INTERNATIONAL SURVEY OF FAMILY LAW 2019 ABSTRACTS

ALBANIA

The Family Code of Albania was adopted in 2003, replacing the Code that had been in place since 1981. The Family Code of Albania provides different forms of the dissolution of the marriage: (i) through the consent of the spouses; (ii) based on a period of three years' separation and (iii) based on the request of one spouse on the grounds provided by law such as continuous quarrels, maltreatment, severe insults, adultery, incurable mental illness, lengthy penal punishment of the spouse or due to any other cause constituting repeated violations of marital obligations, insuring that a joint life becomes impossible and the marriage has lost its purpose for one or both of the spouses. The court may assign fault, in the dissolution of the marriage, only when requested by one or both spouses.

Not until May 2003 was there a dissolution of marriage based on a period of three years of separation, because of the emigration of one of the spouses without the consent of the other. During the years 1992–2002, the court decided dissolution of marriage based on the request of one spouse for much shorter periods. As long as there is no legal separation, there is an obligation of the spouses to live together. For the first time, the legislature has been obliged to reflect reality and provide dissolution of the marriage based on a three years of separation.

In the case of dissolution of marriage based on the request of one spouse for several grounds, starting with continuous quarrels or maltreatment and continuing with the repeated violations of marital obligations, the spouse must prove to the court that, because of the above-mentioned grounds, joint life has become impossible and the marriage has lost its purpose.

In 2003, the Family Code provided for domestic violence and the protection that should be provided to the victim of said violence for the first time. Maltreatment is one of the grounds for divorce, but the law requires that it affect the continuity of the marriage in the future.

In the Family Code there are no provisions that in the case of domestic violence the court must decide upon the request of the victim for divorce. There are many cases when the court has made a protection order, but has dismissed the request for the dissolution of the marriage. In several cases, the domestic violence ended only with the murder of the victim spouse.

Under the Family Code, marriage partners have a mutual obligation of loyalty, for moral and material support, and for cooperation in the interest of

the family and cohabitation. In the case of proven repeated violations of such obligations, the court must decide dissolution of marriage. There is a margin of discretion on dissolution of marriage, even when there is clearly a high-conflict divorce.

AUSTRALIA

Australia's family law system has been the subject of much reform over the last 40 years. The result is an Act that is now very lengthy and extremely difficult to read. The extent of the problem of complexity in the legislative scheme is identified by setting out the legislative 'pathway' for determining children's cases and a recent decision of the Full Court addressing some of the problems caused by this complexity. Two key legislative changes made in Australia in 2018 (broadening the range of offences relating to removing children from Australia and preventing parties from cross-examining each other directly in cases involving domestic violence) are also identified. Finally, it is noted that the Australian Law Reform Commission is conducting a major review of the Australian family law system.

BRAZIL

Problems involving the absence of payment of child support are common in today's societies, which in Brazil leads to the need to supply alimentary credit when child support debts are not honoured by the court-ordered debtor. Execution, which must necessarily count on certainty, liquidation and enforceability, is often frustrated, even after judicial proceedings and leaves the child support creditor at risk, without having at least the minimum necessary for subsistence. By focusing on this context, this chapter proposes that the state, using the Funds for the Rights of the Child and the Adolescent, creates a social food bank (SFB), in view of the constitutional responsibility attributed to it, and thus removes the child and the adolescent from risk. The SFB would pay the amount sought in the execution, subrogating itself to the rights of the creditor. The creation of an SFB proves viable, especially since there is already an organised and fully functioning structure, while examination also reveals the extreme need for the state to assume its responsibility towards the child and youth population when there is an absence of child support by the judicially obligated.

CANADA

Canada has modified its test for determining the habitual residence of children when dealing with applications under the Convention on the Civil Aspects of International Child Abduction. Major amendments to the federal Divorce Act and related statutes are working their way through Parliament. These amendments will introduce new frameworks for addressing family violence and relocation cases. There will also be a new emphasis on resolving matters outside of court and on enforcement of custody, access and support orders. Canada has also taken its first steps toward ratification and implementation of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

CHINA

In China, with the implementation of the General Rules of Civil Law (民法总则) on 1 October 2017, the guardianship system has substantially improved. The minor guardianship has better provisions now compared with the old system in the General Principles of Civil Law promulgated in 1986. This chapter aims to analyse the present rules in the guardianship system for minors in the General Rules of Civil Law and other laws and regulations under the guidance of the United Nations Convention on the Rights of the Child. The authors comment on the laws and rules' successes and deficiencies with real-life relevant cases and put forward suggestions for legislative improvement of the minor guardianship system in China.

ENGLAND AND WALES

In this chapter, two important decisions handed down by the UK Supreme Court, relating to the right to enter and exit from legally recognised familial relationships, are considered as also are the major consequences for family law reform demanded by the decisions.

In the first decision, *R (Steinfeld and Keidan) v. Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32, Rebecca Steinfeld and Charles Keidan, an opposite-sex couple wished to have their long-term relationship

recognised by entering into a civil partnership. The Court analysed the current law relating to civil partnerships which restricts entry into that status to same-sex couples. The Court held that the provisions of ss. 1 and 3 of the Civil Partnership Act 2004 (CPA) were discriminatory and made declaration of incompatibility under s. 4(2) of the Human Rights Act 1989.

In the second case, *Owens v. Owens* [2018] UKSC 41, Mrs. Owens appealed against the denial of a decree of divorce brought under the behaviour fact of s. 1(2)(b) of the Matrimonial Causes Act 1973 (MCA). The Court explored the meaning of the subsection and the complex question of its requirements of behaviour by the respondent and the reasonableness of the expectations that a petitioner should continue to live with such behaviour. The Court expressed its regret that it had to refuse Mrs. Owen's appeal and leave her locked in an unfriendly relationship with her husband which neither he nor she desired. In so doing the Supreme Court drew attention to the problematic, and outdated, nature of a divorce law which has remained unchanged since 1973.

The government has reacted positively to both decisions and reform is under serious consideration but as yet its final plans to carry out reform have not been published.

FAROE ISLANDS

The Faroe Islands obtained autonomy from Denmark by the Home Rule Arrangement in 1948, which was further broadened by the so-called Takeover Act in 2005. Family law was foreseen as a matter that could be assumed by the Faroese authorities after prior negotiation with the Danish ones. This chapter explains the functioning of the framework of distribution of competences between the Faroe Islands and Denmark in family law and the process by which the field was placed under Faroese competence in 2018. There is a spirit of cooperation and of keeping the harmony between the legal systems of both parts of the Realm. In particular, the chapter delves into the agreement on collaboration between Danish and Faroese authorities in the area of adoption. After the takeover and for the time being, the Danish authorities will still have a relevant role regarding the handling of adoption files connected to the Faroe Islands for the time being.

FRANCE

In the last two years, the main evolutions of French family law have come from case law. In patrimonial issues, it should be noted that the French Court of Cassation has finally adopted a position on foreign laws, which does not

recognise the notion of the 'inheritance reserve'[1] (1). In extra-patrimonial matters, the French judges had to rule on cases resulting from fundamental legal changes that had previously occurred. The Court was thus led to take a position on the possibility of not recording a person's sex on his or her birth certificate (2). The Montpellier Court of Appeal had to determine how to establish the parentage of a child whose father had changed sex in his civil status documents but without undergoing genitalia ablation or definitive hormonal treatment: the biological father was therefore a woman from a civil status point of view at the time of the child's birth (3). The Court of Cassation also had to rule again on surrogacy. This time, it decided that the parent who is an intended parent may only adopt the child when the other intended parent is also a biological parent. In addition, the Court of Cassation has asked the ECtHR for an advisory opinion on whether this position is in accordance with Article 8 of the Human Rights Convention (4). A forthcoming reform of bioethical laws should also decide on this subject but on the question of the opening of medically assisted procreation for female couples as well (5). Finally, the ECtHR needs to rule on conformity of the measures provided for incapacitated persons by French law with the Human Rights Convention that the ECtHR had to rule, especially on the question of authorisations required for persons under curatorship to be able to get married (6). A reform of the French law on vulnerable adults is also in preparation following the report called 'Caron-Déglise' (7).

HONG KONG

2018 was arguably a year of significant change to the landscape of Hong Kong's family law. Nonetheless, in some respects, that change could be said to be at best cautious if not glacial. With regard to marriage, the earlier part of the year saw the Court of Appeal maintain the status quo by upholding as lawful the Administration's refusal to recognise same-sex married couples' rights to benefits arising from marital status. However, a landmark shift came later in the year when the Court of Final Appeal, in a different case, determined that the Administration's refusal to recognise a same-sex civil partnership for the purposes of immigration was unlawful. In the area of child law, a step forward for the recognition of children's rights in the territory was achieved by the institution of a Children's Commission. However, whilst welcome, a number of critics took the view that the Commission lacked sufficient independence and power to protect children's rights adequately. One area in which change is much needed but seems to have stalled

1 Inheritance reserve is part of inheritance, which must be given to certain heirs.

completely is the reform of child custody law. The draft Bill is still on hold with little or no indication of it being revisited any time soon.

IRELAND

The 2012 Children's Rights amendment to the Irish constitution brought about symbolic changes to Irish law by creating a new state obligation to uphold and vindicate children's rights. However, implementation of the amendment has not led to increased priority of children's individual interests where they conflict with adult rights or the rights of the family unit. The constitutional duty of the state to ensure that the best interests of children are paramount is limited in scope to proceedings under the Guardianship of Infants Act, the Adoption Acts and the soon-to-be amended Child Care Acts. Moreover, the legislative realisation of the paramountcy principle continues to be subject to the constitutional presumption that the child's best interests are secured by upholding the autonomy of the marital unit. A deliberate political decision not to alter the traditional constitutional protection given to the marital family has limited the possibility of change to the Irish constitutional hierarchy to ensure that children are treated as equal rights-holders within family structures.

ITALY

The debate on allowing maintenance following divorce in Italian law involves the general theory of the sources of legal rules and at the same time can highlight precisely some trends in the evolution of society and of Italian law in family matters. The great social impact that the crisis in the institution of marriage presents in Italy and the recent changes in Italian society are indirectly involved in the following legal investigation. On the one hand, in fact, society seems to be evolving towards an increasingly central role for women in the world of work. On the other hand, especially in some areas of the country, the role of women remains strongly anchored to the family understood as the essential nucleus of society itself, not only as a supportive structure in which children are raised, but also one in which much of the welfare that the state is not able to provide to citizens is carried out. It is easy to understand, therefore, how the fact of being able to enjoy a contribution to maintenance even after divorce can, in many cases, really make the difference between those who can continue to live a dignified life and those who instead, due to the crisis of their own family, can actually encounter the problem of having to maintain themselves independently.

KOREA

Artificial insemination by donor, or AID, and surrogacy have been and are currently performed in Korea. Nonetheless, the legal issues involved have remained on a somewhat theoretical level in Korea until recently. This reality is changing though. The Seoul Family Court has established an important ruling on these issues in the last couple of years and the Ministry of Health and Welfare began to prepare legislation.

There is little regulation specifically designed for AID and surrogacy in Korea. Consequently, AID and surrogacy is 'tolerated' unless the sperm or egg is transacted in exchange for monetary compensation, which is forbidden by the Bioethics and Safety Act. As Korean family law does not address AID and surrogacy at all, the lower courts and literature apply the traditional rule on parental determination to AID and surrogacy cases. In other words, the Court presumes the husband of the mother who underwent AID as the father of the child and bars the husband from a rebuttal of paternity presumption on the ground of the doctrine of estoppel. The Court declares the surrogate mother and not the intended mother the mother of the child born though surrogacy. This regulation is not proper to address AID and surrogacy cases at all though. In order to regulate these issues properly, new legislation specific for AID and surrogacy is needed. The new legislation should enable a rebuttal of paternity presumption for a limited period, considering the weak basis of paternity in AID cases, grant the surrogate mother the chance to be a legal mother and at the same time guarantee the intended mother, or the egg donor, a biological and not an adoptive motherhood.

NAMIBIA

Efforts to develop a separate criminal justice system for children in conflict with the law began in Namibia a quarter of a century ago. Over time, diversion of children to life skills programs and to supervision by probation officers has become widely accepted as an alternative to formal prosecution. The number of children in detention (especially pre-trial detention) has dropped by half, as stakeholders have accepted the principle of the minimal use of deprivation of liberty. However, law reform efforts initiated at various times have stalled. There is now renewed vigour for finalising a separate law on child justice during 2019, and the necessary policy decisions to underscore its contours have recently been finalised. This chapter describes key aspects of that legislative process.

NEW CALEDONIA

In New Caledonia, persons of customary status are governed by Kanak custom for their civil rights. However, Kanak custom is based on a societal vision and organisation that are very different from current Western values. This raises the question of the conformity of Kanak custom to the rights guaranteed by the European Convention on Human Rights, especially with regard to equality between men and women and the right to privacy and family life.

NEW ZEALAND

The reforms in family law in New Zealand are a sign of the changing nature of New Zealand society, consistent with a more diverse range of families and acceptance that families will break up, and with the notion that the law should support this wide range of families in a manner which reflects important values in New Zealand society. A theme which runs through the proposals is that the law needs to ensure that it is inclusive of different cultures of people with disability and of children. Family law has always been a dynamic reflection of the values of society in determining what is fair in family relationships. Family law has always evolved over time, and what is happening in New Zealand is a good reflection of a society that wants to provide a family law framework that works for everyone and that is accepted as being fair, transparent, understandable and accessible to all members of the community.

PAPUA NEW GUINEA

Family law in Papua New Guinea (PNG) is governed by two legal regimes, state and customary. These regimes sometimes operate independently, but increasingly overlap and, on occasion, collide. The position is complicated by a unique 'bridge' between the two systems provided by the Constitution and the Underlying Law Act, whereby, in the absence of written law, the courts must develop the underlying law, drawing first on customary laws, and only then on common law and equity. International law provides another layer of complexity to the family law landscape in PNG.

This chapter commences with some background information on PNG and its legal system, including an outline of the arrangements made by the Underlying Law Act for incorporating customary law in the state system. It then sets out the principal sources of family law, giving an overview of the

customary system and its impact on family relations and an explanation of how this fits with the state regime. The chapter also sets out the avenues provided by the state for resolution of family law disputes, including a recently established Family Court. It then delves into the case law to illustrate the tensions between customary and state laws regulating family affairs in PNG. It also discusses some of the rare instances where the courts have expressly considered the underlying law in the context of family disputes. The chapter concludes that the constitutional pledge, 'to guard and pass on to those who come after [them the] noble traditions', when taken with the right of 'all persons in [the] country are entitled to the fundamental rights and freedoms of the individual', faces courts determining family law cases involving customary laws with a 'constitutional conundrum'.

PORTUGAL

Law 48/2018, dated 14 August 2018 newly recognised the possibility of opting out of the spousal status of forced heir that had been imposed by law until that moment in Portugal. As a consequence of that legal amendment, the future spouses may enter into a pre-nuptial agreement to that effect. This option can be exercised only before the solemnisation of marriage and if some legal requirements are met as will be explained in this chapter.

This innovative solution embodies significant departures from some structural principles of Portuguese family and succession law, namely the compulsory nature of the succession between spouses on the one hand, and the prohibition of succession contracts, on the other.

The impact of such an alteration was assessed, considering the previous legal framework, the specific conditions and requirements of the newly introduced solution and the aims that were envisaged by the legislature.

SERBIA

Transgender issues, such as legal sex change and all the legal consequences after the gender reassignment surgery, have been taboo in Serbia for a long time. Not only was there no legislation to regulate these legal issues, but there is also still a negative attitude of the population towards same-sex couples, same-sex sexual orientation and transgender people. However, there have been certain positive shifts in the field of gender identity law since the adoption of the Anti-Discrimination Act 2009. After the implementation of this Act, some issues dealing with discrimination on the basis of gender identity were brought before the Constitutional Court, the case law of which

eventually led to an important legislative change dealing with legal sex change in Serbia in 2018. This chapter will analyse transgender issues in the Serbian constitutional law practice and its impact on the legislation.

SEYCHELLES

The Seychelles Family Tribunal was established under section 77 of the Children Act. According to section 78 of the Children Act, the Tribunal has jurisdiction to hear matters relating to, *inter alia*, care, custody and maintenance of children and has developed rich jurisprudence on these issues. Once the Supreme Court has dissolved a marriage, it leaves the issues regarding the children's care, custody and maintenance, where there are children of the marriage, to be resolved by the Family Tribunal. In 2000, the Family Violence (Protection of Victims) Act was enacted which, under section 3, extends the jurisdiction of the Tribunal to the granting of protection orders under this Act. In *Jean v. Sinon*, the Supreme Court held that the purpose of the Family Violence (Protection of Victims) Act is 'to protect victims from violence from members of their family.' Since then, the Tribunal has dealt with hundreds of cases resulting in making hundreds of protection orders or referring the parties to probation services for counselling or for treatment/rehabilitation in alcohol or drug-related cases. It has also made many eviction orders and sentenced many people to imprisonment for breaching protection orders. The purpose of this chapter is to illustrate from a close examination of the cases how the Tribunal has implemented the Family Violence (Protection of Victims) Act (the Act).

UN COMMITTEE ON THE RIGHTS OF THE CHILD

The chapter aims to analyse the most recent family-related jurisprudence of the UN Committee on the Rights of the Child (CRC Committee), trying to identify evolution of child-rights concepts and issues in the family context and progress in the implementation of the respective provisions of the UN Convention on the Rights of the Chid (CRC). It highlights those issues where there is limited consensus, or no consensus achieved at all yet, and which therefore require clarification. The chapter is primarily based, apart from the academic sources and reports, on the analysis of the Committee's interpretation of the provisions of the CRC particularly expressed in its Concluding Observations and its General Comments. The discussion is not focused on any specific countries or regions, though as a matter of fact some thematic issues are more relevant to some region(s) than others.

The chapter consists of two parts. Part 1, appearing in the 2019 edition of the Survey, includes discussion of the concept of family, the principle of non-discrimination, child's evolving capacities, parental rights, child marriage, polygamy as far as it relates to children's rights, and issues related to the status of child born through surrogacy. The main focus of Part 2, which will be in the 2020 edition of the Survey, covers issues of childhood statelessness, the child's right to family environment, separation of children from the family, adoption, international child abduction, as well as the rights of children in the context of international migration. Thirty years of implementation of the Convention have demonstrated that family-related child rights issues not only continue to provoke hot debates but also evolve, often changing their forms or even transforming into completely new issues, and, therefore, continue to be central to the work and jurisprudence of the CRC Committee.

USA

Two long-term shifts in the family have remade family law in the United States: the fight of same-sex families for equal recognition and respect and the creation of alternative family forms for different sex couples who join together with or without marriage, have children, separate and form new relationships. The courts have responded to these two developments through the use of different doctrines; such as the creation of civil unions limited to partners who could not marry or the application of equitable principles to recognise the parental standing of a same-sex partner without a biological tie to the child, but not a traditional step-parent performing a similar role.

This chapter examines recent developments in US family law and argues that the time for convergence among these different legal doctrines is at hand. Three developments, in particular, may drive that convergence. The first is the ability of same-sex couples to marry. This raises the issue of whether the marital presumption will attain a greater role in establishing the parentage of adults without a biological tie to the children they raise, and whether alternative statuses such as civil unions will die on the vine. The second involves the continuing use of alternative approaches such as parentage by estoppel, de facto parentage, psychological parentage, and other doctrines to recognise functional parents, and whether they will be extended to different-sex step-parents and unmarried partners without a biological tie to the child. The third is the growing recognition of more than two legal parents, and whether the doctrines that permit recognition of sperm donors will be harmonised with recognition of other biological parents and caretakers without a biological tie who enter the child's life after birth. The most likely

result is that the doctrines that govern same-sex and different-sex couples will grow closer together in individual jurisdictions, but the 50 US states may grow further apart in the way that they treat marriage and its alternatives.