

ANALYSIS OF MACAO'S DIVORCE LITIGATION SYSTEM IN THE PAST TWENTY YEARS: IRRETRIEVABLE BREAKDOWN OF MARRIAGE AND NO-FAULT DIVORCE LITIGATION

O SISTEMA JURÍDICO DE DIVÓRCIO LITIGIOSO EM MACAU APÓS 20 ANOS DE RETORNO À PÁTRIA: DIVÓRCIO-CONSTATAÇÃO DA RUPTURA DO CASAMENTO E DIVÓRCIO LITIGIOSO SEM CULPA

Jiang Yi Wa¹

ABSTRACT: According to the law, both spouses have equal rights and duties within the marriage, meaning that they must act with respect, fidelity, cohabitation, cooperation and assistance, either spouse may request the dissolution of the marriage if the other culpably violates those duties. Although the Macao's Family Law (Book IV of Civil Code of Macao) does not expressly provide for the right to divorce, the interpretation of this right can be done by combining articles n.ºs 25, 38 and 41 of Macao Basic Law, which enshrine the right to freedom for all citizens. The litigious divorce is regulated under articles n.ºs 1635 to 1648 of the Macao's Civil Code, which establish its requirements, the fault of one of the spouses, or, the breakdown of common life, which means that, if one of the parties has not violated marital duties, and there is no disruption of common life due to crucial circumstances (e.g. "de facto" separation for 2 consecutive years), the other spouse cannot resort to the litigious divorce to dissolve the marriage, they can only divorce by mutual consent, which doesn't exist often. This situation conflicts with the principles of a society governed by Law in which freedom is one of its basic principles. To attain a fairer system, there must be rules that balance both individual freedom and the objective of protecting the family institution.

Keywords: freedom to divorce; marriage break; disputed divorce; disputed divorce without guilt; Macau Civil Code; basic law of Macau.

RESUMO: De acordo com a lei, ambos os cônjuges têm direitos e deveres iguais dentro do casamento, que incluem os deveres de respeito, fidelidade, coabitação, cooperação e assistência, podendo qualquer dos cônjuges pedir a dissolução do casamento se o outro violar culposamente aqueles deveres. Embora que a Lei da Família (Livro IV do Código Civil de Macau) de Macau não preveja, de forma expressa, o direito ao divórcio, podemos subentender esse direito pela conjugação dos artigos n.ºs 25, 38 e 41 da Lei Básica de Macau que consagram o direito à liberdade de todos os cidadãos. O divórcio litigioso encontra-se regulado entre os artigos n.ºs 1635 a 1648 do Código Civil de Macau, que prevêm os requisitos para o mesmo, a culpa de um dos cônjuges, ou a ruptura da vida em comum, o que significa que se uma das partes não tiver violado os seus deveres conjugais nem se verifique qualquer outra razão como a ruptura da vida em comum devido a circunstâncias cruciais (ex.: a separação de facto por 2 anos consecutivos), a outra não pode recorrer ao divórcio litigioso para dissolver o casamento, podendo somente divorciar-se por mutuo consentimento, o que muitas vezes não se verifica. Situação esta que conflitua com os princípios de uma sociedade governada pelo Direito em que a liberdade constitui um dos seus princípios basilares. Para que se constitua um sistema equilibrado, são necessárias normas que balancem tanto a liberdade individual, como o objectivo de protecção da instituição família.

Palavras-chave: liberdade ao divórcio; ruptura de casamento; divórcio litigioso; divórcio litigioso sem culpa; Código Civil de Macau; lei básica de Macau.

¹ Bachelor and Master Degree from the Faculty of Law of the University of Coimbra (Portugal). PhD Candidate in Public Law of the same School. Currently Senior Instructor of the Faculty of Law of the University of Macau, also Director of the Introduction to Macau Law Program and Associate Director of the Legal Research Center, both in the same Faculty. Main research areas: Environmental Law, Administrative Law, Administrative Procedure Law, Family Law, Succession law and Tax Law. Lawyer registered in Macao.

PART I. BRIEF INTRODUCTION OF THE DIVORCE LITIGATION SYSTEM IN MACAO

There is a traditional saying in China that it is preferable to tear down ten temples rather than destroy one marriage. By showing the importance given to family values, behind this sentence is the deep foundation of Confucianism, which insist a strong protection (almost stubborn and conservative) from Chinese traditional culture to the relationship established between men and women through marriage. Indeed, marriage, as a system of establishing special relations between two persons, is the embodiment of emotion, ethical principles² and the effectiveness of serious legal relations. In modern societies ruled by law, the direct effect of marriage is to give legal restraint and protection to spouses in marriage. Any violation of legal obligations and rights will have corresponding consequences foreseen by law. On the premise of meeting the legal requirements, everyone has the freedom to enter into marriage. Both husband and wife have equal rights and obligations. They should love, support, respect, cooperate and be loyal to each other. Once married, one should maintain the integrity and harmony of marriage life. However, it is also undeniable that under the principles of equality and freedom, either spouse can freely decide whether to seek for dissolution of marriage. Freedom to divorce is a universal legal value pursued by most countries³. Once irreparable cracks arise in the common life, any party in the marriage relationship has no obligation to reluctantly maintain the relationship against his/her will. At the same time, the protection of the right to request for divorce is also conducive to the protection of their right and freedom to re-enter into marriage after divorce.

However, freedom cannot exist in isolation, nor is it personal and selfish freedom. Freedom must be achieved through the boundaries of equality and justice⁴. That is to say, the limit of freedom is justice. In order to ensure justice, freedom can never be without boundaries. It always accompanies with responsibility and restriction⁵. Therefore, behind the freedom of

2 In the field of sociology, the relationship between people can be divided into primary-level relationship and secondary-level relationship. Primary-level relationship occurs within a relatively small, multi-purpose primary-level group and is an emotional and personal relationship. Family is the most common primary-level group. The maintenance of primary-level relations is mainly based on habits, customs, ethics, morality and group consciousness. When contradictions arise, litigation may not solve the problem effectively. But it is precisely because the normality of family relations generally relies on the internal adjustment of ethics and morality, so when the relationship is established and broken, the intervention of state power is more needed to regulate such relations and protect the vulnerable party appropriately. Secondary-level relations occur in secondary-level groups. Members gather for certain specific purposes. They relate to each other through clear rules and regulations. When disputes arise, it is more likely to be settled by litigation. Therefore, some people also regard the rights in the scope of family law (including the rights of spouses) as a kind of rights that are weak in protection and difficult to complete relief. See Pereira Coelho e Guilherme de Oliveira, *Curso de Direito da Família*, I, pp.155 ff., 4^a Edição, Coimbra Editora, 2008; Manuel Trigo, *Lições de Direito da Família e das Sucessões*, Vol. I, pp.173 ff., Faculty of Law of University of Macao, 2016; David Popenop, *Sociology*, pp.172 ff., China Renmin University Press, 1999; Zhan Wei, The Legal Philosophy of Marriage and Family Harmony, in *Hebei Law Science*, pp.47 ff., 2009, no.5.

3 Divorce is an integral part of family relations. It is marriage that creates divorce, which aims to solve problems in family life, and everyone has the right to remarry through divorce. As for the elements, procedures and effectiveness of the divorce system, part of the discussion focuses on the balance of freedom, fairness and justice involved. Especially when the implementation of the divorce system in no-fault litigation is gradually popularized in various countries, the discussion of relevant legal and social issues becomes more prominent. In modern society, although few people oppose the principle of freedom of divorce, there are different opinions on whether and how to restrict such freedom. See Yang Da Wen, *Marriage and Family Law*, China Renmin University Press, 2001; Xia Yin Lan, Research on Divorce Equity Mechanism, in *Journal of China Women's College*, Volume 16, No. 5, 2004, pp.30 ff.; *Freedom and Restriction of Divorce*, China University of Political Science and Law Press, 2007; And *The American Modern Marriage and Family System*, China University of Political Science and Law Press, 1999; Zhang Xian Yu, The Evaluation and Enlightenment of The Reform of Contemporary Foreign Divorce Law, in *China Legal Science*, No. 3, 1991, pp.106 ff.; William Josiah Goode, The Change of Divorce Patterns Around The World (translated by Chen Yi Jun), in *Sociological Research*, No. 3, 1993, pp.105 ff.; And *Family Sociology* (translated by Wei Zhang Ling), Laureate Press, 1988.

4 See Edmund Burke, *Freedom and Tradition*, Chiang Ching, Wang Rui Chang, translated by Wang Tian Cheng, Laureate Press, 2004, pp.113 ff.. At the same time, on the premise of guaranteeing that every individual can enjoy the right of freedom and equality, the strong have the responsibility to give the weak basic compensation, so that they have the opportunity to participate in social competition. Only when the principles of freedom and difference are combined can we call it a just society. See John Rawls, *Justice Theory*, translated by Li Shao Jun, Du Li Yan, Zhang Hong, Laureate Press, 2003. (See through iRead eBooks)

5 Friedrich August Von Hayek pointed out that responsibility is an integral part of freedom, which can help people to determine obligations, and therefore determine whether punishment is applicable or not, which constitutes a constraint on people's freedom of action. See Friedrich August Von Hayek, *principle of free order* (volume 1), translated by Deng Zheng Lai, SDX Joint Publishing Company, 1997, pp.89 ff..

divorce, there are still legal elements that need to be met. The starting point of restricting the freedom of divorce by law is due to careful consideration. Especially when it comes to the social effects of divorce, the absolute individual-based right of freedom becomes more dangerous. Because of this, the principle against hasty divorce is basically the focus of divorce laws in almost every country. Almost all countries seek to balance between freedom and restriction in accordance with their own legal traditions and social norm.

Due to the historic reasons, the profound influence of Portuguese law⁶ can be seen everywhere in the legal system of Macao. Although Macao's laws have specific systems and norms designed to suit local conditions, and before Macao's return to Mainland China, the localization reform of Macao's laws had begun and had been carried out in a systematic way, and various Macao's laws did differ from those of Portugal. Generally speaking, the mother-child relationship (or brotherhood) between Macao's law and Portuguese law is quite obvious. The legal system of divorce litigation serves as an example.

The current Macao Civil Code came into force on November 1st, 1999. Until then, the Portuguese Civil Code of 1966 had been applied. Compared with the past, the Macao Civil Code after the return to Mainland China has been amended to a more suitable system for the actual situation in Macao. However, in terms of the divorce system, there is no structural change from the previous provisions. There is no so-called separation system as the prepositional procedure of divorce⁷ in the current divorce system in Macao where divorce procedure adopts a dual-track system, the divorces via consent and via litigation are in line with the provisions of the Portuguese Civil Code^{8,9}. They are also the two-part parallel divorce system commonly

6 Regarding the history of Macao's legal system, the relationship between Macao's law and Portuguese law, its historical origin and current situation, Mainly refer to António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, written by António Manuel Hespanha, translated by Chao Im Peng / Cheong Weng Chon, Macao Foundation; *The Selection of Studies in Humanities and Social Sciences of Macau*. History, (Editores-in-Chief: Wu Zhi Liang, Lin Fa Qin, He Zhi Hui), *Social Sciences Academic Press*(China), 2010; Tong lo Cheng, *The Way Of Legal Development In Macao: Exploring The Legal Ideal Of One Country, Two Systems In The Puzzlement Of Post-Colonialism In Macao*, in *Collection Of Legal Development Seminars Of Four Places Across The Taiwan Straits In 2014*, pp.213 ff., Institutum Iurisprudentiae Academia Sinica; Liu De Xue, Reflections On Macao's Legal Reform And Development Strategy Under the Principle Of "One country, Two systems", in *Journal of Administration*, No. 102, pp. 865 ff., 2013; Wei Shu Jun, From Legal Culture to Rule Of Law Culture: Changes of Macao's Legal Culture Before and After the Return, in *Journal of China Executive Leadership Academy Pu Dong*, Volume 11, No. 5, pp.126 ff., 2017.

7 Before demanding divorce, couple must be separated for a certain period of time. Only after the period of separation and it is hopeless to continue the marriage, can one of them apply for divorce. The period of separation acts, in this system, as a request for divorce.

8 Portuguese Civil code (Chinese version), translated by Tong lo Cheng etc., Peking University Press, 2009; and: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis

9 In the past, divorce has been forbidden for generations. Catholicism has forbidden divorce in many countries, or forced the government to repeat it when policies loosened. The Portuguese law did not allow divorce until 1910. The Portuguese Civil Code of 1867 only allowed the division of labour between husband and wife. Only in 1910 did the system of divorce be introduced. (See *Diário do Governo*, n.26, de 4 de Novembro de 1910, the divorce law promulgated on November 3, which was considered the most liberal divorce law of the time. At the same time, Portugal also became the second country that allowed consensual divorce in 1910 after the European continent (1909). Although its divorce system was criticized as a retrogressive amendment in 1940 because of the requirement that Catholic Marriage could not be dissolved, its related system in 1910 was a pioneer. The Portuguese Divorce Act of 1910 allows divorce to be initiated on subjective or objective grounds. If it is a subjective factor, it is necessary to identify the fault party, such as adultery, serious injury, leaving home for not less than three years, etc. The request for divorce may be made at any time after marriage, and there is no statutory requirement of minimum duration of marriage or minimum separation time, but the plaintiff must make a request for solutions to minor children and maintenance problems when filing a complaint. On the contrary, if the basis of litigious divorce is an objective factor, it is not required to identify the fault. For example, the fact that a spouse separates for ten consecutive years with the consent of his or her free will or there is no news for at least four years. At this time, the premise of filing divorce lawsuit is stricter than that of the former, and there is a minimum requirement for the duration of marriage. The Portuguese Civil Code, enacted in 1966, extends the stipulation that religious marriage is not allowed to be dissolved after the amendment of the Civil Code in 1940. At the same time, it also excludes objective factors from the causes of the dissolution of civil marriage. It only allows divorce proceedings to be initiated by subjective factors which are clearly prescribed by law and which have errors. It is a typical punitive divorce system. This situation continued until the enactment of Decree No. 261/75 of 27 May 1975, which reopened the door to divorce proceedings for objective reasons and allowed the dissolution of Catholic marriages. Two years later, the Portuguese Civil Code of 1966 ushered in another reform (Reform of 1977, DL n. 496/77, 25th de November), once again bringing objective and subjective factors into the reasonable requirements of divorce proceedings. In 1998, after the promulgation of Law 47/98, the time limit for suing for divorce was relaxed. At the same time, it was stipulated that divorce should be declared in divorce proceedings if the defendant had not raised any objection and the de facto separation had actually lasted for one year. In fact, since the reform of the Civil Code in 1977, there has been a trend of "divorce to drama/tragedy" in Portugal, which highlights the importance of objective factors in divorce proceedings. With the influence and reference of the relevant systems in other European countries and the convergence and replacement of various theories in the scope of Portuguese civil law, Law 61/2008, promulgated in 2008, finally formalized the system of divorce without fault.

adopted in most countries, which is limited in length and subject matter. This paper mainly discusses the legal issues related to divorce litigation.

Traditionally, divorce proceedings in Portugal (and Macao) can be interpreted as three modes: 1.) punishment model; 2.) irretrievable breakdown; and 3.) relief model¹⁰, and each model has its own advocates¹¹.

Fault is the key word in the punishment model. It is generally believed that divorce is a punishment caused by the fault of one spouse. It is a sanction imposed by law on the spouse for his/her fault when violating marital obligations. The purpose of this punishment is to punish the party and to protect the legitimate rights and interests of the other party through divorce proceedings. According to this theory, as a punishment to the spouse at fault, divorce in litigation can only be brought by the no fault party.

The second model is irretrievable breakdown. According to this theory, the focus of divorce proceedings is not the words and deeds of spouses, but the fact that both spouses are in a situation where their marriage cannot be maintained, and their common life has broken down. This situation may be caused by either spouse or, in some cases, by the spouse of the plaintiff who initiated the divorce. That is to say, no matter which party of the spouse is responsible or whether there is a fault, the only objective factor to be considered in divorce proceedings is: the impossibility of maintaining common life. At the same time, many individuals at both doctrinal and legislative level agree that the theory of irretrievable breakdown cannot be interpreted in an abstract way, but that instead objective facts that can prove the existence of "breakdown" should be verified and analyzed concretely. Therefore, the adoption of this theory is to put the objective dimension of divorce litigation to the highest point, affirming the right of either spouse to pursue happiness as an independent individual right protected by the law. If the spouse cannot continue to obtain happiness from the marriage relationship, he/she has the legitimacy to seek for divorce. In this way, any spouse can sue for divorce as a plaintiff, even if the responsibility for the failure of the marriage (partially or mainly) lies with that spouse¹².

Under the understanding of the relief model of divorce litigation, divorce itself is not been favored but can be regarded as an act of necessity in the event of irreversible crisis in marital life, and a legal relief for the unsustainable marriage relationship. Therefore, when common life is no longer possible, in divorce proceedings, there is no need to identify and punish the party at fault (sometimes there may be no fault behavior or party at fault), but only to determine which party is not responsible for the crisis and unsustainability of the marriage relationship. This is mainly to protect the so-called "innocent party within the couple" and to give such party the legitimacy to sue for divorce on the basis of the words and deeds of the other party¹³. Generally speaking, relief is not an independent legislative motivation, and it is often in a non-dominant position in the divorce system.

10 In Portugal, it is called punishment theory (divórcio-sanção), relief theory (divórcio-remédio) and marriage breakdown theory (divórcio-constatação da ruptura do casamento). Others call it fault doctrine, purposivism and rupture doctrine of divorce legislation principles. See Tao Yi, Ming Xin, Divorce: Single Breakdown Or Mixed Doctrine, in *Chinese Journal of Law*, No. 6, 1999, pp.30 ff.; Xue Ning Lan, the Equity Mechanism in the Legislation of No-Fault Divorce, in *China Law Network*, <https://www.iolaw.org.cn/showNews.aspx?ld=12553> (2019/7/10).

11 See Pereira Coelho e Guilherme de Oliveira, *Curso de Direito da Família*, Vol. I, 4ª Edição, Coimbra Editora, 2008; Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*, Almedina, 2016; Eduardo dos Santos, *Do Divórcio, suas Causas, Processo e Efeitos*, 2ª Edição, ELCLA, Almedina&Leitão, Lda., 1998; Antunes Valera, *Direito da Família*, Vol. I, 5ª Edição, revista e atualizada, Livraria Petrony, Lda. Editores, 1999; Fidélia Proença de Carvalho, *O Conceito de Culpa no Divórcio - Crime e Castigo*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977, Direito da Família e das Sucessões*, Vol. I, Coimbra Editora, 2004; Eva Dias Costa, *Da Relevância da Culpa nos Efeitos Patrimoniais do Divórcio*, Almedina, 2005.

12 See Diogo Leite de Campos, *Lições de Direito da Família e das Sucessões*, 2ª Edição, Almedina, 2005, pp.271 ff.

13 Legislative perspectives vary from country to country. But generally speaking, the relief theory is not an independent legislative drive. It often does not play a dominant role in the divorce system, and the theory of marital breakdown and punishment can coexist or be independent. And in the divorce law of civil law countries, fault punishment, problem relief and breakdown of common life are the three main reasons for divorce. See Li Zhi Min (edition), *Comparative Family Law*, Peking University Press, 1988.

Divorce litigation has been introduced into Portuguese national law system since 1910. After several changes, the constant trend is to remove the tragic/dramatic implication of the system and the current system of divorce litigation is established on the basis of Law 61/2008, which introduced significant modifications to the Portuguese Civil Code of 1966 where the divorce part was maintaining almost similar until the legal reform of 2008. The theory for divorce in the academic circles is basically called the mixed mode for the divorce pattern before the amendment of the law in 2008. In view of this background and since the relevant parts of Macao's Civil Code are deeply influenced by Portuguese Civil Code of 1966, we can also find the characteristics of the called mixed model.

The provisions of the Macao Civil Code concerning divorce proceedings can be found in Articles 1635 to 1648.

Article 1635 (Fault Violation of Couple's Obligations) allows one spouse to apply for divorce on the premise that the other party with fault, violated the obligations of being a husband/wife¹⁴. The application for divorce here is directed at the spouse (defendant) or the party at fault, and such party is not entitled to make a divorce request. Therefore, the original intention of the law is to punish the party at fault. If the legal basis for litigation divorce is Article 1635, which states that "fault leads to breach of husband and wife's obligations" as the requirement for the plaintiff to prove, fault could be considered as the justification for divorce. From this point of view alone, it is a pure fault doctrine, or, the called accountability doctrine.

At the same time, the law also stipulates that fault must be serious or repetitive, and as a consequence, the common life of the couple cannot be maintained. From this, we can see that the punitive part of divorce litigation in Macao also requires the objective factor of "breakdown of common life".

In addition, Article 1637 of the Macao Civil Code stipulates that divorce proceedings may also be filed if there are three situations leading to the destruction of the common life. Among them, paragraph B (missing spouse without news for over three years) and C (the other party's mental ability has changed for more than three years and it is impossible to continue to live together due to its seriousness) are considered as the manifestations of the doctrine of divorce litigation relief in the Macao Civil Code. This in fact presumes the cause of relief as the breakdown of common life. Since the marriage relationship is affected by the objective reasons of B and C, and the original purpose of marriage and family establishment is hindered and destroyed, it is necessary to remedy the parties concerned. In these two cases, fault does not affect the right to claim divorce in litigation, but only the fact that the spouse who intends to divorce brings forward the fact of disappearance or mental change¹⁵. But there are still differences between the two. The divorce lawsuit based on paragraph B of Article 1637 embodies the idea of relief as the main principle and punishment as the supplement. If the grounds for litigation divorce are the disappearance of one spouse and his/her whereabouts has not been heard for more than three years, and one or both spouses have missed it (the cause of the disappearance may be unrelated to the spouse, or may be caused by the fault of one or both spouses), the Court shall make a declaration of the party at fault in the litigation divorce judgment. The main consequence of such a declaration is that for the sole or principal offender, it could be regarded as a punishment during the sharing of property in divorce proceedings¹⁶. However, if the basis for divorce in lawsuit is paragraph C of Article 1637, the

14 In this case of Macao Civil Code, the obligations for husband and wife are not abstract concepts, having very specific criteria, including mutual respect, loyalty, cohabitation, cooperation and support (Article 1533). Among them, the contents for the obligation of cooperation and the obligation of support are regulated concretely (by Article 1535 and 1536, respectively).

15 According to the second part of article 1640, paragraph 2, of the Macao Civil Code, only spouses who can point out the disappearance of another party or the change of their mental ability can be justified to sue for divorce under this clause.

16 See Article 1639, Article 1638, Paragraph 2, Article 1642, Paragraph 1, and Article 1645 of the Macao Civil Code.

Macao Civil Code does not require a declaration of fault in this lawsuit^{17 18}, which is a single and pure embodiment of the relief principle.

In addition, the “de facto” separation¹⁹ for two consecutive years referred in Article 1637 (a) of the same Code is also one of the legal basis for the destruction of common life. “De facto” separation is a legal concept. According to the provisions of Article 1637 (1), when the husband and wife no longer lives together and both or one of them no longer have the will to live together, it constitutes “de facto” separation. Thus, the situation of the breakdown of husband and wife’s common life at the objective level is formed. This clause is generally considered to be the main criterion for the breakdown of common life in divorce proceedings. At the same time, when judging whether there is a “de facto” separation, the law also stipulates subjective factors, that is, the intention of no longer living together. Therefore, it embodies the irretrievable breakdown of marriage with the combination of subjectivism and objectivism. Obviously, it is important to point out that divorce proceedings are initiated by “de facto” separation. If one or both parties cause the de facto separation by fault, the court should also declare the fault. As mentioned above, such declarations may directly lead to the disadvantage of the principal or sole party at fault during the division of property in divorce proceedings. Accordingly, divorce proceedings based on “de facto” separation for two consecutive years may constitute a form of punishment with a patrimonial nature for the party at fault²⁰. We believe that the legal provisions reflects the dualism of irretrievable breakdown of marriage in Macao’s divorce system. If Article 1637 (a) is used to request the divorce by one spouse, based on the “de facto” separation for two years, thus, the breakdown of common life and no intention to mend marriage, if the spouses, during the divorce proceedings, do not make a request for the determination of fault, it embodies the doctrine of irresponsible breakdown of divorce proceedings; otherwise, it is the doctrine of accountability breakdown.

It can be seen from this that the legislative principle of divorce litigation in Macao adopts the doctrine of syncretism, or mixedism. It takes into account three theoretical foundations: 1.) the breakdown of common life; 2.) the failure to achieve the purpose of marriage; and 3.) the violation of legal obligations by fault. It means that the legal basis for the parties to file a divorce claim can be mixed. This conforms to the law in most civil law countries, but it still has its own unique features.

17 Nevertheless, while guaranteeing the plaintiff’s freedom of divorce and the right to rebuild family with other normal persons, for the defendant in the lawsuit who is asked to litigation divorce due to the significant changes in his psychological abilities, the legislators also consider the protection and balance of the rights for the same one who has been sued for divorce because of his mental capacity. As well as we can see that Article 1647 of the Macao Civil Code clearly stipulates that if a divorce claim is made on the basis of Article 1637 (c), the plaintiff shall compensate the other party for the non-property damage caused by the dissolution of the marriage.

18 Some scholars believe that although there is no requirement for fault judgment in the code, exceptions are not necessary. For example, one spouse’s serious mental ability changes are the initiator of the other spouse. See Jorge Duarte Pinheiro, *O Núcleo Intangível da Comunhão Conjugal, Os Deveres Conjugais Sexuais*, in Coleção Teses, Almedina, Coimbra, 2004, pp.368; Miguel Teixeira de Sousa, *O Regime Jurídico do divórcio*, Almedina, Coimbra, 1991, pp.91.

19 Separation “de facto” state occurs when couples in marriage stop living the common life without getting divorced. Usually it is used as an initial step in the divorce process, or as a temporary state for couples to gain perspectives on the marriage in order to determine if the divorce process will be taken. A separation can be decided unilaterally by one of the spouses moving away or even without moving away but simply ceasing to have the relationship as married as before. Being separated for a given period of time is one of the requirements for the separation in fact to be legally qualified in many counties.

20 According to the first part of Article 1640, paragraph 2, of the Macao Civil Code, either spouse has the legitimacy to initiate such divorce proceedings.

PART II. THE ANALYSIS OF DIVORCE DATA AND CASES IN MACAO

2.1. Freedom of Divorce as a Basic Principle?

In the current legal system of the Macao Special Administrative Region, laws concerning marriage and family mainly include the Basic Law of Macao, the Civil Code of Macao, the Outline Law of Family Policy, international treaty agreements and other codes and laws²¹. Among them, the Basic Law of Macao has made multi-layered, typified and autonomous norms on the basic rights of residents²². In Article 25, the principle of equality is established, which stipulates that all Macao residents are equal before the law and are not discriminated against. Article 38 also stipulates that Macao residents shall enjoy freedom of marriage and the right to establish a family. At the same time, Article 41 also stipulates in a general way that Macao residents enjoy other rights stipulated and guaranteed by Macao law.

There is no provision prohibiting divorce in Macao's law, but can it be presumed that freedom of divorce is a basic principle explicitly defined in Macao's Family Law? Some people believe that since the Basic Law of Macao clearly stipulates in Article 38 that Macao residents have the freedom to marry and organize their families, the freedom to dissolve marriage derives from this article. That is to say, on the premise of satisfying the legal requirements, spouses who wish to divorce should not be forced to maintain their marital relationship²³, the freedom of divorce. At the same time, some people also believe that the right of freedom stipulated in Article 72 of the Macao Civil Code can refer to all forms of freedom in general. Although there is no provision in this article that directly and clearly regulates the right of freedom in dissolution of marriage, its paragraph 9 can be used as the legal basis of the principle of freedom to divorce²⁴. The same logic can also be used to interpret the relationship between Article 25 and Article 41 of Macao Basic Law and the principle of freedom to divorce²⁵.

In order to get rid of the marital relationship and give the spouse who has no intention of continuing the marital relationship the right to pursue happiness²⁶. We can see that the principle of freedom of divorce is not directly and clearly defined in the Basic Law²⁷, the Civil Code or other laws of Macao. Although Macao's divorce system gives residents the freedom and right to apply for divorce within a limited scope, due to the existence of the divorce by fault system, the freedom of divorce has not been fully realized²⁸.

There is no doubt that, through the amendment of the divorce system in different periods, we can see that the specific expression of the divorce clause has fully demonstrated

21 The Legal Origin of the Family Law in Macao, including the Changes of the Legal Origin in Different Periods (before and after the Return to Mainland China), See Manuel Trigo, *Lições de Direito da Família e das Sucessões*, Vol. I, pp.30 ff., Faculty of Law of University of Macao, 2016.

22 See Jorge Bacelar Gouveia, *Direito Constitucional de Macau*, Instituto do Direito de Língua Portuguesa, Lisboa, 2012, pp.52 ff..

23 See Manuel Trigo, *Lições de Direito da Família e das Sucessões*, Vol. I, pp.103 ff., Faculty of Law of University of Macao, 2016; Xia Yin Lan, An Analysis of the Family Law of Macao's Civil Code, in *Perspectivas do Direito*, No. 8, 2000, pp.21 ff..

24 Article 72, paragraph 9, of the Macao Civil Code stipulates that the right to liberty shall be subject to short-term restrictions only on a voluntary basis, depending on the reasons for such restrictions.

25 See Manuel Trigo, *Lições de Direito da Família e das Sucessões*, Vol. I, pp.104 ff., Faculty of Law of University of Macao, 2016; José Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa*, CEJJ, 2013, pp.92 ff.

26 See Diogo Leite de Campos, *Lições de Direito da Família e das Sucessões*, 2ª Edição, Almedina, 2012, pp.104 ff.

27 In fact, the Portuguese Constitution stipulates in its article 36, paragraph 2, that the conditions and effects of the conclusion and dissolution of marriage shall be stipulated by law. Although the principle of freedom of divorce has not been put forward directly and explicitly, it can be understood according to the meaning disclosed in the legal provisions. In mainland China, the law's permission for divorce is also included in Article 37 of the Chinese Constitution on freedom (the personal freedom of Chinese citizens is inviolable).

28 Perhaps it is for this reason that the scholars did not elaborate the principle of freedom of divorce as a basic principle of Macao's Family Law in their works. See Manuel Trigo, *Lições de Direito da Família e das Sucessões*, Vol. I, pp.61 ff., Faculty of Law of University of Macao, 2016.

the different attitudes of the government towards the freedom to divorce in different periods. The practice of the freedom to divorce often modifies when the relationship between the government and society changes. The government makes it possible to intervene and govern individual's marital behavior by law, but, needless to say, also we can see the realities over the world that the freedom of divorce has been strived enriched and innovated by most individuals as the type of freedom with paramount importance²⁹.

2.2. Divorce Data and Analysis in Macao

According to official statistics³⁰, Macao's permanent population has gradually increased from around 300,000 in the early 1990s to about 670,000 in 2018. Within nearly 30 years (1990 to 2018), the population has doubled (339,000 to 667,000). In 1990, the government recorded 95 divorce cases, which accounted for a low proportion of the total permanent population at that time. In the first year of Macao's return (2000), total permanent population was about 430,000. In that year, there were 1,222 marriages and 369 divorces. Among them, 127 new lawsuits and divorces were brought in this year, and the rest were consensual divorces³¹. In 2001, Macao's permanent population did not increase significantly, totaling 436,300 people. There were 348 divorce recorded in that year, of which 116³² were new cases of litigation divorce that took their first step of judicial process in the Court (Court of First Instance). In 2004, 1,737 marriages were registered in Macao (162 remarried males and 116 remarried females) and there were 475 divorces, of which 167 were new cases. In 2005, Macao recorded 1,734 marriages (178 remarried males and 149 remarried females). In the same year, there were 573 divorces, of which 149 were newly filed.

Until October 15th, 2013, divorce proceedings were conducted by the general civil courts of the Court of First Instance. The specialized Court for Family and Minor Issues did not start functioning until October 16th, 2013³³. According to the data of 2013, the total number of marriages was 4,153 (the proportion of remarried men and women was 13.9% and 11.3%, respectively, 0.9% lower and 0.7% higher than 2012), and the total number of divorces was 1,172. In the second year after the operation of the Family and Minor Courts (2014), the permanent population of Macao recorded about 640,000 people, and the total number of marriages was 4,085 (the proportion of remarried men and women was 15.4% and 12%, respectively, up 0.2 and 0.1% from 2014). The total number of divorces was 1,308. There were 231 new divorce cases filed that year. The total number of marriages in 2015 was 3,719 (the proportion of remarried men and women was 14.1% and 11.4% respectively, up 1.3 and 0.6% from 2013). The total number of divorces was 1,168, of which 212 were newly filed³⁴.

Over the past three years (2016, 2017 and 2018), the number of marriages in Macao has remained at about 3,800³⁵, and the number of divorces has remained at about 30 to 40

29 Even from the perspective of guaranteeing the freedom of marriage, the freedom of divorce should be protected to the greatest extent. Can restricting the freedom of divorce, unable to end the existing marriage relationship and pursuing the next marriage be regarded as a direct and substantial restriction on the freedom of marriage mentioned in the Basic Law?

30 See <https://www.dsec.gov.mo/Statistic.aspx?NodeGuid=7bb8808e-8fd3-4d6b-904a-34fe4b302883>

31 The data of annual case statistics at the website of Macao court begin from 2000, See <http://www.court.gov.mo/zh/subpage/statisticstjb?report=2000>

32 See <http://www.court.gov.mo/zh/subpage/statisticstjb?report=2001>

33 See the Administrative Regulations at 15 October, https://bo.io.gov.mo/bo/i/2013/42/regadm23_cn.asp.

34 Data Sources: Macao Bureau of Statistics and Census and Macao Court Web pages.

35 The proportion of remarried men and women in Macao in 2015 was 15.4% and 12.0% respectively, up 1.3 percentage points and 0.6 percentage points from 2014. In 2016, the remarried males (631) and females (522) accounted for 16.2% and 13.4% respectively, up 0.8 and 1.4 percentage points from 2015. Remarried males (662) and females (562) accounted for 17.0% and 14.5% respectively in 2017, up 0.8 and 1.1 percentage points from 2016. Remarried males (635) accounted for 16.5% in 2018, a slight drop of 0.5 percentage points from 2017. Remarried females (586) accounted for 15.3%, an increase of 0.8 percentage points. (Data source: Macao Court website and Macao Bureau of Statistics and Census website).

percent of the total number of marriages³⁶, consensual divorces are the majority, accounting for more than 90 percent of the total number of divorces. Overall, divorce cases in Macao continue to rise, with divorce cases in 2018 rising sixteen times as much as those in 1990. Even comparing the data of 2018 with the data of the second year (2003) after Macao's return, when gambling was liberalized, divorce cases increased by about 3.5 times³⁷, and, we must notice that the statistics did not include those couples who were in litigation divorce proceedings, or with divorce process in an idle situation or, those who were in the separated state until 2 years completed to be able to initiate a divorce process. As we can see above, apart from the doubling of divorce rate, the statistics also show that divorce litigation accounts for a very low proportion, almost 90% of divorces being achieved through consensual divorce. We would ask why? The reasons need to be considered in different ways.

First of all, divorce procedure is relatively simple when both agree with the divorce, i.e., consensual divorce. Couples who want to divorce and meet the legal requirements for divorce by a consensual path can dissolve their marriage in a relatively short time and through simple procedures, even without going to the Court. It saves time, money and protects their privacy to the greatest extent.³⁸

The second reason is the inefficiency of litigation. In fact, the inefficiency of Macao courts in handling litigation is no longer surprising, and this problem could not be solved overnight. Indeed, after the return, especially with the rapid development of the gambling industry and tourism, Macao's economic structure and social environment have undergone tremendous changes, resulting in a substantial increase in the number of lawsuits and increase in the difficulty of trial. In addition, the number of judges is relatively small, the litigation procedure is complex, the way of dispute resolution is single, and the backlog of cases is increasing year by year. Faced with practical difficulties and complaints from the public, how to set up a speedy and economical judicial procedures on the basis of balancing judicial justice and efficiency is one of the most important tasks in Macao's judicial reform³⁹. But these are not the only two reasons.

Furthermore, the inefficiency of divorce litigation, the acceptance of cases, the trial and the closure of cases have not been smoothly promoted. The procedural factors, of course, are

36 Data Sources: <https://www.dsec.gov.mo/PredefinedReport.aspx?ReportID=1>

37 It is pointed out that the liberalization of gambling rights has brought opportunities for economic development in Macao, but the high-intensity work and shift system required by the gambling industry and tourism have a direct impact on the couple's time together. At the same time, with the improvement of consumption level and the increase of living cost in Macao, more and more women in Macao have joined the workplace and more dual-career families. This is also one of the reasons for the lack of communication between husband and wife and the contradiction between families. See People's Daily News on September 24, 2013 (Marriage Attitude Changed, Divorce Rate in Macao Continuously Rising) <http://hm.people.com.cn/n/2013/0924/c230533-23019550.html> (2019/7/1) Statistics show that there are 440 divorces in Macao in 2003 and 1544 divorces in 2018. Sources: Macao Court Website and Macao Bureau of Statistics and Census Website. In addition, we believe that although the official data on divorce are well documented, there are absolute cases of unsuccessful divorce due to legal difficulties, and those factors that lead to family breakdown have not been eliminated. Therefore, although couples are not allowed to divorce by the law, they are in the relationship of "having different dreams in the same bed", in a separation or conflict situation, all of which are not included in the official statistics of divorce.

38 In Macao, if both husband and wife agree to divorce, they can apply to the Civil Registration Bureau or the court. The divorce declaration made by the Registrar of the Civil Registration Bureau has the same effect as the court's judgment. However, only in the absence of minor children born to a husband and wife, can the Civil Registration Bureau handle divorce. Although the law also sets certain conditions for two wishes to divorce (after one year of marriage, agreement must be reached on three major issues: maintenance, parental rights of minor children and family residence). However, spouses who intend to divorce need not disclose the reasons for divorce, and as long as they insist on the intention of divorce, they can generally dissolve the marriage relationship quickly and with the maximum protection of personal privacy, and there is less protracted tug-of-war. Details can be found in Articles 1628 to 1634 of the Macao Civil Code.

39 In recent years, at the opening ceremonies of all previous judicial years in Macao, it has been pointed out that improving the efficiency of lawsuits in Macao should be the focus of judicial reform in Macao. For example: Speech by Sam Hou Fai, President of Macao Court of Final Appeal, at the opening ceremony of Macao Judicial Year 2017-2018, <http://www.court.gov.mo/uploads/attachment/92/pdf/1508385892rrvre.pdf>.

affected by the structure and operation of the court itself. On the other hand, from the perspective of substantive law, is the content of the divorce system itself conducive to the emergence and handling litigation? To put it another way, is there any suspicion that the provisions of the Macao Civil Code concerning divorce proceedings limit the freedom of divorce excessively? Is it advantageous for spouses intending to divorce to choose litigation to force their spouses to accept the dissolution of their marriage? Will it not only cause psychological problems to the parties, but also cause delay in divorce proceedings and limited success rate?

2.3. Cases and Analysis of Divorce Litigation in Macao

Based on a limited number of litigious cases, divorce proceedings in Macao can be based on two main types of grounds: fault-based on violation of husband and wife's obligations and the breakdown of common life. The latter includes three aspects: 1.) de facto separation for two years; 2.) disappearance of three years without news; and 3.) the mental ability of the opposite party has changed for more than three years, and it is impossible to continue to live together because of its seriousness. In this paper, the focus of this analysis will be limited to fault-based violation of husband and wife's obligations and de facto separation.

2.3.1. De facto Separation: Subjective and Objective Elements

It is a manifestation of irretrievable breakdown that the "de facto" separation lasts for two years and claiming divorce in a lawsuit. As long as both subjective and objective legal requirements are in place, as a permanent defense, the court has no discretion in deciding on divorce claims⁴⁰. About this point, there is no objection in Macao's legal circles. However, in practice, there are different opinions on the legal identification of relevant legal elements⁴¹.

Take judgment no. 457/2015 as an example. In first instance, the plaintiff filed a divorce lawsuit against his spouse (defendant). The lawsuit was based on the fact that the two persons had separated for more than two years by the date of filing the divorce lawsuit, and neither of them had any intention to resume their common life. However, the Family and Minor Courts of the lower court ruled that the reasons for the plaintiff's request were not valid and therefore refused to support the claim for divorce. The Court of First Instance held that, after applying the provisions of Articles 1637/a and 1638/1 of the Macao Civil Code, the time requirement for divorce prosecution on the grounds of de facto separation must be met, i.e. no longer having the will to live together should exceed two years. However, although it has been proved in the case that the plaintiff developed an extramarital relationship with another woman since 2011 and has not returned to family home since then, the date of filing the divorce proceedings (2012/11/22) should be the starting point for the plaintiff to show no interest in returning to his spouse's life with the defendant. Therefore, the Court of First Instance held that by the end of the debate in the first instance (2014/11/10), the plaintiff was separated from the defendant for less than two years, and the subjective elements of de facto separation have not been met, so the Court would not support plaintiff's case.

The plaintiff appealed to the Court of Second Instance, believing that the date on which

40 See Antunes Valera, *Direito da Família*, Vol. I, pp.501 ff., 5ª Edição, revista e atualizada, Livraria Petrony, Lda. Editores, 1999.

41 Major Reference Cases: Judgements of the Intermediate Court nos. 388/2010, 158/2011, 723/2013, 728/2014, 756/2014, 271/2015, 386/2015, 457/2015 and 267/2017.

he hired a lawyer to prepare for divorce proceedings (signing a power of attorney on May 21, 2012) should be at least the date on which he decided that he was no longer willing to maintain a marital relationship with the defendant, rather than the date on which his indictment was actually distributed in the Court of First Instance (November 22th, 2012). Therefore, the subjective elements of “de facto” separation already exist, requiring a ruling on the grounds of appeal and then a divorce declaration.

According to the provisions of Article 1638, paragraph 1 of the Macao Civil Code, divorce proceedings based on “de facto” separation require both objective and subjective elements: husband and wife no longer live together and neither of them or one of them has any intention of living together⁴². But in special cases, even if couples are living and eating together, if there is no or very little interaction in their lives, or only so because of their children, and they get along with each other like strangers and have no sexual relationship, it can be concluded that the objective conditions for de facto separation are available. Typical reasons for this behavior are: protecting the feelings of minor children, worrying about the comments of society and family members, and being unable to move because of limited financial capacity. Therefore, the objective elements of de facto separation should not be judged mechanically and rigidly. It is necessary to make a concrete analysis of the specific circumstances. The key point is to consider whether the common life of husband and wife actually exists (or no longer exists).⁴³

Another element of “de facto” separation is related to subjective will. In the above-mentioned case, the Court of Second Instance did not agree with the conclusion of the Court of First Instance that the subjective elements involve the feeling and emotion, and that the will to live together is gradually generated with the passage of time in many cases, so it is difficult to determine an accurate time point. Therefore, the determination should not be too strict, but should be based on the overall facts, and then according to the general rules of experience to judge the intent of the problem. At the same time, the subjective element should be viewed as supplementary. The plaintiff/appellant in the aforementioned case has left home before filing for divorce proceedings and has developed extramarital affairs with other women. It can be seen that the plaintiff/appellant no longer attaches to the marital relationship established with the defendant/appellant, and the common life between husband and wife's no longer existed since then. In summary, the Court of Second Instance held that the law did not require that one or both spouses no longer have the intention to live together for two years before a divorce claim could be justified. In view of the fact that the relationship between the husband and wife has actually broken down and that the appellant has not actually lived together for more than two years, and has no intention of continuing to live together. Therefore, the elements of de facto separation in this lawsuit are all filled. The reason for the appellant's divorce claim should be decided and the declaration of divorce between the plaintiff and the defendant should be permitted.

As for the legal determination of “de facto” separation, there are mainly some disputes in the following aspects.

First question: Is there a time requirement for the subjective factor of “no longer having the intention to live together”? Macao's Court of Second Instance has basically adopted the judgment orientation in the case above. That is to say, the subjective factors should be

42 In another case, because of the work, health or other reasons of both husband and wife or one of them, the couple actually do not live together, eat together and sleep together, but the couple still maintains the willingness to maintain the marriage relationship. (See Macao Intermediate Court Judgment No. 635/2015: Living at home with a spouse for work reasons should not be regarded as a de facto separation which constitutes a ground for divorce proceedings). This is also the reason why we should consider the subjective factors in de facto separation to judge whether divorce can be brought.

43 See Pires de Lima, Antunes Varela, *Código Civil Anotado*, Vol. IV, pp.541; Miguel Teixeira de Sousa, *O Regime Jurídico do divórcio*, Almedina, Coimbra, 1991, pp.95; Eduardo dos Santos, *Do Divórcio, Suas Causas, Processo e Efeitos*, 2ª Edição, ELCLA, Almedina&Leitão, Lda., 1998, pp.161.

determined on the basis of the overall facts. According to the general rule of experience, it can be judged whether the husband and wife or one party no longer has the intention of living together, and the law does not require one or both spouses no longer have the intention of living together to last for two years before the divorce request can be ruled as a justification. Some Portuguese judges even believe that the filing of divorce claims in litigation itself means that the claimant has no intention of continuing marriage. That is to say, as long as the lawsuit is filed, the subjective elements of “de facto” separation are considered to be satisfied⁴⁴. It is also argued that subjective elements are actually complementary. The Macao Court has also ruled that for the requirement of “de facto” separation for at least two years, legislators had a focus on meeting objective elements rather than on subjective elements⁴⁵.

However, the objection holds that the legal requirements laid down in the provisions of law should not be directly ignored. If the act of filing for divorce is equivalent to the intention not to live together, it is equivalent to the provisions of Article 1638, paragraph 1, part 2, of the Civil Code. Because it is uncontested and unnecessary to prove that there is no desire to live together at the time of filing a complaint. The “de facto” separation defined by law exists only when the common life is no longer sustainable and neither of the two parties or one party wishes it to last for more than two years. Because only in this way can there be sufficient reason to show that there is no hope and necessity for mediation, and the irretrievable breakdown is meaningful⁴⁶.

Another controversial issue concerning “de facto” separation is: if the time requirement of “full two years” in the objective elements of “de facto” separation, when should we start to calculate the starting point of de facto separation? How can we know from which date the husband and wife no longer live together? Scholars generally believe that it is necessary to ascertain when the symbolic content of common life ends and take this time point as the criterion. For example, if a spouse moves out of the family home on a known date and never returns, that date can be regarded as the starting point for the breakdown of a common life. In addition, in terms of time, is suspension allowed? Most Portuguese theories hold that if a couple no longer lives together for a period of time, the calculation of the two-year period does not have to be suspended if those meetings are related to the sharing of property or relating to children’s affairs. However, if the purpose of reconnection is to try to continue their common life, the prior separation time will not be effective in calculating the period of no longer living together. Accordingly, if the attempt to continue their common life fails and the two sides no longer live together, the time of “de facto” separation must be recalculated⁴⁷. The objection is that the time of trying to reunite should not be suspended, otherwise it will affect the willingness of couples to try to continue their common life. The suspension effect can only be given to the real coincidence and the time for the re-establishment of the common life⁴⁸.

Finally, with regard to the time requirement in the statutory requirements of “de facto” separation, the mainstream opinion is that if, at the time of filing for divorce, as an objective

44 See acórdão da Relação de Coimbra, de 17 de Outubro de 2006 (proc. N.º 2833-/04.0TBFIG.C1), acórdão do STJ, de 3 de Junho de 2004 (proc. N.º 04B1564), acórdão do STJ, de 5 de Julho de 2001 (proc. N.º 1858/01). Macao: Intermediate Court Judgment No. 158/2011.

45 Judgment of the collegial panel 723/2013 of the Macao Intermediate Court.

46 Pereira Coelho e Guilherme de Oliveira, *Curso de Direito da Família*, Vol. I, pp.638, 4ª Edição, Coimbra Editora, 2008; Courts with the same opinion, see acórdão do Tribunal da Relação de Coimbra, de 12 de Abril de 2011 (proc. N.º 235/08.8TBSRT.C1).

47 See Francisco Pereira Coelho, *Divórcio e Separação Judicial de Pessoas e Bens Na Reforma do Código Civil*, in *Reforma do Código Civil*, Ordem dos Advogados, Lisboa, 1981, pp.38.

48 See Miguel Teixeira de Sousa, *O Regime Jurídico do divórcio*, Almedina, Coimbra, 1991, pp.84 ff; Eduardo dos Santos, *Do Divórcio, Suas Causas, Processo e Efeitos*, 2ª Edição, ELCLA, Almedina&Leitão, Lda., 1998, pp.163.

factor of “de facto” separation, the time (of no longer living together) has not been more than two years, the Court shall not accept the lawsuit, although, there are still judges who disagree⁴⁹.

This author has not found any record of the declaration of fault in the case of divorce due to “de facto” separation on the website of Macao’s Courts, so the author concludes that the declaration of fault is rarely made in this type of divorce. However, according to Article 1638, paragraph 2, and Article 1642, paragraph 1 of the Civil Code, the declaration may also exist. Its main function is to determine who the principal party at fault responsible is for the separation, so as to give effect to the sharing of property and compensation for damages⁵⁰. It is worth noting that no matter who is the sole or main party at fault, both husband and wife have the legitimacy to bring a lawsuit.

2.3.2. Breach of Husband and Wife’s Obligations by Fault

According to the judgment published on the website of Macao’s Courts⁵¹, there are basically two controversial issues in the course of the debate on the cases of divorce claims due to the fault of one or both spouses in breach of husband and wife’s obligations: Is it a breach of husband and wife’s obligations? Is it a fault violation?

As mentioned earlier, Article 1533 of the Civil Code stipulates obligations between husband and wife, includes respect, loyalty, support, cohabitation and cooperation. Among them, the duty of cooperation and support is regulated by specific laws, while the duty of respect, loyalty and cohabitation also has specific criteria, which are not controversial in theory, so the same are not discussed here⁵².

PART III. NO-FAULT LITIGATION DIVORCE AND MACAO’S DIVORCE LAW

3.1. Fault-free divorce proceedings following the enactment of Portuguese Law 61/2008

Historically, there have been many discussions on the mechanisms and orientation of divorce system, from prohibition to permission, from authoritarianism to equality, from restrictionism to liberalism, from fault doctrine to no-fault doctrine, from accountability doctrine to blamelessness doctrine. In Portugal, in order to fully protect citizens’ freedom of choice, respect the basic principles of equality of rights and duties between spouses, and to adapt

49 Judges of the Supreme Court of Portugal, in their judgements No. 05B2266 and 07A297, stated that on the one hand, the time requirement in the legal requirements should be taken into account, on the other hand, the principle of the present determination (*princípio da atualidade da decisão*) should also be taken into account, and that the latter is superior to the former. Therefore, the time in the process of litigation should also be included. As long as the de facto separation has been completed for two years before the judgment is rendered, the objective factors will be satisfied.

50 If a claim for damages is made, the law requires that it be filed in the original divorce action (Article 1647, paragraph 2, of the Civil Code).

51 The main reference judgments are: Intermediate Court No. 248/2005, No. 257/2006, No. 158/2011, No. 168/2013, No. 723/2013, No. 45/2015, No. 270/2015, No. 1039/2015, No. 636/2017, and Court of Final Appeal No. 28/2011.

52 The obligation of husband and wife to respect each other first appeared when the Portuguese Civil Code was revised in 1977. It is generally believed that it contains two elements: Positive and negative. On the positive side, it means that couples are required to get along with each other at least with mutual respect. If one party does not talk to the other party, does not care about family affairs or spouse affairs, and treats the spouse impolitely, it is a violation of the obligation of positive respect. Negative respect obligations are understood to be inviolable to the physical or mental integrity of the spouse. Any improper act that results in the loss of spouse’s dignity, reputation or image is also a violation of the obligation of respect. When discussing the duty of loyalty between husband and wife, some theories hold that physical and psychological loyalty should be included, but others hold that psychological derailment should be included in the scope of obligation of respect. The duty of cohabitation includes living together, eating together and sleeping together. Sexual relationship is a necessary factor for sleeping together. The duty of support refers to the duty of both husband and wife to provide support according to their respective abilities and to shoulder the family burden together (Article 1536, 1537 of Macao Civil Code). The duty of cooperation refers to the mutual support and assistance between husband and wife, and the joint responsibility for life of the families established by both parties (Article 1535 of Macao Civil Code).

to the divorce model chosen by most European countries⁵³, the divorce system was deeply reformed by Law no. 61/2008, which was passed in October 2008. Draft Law no. 509/X⁵⁴, which states the justifications for the legislation, states that no one should maintain marriage under compulsion after the breakdown of the relationship between husband and wife. The reasons for the breakdown vary, including the breakdown of marriage⁵⁵, unfair and unequal treatment, or the unacceptable behavior of one spouse by the other spouse. Therefore, even if the other spouse objected or had no fault, the spouse who did not want to maintain the marriage should still have the right to ask for divorce⁵⁶. In fact, it is precisely because of this basic concept that Portugal's divorce law reform in 2008 first abolished the term "wrongful divorce" from its name and replaced it with "divorce without the consent of the other spouse"⁵⁷.

It can be seen that the fault is no longer regarded as the basis for divorce proceedings. The Portuguese Civil Code, as amended by Law no. 61/2008, completely deletes the original content of Article 1779 (breach of husband and wife's obligations by fault). Thus, the tone of no-fault divorce has been set⁵⁸, which can also be said to follow the criteria of irretrievable breakdown of marriage.

Amended Article 1781 (Breakdown of Marriage) constitutes the sole legal basis for divorce proceedings:

53 The European Family Law Principles Concerning Divorce and Spouse Support after Divorce (promulgated by the European Family Law Commission, established on September 1, 2001) published in 2004 is regarded as one of the sources and bases for the reform of the divorce law in Portugal in 2008. The document sets up 20 principles, mainly to give guidance and promotion to European countries in legislation on divorce and related issues. The first ten principles are related to divorce, including the principle of freedom of divorce and the mode of divorce without the consent of other spouse. Portuguese Law 61/2008 absorbs most of these principles. See Jorge Duarte Pinheiro, *Ideologias e Ilusões no Regime Jurídico do Divórcio e das Responsabilidades Parentais*, in *Estudos em Homenagem a Carlos Ferreira de Almeida*, Almedina, 2011; Wu Yong, *The Latest Development In The Process Of European Family Law Unification: From The Perspective Of The European Family Law Association*, in *Contemporary Law Review*, No. 4, 2008, pp.45 ff; *The European Family Law Principles on Divorce and Spouse Support after Divorce can be found in the following links*: <http://ceflonline.net/wp-content/uploads/Principles-English.pdf> and Katharina Boele-Woelki, *Principles Of European Family Law Regarding Divorce And Maintenance between Former Spouse*, Antuérpia/Oxford, Intersentia, 2004.

54 Draft Law 509/X aims at introducing a new paradigm of divorce. One of the driving forces is the change of concept. Marriage is no longer regarded as a permanent or tending permanent relationship based on the commitment between two persons, but as a life-related agreement between them for the purpose of self-realization. This agreement is different from the traditional contract. Its connecting point lies in the affection between the two persons. If the affection disappears, the marriage will lose its foundation. The static marriage relationship should be disintegrated because of the disappearance of the dynamic emotional connection between the husband and wife and the breakdown of the common life. This view takes emotional factors into consideration, and highlights the importance of emotions to the conclusion and preservation of marriage. In addition, in Friedrich Engels's book "Family, Private Ownership and the Origin of State", he also mentioned that if only marriage based on love is moral, then only the marriage that continues to love is moral.

55 The term "marital breakdown" is used in the revised Portuguese Civil Code in 2008 as the legal basis for divorce without the consent of the other spouse. These statements do not appear directly in the provisions of the Macao Civil Code on the basis of divorce, whether they are "marital breakdown" or "emotional breakdown". In the Civil Law of the Mainland of China, there has always been a debate about whether "emotional breakdown" can become the standard of divorce. Although Article 32 of the revised Marriage Law of 2001 retains the standard of "emotional breakdown between husband and wife", and in its paragraph 3, it cites four common and frequently occurring specific situations as an example of judging that a couple's emotions have been broken and allowed to divorce. Other grounds for emotional breakdown are also allowed. However, the requirement of amending "breakdown of marital relations" to "marriage breakdown" has not stopped. Most civil law scholars and marriage law experts believe that the amendment of the Marriage Law in 2001 failed to define the "marital breakdown" as a defect of the amendment. Therefore, they call for adherence to the amendment, which will be reflected in the ongoing work of drafting the Civil Code of China. However, in the case of basically one-sided opinions, we also find that some judges clearly oppose the use of "marriage breakdown" instead of "marital breakdown" as the basis for divorce. See Wang Li Ren, *The Divorce Criterion Of "The Couple's Relationship Has Indeed Broken Down" Can Not Be Shaken - And Discuss With Professors And Scholars Such As Wu Chang Zhen (I)*. http://www.lawtw.com/article.php?template=article_content&parent_path=,1,783,&article_category_id=849&job_id=105770&article_id=45948 (2019/7/17)

56 After Law 61/2008, the declaration of breach of husband and wife's obligations and its legal consequences will be judged by the general courts in independent proceedings.

57 The current Portuguese Civil Code has adopted the revised new formulation in its Article 1773, paragraph 1: Divorce can be divided into two divorces and divorces without the consent of the other spouse (before modification, divorce can be divided into two divorces and divorces in litigation). Article 1781 also changed the title to "Break of Marriage". But the title of the third section still uses the term "litigation divorce". The two wishes of divorce in Portugal can only be handled in the Civil Registry Office, and divorce without the consent of the other spouse must be completed through litigation.

58 Draft Law 509/X holds that the no-fault divorce system is the inevitable result of the sensibilization (sensibilização), individualization (individualização) and secularization (secularização) movements under the influence of modern ideas. Of course, there are a lot of people who strongly oppose this argument. Some even criticize it fiercely. They think that they deviate from responsibility, value and sacrifice. See Rabindranath Capelo de Sousa, *Recentes Alterações Em Direito Da Família, Direito Dos Menores e Direito Das Sucessões*, Boletim da FDUC, Vol. LXXXIX, Tomo I, Coimbra, 2013, p118.

The following constitute the grounds for divorce without the consent of the other spouse:

- a. "De facto" separation lasted for continues for one year;
- b. The mental ability of the spouse of the other spouse has changed for over a year, and because of its seriousness, common life cannot be sustained;
- c. Missing and not have been heard for more than one year;
- d. Any other facts that can prove the breakdown of marriage, whether or not the spouse is at fault.

Thereafter, both spouses may file for a divorce claim, and it is no longer necessary to declare the principal or sole party at fault during divorce proceedings. Although the definition and violation of husband and wife's obligations still have their legal consequences and importance, as far as the divorce procedure itself is concerned, whether the husband and wife's obligations are violated or not and whether the fault is violated has no direct relationship with whether divorce is permitted⁵⁹. Because the procedure of divorce proceedings itself no longer carries out the determination of fault, the court no longer needs to consider fault when deciding the outcome and effectiveness of divorce proceedings, nor does it have any property penalty for the sole or main party at fault before amending the law in 2008.

Of course, this does not mean that the litigation divorce system after the amendment completely ignores the property effects of divorce. According to Article 1790 of the current Portuguese Civil Code, no party may acquire more property in the sharing of divorce, regardless of the property system applicable to marriage between husband and wife. Legislators believe that such a provision helps to prevent divorce as a means of enrichment. At the same time, the division of the common property system can also embody the principle of fairness and consider both spouses' contributions to the family during the period of marriage⁶⁰.

At the same time, Article 1791, paragraph 1, of the Portuguese Civil Code stipulates that:

A divorced spouse loses the benefits he or she will receive from another party or a third party as a result of the celebration of marriage or because of his or her marital status, and regardless of the benefit being prior to or subsequent to the act of marriage⁶¹. As long as the lawsuit is about divorce, both spouses lose the relevant interests. The new divorce law adopts a one-size-fits-all approach, replacing the usual practice of punishing the wrongdoer in the past while benefiting innocent spouses.

The third change relating to the validity of divorce property is Article 1676 of the Civil Code, which stipulates the specific content of husband and wife's family obligations. The second paragraph of Law no. 61/2008 is amended. Prior to the amendment Paragraph 2 stipulated that if the family burden borne by one of the spouses exceeds the portion of the family burden that should be borne by the spouse as stipulated in paragraph 1, it is presumed that the spouse will waive the right to claim compensation from the other party⁶². After amending the law, the

59 After the entry into force of Portuguese Law 61/2008, a study (produced on September 30, 2010) showed that although the public had various doubts or concerns about the practice of divorce without fault, the vast majority of respondents, especially lawyers, had positive opinions on the amendment of the divorce law, and believed that the new system was conducive to reducing the potential of divorce as a wealth tool. In addition, according to the statistical data at the time of making the report, the average number of newly filed divorce lawsuits has not changed significantly after the initial stage of the law's entry into force compared with the data before the amendment of the law. See *O Novo Regime Jurídico em Avaliação*, Editor-in-Chief of Boaventura de Sousa Santos, Centro de Estudos Sociais da Universidade de Coimbra, 2010.

60 Portuguese scholars do not fully agree with this part of the amendment. The main criticisms can be consulted: Rita Lobo Xavier, *Recentes Alterações ao Regime Jurídico do Divórcio e das Responsabilidades Parentais*, Almedina, 2009; Cristina Araújo Dias, *Uma Análise do Novo Regime Jurídico do Divórcio*, Almedina, 2009; Colaço Amadeu, *Novo Regime do Divórcio*, Almedina, 2009.

61 Paragraph 1 of Article 1646 of the Macao Civil Code is similar to it, but the person who loses interest must be the sole or main fault party.

62 Paragraph 1 of this article stipulates that both husband and wife shall share the responsibility of assuming family burdens in accordance with their respective abilities, and either party shall fulfill this obligation by using their resources to cope with the related burdens, do housework, take care of and educate their children. The content is the same as the first paragraph of Article 1537 of Macao Civil Code.

presumption was abolished and changed to stipulate that if one spouse excessively abandons his/her interest, especially his professional life, because of living together, which results in a family burden heavily exceeding that which should be borne by him/her in accordance with the provisions of the first paragraph, and consequently suffers property losses, the spouse shall have the right to request the other spouse to compensate accordingly. The original intention of this amendment is to embody the principle of fairness, focusing on the rights of spouses who give up their careers because of family needs, such as caring for children, the elderly or to do housework. Legislators believe that such rights are not been adequately protected during marriage. Therefore, when divorce occurs, the law should protect the party who sacrifices his/her career and property interests for his/her family, which is equivalent to a compensation mechanism and hopes to achieve the balance of rights of all parties⁶³.

Another property validity caused by breakdown divorce is embodied in Article 1792, paragraph 1, of the Portuguese Civil Code. According to this clause, the spouse of one of the injured parties has the right to claim compensation from the other party, which has the nature of civil liability and should be dealt with in independent proceedings. Therefore, when divorce proceedings are related to breaches of husband and wife's obligations, such breaches do not play a key role in the divorce proceedings themselves. However, after divorce proceedings, the victim of breach of obligations may, in accordance with Article 1792, paragraph 1, sue in civil court and claim compensation from the other party within the scope of civil liability. This clause is helpful to establish the connection between divorce with no-fault lawsuit and husband's and wife's obligations. Otherwise, divorce with no-fault lawsuit will lead to the misunderstanding that husband's and wife's obligations are fictitious. These new practices, on the one hand, take into account the observance of the legal obligations of husband and wife. On the other hand, it can also ensure that in divorce proceedings, disputes over the nature of property (intentional or unintentional) do not slow down the pace of divorce proceedings, which is conducive to the effective protection of the rights of all parties.

3.2. Advantages of No-Fault Divorce Litigation

Some objections to no-fault divorce indicate that in a modern society which is increasingly unfavorable to maintaining marriage, no-fault divorce makes divorce easier and makes the disadvantaged spouse more insecure. The rights and obligations of couples cannot be fully realized, thus pushing marriage to a more fragile situation, and the principle of equality and justice will surely fail.

We disagree with this assertion. Under the requirement of the fault-based divorce system, the judgment of the sole or main wrongdoer often becomes the main reason why divorce proceedings are not going well. There are many examples of men and women hurting each other in court, uncovering shortcomings, and even trying to slow down the proceedings. Although emotional factors are subjective and difficult to judge, there are other factors besides emotions in the composition of marriage from legal and sociological perspectives. However, it is undeniable that spouses in marriage, apart from being husband or wife, have the right to pursue the realization of individual rights as independent individuals, including the right to pursue happiness and the right to remarry. The acceptance of divorce is due to the importance attached to marriage itself. Only after an unsustainable marriage relationship has been

63 Although the original intention of legislation is positive and positive, in practice, there are many doubts about such amendments, especially the concept of uncertainty in this article, which is not judged by the law, so some people criticize it as not conducive to practical operation.

dissolved can it be possible to seek the conclusion of the next marriage.

The author believes that the main advantages of removing the punitive-dominated form of fault-based divorce and replacing it with no-fault divorce are as follows.

Firstly, no-fault divorce can better protect the rights of both spouses. According to the law, if a lawsuit for divorce is filed on the grounds that the fault violates the obligations of being husband and wife, only the victim can file for the law suit⁶⁴, that is to say, the aggrieved party has no right to sue for divorce. In other words, if the injured party does not divorce⁶⁵, the marriage will continue. This is obviously a situation of legal and ethical failure. For spouses who do not intend to continue their marriage, not getting divorced is a disregard and trample on their individual legitimate rights and interests. It is not wise for the injured party to choose not to divorce when facing breach of husband and wife's obligations, because then the injured party cannot claim and protect their legitimate rights and interests⁶⁶.

Secondly, the identification of fault must clarify various facts. The accusation and defense of the plaintiff and the defendant are interlaced. Personal evidence, material evidence and other types of evidence are submitted to the court for one-on-one analysis and with the possibility of appeal if one loses. All of these will turn a divorce lawsuit into a protracted one because of fault judgment. The tug-of-war not only fails to ensure the realization of rights and obligations, but also is the main reason for the protracted indecision of litigation, which further creates the negative impression of litigation inefficiency. Divorce without fault can avoid the delay of divorce proceedings and is beneficial to improve the efficiency of proceedings.

Thirdly, in the process of divorce based on fault, it is unavoidable that the psychology of gain and loss will make the couple enter into a hostile state, which will aggravate the conflict and intensify the contradiction. No-fault divorce litigation can reduce friction and conflict.

Fourth, in the process of proof of fault, there may be fabrication or tampering with evidence due to the logic of litigation⁶⁷, which is not conducive to safeguarding the integrity and dignity of the legal system. Divorce with no-fault litigation is conducive to maintaining the consistency of the legal system.

Fifth, judgment of fault itself is considerably difficult. In the fast-developing modern society, the idea that the breakdown of marriage is a one-party affair has long been outdated, and the interaction between husband and wife is complex and changeable. It is not easy to judge the authenticity of the facts presented in court. To accurately analyze the cause and effect behind it, it is more difficult to determine right and wrong. These difficult factors may affect the fairness of court decisions. No-fault divorce litigation separates the dissolution of marital relationship from the determination of fault. Its legal requirements are clear, which helps

64 See in detail article 1640, paragraph 1, part 1, of the Macao Civil Code, as well as article 1785, paragraph 1, part 1, of the Portuguese Civil Code before its amendment in 2008.

65 The victim knows that the other party's fault violates core obligations, but he is unwilling to divorce for many reasons. Some of them are because of retaliatory mentality and think that divorce is "cheap" on the contrary, so he would rather sacrifice his own happiness than divorce. Some are because the victim is unwilling to face the fact that the marriage has broken down and afraid of public opinion or difficulties after divorce, so he prefers to continue to act as the victim rather than divorce. Some are due to other external factors, such as: children, parents' requests and so on.

66 Article 1636 of the Macao Civil Code provides for the invalidation of the legitimacy of divorce proceedings. If one of the spouses has instigated the other party to make the fact invoked as a request for divorce (the fault violates the obligations of the spouse), or has deliberately created a situation conducive to the fact; Or once, after the occurrence of relevant facts, from his own behavior, especially through express or implied forgiveness, he expressed that he did not think that the fact made by the other party (the fault violates the couple's obligations) would hinder the common life, so he has no right to file a lawsuit for divorce. In the Portuguese Civil Code, Article 1780, which stipulates the corresponding content, has been repealed after its amendment in 2008.

67 For example, the wife accuses the husband of violating the duty of mutual respect, often speaking ill of the husband and the wife, and from time to time there will be mental cold violence, and the severity of which has led to the wife staying up all night. For all the above facts, the wife can prove them by lying, making false appearances and colluding with others.

to make a correct judgement and ensures the fairness of divorce procedure.

Sixth: In dealing with marital relations, the law reflects a certain degree of incompetence, which is related to the fragility of the rights of marriage law. Laws cannot compel unhappy couples to continue to live together, nor can they effectively prevent married men from having affairs. There is nothing the law can do about judgment and enforcement. This also reflects the distance between the law in theory and in practice, which is the disadvantage of the fault-based divorce and another reason for the higher position of the divorce in the no-fault lawsuit⁶⁸.

3.3. No-Fault Divorce Litigation in Macao: Possibility and Necessity

As mentioned earlier, the content of Macao's divorce law is basically consistent with that of Portugal before the amendment of the divorce law in 2008. Therefore, we believe that it is possible and necessary to introduce the system of no-fault divorce into Macao.

Some may object that Macao's current divorce system is not based on a single doctrine of accountability, but rather a mixture of accountability and irretrievable breakdown. Since divorce caused by objective factors (e.g. "de facto" separation of two years) is available in Macao, there is no obvious need to introduce a no-fault divorce system. Moreover, on the issue of divorce, if we adopt the system of divorce without fault litigation, which is equivalent to divorce without restraints, it is totally liberal and may lead to an increase in the divorce rate, which may damage women's right to support after divorce and may have a negative impact on their children. Therefore, no-fault divorce litigation is not conducive to maintaining normal marriage and family relations, preventing and punishing violations of obligations, demanding compensation for damages caused by divorce, and safeguarding the legitimate rights and interests of the parties and social welfare. The author disagrees with these objections.

On the one hand, from the perspective of rights and obligations, in the face of irreconcilable contradictions between husband and wife, one or both spouses have no desire to maintain marital relations. If the relationship that has become unsustainable and continues in conflict and confrontation because of the wrongful judgment, this is absolutely not the in the best interest for either party. It is well known that those who choose to divorce on the grounds of fault and breach of husband and wife's obligations are generally in a state of perpetual procrastination and retaliation. However, in the courts, there is no great detail and long-standing disputes and consumptions, and if one or both spouses have no intention of fulfilling their obligations, the violation of their rights is bound to be in a continuous state. With time, the relationship between husband and wife will only deteriorate, until the final decision of divorce proceedings, if so, the rights of both parties are being repeatedly damaged.

On the other hand, according to the provisions of the Macao Civil Code, when one spouse (A) germinates the idea of dissolving marriage and seeking happiness on the basis of emotional breakdown, and if the other spouse (B) opposes it, and neither A nor B has any fault in violating the obligations of being husband and wife, this means that A who wants to divorce has no right to file a divorce lawsuit because the current law does not give it legitimacy (Article 1640, paragraph 1, of the Macao Civil Code). This provision seems to protect the integrity of the family and the status and rights of the spouse, but is it not an infringement on the personal rights of the spouse who wants to divorce? As a separate subject of rights, the freedom to sue for divorce, the right to pursue happiness and the freedom to marry (remarry) are severely

68 See Xue Ning Lan, the legalization process of no-fault divorce in the United States, in *Foreign Law Translation Review*, No. 4, 1998.

restricted. For them, how does the principles of equality and fairness manifest? Perhaps some people can refute that when B refuses to divorce and violates the obligations of being husband and wife without any fault, who wants to divorce, may move away from his family residence and actively creates the situation of “de facto” separation. After two years of “de facto” separation, either spouse has the legitimacy to sue for divorce. This solution can make up for the lack of legitimacy of A’s lawsuit in divorce proceedings, and its rights are also guaranteed. However, we don’t think it is a fair and equitable solution. As mentioned earlier, in Macao, two years of “de facto” separation is indeed one of the grounds for divorce proceedings, but the declaration of fault is still possible. Imagine, in the above example, B does not violate any marital obligations and does not want to divorce, A does not violate any marital obligations but wants to divorce, because it is not legitimate to bring a lawsuit, A can actually initiate a de facto separation, and then sue for divorce after two years. But precisely because the “de facto” separation is caused by A’s initiative, B can counterclaim A’s fault for violating the obligation of cohabitation and ask the court to declare it the only party at fault. A makes mistakes in order to actively divorce but is passively at a disadvantage in divorce proceedings. It is not in conformity with the basic principles of law to guarantee his/her right to happiness and remarriage by sacrificing his/her legitimate rights in exchange for freedom.

According to Macao’s divorce data, it has an overwhelming number of cases of dissolution of marriage by means of consensual divorce. This means that the utilization rate of litigious divorce in Macao is not high. Furthermore, the fault declaration in litigious divorce has no practical relevance to spouses who intend to divorce. Through the analysis of published cases, this author found that even in divorce litigation based on violation of husband or wife’s obligations, there is often no fault been declared, let alone the fact that there is almost no fault declaration in litigious divorce on the basis of de facto separation. Therefore, according to the fact that divorce based on fault has little chance and low utilization rate in Macao, it can be concluded that there is no need this kind of lawsuit. On the other hand, it also shows that this form of divorce has defects and is no longer suitable to continue to exist.

According to the understanding of traditional concepts, divorce proceedings are not only used to dispute right and wrong in order to determine punishment measures, but also have an implicit function to restrict divorce or remove the idea of wishing to divorce. The strict requirement of divorce conditions in litigation can produce a certain function of persuasion to those who regard marriage as a joke or divorce hastily, which is helpful to safeguard the integrity of the family and the rights and interests of women and children⁶⁹. These concepts all embody a strong patriarchal color, which has gradually declined in the rapidly changing modern society. In their marriage and divorce behavior, people attach more importance to the emotional, interest and sexual compatibility. The influence of political or economic factors began to fade, and marriage behavior began to show the characteristics of personal free choice in a real sense. Although the principle of freedom to divorce has not been expressly written into the Basic Law of Macao, a just and equal society ruled by law must guarantee the freedom of will of divorcees and freedom to choose and act as the basis of legislative principles and institutional ideas. The existence of fault-based divorce litigation severely limits the will, choice and freedom of spouses who wish to divorce. It is a violation of both formal and substantive justice.

69 It is argued that too lenient a divorce law will enable the parties to easily exercise and realize their right to freedom of divorce, resulting in the disintegration of a large number of families, which will objectively weaken the protection and control of the law on marriage and family. See Wu Hong, There Must be Limitations for Divorce, in *Debate on the Amendment of Marriage Law* (Editor-in-Chief of Li Yin He, Ma Yi Nan), Guang Ming Daily Press, 1999, pp.131 ff.; Ma Yi Nan, Chinese Marriage and Family Law of the 20th Century, in *Peking University Law Journal*, No. 2, 1998.

Marriage Law in Mainland China regards no-fault divorce as its legislative principle, and guarantees the freedom of divorce as its consistent legislative concept. Both spouses have the legitimacy to request for divorce. The only legal requirement for divorce in lawsuit is the breakdown of marital feelings. Some scholars believe that China's excessively loose divorce law causes high divorce cases in Mainland China (which increases year by year), that the divorce law is too biased towards the freedom of divorce and contains insufficient restrictions⁷⁰. Especially in the current economic and cultural environment, the diversification of moral and ethical concepts, the weakening of family functions⁷¹, the transformation of family-based to individual rights-based, the introduction of contractual concepts of market economy⁷², the popularization of culture and free values and so on, all contribute to the increase of divorce rate. It must not be unilaterally considered that the legal system opens the door for "free divorce". It is also suspected that the introduction of the system of divorce without fault will inevitably lead to a great outbreak of divorce. In fact, the function of law is to reflect and regulate social reality, not to be the trigger point of social reality⁷³.

The author believes that when a marriage breaks down, the will of one or both spouses to divorce should be fully respected and the declaration of divorce is a beneficial result for both spouses. The focus of the law should be more on the fairness of the effect of divorce. In order to protect both parties, the judicial decision on the effect of divorce should be set up in an independent litigation procedure, which is more conducive to the independence of the subject matter and the effect of divorce should be decided with emphasis.

PART IV. DETAILS OF NO-FAULT DIVORCE LITIGATION: THE PRINCIPLE OF EQUITY

A good divorce system should be a balanced system. We need to consider how to dissolve the marriage relationship, at the same time, how to consolidate the marriage relationship, how to protect rights and other issues. Freedom is always a relative concept. The freedom of divorce realized by divorce without fault litigation advocated in this paper must also be a conditional freedom. When introducing the system of divorce without fault, one should consider the corresponding mechanism to guarantee the rights of relevant persons. While

70 Mainly see Xia Yin Lan, *Divorce Freedom and Restriction Theory*, Peking University Press, 2007, pp.56 ff.; Jiang Yue, *Introduction to Marriage and Family Law*, Science Press, 2007, pp.158 ff.

71 Traditional families have the basic functions of material production, childbearing and raising the family population. However, with the gradual division of labor in society, the various functions of the family have been gradually replaced by the services provided by the society, especially the dependence of the younger generation on marriage and family has been reduced. At the same time, the connotation of marriage and family has also changed. Sex no longer serves for reproduction alone, and together with emotional factors, it has become an important symbol of the harmony between husband and wife. Reference: Li Hong Xiang, *The Value Orientation of the Construction of the Family Law System in the Civil Code of Our Country Is Set Out*, in *The Social Science Front*, n.12, 2012.

72 Under the condition of market economy, the law gives equal status and equal protection to every consumer and producer. Therefore, the traditional concept of husband and wife as a whole has gradually been disintegrated, thus emphasizing the rights and status of individual. At the same time, according to Maine, "the movement of progressive society, up to here, is a movement from identity to contract." Marriage is but a civil contract, which regards the essence of marriage as the understanding of contract, so that divorce is also given the brand of contract. Reference: Li Hong Xiang, *The Characteristics of the Rising Divorce Rate in China and Its Legal Countermeasures*, in *The Social Science Front*, n.16, 2015; Henry Sumner Maine, *Ancient Law*, translated by Gao Min and Qu Hui Hong, Jiu Zhou Press, 2007.

73 Divorce is the funeral of a dead marriage, not the cause of it. Therefore, some people even advocate further enlarging the freedom of divorce. More people think that the marriage law has set certain procedures and conditions for divorce, and further increasing the restrictions on divorce will be a retrogression. See Tan Da Zheng, *New Culture and Law*, People's Press, 1998, pp.155 ff.; Xiao Xue Hui, *Opposed Attaching Divorce Conditions To Emotional Breakdown*; Chen Xin Xin, *Opposed Restrictions On Divorce*; Xu An Qi, *The Misunderstanding in the Amendment of Marriage Law - Restriction Of Divorce and Li Yin He, When Amending Marriage Law, Should Be Vigilant Against Retrogression*, all in *The Controversy On The Amendment Of Marriage Law* (Editor-in-Chief of Li Yin He, Ma Yi Nan), Guang Ming Daily Press, 1999; Li Hong Xiang, Wang Chun Ying, *The Problems and Countermeasures of Marriage Law -- From The Perspective of The Perfection of Family Law System*, in *Contemporary Law Review*, n.2, 2012.

realizing formal justice, one should also consider the needs of substantive justice. Therefore, it is necessary to formulate a reasonable and balanced mechanism for divorce without fault in order to prevent and solve various personal and social problems arising from divorce.

The author is aware that those who oppose the system of divorce without fault are most concerned that divorce without fault may lead to the null and void rules of respect and compliance with the legal obligations of husband and wife. At the same time, the disadvantaged spouse and minor children may lose their protection because of divorce. Therefore, it is necessary to pay attention to these problems in the design of the system.

Firstly, it is necessary to properly set up divorce requirements, which need to be considered in combination with ethics, morality and legitimacy. No-fault divorce is not equal to absolute free divorce. It must have legal requirements. The author believes that Macao can use the no-fault divorce litigation system of Portugal as a reference and adopt the breakdown doctrine.

With objective elements as the main and subjective elements as the supplement, this paper analyses whether the marriage of husband and wife has broken down, therefore to judge whether the lawsuit is legitimate and whether the divorce should be approved.

Accordingly, if it meets any of the following circumstances: a) The fact that they have been separated for a year without any intention of continuing to live together, b) The spouse is missing, and no information is available for more than one year. c) The mental ability of the spouse has changed for one year and its seriousness leads to the inability to continue to live together. The spouse has the legitimacy to file for a lawsuit.

Based on three specific examples, another abstract and generalized irretrievable down premise can be added, it will be paragraph d): Any other facts that can prove the breakdown of marriage, whether by fault or not.

The word "other" is used to clearly distinguish the first three reasons from the last when the law is applied. For example, couples who have been separated for half year cannot sue for divorce, because they do not meet the time requirement, but can one sue for divorce based on "other reasons that can prove the breakdown of marriage" referred to paragraph d)? The answer is no. If the evidence used is "de facto" separation, paragraph a) can only be used as the criterion, not paragraph b), otherwise item a) will be null and void. So what are the examples that match paragraph d)? For example, one spouse has extramarital affairs, or domestic violence, or irreconcilable contradictions between husband and wife on reproductive or professional issues. This abstract generalization method can be a useful and necessary supplement to make the law more adaptable to the rich and changeable reality of life, so that it can be flexibly applied, and at the same time, it can also obtain a certain degree of discretion, which helps the judge to make the most just decision from the actual situation.

REFERÊNCIAS

Antunes Valera, *Direito da Família*, Vol. I, 5ª Edição, revista e actualizada, Livraria Petrony, Lda. Editores, 1999.

António Manuel Hespanha, *Panorama da História Institucional e Jurídica de Macau*, written by António Manuel Hespanha, translated by Chao Im Peng / Cheong Weng Chon, Macao Foundation.

Acórdão da Relação de Coimbra, de 17 de Outubro de 2006 (proc. N.º 2833-/04.0TBFIG.C1), acórdão do STJ, de 3 de Junho de 2004 (proc. N.º 04B1564), acórdão do STJ, de 5 de Julho de 2001 (proc. N.º 1858/01). Macao: Intermediate Court Judgment No. 158/2011.

Capelo de Sousa, *Recentes Alterações em Direito Da Família, Direito Dos Menores e Direito Das Sucessões*, Boletim da FDUC, Vol. Lxxxix, Tomo I, Coimbra, 2013.

- Cristina Araújo Dias, *Uma Análise do Novo Regime Jurídico do Divórcio*, Almedina, 2009.
Colaço Amadeu, *Novo Regime do Divórcio*, Almedina, 2009.
- David Popenop, *Sociology China Renmin University Press*, 1999; Zhan Wei, *The Legal Philosophy Of Marriage and Family Harmony*, in *Hebei Law Science*, 2009.
- Da Wen, *Marriage and Family Law*, China Renmin University Press, 2001.
- Diogo Leite de Campos, *Lições de Direito da Família e das Sucessões*, 2ª Edição, Almedina, 2005.
- Edmund Burke, *Freedom and Tradition*, Chiang Ching, Wang Rui Chang, translated by Wang Tian Cheng, Laureate Press, 2004.
- Eduardo dos Santos, *Do Divórcio, Suas Causas, Processo e Efeitos*, 2ª Edição, ELCLA, Almedina&Leitão, Lda., 1998.
- Eva Dias Costa, *Da Relevância da Culpa nos Efeitos Patrimoniais do Divórcio*, Almedina, 2005.
- Family Sociology* (translated by Wei Zhang Ling), Laureate Press, 1988.
- Freedom and Restriction of Divorce*, China University of Political Science and Law Press, 2007.
- Fidélia Proença de Carvalho, *O Conceito de Culpa no Divórcio - Crime e Castigo*, in *Comemorações dos 35 anos do Código Civil e dos 25 anos da Reforma de 1977, Direito da Família e das Sucessões*, Vol. I, Coimbra Editora, 2004.
- Francisco Pereira Coelho, *Divórcio e Separação Judicial de Pessoas e Bens Na Reforma do Código Civil*, in *Reforma do Código Civil, Ordem dos Advogados*, Lisboa, 1981.
- Friedrich August Von Hayek, *principle of free order (volume 1)*, translated by Deng Zheng Lai, SDX Joint Publishing Company, 1997.
- Henry Sumner Maine, *Ancient Law*, translated by Gao Min and Qu Hui Hong, Jiu Zhou Press, 2007.
- Institutum Iurisprudentiae Academia Sinica; Liu De Xue, *Reflections on Macao's Legal Reform and Development Strategy under the Principle Of "One country, Two systems"*, in *Journal of Administration*, No. 102, 2013.
- Jiang Yue, *Introduction to Marriage and Family Law*, Science Press, 2007.
- Jorge Duarte Pinheiro, *Ideologias e Ilusões no Regime Jurídico do Divórcio e das Responsabilidades Parentais*, in *Estudos em Homenagem a Carlos Ferreira de Almeida*, Almedina, 2011.
- Jorge Duarte Pinheiro, *O Núcleo Intangível da Comunhão Conjugal, Os Deveres Conjugais Sexuais*, in *Coleção Teses*, Almedina, Coimbra, 2004.
- Miguel Teixeira de Sousa, *O Regime Jurídico do divórcio*, Almedina, Coimbra, 1991.
- Jorge Bacelar Gouveia, *Direito Constitucional de Macau*, Instituto do Direito de Língua Portuguesa, Lisboa, 2012.
- John Rawls, *Justice Theory*, translated by Li Shao Jun, Du Li Yan, Zhang Hong, Laureate Press, 2003.
- José Alexandrino, *O Sistema de Direitos Fundamentais na Lei Básica da Região Administrativa*, CEJJ, 2013.
- Jorge Duarte Pinheiro, *O Direito da Família Contemporâneo*, Almedina, 2016.
- Li Zhi Min (edition), *Comparative Family Law*, Peking University Press, 1988.

Li Hong Xiang, The Value Orientation of the Construction of the Family Law System in the Civil Code of Our Country Is Set Out, in *The Social Science Front*, n.12, 2012.

Li Hong Xiang, The Characteristics of the Rising Divorce Rate in China and Its Legal Countermeasures, in *The Social Science Front*, n.16, 2015.

Li Hong Xiang, Wang Chun Ying, The Problems and Countermeasures of Marriage Law -- From The Perspective of The Perfection of Family Law System, in *Contemporary Law Review*, n.2, 2012.

Ma Yi Nan, Chinese Marriage and Family Law of the 20th Century, in *Peking University Law Journal*, No. 2, 1998.

Manuel Trigo, Lições de Direito da Família e das Sucessões, Vol. I, Faculty of Law of University of Macao, 2016.

Maria Clara Sottomayor e Maria Teresa Féria de Almeida, *E Foram Felizes Para Sempre? Uma Análise Crítica do Novo Regime Jurídico do Divórcio*, Coimbra Editora, 2010.

Xue Ning Lan, the legalization process of no-fault divorce in the United States, in *Foreign Law Translation Review*, No. 4, 1998.

O Novo Regime Jurídico em Avaliação, Editor-in-Chief of Boaventura de Sousa Santos, Centro de Estudos Sociais da Universidade de Coimbra, 2010.

Pereira Coelho; Guilherme de Oliveira, *Curso de Direito da Família*, I, 4ª Edição, Coimbra Editora, 2008.

Portuguese Civil code (Chinese version), translated by Tong lo Cheng etc., *Peking University Press*, 2009.

Principles of European Family Law Regarding Divorce and Maintenance between Former Spouse, Antuérpia/Oxford, Intersentia, 2004.

Rita Lobo Xavier, *Recentes Alterações ao Regime Jurídico do Divórcio e das Responsabilidades Parentais*, Almedina, 2009.

Tan Da Zheng, *New Culture and Law*, People's Press, 1998.

Tao Yi, Ming Xin, Divorce: Single Breakdown or Mixed Doctrine, in *Chinese Journal of Law*, No. 6, 1999.

The American Modern Marriage and Family System, China University of Political Science and Law Press, 1999.

The Selection of Studies in Humanities and Social Sciences of Macau. History, (Editores-in-Chief. The European Family Law Principles Concerning Divorce and Spouse Support after Divorce (promulgated by the European Family Law Commission, established on September 1, 2001) published in 2004.

Tong lo Cheng, The Way of Legal Development in Macao: Exploring The Legal Ideal Of One Country, Two Systems In the Puzzlement Of Post-Colonialism In Macao, in *Collection Of Legal Development Seminars Of Four Places Across The Taiwan Straits* In 2014.

The Perspective of the European Family Law Association, in *Contemporary Law Review*, No.4, 2008.

The Perspective of the European Family Law Association, in *Contemporary Law Review*, No.4, 2008.
The European Family Law Principles on Divorce and Spouse Support after Divorce can be found in the following links: <http://ceflonline.net/wp-content/uploads/Principles-English.pdf> and Katharina Boele-Woelki.

William Josiah Goode, The Change of Divorce Patterns around the World (translated by Chen Yi Jun), in *Sociological Research*, No. 3, 1993.

Wu Zhi Liang, Lin Fa Qin, He Zhi Hui), *Social Sciences Academic Press* (China), 2010.

Wei Shu Jun, From Legal Culture to Rule of Law Culture: Changes of Macao's Legal Culture Before and After the Return, in *Journal of China Executive Leadership Academy Pu Dong*, Volume 11, No. 5, 2017.

Wu Yong, The Latest Development In The Process Of European Family Law Unification: From The Perspective Of The European Family Law Association, in *Contemporary Law Review*, No. 4, 2008.

Wu Hong, There Must be Limitations for Divorce, in *Debate on the Amendment of Marriage Law* (Editor-in-Chief of Li Yin He, Ma Yi Nan), Guang Ming Daily Press, 1999.

Xue Ning Lan, the Equity Mechanism in the Legislation of No-Fault Divorce, in *China Law Network*, <https://www.iolaw.org.cn/showNews.aspx?id=12553> (2019/7/10).

Xia Yin Lan, Research on Divorce Equity Mechanism, in *Journal of China Women's College*, Volume 16, No. 5, 2004.

Xia Yin Lan, An Analysis of the Family Law of Macao's Civil Code, in *Perspectivas do Direito*, No. 8, 2000.

Xia Yin Lan, *Divorce Freedom and Restriction Theory*, Peking University Press, 2007.

Xiao Xue Hui, *Opposed Attaching Divorce Conditions to Emotional Breakdown*; Chen Xin Xin, *Opposed Restrictions on Divorce*.

Xu An Qi, *The Misunderstanding in the Amendment of Marriage Law - Restriction Of Divorce and Li Yin He*, When Amending Marriage Law, Should Be Vigilant Against Retrogression, all in *The Controversy On The Amendment Of Marriage Law* (Editor-in-Chief of Li Yin He, Ma Yi Nan), Guang Ming Daily Press, 1999.

Zhang Xian Yu, The Evaluation and Enlightenment Of The Reform Of Contemporary Foreign Divorce Law, in *China Legal Science*, No. 3, 1991.

Recebido em: 08/03/2020

Aprovado em: 21/04/2020

Como citar este artigo (ABNT):

WA, Jiang Yi. Analysis of Macao's divorce litigation system in the past twenty years: ir retrievable breakdown of marriage and no-fault divorce litigation. *Revista Eletrônica de Direito do Centro Universitário Newton Paiva*, Belo Horizonte, n.40, p.13-36, jan./abr. 2020. Disponível em: <<http://revistas.newtonpaiva.br/redcunp/wp-content/uploads/2020/07/DIR40-01.pdf>>. Acesso em: dia mês. ano.