schmidt, *Handelsrecht*, page 712, and footnote 4; and of K. Schmidt, *Die Zukunft der Kodifikationsidee* (1985).

An interesting note of the Commercial Code of Macau is that it included institutes of Common Law origin. One of the main criticisms that were voiced time and again in business circles was that there were in comparison to Hong Kong few alternatives to create guarantees. Having this into consideration the legislator, also taking into account the evolution pretended to Macau economy, decided to introduce the floating charge (articles 928–941), based on the discipline of the floating hypothec of the Civil Code of Quebec. In Civil Law countries a guarantee over the business itself as a whole takes the form of a pledge (e.g., the French law of 1909 on the *nantissement du fonds de commerce*). Also this type of guarantee has been included in the Commercial Code under the name of “*Penhor de empresa*”, “Pledge of Enterprise”, in articles 144–152. Offering two similar legal instruments aimed at solving identical problems it can be said that the law promotes an unnecessary hybridism, but it was intention of the legislator to suit the interested parties according to their own background in order that they could use legal tools familiar to their origin. And if criticism can be aimed at the law for this maybe it can be said in its defense that to the law it is not to decide what is or what is not scientifically correct, but rather to solve in the most efficient way the problems that business needs present. The pragmatism of the law may be adequate in a place like Macau where different legal traditions, mainly Civil and Common Law traditions, with elements of Chinese tradition, are in a continuous competition. The hybridism of the law, in this particular, is no more than the reflection of the hybridism of Macau itself, which has always been a revolving door between East and West: Macau is *Janus*.

The Commercial Code mainly deals with the private aspects of the legal commercial relations (private commercial law). Which means that public legal aspects of the same questions are ruled by specific laws. Therefore although the discipline of the insurance contract is contained in the Commercial Code, the insurance activity is ruled by several laws, being the most important the Decree-Law no. 27/97/M, of 30th September 1997, entered into force on 1st September 1999. The same can be said of banking contracts that although some of them are ruled in the Commercial Code banking activity as such is regulated in Decree-Law no. 32/M/99, of 5th July. Also the most important industry in Macau, gaming industry, is ruled by Law no. 16/2001. Bankruptcy rules are to be found in the Civil Procedure Code, enacted by Decree-Law no. 55/99/M, of 8 October 1999, as special civil process “liquidation in the benefit of creditors”, sections 1043 through 1184. Bankruptcy only applies to entrepreneurs; for the non-entrepreneurs there is an insolvency procedure, although similar but simpler. Maritime law is not included in the Commercial Code but rather in a special law, the Maritime Commerce Ordinance (*Regime Jurídico do Comércio Marítimo*), which was enacted by Decree-Law no. 109/99/M, of 13 December 1999. Intellectual Property Law is divided in two laws: the Industrial Property Code (*Regime Jurídico da Propriedade Industrial*), enacted by Decree-Law no. 97/99/M, of 13 December 1999 and the Copyright Law (*Regime do Direito de Autor e Direitos Conexos*), enacted by Decree-Law no. 43/99/M, of 16 August 1999, that came into force on the 1st October 1999. Contrary to what is the traditional division and contents of the old European commercial codes, matters related with commercial



registration<sup>23</sup> were not included in the Macau's Commercial Code. The commercial registration is governed by the so called Commercial Registration Code, enacted by Decree-Law no. 56/99/M, of 7 October 1999, entered in force on 1st November 1999, modified by Law no. 5/2000, of 26th April 2000. There is no law on trust.

In what concerns the relations between the Civil Code and the Commercial Code it is understood that the former encapsulates the general law, therefore it is applicable to all private matters where there is no special rule. Since the Commercial Code is construed as a set of special rules in face of the Civil Code, this will cover the commercial matters only if the Commercial Code does not offer a solution. However in commercial matters before resorting to the Civil Code it is necessary to take into consideration section 4 of the Commercial Code. According to this section, if the situation is of commercial nature and the Commercial Code does not provide for a direct solution, the interpreter should first seek an analogous situation in the code itself and only if none can be found can he resort to the Civil Code, as long as the potentially applicable rules of this law do not contravene any principle of commercial law.

#### 4.4 Consumer Law: Relationship with the Civil and the Commercial Codes

In Macau, Consumer Law is normally perceived as a special branch of economic law.<sup>24</sup> Consumer protection can be achieved by different areas of legal devices, namely, private law, administrative law, criminal law and procedural law. From the perspective of private law, the protection measures are not attached exclusively to the Law no. 12/88/M, of June 13 on Consumer Protection. Consumer Law is a special legislation outside the Civil Code and the Commercial Code. Generally speaking, the relationship between the Civil Code and Consumer Law is the one between special law and general law in consumer relations. While Consumer Law deals with the issues in a more synthesized way, the Civil Code and the Commercial Code contain relatively broad and detailed provisions with respect to the quality of products and services, prevention and compensation for injuries, commercial practices and various contractual protections. The two Codes address civil liability for manufacturers, producers and sellers and define unfair and abusive commercial practices.

<sup>23</sup>Commercial registry was contained in the Commercial Code of 1888, but in the late fifties it was revoked with the enactment of an independent law the Commercial Registry Code (Decree no. 42644) and the Commercial Registry Regulation (Decree n.º 42645), both of 1959, that have been extended to Macau by Order no. 22139, of 29 July 1966, and gazetted together with the extension Order in BO Macau no. 35, of 27 August 1966.

<sup>24</sup>Chou Kam Chon, "Consumer Protection Law of Macau" and Fan Jianhong, "Introduction to Macau Economic Law", in *New Commentary on Macau Law* (in Chinese), Liu Gaolong and Zhao Guoqiang, eds., (Macau: Macau Foundation, 2005), 281–286 and 143–147.

Taking into account that Law on General Contractual Clauses is not made to apply only to consumers and there is no typical consumer contract being regulated and incorporated by Consumer Law of Macau, one cannot come across any confrontation or discrepancy in legal norms between Consumer Law and Civil Code.

It is recognized worldwide that the perceptions and notions underpinning Civil Code and Consumer Law are very different. Conventionally, contract law was rooted and developed aiming to prevent the State from interfering and controlling private freedom and equality to establish and carry on trade and business. Nonetheless, Consumer Law can be said to be based on "social task of private law", with an objective to remedy the "exaggerated individualism and formalistic concept of freedom and equality".<sup>25</sup> Therefore, "freedom of contract" and "party autonomy" are not the best rules in consumer contracts. In addition to define the notion of "consumer" and the notion of "consumer contract", in the private law area, the main devices of Consumer Law are the imposition of the duty of information of the entrepreneur, the right of revocation of the consumer and the establishment of mandatory rules of law or contract regimes.<sup>26</sup> So far, such law tools have not been granted and implemented in Consumer Law in Macau. In this sense, the provisions and the consumer's basic rights enshrined in the Law no. 12/88/M, of June 13 on Consumer Protection are very difficult to be effectuated. Some modern and new types of consumer relations (for instance, sale of consumer goods, distance selling, package travel, e-commerce and credit card, etc.) have not been regulated yet in Macau and consumers have to depend on Civil Code and Commercial Code in concrete consumer relation. In case that a consumer understands standard terms in a way different from the entrepreneur's interpretations, it will not be easy for the consumer to defend his rights in judicial actions based on the available legal rules. For the time being, in many cases, the relationship between Consumer Law and Civil Code of Macau can be described as a relation of "passive-conflict", in other words, neither Consumer Law nor Civil Code is able to provide an effective protection for consumers.

Considering that the quantity of legislation pieces on Consumer Law of Macau is still very limited, and for consumer relations the genuine legislation overturning the classical paradigms of contract law such as "party autonomy" and "*pacta sunt servanda*" does not exist in Macau, it can be said that at present there are not collisions between the existing Consumer Law and Civil Code. However, along of the constant improvement of Consumer Law legislation in the foreseeable future, how to systematize different rules and approaches of Consumer Law and harmonize with Civil Code will be an inevitable question. Macau legislature has to reflect on the social function of private law as well as the thinking and values to be incorporated into Consumer Law in the future.

<sup>25</sup>Zweigert, Konrad and Hein Kötz, *An Introduction to Comparative Law*, 3rd Edition, 1996, translated by Tony Weir, page 148; Reinhard Zimmermann, 2005, 161–1622, David W. Oughton, *Consumer Law Texts, Cases & Materials*, Blackstone Press Limited, 1991, 14–17.

<sup>26</sup>See, for instance, provisions in German *BGB*, Japanese Law of Consumer Contract (2000) and the Brazilian Consumer Protection Code (Law no. 8078/90).

Since 1988 when the first Consumer Law (Law no. 12/88/M of June 13 on Consumer Protection) was enacted, Macau's Consumer Law has been developed to a certain extent. As for contractual protection, the Law no. 17/92/M of September 28 on General Contractual Clauses is the most relevant legal device which prevents unfair and abusive clauses from being included in business-to-consumer contracts. The two laws and other pieces of legislation of Consumer Law are not included in Civil Code of Macau. Despite some recent development, the effectiveness of Consumer Law of Macau is not very strong and its influence on the general theory of contract is not remarkable. In recent years, the literature on consumer contract remains to be insufficient and there are not many scholarly debates about the need to provide consumers with special protection with special rules of interpretation of standard terms. Due to peculiar socio-economic factors, Macau's legislature has always tended to depend on free market's operation and to avoid governmental intervention in private relations.

However, after the transfer of sovereignty to China, the city has become no. 1 of profitability in global gambling destinations by gaming revenue as well as a tourism and leisure destination for millions of consumers worldwide. In pace of the societal development and the growth of the consumer market, classical paradigms of contract law have long ceased to reflect reality. Macau is no exception. It has been argued that modern advertising methods misinform rather than inform the consumers<sup>27</sup>; as a consequence, consumers are at the risk of making unfavorable decisions. Nevertheless, traditional principles such as "party autonomy" and "*pacta sunt servanda*" cannot reduce the risk and restore the balance of power in contracting. Without recognizing information obligations and withdrawal rights in consumer contracts as legitimate tools for consumers, Consumer Law will not turn to be effective. In this sense, the Consumer Law of Macau has to respond to new challenges. There is an urgent need for scholars, practitioners and legislators of Macau to rethink about the underlying assumptions of conventional private law, the new trend of private law and the direction of Macau Consumer Law.

If Macau draftsmen of the legislation are aware that to draft Consumer Law on the agenda is a general trend in many jurisdictions, then the next challenge is to find new legal measures and approaches.<sup>28</sup> Is there any good reason to deal with the general clauses of commercial contracts at a separate place? Will codification promote the coherence of the Consumer Law? More radically, how to insert and integrate the Consumer Law into the intricate fabric of the Civil Code? All these are not merely formalistic issues, but ones involve many theoretical supports and perceptions. Unfortunately, we cannot provide any solutions at this moment. But one thing is certain: Macau Consumer Law should provide minimum standards to passive

<sup>27</sup>David W. Oughton, 1991, page 14, "The adviser only tells the consumer what he wants the consumer to hear and the other facts which might be relevant to a prudent shopping decision tend to be omitted".

<sup>28</sup>European Law, as an example, is confronted with the question of coordinating general contract law and consumer contract law. See Christian Twigg-Flesner, ed., *European Union Private Law*, (Cambridge: Cambridge University Press, 2010), 131 ff.

consumer protection in all distance contracts, contracts negotiated in Macau by local or non-local people or when the advertisements or the offers are made in Macau.

## 4.5 Family Law

As previously stated, Family Law is part of the Civil Code,<sup>29</sup> of its fourth Book to be precise. Nonetheless, we recall that some important Family Law matters are not regulated in the Civil Code, but separately, in other codified and non-codified legislation. Here are the most relevant sources of Family Law, and thus beyond the limits of private law.

To begin with, the fundamental rights and duties of Macau residents are part of Macau Basic Law (MBL). "The freedom of marriage of Macau residents and their right to form and raise a family freely<sup>30</sup> shall be protected by law. The legitimate rights and interests of women shall be protected by the Macau Special Administrative Region. The minors, the aged and the disabled shall be taken care of and protected by the Macau Special Administrative Region" (article 38).

Still according to MBL (article 40), in what Family Law is concerned, the provisions of International Covenant on Civil and Political Rights (*Pacto Internacional sobre os Direitos Civis e Políticos*) and International Covenant on Economic, Social and Cultural Rights (*Pacto Internacional sobre os Direitos Económicos, Sociais e Culturais*) shall remain in force and shall be implemented through the laws of the MSAR.

Codified legislation with significance for Family Law, other than the Civil Code, is as follows: Civil Registry Code (*Código do Registo Civil*), approved by *Decreto-Lei no. 59/00/M, de 18 de Outubro*; Civil Procedure Code (*Código de Processo Civil*), approved by *Decreto-Lei no. 55/99/M, de 8 de Outubro*.

Among the non-codified legislation we would still mention the following: Family Policy Basis Law (*Lei de Bases da Política Familiar, Lei no. 6/94/M, de 1 de Agosto*); Educational and Social Protection Régime of Minor's Jurisdiction (*Regime Educativo e de Protecção Social de Jurisdição de Menores*, regulated by the *Decreto-Lei no. 65/99/M, de 25 de Outubro*).

The most important modifications brought into the 1999 Macau Civil Code were, not surprisingly, in Family Law. Briefly, here are the matters concerned and the main reformations: models of marriage – limited to one only model, that is, marriage according to the civil law; marriage procedure – simplification, in general; matrimonial assets regime – adoption of the participation in acquests regime with regard to the supplementary legal assets regime; matrimonial conventions – admission of post-nuptial conventions (together with pre-nuptial conventions) and therefore abolishment of the principle of the immutability of the assets regime; spouses'

<sup>29</sup>Unlike Chinese Family Law, where we can find a Marriage Law and an Adoption Law, along with a Law of Succession.

<sup>30</sup>This is a fundamental right. Therefore, the Chinese "one child policy" does not stand for Macau.



debts – more protection for the non-debtor spouse in case of debts of exclusive responsibility; separation from bed and board or legal separation – abolishment; divorce – decrease in the delays required with regard to divorce by litigation due to rupture of life in common (for instance, the duration of a *de facto* separation as grounds for divorce was decreased from 6 to 2 years), as well as the adoption of a registry divorce, side by side with a judicial divorce, whenever there is mutual consent for divorce and no minor children involved; affiliation – reinforcement of the biologist principle in what its establishment is concerned, somehow compensated by some concession to social parenthood, as well as the introduction of regulation, even though very limited, on medically assisted procreation; adoption – limited to one only model, resulting from the abolishment of the previously designated “restrict adoption”; *de facto* union – regulation, although according to a “minimum juridical environment”, in the words of the lawmaker, that is, cautious and limited to indispensable ruling; alimony – alimony obligation generally improved, namely in accordance to some of the previously mentioned amendments.

#### 4.6 Relationships Between the Civil Code and the Basic Law and Treaties

Macau Basic Law is described as the “mini-constitution” of Macau, as it regulates fundamental rights and duties of the residents, political structure and authorities. Furthermore, Macau has its own legal and economic system, which implies that policies introduced and legislations enacted in China will not have any effects over Macau.

Such a new legal framework created by the Basic Law shall of course generate doubts in the first stage of its implementation. The first doubt among others is perhaps the relation between the National Constitution of PRC and the Basic Law.

Legislative basis of Basic Law comes from the National Constitution and is enacted in accordance with the provisions of the latter, thus is regulated by the Constitution.<sup>31</sup> It should be known that the Chinese Constitution has legal force over Macau through medium of the Basic Law. They differ from one another in many aspects, so it is not proper to call the Basic Law or even equalize it with the Constitution. In general, the origin of legislative legitimacy of the Basic Law comes from the National Constitution.

Noted that the Basic Law is a national law, it has its legal force and effects not just within the special administrative regions, and also among other provinces and regions of China which they have to respect and comply with it, too. It requires both Macau and other provinces of China to obey it. Regarding its special and extraordinary legal force and as a national law, it means although other provinces could still

<sup>31</sup> See Lok Wai Kin, “One Country, Two Systems of the Chinese Constitution – Discussion to relations of power between the Central and Special Administrative Regions”, in *One Country, Two Systems and Execution of the Macau SAR Basic Law*, GuanDong Printing Press, 2009, 13–14.

make their own regional regulations or other regulatory documents to complement or harmony with their execution of regimes like Macau (the legislature can enact laws to implement and define in details in area of practice and execution of policies issued by Central Government), they should never enact regulations contravened with provisions of the Basic Law. This can be easily understood to be a consequential outcome for being a national law.

Nonetheless, though considered a national law, the dignity of Basic Law is not parallel to other national laws enacted for the ruling of affairs within the boundaries of mainland China. By elaborating a comparison between legal force of the Basic Law and other national laws, it is easy to come to a conclusion: the Basic Law is regarded as a special national law. Its classification is done because of several key factors: the scope of application and its suppressing effect over other national laws with contraventions to the Basic Law. Firstly, it is nationwide applicable for the sake of its legislative organ that enacted it – National People’s Congress, thus local legislature of Macau, the Legislative Council, has no power to alter, amend or suspend provisions of the Basic Law even for benefits of Macau’s economy or society. This does not provide a legitimate basis for the Legislative Council to make any alteration or amendments, in fact, it is forbidden to do so. These issues are all reserved and to be done by the National People’s Congress, therefore it shows the Basic Law is not just a regional law, but a national one. Secondly, based on its reserved legislative power,<sup>32</sup> the National People’s Congress had stated in the Basic Law the concrete policies and regimes to be practiced after the handover of Macau in 1999. With establishment of institutions and introduction of policies differed from those in operation in China, the context of the Basic Law forces it to be a special legislation, in turn ensures its effects to dominate in Macau’s legal order and even reject other constitutional documents to come into effect in Macau. This is due to the basic concept of legal theory: special legislations are superior to ordinary ones.<sup>33</sup>

Hence, the Basic Law is granted a supreme status among legislations in Macau’s legal order, and thus leads the directions of evolution and orientation of various significant areas in Macau, such as economy, society and external affairs.

<sup>32</sup> See Article 31 of the National Constitution of People’s Republic of China, this article reads: *The State may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People’s Congress in the light of specific conditions.* From official website of the National People’s Congress: [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372963.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372963.htm). Also see Article 8, no. 3 of the Legislation Law of the People’s Republic of China, this article reads: *only national law can be enacted in respect of matters relating to autonomy system of ethnic regions, system of special administrative region, and system of autonomy at the basic level.* From official website of the Central People’s Government of the people’s republic of China: [http://www.gov.cn/test/2005-08/13/content\\_22423.htm](http://www.gov.cn/test/2005-08/13/content_22423.htm)

<sup>33</sup> See *Commentaries on Contemporary Macau Law*, Vol. 1, Macau Foundation, 2005, page 51. It discussed further on the Basic Law’s supreme power of authority in the Macau Special Administrative Region, and in two aspects pointing out the Basic Law is a national law and also the supreme in Macau SAR.

The Legal Hierarchy was developed in classical legal science. It mainly refers to relations among various forms of law.<sup>34</sup> It results the following consequence: laws in lower-levels cannot contradict or go against those in higher-levels.

In fact, it is a consequence of logics if considered to which legislative organs they are enacted, their context materials and applicable areas. To minimize controversy in this respect, some measures may be taken in the legislative level.<sup>35</sup>

Generally speaking, the problem of Legal Hierarchy is a synthesis of observance to the existing forms of laws by placing them in orders according to their force over the legal order. This is usually expressed in a pyramid form or triangular figure, in which the higher-level legislations are put in the tip while those lower-levels put in the bottom part. They are arranged in decreasing order corresponding to their legal forces: the higher the legal force, the higher it is placed in the hierarchy, and vice-versa.

After discussing status of the Basic Law, we are about to relate on its interaction with public international law and ordinary laws. It is evident that a legal order is not only composed of a constitutional document, but also with many other regulatory acts in various forms (they can be international conventions, treaties, agreements, internal ordinary laws, etc.).

The Legal Hierarchy can be established by comparing the limits of legislative authority or legislative power. Therefore, in the case of Basic Law, as discussed above, it is enacted by the National People's Congress, and is considered to be a special national law.

It is the Basic Law that laid out the whole framework of the normative order in Macau, while other regulatory documents fill in the detail. Basic Law and legal diploma in other levels together form an integrated legal structure which provides the citizens with behavioral criterion.<sup>36</sup> In Macau, it is mainly the Legislative Council that amends codes and enacts separated legislations so as to give response to social needs in time, yet it is the Government that is entitled to propose a bill.

There is no difficulty to see that the Basic Law stands in a higher hierarchy in relation to any other ordinary laws, including the Civil Code. The more controversial case is the hierarchy of international law, which once became the subject matter of legal dispute in the Macau Courts.

Based on general theory of international law, there is possibility for countries, organizations or entities to be qualified as the subject, and only with this quality, it can participate and be a party in international legal relation, exercise rights and bear

<sup>34</sup> See João de Castro Mendes, *Introdução ao estudo do Direito*, Lisboa, 1984, 95 ff.

<sup>35</sup> Just take the examples of Macau and China. In Macau, there is the "*Regime jurídico de enquadramento das fontes normativas internas*", *Lei no. 13/2009*, that is the legislation law stating on the contents to be regulated by law, independent administrative regulations and complement administrative regulations, approved on 14th July of 2009 by the Macau SAR Legislative Council; also see the Legislation Law of the People's Republic of China that is approved by the 3rd Congress of the National People's Congress on 15th March of 2000, and it also aims at similar functions like the above.

<sup>36</sup> See Tong To Cheng, "The origin of Dominium and the Legitimacy of the Continuity of its System: an Interpretation of the Individual Property Protection in the Macau basic Law", *Academic Journal of One Country Two Systems*, no. 4, 2010, page 57.

responsibility (but qualification of subject of international law is not the issue to be discussed here). What is significant here is the statue of these international treaties and conventions negotiated and signed in internal legal system. This is *ex facto* quite apparent to reach a conclusion. It can be divided into four situations:

- (a) International treaties or conventions had already come into effect before the handover of Macau, and these were all extended to apply in Macau by ordinances or ordinations promulgated by the Republic of Portugal, thus it suggested that the agent (*sujeito*) signing all these treaties was Portugal;
- (b) When contracting international treaties of defense, foreign affairs or matters that Macau does not have any deciding power (these have been prescribed in the Basic Law), thus it is the Central Government of China that can decide and take action to negotiate in this case, and the treaties must be applied to Macau because it is lack of jurisdiction or deciding power in those areas;
- (c) When contracting international conventions of other areas, such as society, culture, etc. by the Central Government of China, the central government will depend on Macau's situations and needs, and after seeking the views of Macau government, then decides if the convention is applied to Macau or not; and
- (d) Contracting international agreements of certain aspects that Macau, on its own, is authorized to join international organization and agreements in the name of "Macau, China".

For the first circumstance, since it is not Macau who directly joins those international conventions, instead, the subject of those relations is Portugal. For this case, the Basic Law has already given the solution in accordance with Article 138, stated that they will continue to implement in local legal order. The Central Government only needs to do some appropriate arrangements to notify continuation of effects of those conventions in Macau. But before this, the Foreign Affairs of the Central Government will have to verify criteria if the international law is against sovereignty of China or contravene the Basic Law.

With regard to the second situation, this is a natural consequence of logics since it is beyond jurisdiction owned by Macau with accordance of Article 14 and 19 of the Basic Law.

Concerning the third situation, in accordance with first part of Article 138 of the Basic Law, the subject is the Central Government and the extension of applying those treaties or agreements depends on decisions made by the Central, thus in this case, Macau does not have much influence in the decision-making process, but only providing its own review.

With reference to the fourth condition, this is prescribed in the Article 136 of the Basic Law and stated plainly in which areas Macau can join international treaties on its own.

From all the above, among the first three situations the subject falls on the Central Government of China. Frankly speaking, Macau does not have much room to interfere during the process, and the most important is the quality of subject. As all those are signed and approved by the Central, the local legislature has no power or authority to alter or repeal application of international law. As a matter of course, the

international law has a higher ranking than ordinary laws. Only in the last case, Macau signs and contracts in its own name as an independent signatory, but noted that this power is authorized and based on the Basic Law in terms of Article 136 of the Basic Law.

Eventually, the Legal Hierarchy could be done after the above discussions on their respective field: the Basic Law is certainly located at the top level, public international law in the middle level whereas the Civil Code, part of ordinary laws, is placed at the bottom in this case.

The Basic Law gives a legitimate basis to enact or impose ordinary laws, but it is not the source of private law. Noted that the provisions in the Basic Law are abstract and general, they are not suitable to apply directly to discipline civil legal relations in daily lives which it might be too general and not technical<sup>37</sup> enough to modulate behaviors of beings.<sup>38</sup> But those rights stated in the constitution play an important role in opposing the government or “authoritative power”, enabling fundamental rights of people will not be violated or infringed by exercise of public authority, especially fundamental rights, freedom and protection. They are the bases for residents and set a bottom line where the public authority can never stride across.

Civil law is just one of the components of the private law, and in its own is not able to form a whole, integrated private law. Private law simply regulates relations that each person, both natural and legal one, can join as a party, thus it is related to the whole community.<sup>39</sup> There are still other components in the private law system, such as commercial law and other independent legislations (those are not able or appropriate to be included in the Civil Code).<sup>40</sup>

In Macau, for influences of the Basic Law on the Civil Code, actually it is mostly distinctive before the resumption of exercise of sovereignty and at that time, a temporary council<sup>41</sup> was set up in order to follow and take charge of enactment of the Civil Code, the Civil Procedure Code and the Commercial Code. Thus, this council had aimed to moderate institutions and innovate provisions in the Civil Code corresponding to current needs from society.

Due to higher and stronger legal force imposed by public international law, ordinary laws have to obey and adopt regulations from international treaties, conventions or agreements if necessary.

<sup>37</sup> See Wang Tez Chien, *General Theory of Civil Law*, Series of Study in Civil Law, Peking University Press, 2009, page 39.

<sup>38</sup> Here includes both categories of natural person (*pessoa singular*) and legal person (*pessoa colectiva*).

<sup>39</sup> See Karl Larenz, *General Theory of German Civil Law*, translated in Chinese version, Law Press, China, 2007, page 9.

<sup>40</sup> There are so many examples in the Continental Family, especially after codification, some regulations or laws are not suitable to add into the code which may disturb or even destroy logics of system. In Macau, it has labor law (some scholars say that part of it belongs to private law, other part is public law), commercial law and many other legislations.

<sup>41</sup> See Annex concerning on reform of the Civil Code – Initial Planning, official website of the Legislative Council: <http://al.gov.mo/lei/codigo/civil/po/4.htm>

It is somehow compatible for cooperation of public international law and the Civil Code within legal orders, especially in cases involving members of European Union (EU),<sup>42</sup> they show a great example in this case. Take as an example the Republic of Portugal, as a member of the EU, the EU treaties and directives are also applicable in internal legal order. Besides, Portugal has expressly prescribed that general or common international law is a part of Portuguese law.<sup>43</sup> Since international law signifies a relative unification of rules and principles where persons of different countries or other subjects of private law can contract under the same terms and conditions, they could make use of the same set of instruments. Therefore, enables more efficient and rapid business transactions and encourages exchange of information and progress of globalization. More conclusion of a treaty can do good to global trade, intercommunications, cultural and other exchange of ideas.

On the contrary, it brings side-effects to internal legal system under total adoption of public international law, particularly when it causes conflicts or inconveniences to social progress. That is the conclusion of treaties may not bring benefits and even do harm to the countries, at the same time hinder it from evolution because it fails to adapt to environmental changes easily. Take an example, if a country signs a treaty without any reserves, which means it accepts all the provisions written and its internal ordinary law has to obey all these. Sometimes, it might cause conflicts with internal legislations, however, the contracting party has no way to choose since it has to obey the treaty completely (*pacta sunt servanda*).<sup>44</sup> It implies there is no room for them to alter or repeal application of part of the treaty, however, in various cases this would retard progress of the country. A good example is the *Geneva Uniform Law* adopted in Macau. This is a convention applied to Macau since its publication on official bulletin on 8th February, 1960, and it stated the interest rate of checks, bill of exchange and promissory notes is fixed at 6 %. Nevertheless, in virtue of rapid economic progress and inflation, the current legal interest rate

<sup>42</sup> Internal legislations of members of European Union (EU) have to obey the directives issued by the EU as they have some common and mutual systems which have to be regulated by the EU, but not individual country.

<sup>43</sup> See the Constitution of the Republic of Portugal, concerning the international law, reads: *Artigo 8.º (Direito internacional)*

1. *As normas e os princípios de direito internacional geral ou comum fazem parte integrante do direito português.*
2. *As normas constantes de convenções internacionais regularmente ratificadas ou aprovadas vigoram na ordem interna após a sua publicação oficial e enquanto vincularem internacionalmente o Estado Português.*
3. *As normas emanadas dos órgãos competentes das organizações internacionais de que Portugal seja parte vigoram directamente na ordem interna, desde que tal se encontre estabelecido nos respectivos tratados constitutivos.*
4. *As disposições dos tratados que regem a União Europeia e as normas emanadas das suas instituições, no exercício das respectivas competências, são aplicáveis na ordem interna, nos termos definidos pelo direito da União, com respeito pelos princípios fundamentais do Estado de direito democrático.*

<sup>44</sup> Stated Article 26, Section 1 observance of Treaties, Part 3 of Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, reads: *every treaty in force is binding upon the parties to it and must be performed by them in good faith.*



increases to 9.75 %.<sup>45</sup> But because of intrinsic binding force of the convention, the legislature can find no way to make amendments, and if it is desperate to alter the respective interest rate, the only method it can do is to terminate the treaty or withdraw from it: in conformity with the provisions of the treaty, or at any time by consent of all the parties after consultation with the other contracting States, in terms of Article 54 of Vienna Convention on the Law of Treaties. Therefore, it leads to a long-winded, complicated and not economical process which none of the parties is willing to choose.

## 4.7 Conclusions

The reform of Civil Code in Macau was done under the context of the handover of Macau from Portugal to PRC, in 1999. In the preparatory period, both PRC and Portugal have recognized the importance of a stable legal order in the future SAR, and therefore a series of measures were taken to assure such an order. Justification of the works done could be seen in an opinion drawn by the then Portuguese Government about the Civil Code, the Civil Procedure Code and the Commercial Code (*Parecer no. 2/199 da Comissão Eventual destinada a acompanhar e participar na elaboração dos projectos relativos aos Códigos Civil, Processual Civil e Comercial*). It mentioned various reasons for the desperate need to revise the institutions adopted in the Civil Code:

- (a) Only a short period of time was remained until resumption of exercise of sovereignty, at the same time, after consideration of dimension of the code;
- (b) Neither moderations nor alterations were done since the promulgation of the code in Macau, as a result, it hardly matched the current needs and social lives;
- (c) Give response to the Joint Declaration was one of its purposes and were anticipated to reach, so as to protect those deep-rooted values from current legal system; and
- (d) Building up its own legal system with reserve of antecedent experiences, resulted in a more precise and decisive guidance to behaviors.

By nature, the Macau Civil Code can be seen as a product of legal transplant from the Portuguese's,<sup>46</sup> thus there are of course cultural aspects to be considered whenever there is a chance for reform. On the other hand, for a code promulgated for more than 30 years, it must be modified in some points in order to respond to

<sup>45</sup> See the Administrative Order, no. 29/2006, promulgated on 6th July, 2006 which repealed the previous administrative order, no. 9/2002 and increased the legal interest rate from 6 to 9.75 %.

<sup>46</sup> See Tong Io Cheng and Wu Yanni, "Legal Culture and Legal Transplants", *ISAIDAT Law Review*, Volume 1, Issue 2, 633–637. Detailed exposition of the process of legal transplant of Portuguese law in Macau can be seen in this paper, especially how the Portuguese law "rooted" to form a unique legal order after eventual combination with the original existing traditional legal culture in its colonized cities.

current social needs. After all, it is for the first time in history Macau has been given the chance to mode its future Civil Code with a focus on its local interest. In this context, we can see why the Coordinator of the Project, Luís Miguel Urbano, referred the following in the brief statement of reason in the Macau Civil Code: "it was not to create a new code from nothing, (...) while the raw materials have been provided and are in good condition". Besides, he mentioned that "radical changes signify a loss of experiences accumulated in application of civil law". "In reality, this reform had just cancelled or amended those lagged regimes."<sup>47</sup>

As a final remark, a distinction between Chinese law and law in China is advisable: if the former remains, so far, non-codified, with regard to the latter Macau legal order is definitely supported by codes.

<sup>47</sup> See the Macau Civil Code, Portuguese version, Macau Government Printing Bureau, 1999, VIII–IX.