REFORM OF FRENCH FAMILY LAW: A PEACEFUL REVOLUTION

Pierre Catala*

The "peaceful revolution" in private law, to adopt the expression of Dean Gerard Cornu, began at the same time as the Fifth Republic. It was a revolution in a number of ways because the new laws changed habits of society by repudiating the old legal principles. It was also peaceful because it was carried out without undue haste over a period of fifteen fruitful years of legislation, producing a crop of well-made laws.

The revision of the written sources of law affected mainly business law, the code of civil procedure and family law, and it is with the latter that we are going to deal. The principal measures carrying out the reform of family law were passed between 1964 and 1976.

1964: The law on the tutorship of minors placed emphasis on the protection of the child, and considerably relaxed the rules relating to the management of the child's property.

1965: The reform of matrimonial regimes reduced the importance of the community of moveables, diminished the power of the husband, and gave the wife increased legal powers in the life of the family. A perfect equality between the two spouses was completed in 1985.

1968: The regime protecting mentally handicapped adults was made more flexible in much the way that tutorship of minors had been changed four years earlier.

1970: Parental authority replaced paternal power. The role of the father and mother were declared to be equal in the education of the child and the intervention of public authority in moments of crisis was reorganised.

1972: The law of legitimation and natural filiation was transformed in all aspects: in the methods of establishing filiation, in contests over paternity and maternity, as well as in the effects of filiation once established.

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* Professor of Law, University of Paris II.

1975: The reform of the law of divorce introduced divorce by mutual consent and divorce based on the rupture or break-up of conjugal life; there were profound transformations in the consequences attached to the break-up of the conjugal relationship.

One could add to this list several other laws which changed the laws of succession, gifts and wills. In a word, a lawyer who had studied family law before 1964 was forced to relearn everything.

The list of dates of the successive laws may give the impression that the reform was carried out in a haphazard manner. In fact, the revolution was carried out with an extraordinary singleness of mind and method so that the different pieces of the jigsaw embody a legislative achievement as coherent as the original code civil. The Minister of Justice entrusted the drafting of the laws to Dean Carbonnier (and not to Commissions as was the case for business law). Dean Carbonnier called on experts of his choice. He carried out opinion polls and juridico-sociological surveys among the general public and the legal profession on the matters concerned. Then he himself drafted the bills which were presented to the parliamentary assemblies by the Ministry of Justice. In most cases, the bills were adopted by all political groups, both right-wing and left-wing, which is extremely unusual in France.

Finally, as to method employed, the plan of the Code Civil was scrupulously followed. The Code Civil is divided into "books," "titles" and "chapters." It was revised bit by bit. Each new law became a complete title of the first Book. Each new title began and ended with the same article number as the former code. (For example, filiation goes from article 311 to article 370.) But, since there are a greater number of articles in the new version, the numbering of the articles has been modified so that we have now 18 articles under article 311.

To give a better idea of the spirit of these new acts, two particularly characteristic areas can be examined: *divorce* and *filiation.*

A. Divorce

Divorce first appeared in France in 1792 at the same time that civil marriages appeared. Divorce was freely accepted during the Revolution when, apparently, the number exceeded at one moment the number of marriages. The Code Civil then introduced a stricter form that was abolished altogether at the Restoration in 1816 without provoking any particular public outcry. For more than 70 years the French had to make do with separation, which lifts the obligation to live together, but does not otherwise affect the bonds of matrimony.

Divorce was reintroduced in 1884 and very quickly it was made easier to obtain by procedure passed in 1886.

A priori, two conceptions of the institution are possible. One consists in seeing divorce as the acknowledgement of the failure of the marital union and as a remedy for this shipwreck. This is the objective conception: the marriage has broken down because the spouses cannot or will not live together any longer. The law ignores any question of who was right and who was wrong. The other conception sees divorce as a sanction for faults committed by one spouse against the other. Divorce is therefore open to the innocent spouse and not to the guilty. In other words the deserted spouse can divorce but the deserter cannot. French Catholicism which was no longer strong enough to prevent the reintroduction of divorce was nevertheless vigorous enough in 1884 to impose the idea of divorce as a sanction thereby introducing a moral element into the institution that stigmatises the guilty partner.

The number of divorces rose slowly until the First World War, much more quickly between the two World Wars and since 1945 it has risen without interruption. In 1974 the last year before the reform, there were 60,000 broken marriages (divorces and separations) for 394,000 marriages which is a ratio of about 1 to 6.5.

After 90 years the institution had developed a number of peculiar features. In many cases what appeared to be a divorce for fault was in reality a divorce by mutual consent. All the couple had to do was to write each other insulting letters which would be used to prove a fault by one of the spouses. This legal simulation involved a number of drawbacks: it made the courts into accomplices and led to a degree of uncertainty in the granting of divorces, with some judges sympathetic and others hostile to the idea of divorce by agreement.

This situation was common knowledge at the time of revision; nevertheless the legislator preferred to undertake further research before proceeding with a reform. Everything pointed to a reform which would make divorce less of a drama and eliminate litigation after a divorce.

Before coming to a final decision, a preliminary question had to be settled: would French law change from a unitary conception of divorce based on fault of the spouses to another unitary conception of divorce based on the objective failure of a conjugal union? After consideration, this last approach was rejected. A pluralist system was preferred where several alternative causes of divorce were available to the couple. We shall consider, in turn, the *causes* of divorce, and its principal *effects*.

Under the new pluralist conception, the law of 11 July 1975 accepts divorce by mutual consent. It accepts it so warmly that it even offers two procedures for couples who wish to divorce in this way.

The first is divorce on joint demand. This is a real separation by mutual consent: divorce like marriage is based here on agreement. But, as in marriage, the agreement must be recorded by a public authority to have a legal effect. In the case of marriage this authority is the mayor and in the case of divorce it is the matrimonial judge sitting alone and specialising in matrimonial cases.

Regarding procedure, the spouses together ask for divorce without making the reason known to the judge and with the assistance of one or two counsel. At the same time they must submit to the judge a draft agreement of the divorce settlement. This includes in particular the liquidation of the community of property (more than 90% of couples are married under the regime of community property). It also specifies the provision which the husband may pay the wife, and sets out the terms for the custody of the children, their maintenance and education. The judge hears the two parties separately, then together, and finally in the presence of their counsel. If they persist in wishing to divorce, the judge imposes a mandatory three-month period of reflection after which they must renew their demand.

The judge then pronounces the divorce on two conditions:
- if he is satisfied that each spouse really wishes a divorce and has freely given his or her consent to it;
- if he finds that the agreement settling the consequences of the divorce protect the interests of each spouse and of the children.

This form of divorce presupposes a degree of maturity and reflection of which all couples are not capable. That is why the law of 1975 offered another form of divorce by agreement where one partner can accept, perhaps reluctantly, a divorce desired by the other. This is a divorce requested by one spouse and accepted by the other.

Under this procedure the person requesting the divorce sets out in writing a series of facts, which render conjugal life intolerable. An effort must be made to describe the situation objectively. The other partner receives a copy of this document. If he or she rejects it, the proceedings stop there. If the partner accepts it, the proceedings continue. The defendant can in turn submit a statement setting out his or her personal version of the facts. The aim of this procedure is to obtain a double written admission of marital breakdown.

In the following phase, the matrimonial judge records the double admission and authorises the spouses to continue the proceedings in court. The court must enter a divorce judgment where

the grounds have been definitively recorded by the matrimonial judge. The judgment will refer to the double admission without indicating another reason. The divorce is declared against both parties, and the court settles the monetary effects as well as the consequences for the children.

The latest available figures after seven years of the new regime show that about 40% of divorcing couples choose the joint demand and 12-13% the accepted request. This comes to over 50% for divorce by consent which gives the reform a satisfactory rate of success. However, alongside divorce by consent, the 1975 act maintained divorce desired by one of the spouses and imposed by him or her on the other. There are two versions of this variety, one of which is new and the other corresponding to the old divorce for fault of the 1884 act.

The innovative version admitted divorce for break-up of married life, which shows that French law has timidly acknowledged the possibility of divorce as a remedy in case of objective breakdown of conjugal union. Divorce for break-up of marital life is requested in two cases: where there has been separation for at least six years and where the mental faculties of the spouse have been so seriously altered that for six years no life in common has been possible for the couple. Thus, divorce is now open to those who abandon their partner and to those married to a mentally handicapped person. After a long waiting period, they can now force the innocent partner to accept a divorce.

The judge, however, may reject an application if divorce would cause exceptional hardship for the defendant or the children. This is the "hardship clause" which was taken from German law. Furthermore, the defending spouse may counter-attack by putting forward the faults of the applicant. Then if the judge grants the divorce, it will not be for break-up of married life but will be pronounced against the spouse who started the proceedings.

The old concept of divorce for fault remains a fourth and final means for those who do not want or are unable to use the other three.

The terms of the Code Civil are very general: it "can be requested by a spouse for acts imputable to the other partner when these acts constitute a grave and repeated breach of the duties and obligations of marriage and which render intolerable the maintenance of married life," (art. 242 Code Civil). This is a very abstract definition of fault, whereas the former law specifically mentioned adultery, physical violence and moral cruelty. Moreover, the new law does not adopt the distinction made by the old law between adultery as a peremptory ground which forces the judge to grant the divorce and other so-called facultative grounds. Now, divorce for fault is always left to the discretion of the court.

The statistics of the Ministry of Justice show that divorce for break-up of married life, after reaching 3% of the cases just after the reform (probably as a result of a backlog of old cases) has dropped to less than 1.5% since then. Closer examination shows that it is not always the husband who applies for divorce after separation of six years, contrary to the expectations of the legislature which was dominated by males.

Divorce for fault accounts for more than 45% of all proceedings, which indicates that divorce as a sanction is still flourishing. Such proceedings last appreciably longer because of the greater pugnacity of the parties over the very principle of divorce, its pecuniary consequences, or the custody of the children. This type of proceeding often involves wives without work and without resources for whom the prospect of break-up means a considerable risk of material difficulties.

Now taking a quick look at the effects of divorce, we find that the most noticeable change has been the replacement of alimony by another form of payment called "compensatory provision."

Alimony under the former divorce law was the source of numerous difficulties. In the first place, in the spirit of divorce as a sanction, it was due by the guilty partner to the innocent partner. If both were found guilty the divorce was declared against both spouses, and the husband could not be ordered to pay alimony. This system tended to create a high degree of acrimony during the proceedings, many husbands making furious attempts to prove the guilt of their wives to avoid having to pay anything after the divorce. The law of 1975 cleverly avoided this by providing that the compensatory provision could be ordered in cases where there were faults on both sides. Only those who bore all responsibility for the divorce were disqualified from receiving payment. As expected, this simple and reasonable measure has removed one of the main causes of acrimony during divorce proceedings.

The other difficulties involved in alimony occurred after the divorce and often prolonged a climate of bitterness between the former partners. Certain wives insisted on having the allowance increased since the rule was that the amount should vary according to the resources of the payer and the needs of the beneficiary. This gave rise to modification demands and numerous conflicts. Another difficulty after divorce was that many ex-husbands paid their allowance irregularly or even stopped paying altogether in spite of the criminal sanctions to which they made themselves liable.

To settle these conflicts the law of 1975 replaced the former alimony by a payment called the "compensatory provision." Its function is not to continue to give effect to the duty of help between spouses but to "compensate as much as possible for the disparity which the breakdown of the marriage creates in the respective lives of the couple," (art. 270 of the Code Civil). The provision is fixed according to the needs of the beneficiary and the resources of the other partner at the moment of divorce, taking into account foreseeable changes. The provision is fixed once and for all and cannot be subsequently revised unless failure to revise it would have consequences of exceptional gravity for one of the spouses. Such revisions being very rare, the law has achieved its objective of avoiding litigation over the modification of allowances.

To settle the problem of irregular payment, the law of 1975 provided that the compensatory provision should take the form of a capital sum wherever possible. Thus, the obligation would be performed in one transaction and not at fixed intervals over a period of time. This would not prevent the beneficiary from using the provision to buy an annuity if a regular income was preferred. The reform, however, has failed in this respect. In practice the immense majority of awards fixed by the courts are in the form of an allowance because the spouse who has to pay does not possess enough property to pay out a capital sum. Thus, payment in the form of regular allowance has given rise to the same problems encountered under the old system of alimony.

Nevertheless the legislature has some cause for satisfaction. More than half of divorces today are granted by mutual consent of the spouses. Even for the others, the pugnacity of the proceedings has diminished, which is shown by the reduction in the number of incidents and actions. In most cases the law of 1975 has in fact succeeded in taking the drama out of divorce which was often lived as a sort of tragedy in the Latin tradition.

B. Filiation

Even more than divorce, filiation has been profoundly transformed by the reform of civil law. The law of 3 July 1972 has changed the effects and methods of proving filiation.

The Code Civil radically discriminated between legitimate filiations and natural filiations. Only the former, based on marriage, could be protected by law. This form of filiation gave the child the maximum benefit. Entering a real family by the door of legitimacy, he inherited not only from his father and mother but from all blood relatives to the twelfth degree. It was in the child's interest to acquire

this status, and it was therefore granted wherever possible. Thus, it was practically impossible to rebut the presumption of paternity, which considers that children of a married woman are legitimate.

In comparison, the status of natural children seemed to be extremely hard. To establish their filiation a voluntary acknowledgement of their status was required; in other words, it depended on the goodwill of the parents towards the child.

Finally, in those cases where filiation had been established, it had only limited effects compared with those of legitimate filiation. The natural child was attached only to his father and mother and not to the other members of the family. The child had no real family, and even in the succession of his father and mother, his rights were inferior to those of the legitimate children.

At the end of the nineteenth century, a legislative movement in favour of natural children was set in motion, and some new provisions were enacted. But these were on the whole slight modifications which destroyed the coherence of the Code Civil without putting any other rational system in its place.

The reform of the law of 3 January 1972 was generally considered necessary. It is based on the principle of equality of rights for all children. Legitimate filiation lost most of its predominance, and there was no longer any reason to favour its establishment rather than that of natural filiation. The means of proof of filiation were also made more uniform.

The 1972 law effaced wherever it could the radical differences which the Code Civil had established between the effects of the two types of filiation. In this it went for inspiration back to the revolutionary law of 1792 (an anagram of 1972). But the revolutionary law was ahead of its time and was never applied whereas the new law has already been accepted.

The natural child now has a real family, and even two families if his filiation is established on both sides. Previously he had only a father and a mother. Now he has brothers and sisters, grandparents, uncles, aunts and cousins. Among these different persons there is the same reciprocal duty of support as between legitimate relations. In cases of succession especially, the same reciprocal rights exist as in a legitimate family. The natural child inherits from his parents, and they inherit from him, in the same proportions and with the same rights in the estate as if he were legitimate.

At present there remain only two limited exceptions which spoil this picture of perfect uniformity. One concerns parental authority. In

a legitimate family it is exercised in common by the father and the mother. In the natural family it is exercised by the mother even if the father has recognised the child and even if the two parents are living together. It is a matriarchal family.

The other exception concerns the rights of succession of children born of adultery. In principle, they are treated simply as natural children and are assimilated to legitimate children. But this principle does not apply when such a child inherits along with the spouse who was the victim of the adultery, or with legitimate brothers and sisters born of the marriage in effect when the adultery took place. In these two cases only, the inherited portion of the natural child is reduced in comparison with that of another child. In all other cases of succession, the natural child is on the same footing as the other children. Recalling that before 1972 the child born of adultery had only a claim to maintenance, we see that the progress has been considerable.

This near equality of family standing takes away one of the enormous advantages which legitimate filiation had over natural filiation. There are no longer the same reasons for proclaiming the legitimacy of a child by artifices of proof. With respect to proof and methods of establishing filiation, the law of 1972 upset a number of traditions.

The new law was based on a number of simple points:

- the double filiation of any child can be established by voluntary acknowledgement or by judicial decision even for children born of adultery.
- in addition to proof by title, which is based on the statements made to the Register of Births, great importance is attached to what is called the "possession of status" (possession d'Etat); in other words, the manner in which the child is treated by the mother or the alleged father. The status is determined by the conduct of the parents both before and after birth and can be compared to apparent paternity or maternity. It is supposed to translate a "sociological fact" to which the law now attaches much more importance.

In addition to proof by title and the "possession d'Etat," modern techniques of biology have found a new type of proof. For the moment it is composed essentially of blood analyses and has been accepted as proof in refuting claims. Blood analysis can establish nonpaternity. At present there is also a tentative effort to use it to establish claims. It is supposed to be able to prove paternity with a high degree of certainty. In the near future, even more reliable biological tests will certainly be added to the panoply of means of proof and enable the biological truth to be established in every case.

These future scientific successes will encounter difficulties if they happen to show that the biological father is not the same person as the "sociological" father: in other words, if they show that the real father is not the same person as the man who has brought up the child as his own. This problem raises a number of questions about the real nature of filiation. Is it simply a question of genes or a question of upbringing? One wonders which new Solomon or computer will give the answer in the future.

The new principles of the law do, nevertheless, upset the delicate balance of the former system. The most striking fact about legitimate filiation is the weakening of the presumption of paternity which was formerly almost irrebuttable. The presumption simply disappears when the child's birth has been registered without indicating the name of the husband and when the child has "possession d'etat" only as regards his mother. This would commonly be the case after separation followed by adultery.

In the normal case where the presumption of paternity is given effect, the husband can contest it by adducing all facts tending to show that he is not the father. This method of proof is now quite open whereas before 1972 it could only be carried out by showing that it was physically impossible. A more audacious change establishes the right of other persons to contest the paternity of the husband. This right used to be the exclusive prerogative of the husband. It is now open to a wife who after divorce has married the real father of the child. Provided the child is not older than seven, the mother can within six months of her remarriage, submit a request to the court to take the paternity away from the first husband and give it to the second.

Finally, a presumption of paternity is fragile when the "possession d'Etat" does not correspond to the birth certificate, that is to say when the husband has not treated the child as his own. In this case, an acknowledgement by the natural father would be valid even though it brought to light the adulterous origin of the filiation.

Thus, to give the child its real parents, the 1972 act took the risk of increasing the number of filiation conflicts. If such a conflict arises, the Code Civil asks the courts to determine by all possible means the most likely filiation. This provision is typical of the new law which marks the end of the systematic predominance which was enjoyed by legitimate filiation. In fact, litigation on filiation has become more frequent and more complex over the last ten years. At present, it can be said that the search for greater truth in the matter of filiation has been carried out at the expense of legal security.

The number of cases will certainly diminish when the main problems of interpretation have been settled. But more difficulties have

already appeared on the horizon, difficulties which were not foreseen by the law of 1972 and which will have to be dealt with by the legislature. There is the problem of artificial insemination (with about 2000 cases a year in France). Can the husband disown the child of his wife after having given his consent to insemination? There is the problem of the surrogate mother who gives birth to a child for someone else, and the problem of posthumous children conceived with the frozen sperm of their dead father. Should these practices be prohibited, regulated or simply ignored? It is, of course, not only in the matter of filiation that discoveries in the field of biology will remain a permanent threat for the law of persons.

C. Conclusion

The unity of the methods used for the reform of family law was accompanied by a singleness of purpose. As a conclusion I should like to sketch the main lines of this purpose.

First, in the morass of contemporary laws the art of legislating reaches its summit here. Jean Carbonnier is in a direct line from Portalis. His laws contain the general affirmations and the principles to guide their interpretation, and all this is done with perfect clarity. His implicit but constant assumption was that in a period of rapid change, written law should be reasonably flexible to enable the judge to adapt it without forcing.

Second, the role given to the courts in the application of the laws was considerable, much greater than that of 1804. In fact, it may be too great. In the French tradition, statute law is a source of objective security, and the courts guarantee subjective equity. The new laws are idealistic in that they are inspired by a desire for a juster and more humane law better adapted to personal situations.

This idealism is manifested, for example, in the increased equality of spouses and children, in the humanisation of the status of persons of unsound mind, in the educative function assigned to parental authority and to the protection of minors, in the sincerity hoped for in divorces, and in the search for the truth in filiation.

Jean Carbonnier, however, is also a sociologist and an historian, two subjects which teach one to be realistic. Realism forces us to admit that the functions of the husband and the wife in our society are still not quite the same and that the unilateral breaking up of a marriage should not be allowed too freely, that the conjugal family is not yet willing to welcome as an equal a child born of adultery, and that the security of minors and of adults suffering from mental incapacity

requires the control of the courts over the management of their property.

This is why the new French family law is more complex than the old, why it has often been subject to contradictory criticisms. Too innovative for some, not enough for others, it is a law of conciliation. This was apparently the nature of the Code Civil. We can only wish the new law the same success.