

A NEW CIVIL CODE IN SEYCHELLES

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On 1 July 2021, the Civil Code of Seychelles Act 2020 passed into force. It marked the end of a comprehensive and inclusive law reform process which commenced in 2013. The outcome is a revised Code that better reflects modern Seychelles society, and which is consistent with the Constitution and Seychelles' international law obligations. This paper provides an overview of the new Code.

Aboutissement d'un processus législatif débuté en 2013, la loi 2020 portant réforme du Code Civil des Seychelles est entrée en vigueur le 1er juillet 2021. Ce Code Civil refondu et actualisé reflète l'évolution de la société contemporaine des Seychelles. Il lui permet également d'être aujourd'hui en conformité avec les dispositions de la Constitution des Seychelles et avec les obligations de cet État au regard des règles du droit international. L'article donne au lecteur un aperçu de l'architecture du nouveau Code ainsi qu'un exposé de ses dispositions principales.

I A BRIEF HISTORY

The Civil Code of Seychelles Act (1975 Code) came into force on 1 January 1976, a few months before Seychelles' independence from Britain on 29 June 1976. Based on the Napoleonic Code introduced in Mauritius and Seychelles in 1808, the 1975 Code was firmly rooted in the civil tradition. However, in addition to being in English, it contained certain Common Law elements.¹ This legal hybridisation reflects Seychelles' colonial history. First colonised by the French, it was later colonised by Britain, before obtaining independence. As explained by Twomey JA:²

The result is a micro-jurisdiction that combines both the *civil law* of France and the *common law* of England. Caught between European, colonial legal traditions and the legacy of its African heritage, the Seychellois legal tradition is now seeking its own identity.

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1 For further background to the 1975 Code, see: AG Chloros *Codification in a Mixed Jurisdiction: The Civil and Commercial law of Seychelles* (North Holland Publishing, 1977) 7. Chloros drafted the 1975 Code. Among other things, Chloros partially introduced the concept of trusts into the Civil Code, by requiring the appointment of a fiduciary in cases of property in co-ownership, as discussed further below. See also art 1383 of the 1975 Code regarding the law on defamation.

2 M Twomey *Legal Metissage in a Microjurisdiction: The Mixing of Common Law and Civil Law in Seychelles*, Collection "Ex Professo" Vol VI, (CLJP, Printhouse, Providence, Seychelles, 2017) 3.

The entry into force of the Civil Code of Seychelles Act 2020 (revised Code) is part of that new identity.³

II REVIEW PROCESS

The project for the review of the 1975 Code was launched on 6 May 2013. The aim of the review was to take account of 40 years of social, constitutional and other legal developments since the enactment of the 1975 Code. In particular, it was necessary to ensure consistency between the Civil Code and the 1993 Constitution of the Republic of Seychelles and Seychelles' obligations under international law.⁴ Consistent with international human rights law, the Constitution emphasises the equality and dignity of all human beings and protects the right of every person to equal protection of the law without discrimination.⁵ Accordingly, provisions in the 1975 Code which discriminated on the grounds of sex, religion, property, birth or other status needed to be amended.

A Committee of nine, chaired by Justice of Appeal and former Chief Justice Mathilda Twomey, was charged with leading the review process and proposing reforms desirable to reflect contemporary needs and conditions of Seychelles. For this, they were to consult as widely as possible with interested parties.

Between August 2013 and June 2016, the Committee had 34 formal working sessions. These were open to the public and had an average attendance of twelve. The work of the Committee ended with the production of a draft revised Code (2281 articles in 323 pages), a supporting commentary (157 pages), and a supporting draft Amendment Bill and concordances.

In April 2017, the Cabinet gave approval for a public consultation process to be held on the changes to the Civil Code proposed by the Committee. This eventually led to the Civil Code of Seychelles Bill 2018.⁶ The Bill noted that "[t]he Bill reflects a thoroughgoing revision and modernising of the Code". Specifically:

The Code has been revised to be consistent with the Constitution of Seychelles, with particular consequences for the rights of children and women. The Bill reflects judicial experience with the Civil Code

3 Civil Code of Seychelles Act 2020, Act No 1 of 2021 (2020 Civil Code); Civil Code of Seychelles Act, 2020 (Commencement) Notice, 2021.

4 For instance, under the International Covenant on Civil and Political Rights. See also art 2 of the South African Development Community (SADC) Protocol on Gender and Development, under which Seychelles undertook to "harmonise its national legislation, policies, strategies and programmes with relevant regional and international instruments ... for the purpose of ensuring gender equality and equity". By arts 4 and 6 of the SADC Protocol, Seychelles undertook to "review, amend or repeal all laws that discriminate by sex or gender by 2015". In respect of children and the family the emphasis (art 8) is on "the best interests of the children always being paramount".

5 See, for instance, art 27(1) of the Constitution provides that: "Every person has a right to equal protection of the law, including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society".

6 Bill No 13 of 2018. Available at <<https://seylit.org/sc/legislation/bill/2018/13>> (accessed 24 August 2021).

1975 and provides greater certainty in respect of property rights and, with its consistent use of terminology and structure, it provides the basic law of Seychelles in a more accessible form.

On 16 July 2018, the Bill passed its First Reading in the National Assembly. The Assembly then adjourned, and members of the National Assembly met in committee in the Members Lounge for four full days from 17-20 July 2018 to discuss the proposed changes and ask questions of an Expert Panel which included the Attorney-General and members of the Mauritian Law Reform Commission.⁷ The meetings were chaired by the Speaker and televised live to the public. Further meetings were held on 13-14 June 2019, to complete these discussions. This led to an amended Bill in June 2021, the Civil Code (Amendment) Bill 2021.⁸ The first reading of the revised Bill took place on 22 June 2021, with the second and third readings following on 23 June 2021.⁹ The Civil Code of Seychelles (Consequence of Enactment) Bill 2021 and the Curatelle Bill 2021 were passed at the same time.

On 23 November 2020, the President assented to the Civil Code of Seychelles Act 2020, and on 1 July 2021, the revised Code came into force.¹⁰

III MAIN CHANGES

The revised Code retains the three-book structure of the Code Napoléon and reproduces, in modern drafting form, approximately 90 per cent of the 1975 Code. The most significant changes are here set out in brief.

A Book I

Book I contains provisions relating to civil rights, descent, and other aspects of family law.

1 Property rights of domestic partners (Book I)

The most important change in Book I relates to the law governing the division of relationship property on the termination of unmarried stable and continuous relationships (domestic relationships). Such relationships are generally referred to in Seychelles as '*en ménage* relationships' when between a man and a woman.

7 Rosario Domingue, the Chief Executive and Sabir Kadel, a senior law reform officer of the Mauritian Law Reform Commission attended the meetings.

8 Bill No 28 of 2021.

9 The object and purpose of the Civil Code (Amendment) Bill 2021 was to:

The object and purpose of the Bill is to amend the Civil Code Act of Seychelles, 2020, (*Act 1 of 2021*) to —

- (a) to insert the amendments that were made to the Civil Status Act (Cap. 34) by the Civil Status (Amendment) Act, 2018, (*Act 6 of 2018*) and which were inadvertently omitted in the Civil Code of Seychelles Act, 2020 (*Act 1 of 2021*);
- (b) align the provisions of the Civil Code of Seychelles, which is a schedule to the Civil Code of Seychelles Act, 2020, (*Act 1 of 2021*) with the provisions of the Curatelle Bill, 2021, 1, under which the Curator will appoint executors and fiduciaries.

10 Civil Code of Seychelles Act, 2020 (Commencement) Notice, 2021 SI 44 of 2021.

For many years, the courts and the Seychelles community struggled with the property consequences of the termination of long-term domestic relationships.¹¹ The 1975 Code did not make provision for the *inter vivos* division of relationship property. For married couples, the courts relied on powers under the Matrimonial Causes Act to make *in rem* property orders to distribute relationship property if the marriage ended *inter vivos*.¹² The law did not provide a period after which relationship property was to be shared equally, but the case law suggested that this occurred after about 10 years. No such statutory provision existed in relation to long-term domestic relationships. A party to a failed domestic, or *en ménage*, relationship was typically restricted to seeking a restitutionary right (unjust enrichment) – an *in personam* action. This required proving contribution to the relationship property in kind, for instance, contribution to mortgage repayments.

The revised Code provides that, on the termination of a 'qualifying relationship' of seven years, parties "share equally the property which has been acquired by each during the relationship in the context of the relationship".¹³ The revised Code defines a qualifying relationship as "either a marriage, or a domestic relationship between two persons of full age and capacity characterised by stability and continuity, and to which there is no legal impediment."¹⁴

In brief, the changes are as follows:

- For married couples, where the relationship terminates prior to seven years, the law remains unchanged.¹⁵ For termination after seven years, the revised Code provides for equal division of the relationship property as a statutory right.¹⁶ This broadly reflects how the courts pre-2020 exercised their discretion to make a property order in respect of relationship property (acquisitions only).
- For other couples, where the domestic relationship terminates prior to seven years, the law has been changed to give courts a discretion to grant a party to the relationship an *in rem* right in the relationship property (as with married couples).¹⁷ After seven years, the revised Code

11 M Twomey *Legal Metissage in a Microjurisdiction: The Mixing of Common Law and Civil Law in Seychelles, Collection "Ex Professo" Vol VI*, (CLJP, Printhouse, Providence, Seychelles, 2017), 68. See for instance *Hallock v d'Offay* (1983-1987) 3 SCAR (Vol I) 295,301, 304; *Monthy v Esparon* (1983-1987) 3 SCAR (Vol II) 12 and *Monthy v Esparon* (2012) SLR 104.

12 Under s 20(1)(g) of the Matrimonial Causes Act, the court could make "make such order, as the court thinks fit, in respect of any property of a party to a marriage or any interest or right of a party in any property for the benefit of the other party or a relevant child".

13 Article 259(1)(a), 2020 Civil Code. This may exclude property acquired by one of the parties on succession or from a third party by way of a gift *inter vivos* or by will.

14 Article 260(1), 2020 Civil Code.

15 Article 259(5), 2020 Civil Code. Although note art 259(6)(b) regarding the commencement of the relationship for the purposes of calculating the seven year period. It states that: "Where a marriage has been preceded by a domestic relationship between the parties, the calculation of time dates from the beginning of the domestic relationship".

16 Article 259(1), 2020 Civil Code.

17 Article 259(5), 2020 Civil Code.

provides for the equal division of the acquired relationship property as a statutory right – the same as for married couples.¹⁸

The revised Code also contains an explicit provision that the statutory regime is one of separation.¹⁹ Concurrent qualifying relationships are possible, but marriage retains a privileged status under the revised Code.²⁰ Furthermore, because a 'qualifying relationship' is not defined as between a man and a woman, a same-sex relationship can also be 'qualifying relationship' under the Revised Code. This may serve to remedy concerns relating to any restrictive definition of marriage.²¹

The reason for changes in the law relating to the division of relationship property was concern for the material welfare and the property inequality that resulted from the law under the 1975 Code. In Seychelles, most domestic relationships are not marriages, and the substantial assets of the relationship are often held in the name of the male partner. Women therefore often faced hardship following the breakdown of the relationship, as evidenced by the case law.²² The changes also serve to bring Seychelles into line with its commitments under international law – specifically the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).²³

2 *Reintegration of law on marriage*

The revised Code also reintegrates the law relating to marriage and matrimonial causes back into the Civil Code. The 1975 Code dealt with some matters related to marriage. Over time both the basic rules relating to marriage and those relating to matrimonial relationships had been dealt with primarily by separate statutes, notably the Civil Status Act, Status of Married Women Act and the Matrimonial Causes Act. Matters of substance relating to the law on marriage have been returned to the Act,²⁴ to confirm the integrity of the Code and for ease of use.

B Book II

Book II contains provisions relating to property in general including ownership, movable and immovable property rights.

18 Article 259(1), 2020 Civil Code.

19 Article 1400, 2020 Civil Code.

20 Article 259(6)(d), 2020 Civil Code, provides that "[t]he qualifying period for a domestic relationship cannot commence during the subsistence of the marriage of one of the parties".

21 There is no definition of marriage in the Code. The assumption from the rules relating to eg prohibited degrees is that marriage refers to a union according to the classical definition provided by Modestinus.

22 See for example, *Hallock v d'Offay* (1983-1987) 3 SCAR (Vol I) 295.

23 A commitment was made by Seychelles to the CEDAW Committee to create a right *in rem*. See for instance UN Doc. CEDAW/C/SYC/6 (9 July 2018), paras 183-198.

24 For instance, s 21 of the Status of Married Women Act is art 258 of the 2020 Civil Code on property orders.

Droit de superficie

The most significant change in Book II is the codification of *droit de superficie*. A *droit de superficie* is an immovable property right found in civil law jurisdictions. It concerns the division of property rights between the 'bare owner' of the land, and the 'superficiaire' who is the owner of part of the surface of the land.

The 1975 Code made no provision for *droit de superficie*. Rather, the right was a creature of equity developed by the courts to address a perceived hardship. Often, in Seychelles, landowners give permission to third parties – usually family members – to build on their land. A parent, for instance, might give permission to a daughter to build a house on the edge of their property and later have a change of mind and ask the daughter to remove the house. The daughter, in such a case, might claim a *droit de superficie* to continue living on the land.

The nature of *droit de superficie* under Seychelles law has been a source of significant confusion for some time, as reflected in the case law.²⁵ The revised Code sought to clarify the nature of the right and to bring certainty to the law.

Pursuant to the revised Code, a "*droit de superficie* is a right, conferred on a person other than the owner of the land, to enjoy the surface of the land".²⁶ It is a real right and is both alienable and inheritable, subject to any period specified in a written agreement creating it,²⁷ and can be created by agreement, prescription, alienation, or court order.²⁸

While providing much needed clarification to the law, the new provisions raise questions in relation to the land registration system. The Land Registration Act 1967 establishes a system of title based on its English counterpart. In order to simplify the process by which land transactions are carried out, the Act stipulates that entry into the register perfects the transfer of land and certifies absolute title.²⁹ No provision is made in the Act for registering a *droit de superficie*, but practice was to treat the *droit* as an "overriding interest". This practice is now provided for in the revised Code: it expressly specifies that a *droit de superficie* is an overriding interest for the purposes of s 25 of the Land Registration Act.³⁰ This brings into question the certified absolute title envisaged by the land registration system.

25 M Twomey *Legal Metissage in a Microjurisdiction: The Mixing of Common Law and Civil Law in Seychelles*, Collection "Ex Professo" Vol VI, (CLJP, Printhouse, Providence, Seychelles, 2017), 84. See also: E Wong, *Droit de Superficie: Coelho versus Tailapathy*. Available on SeyLII: <<https://seylII.org/content/edith-wong-droit-de-superficie-coelho-versus-tailapathy>> (accessed 17 September 2021).

26 Article 554(1), 2020 Civil Code.

27 Article 554(4)(a), 2020 Civil Code.

28 Article 554(3), 2020 Civil Code.

29 Section 46, Land Registration Act 1967.

30 Article 554(5), 2020 Civil Code.

C Book III

Book III contains provisions relating to succession and obligations including contracts, delicts and unjust enrichment.

1 Testamentary freedom

In a significant departure from the 1975 Code, the revised Code introduces testamentary freedom in place of the fixed heirship system.³¹ The 1975 Code reflected the French approach to property on death, with the property of the deceased transferring automatically to the heirs.³² A person had limited freedom over how they apportioned their estate on death: For instance, a testator survived by children had freedom of testation over only one quarter to one half of the succession.³³

There is now a strong sense of individual property rights in Seychelles, so the changes in the revised Code better reflect modern Seychelles society's attitude to property. Under the revised Code, a person can decide freely how to distribute their property on death – as they can in life. The concern that this might result in the interests of dependants not being met is addressed by provisions that protect their interests.³⁴ Where inadequate provision is made in a deceased's person's will for the "survivor of a qualifying relationship and children and parents of the deceased who were at the time of the death of the deceased wholly or partly dependent on the deceased for maintenance may make application under this article", a court can make an order for maintenance in favour of such dependents.³⁵

The introduction of testamentary freedom rendered unnecessary the provisions in the 1975 Code on the disposable portion and reduction – which have therefore been removed from the revised Code.³⁶

2 Inheritance rights for domestic partners

The revised Code makes significant changes to the law relating to the succession rights of unmarried parties of long-term domestic relationships. The 1975 Code ensured that a surviving spouse received a portion of a deceased spouse's estate. However, a party to a long-term domestic relationship was legally entitled to property of the deceased partner only if they could establish that the estate was unjustly enriched. Any claim would need to be brought against the heirs to the estate. If the deceased partner died testate, any provision in the will in favour of a domestic partner was limited to what was left over from the reserved portion.

31 See art 967, 2020 Civil Code, which states: "Every person may dispose of property by will, wither by appointing an heir, or by granting legacies, or in any other appropriate form of declaration of intention."

32 See art 731, 1975 Code.

33 Article 913, 1975 Code.

34 Article 913, 2020 Civil Code.

35 Article 913(2)(a), 2020 Civil Code.

36 This was previously addressed in arts 913-930 of the 1975 Code, most of which are now vacant in the 2020 Civil Code.

The introduction of testamentary freedom in the revised Code means there is no restriction of how a person apportions their estate – for example, a person can leave their whole estate to their domestic partner, assuming dependents are adequately taken care of. In intestate situations, a party to a qualifying relationship (married or unmarried) is treated the same as a spouse under the 1975 Code.³⁷

Concurrent qualifying relationships complicate the situation.³⁸ Where there are concurrent qualifying relationships on death, one of which is a marriage, the revised Code provides that the marriage takes precedence.³⁹

For an overview of the effect of the revised provisions, see the flow charts in the Appendix.

3 *Equalising the rights of children*

The 1975 Code distinguished between legitimate and adulterine children for the purposes of succession, with adulterine children receiving half of the share of legitimate children.⁴⁰ The 1975 Code noted: "The fraction of [the adulterine children's] part of the reserve, which represents the reduction, shall accrue exclusively to the children of the marriage which has been affected by the adultery".⁴¹

The revised Code equalises the rights of children. Children have the same rights under the revised Code – whether born of marriage, outside of marriage, or if one of the child's parents was married to another party at the time of conception. Given almost 80 per cent of children in Seychelles are born outside marriage, this is an important change in the civil law of Seychelles.⁴² It also is consistent with the equality provisions in the Constitution, and with the Convention on the Rights of the Child which has been ratified by Seychelles.⁴³

The equalising of children's rights also impacts on the law relating to the establishment of parenthood, which is part of Book I.⁴⁴

4 *Co-ownership and fiduciaries*

Finally, a peculiarity of the 1975 Code was the law relating to co-owned property. Due to concerns regarding excessive fragmentation of land and to avoid land becoming unmarketable, the 1975 Code established a system whereby a fiduciary held co-owned immovable property on behalf of the co-

37 Article 731, 2020 Civil Code.

38 See art 745. See flowchart in the Appendix.

39 Article 745(2), 2020 Civil Code.

40 See arts 760 and 915(1) of the 1975 Code.

41 Article 915(1), 1975 Code.

42 National Bureau of Statistics, Statistical Bulletin: Population and Vital Statistics (December 2020, released 31 March 2021) <<https://www.nbs.gov.sc/downloads/data-acquisition-census/population-and-vital-statistics/2020>> (accessed 17 September 2021).

43 Seychelles ratified the Convention on the Rights of the Child on 7 September 1990.

44 Articles 373-382, 2020 Civil Code. Compare with provisions in 1975 Code, Chapter II titled "Proof of descent of legitimate children" and Chapter III titled "Illegitimate children".

owners.⁴⁵ The function of the fiduciary was to "hold, manage and administer the property, honestly, diligently and in a business-like manner as if he were the sole owner of the property."⁴⁶ The fiduciary concept was an attempt to 'graft onto' Seychelles law the English concept of the trust for sale, without introducing the concept of trust itself.⁴⁷

The provisions concerning co-owned property under the 1975 Code caused confusion and unnecessary hardship.

Firstly, the 1975 Code provided that the fiduciary alone could deal with the land, and that "the right of co-ownership was to be converted into a claim to a like share in the proceeds of sale of any such property".⁴⁸ At the same time, the fiduciary did not have any legal right in the property itself,⁴⁹ and the provisions suggested that a co-owner could sell his or her share to a third party without acting through the fiduciary.⁵⁰ The courts undertook significant interpretive exercises to try to make sense of the former provisions, but ultimately failed to clarify what rights a co-owner had vis-à-vis the fiduciary.⁵¹

Secondly, the requirement to appoint a fiduciary to sell the property – which may have been in the family for some time – was often unnecessary. Some heirs preferred to stay in indivision on the family land. There was also evidence of fiduciaries not doing their job properly, causing land to remain tied up.

45 Article 818, 1975 Code.

46 Article 825, 1975 Code.

47 This was indicated by Chloros, the drafter of the 1975 Code. See AG Chloros "The Projected Reform of the Civil Law of the Seychelles: An Experiment in Franco/British Codification" (1974) 48 *Tulane Law Review* 815, 839. See also M Twomey *Legal Metissage in a Microjurisdiction: The Mixing of Common Law and Civil Law in Seychelles, Collection "Ex Professo" Vol VI*, (CLJP, Printhouse, Providence, Seychelles, 2017) 74.

48 Articles 817 and 818, 1975 Code.

49 Article 817, 1975 Code.

50 Article 834, 1975 Code.

51 See *Michel v Vidot (No 2)* (1977) SLR 214; *Jumeau v Anacoura* (1978) SLR 180; and *Legras v Legras* 3 SCAR (Vol 1) 367. Sauzier JA in the minority in *Legras v Legras* concluded, on the facts of that case, that "A co-owner may apply to the Court for partition or licitation of the immovable property or for retrocession of a share sold by another co-owner to a third party under Article 834, without the intervention of the fiduciary". The other two judges disagreed and Law JA said that a unilateral partition of the land "without the consent of her co-owner and without acting through a fiduciary" could not be lawfully done. With a degree of editorial licence, Sauzier JA in preparing the Law Reports noted his minority reasoning and further stated (at 372 of the report) that "The majority judgments are weak and unauthoritative. They should not be followed". Note however the comment of Sauzier J in *Jumeau v Anacoura* at 182.

The difficulties are also apparent in the Chloros' commentary. AG Chloros *Codification in a Mixed Jurisdiction: The Civil and Commercial law of Seychelles* (North Holland Publishing, 1977), 78. The commentary begins with a discussion of art 818 but also states that art 817 "is a crucial article". The commentary makes it clear that the dealings are with the fiduciary and not with the co-owners. This is emphasised at page 93 in footnote 114, *ibid*, where any registered rights are in the name of the fiduciary alone.

The revised Code provides for a simpler process, which is also more attuned to Seychelles expectations. The fiduciary is "to hold, manage and administer the property diligently and in a business-like manner, as agent of the co-owners".⁵² A fiduciary does not necessarily need to be appointed for co-owned property: the co-owners may choose to stay in a state of indivision.⁵³ However, a fiduciary must be appointed if co-owners want to divide the property.⁵⁴ In such cases, the fiduciary is to give priority to division in kind, and only if that is not possible, are they to proceed to sell the land – with an obligation to inquire whether any of the co-owners wish to purchase the property.⁵⁵ This is aimed at giving co-owners, who are often heirs, the opportunity to retain land which may have been in the family for some time.

IV CONCLUSION

The vast majority of the 1975 Code remains intact, albeit in modern drafting form. This signals a desire on the part of Seychelles to retain its Civil Law heritage. The changes set out in this article however bring Seychelles law into line with the modern realities of Seychelles society. There are notable changes that are not covered in this brief overview. For instance, the revised Code includes changes to the law on encroachment,⁵⁶ delict law by the addition of the delict of *troubles de voisinage*,⁵⁷ and back letters.⁵⁸ A full study of the revision process would be a fitting recognition of the landmark nature of the revision process.

APPENDIX

52 Article 825, revised code. Emphasis added.

53 Articles 818 and 821, 2020 Civil Code.

54 Article 821(1), 2020 Civil Code.

55 Articles 821(2) and (3), 2020 Civil Code.

56 Article 556, 2020 Civil Code.

57 See art 1389 in the 2020 Civil Code. This confirms the principles developed by the courts of Seychelles and establishes a regime of strict liability for harm caused or loss suffered by a neighbour.

58 Article 1321.



