

THE SECULARIZATION OF CIVIL STATUS

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The present communication will focus on French law. We had neither the time nor the means to make a comparative-law study, which would have been interesting since, although civil status is a State institution nearly everywhere, its secularization (or, as we prefer to say in France, its laicization) – the degree to which it distances itself from religion – can vary from one country to another. To speak of a French exception in this area would be an exaggeration, but with us history has left a special mark on secularization.

The notion of civil status requires some defining for the purposes of our topic. It would be both too much and too little to equate it with the three kinds of events – birth (and recognition), marriage and death – dealt with by the Civil Code under this head. Today, births and deaths have ceased to be directly concerned by secularization : the essence of the matter is concentrated on marriage, which is a civil status event but at the same time an institution involving questions of substantive law. Secularity of civil status means in practice the monopoly or at least the pre-eminence of civil marriage (civil meaning in this context non-religious). Conversely, however, it would be rational to extend the notion of civil status to judgments of divorce or separation, because they modify a person's status and will, moreover, be recorded in municipal registers. Their judicial character is no obstacle to this, since civil status has always taken cognisance of declaratory judgments.

The very word secularization suggests a process, a progression. It seems, however, that in French law the process is complete, in that the secularity of civil status has become an accepted fact in substantive law. Yet to over-emphasise that there has been movement could suggest that there might one day be a reversal of direction and prompt the question whether this secularity is irreversible. In fact, one cannot give a true picture of the current situation if, after a detailed analysis of substantive law (I), one does not mention the criticism which has been and continues to be directed against it, sometimes more and sometimes less fervently (II).

I

a) *By way of introduction, a reminder of the legal texts and the sociological context.*

- *At the summit of the hierarchy of sources, at least for domestic law (leaving to one side international law and treaties), there is Article I of the 1958 Constitution : «France is a secular Republic». Constitutional lawyers will enlarge on this by citing either Section 2 of the Act of 9 December 1905, separating the Churches and the State («The Republic does not recognise any cult»), or, in the 1789 Declaration of Rights, Articles 4 and 10 (freedom and religious freedom) read together with Article 1 (equality). The Napoleonic Code is silent on the subject of religion – an eloquent silence, but was it warranted ? Let us investigate, by asking what precedent the authors had in mind when they started work on the Chapter on Civil Status Events. It was, very directly, the Acts of 20 September 1792, one of which introduced civil marriage and the other, divorce. By 1792 we no longer have the semi-consensual Revolution of 1789 but the proclaimed Republic, and it was even the September massacres that one had to try to forget. The new institutions would find it difficult not to retain traces of the fact that they were the offspring of a conquest and not of an agreement.*

- *Has the context of religious sociology changed basically since the middle of the century, since the Second World War ? As regards the country's so-called historic religions (i.e. the Judeo-Christian), it is generally accepted that there has been a certain secularization of morals, in parallel with a weakening of religious practices or even beliefs – what foreign historians call a phenomenon of the final years of the XXth century, that is the self-secularization of societies and even of the Churches. Thus, the violent conflict which divided clericals and anti-clericals at the beginning of the century has been transformed into a peaceful co-existence between religion and philosophy (to utilise a very XVIIIth century pairing, that has sometimes crept into the texts¹). However, this optimistic interpretation is only partially true for France. Part of the conflict has moved to the school arena, where lay schools and Catholic schools have, in turn, demonstrated their ability to mobilise. And what is more, in 1998, in a context not so far removed from marriage, namely the civil solidarity pact (the «PACS»), the violence of the debate revealed religion lurking beneath the surface.*

The new religions, otherwise known as sects, can be considered to be guiltless on this point because they lack any history and can therefore scarcely feel nostalgic for some kind of marriage of their own. The irruption of Islam, on the other hand, has brought about a spectacular upheaval in our religious landscape. This is because it has a matrimonial system that is self-sufficient and, in some of its important features – polygamy, repudiation, the status of women –, is incompatible with the system of Western countries.

¹ For example, Art. 1200 of the Code of Civil Procedure. The first Act recognising conscientious objection to national service (the Act of 21 December 1963) put religious or philosophical convictions on the same plane.

For more than a century, in Algeria, France managed to make the two systems live together, only thanks to a relationship of inequality between coloniser and colonised. It may be that these colonial habits continue, even today, to influence the way in which the authorities tackle the Muslim presence in metropolitan France – often giving the impression of inclining, for purely strategic reasons, more naturally towards recognising by way of exception a single religion than towards amalgamating it into a secularity shared by all. However, if their attitude is not clear, it is perhaps because many of the difficulties over which they stumble lie in the very phenomenon with which they are faced².

b) *The changes, whether more or less perceptible, that have affected the religion (or the irreligion, the philosophy) of French society have had no more than a limited or sporadic incidence on the secularization of civil status : that is the general observation that can be made. The secular character of marriage and un-marriage has become settled to the point of being seen as a moral as well as a legal rule – a rule that is all the more easily accepted by everyone because it is accompanied by and inseparable from two mitigating features (above all the first), namely freedom to contract a religious marriage as well, and the possibility of separation («the Catholics' divorce») as an alternative. In this tranquil situation, what is the importance of the few subjects of controversy which must nevertheless be mentioned ?*

- *Inconvertible separation. After the Naquet Act of 1880, the conversion of separation into divorce became the subsidiary issue in the recurring battle between supporters and opponents of divorce : if one of the separated spouses is able to obtain a divorce as of right after a fairly brief interval, the guarantee conceded to Catholicism in the shape of retention of the institution of marriage will lose much of its value. The 1941 Act, passed under the Vichy regime, made such conversion conditional on a court decision when it was applied for by the guilty spouse. However, as early as 1944 we came back to conversion as of right. Yet, the 1975 Act (Art. 307 para. 2, of the Civil Code) went in the opposite direction by providing that conversion could be obtained only by mutual consent when the separation itself had been granted on joint application. This was perhaps a question of symmetry, but it was also a gesture towards canon law. It had to be negotiated with the Vatican, but it is not known who conducted the negotiations. Moreover, it does not seem that the hand extended was often grasped. And, in return, the lay parties remained rather indifferent.*

² Difficulties of information : imperfection of the statistics on the Muslim population in France and of the enquiries into the extent of practices and convictions (see Alain Boyer, *L'Islam en France*, 1998). Difficulties of theoretical analysis : what is the nature of what is called sometimes *charia*, sometimes *fiqh* ? Is it a law, a religion, a moral precept ? Experts on Islam disagree amongst themselves. One could reply that the main thing is to know how the persons concerned regard these commandments.

- *The hardship clause in the rules on divorce on account of breakdown of cohabitation. This kind of divorce, introduced in 1975, is the French version of divorce on objective grounds, as opposed to divorce on the grounds of fault. Since it is granted on unilateral application, its numerous opponents have objected that it is a form of repudiation. Nevertheless, it differs from repudiation ; it is not granted simply at the will of the applicant ; the respondent spouse, who ex hypothesi is innocent, can have the application dismissed on proof that divorce would occasion for him or her and for the children material or moral consequences amounting to exceptional hardship (Art. 240). Take the case of a Catholic wife, who is passionately attached to the indissoluble character of the marriage bond : her beliefs would be infringed if she had to undergo a divorce and then resign herself to the status of a divorcee. Can she not plead exceptional hardship ? The courts assess sincerity and the strength of convictions ; they do this on a case-by-case basis and apparently do not often accept that the clause should operate³. In any event, its operation cannot be systematically excluded in advance in the name of the principle of secularity, because that principle is not in issue ; it is not a religious norm that brings the clause into operation, but the psycho-sociological phenomenon identified by the rule in the person of the spouse. Decisions accepting the existence of hardship fit into a wider case-law, according to which secular law may take a religious fact into consideration without paying allegiance to religion. A long-standing example of that case-law is the following : if a spouse who had promised that a church ceremony would follow the town-hall ceremony does not keep that promise, he is guilty of a fault grounding a divorce, for having disregarded not his spouse's religion but her religious feelings⁴.*

- *The civil marriage before the religious marriage : this old subject of controversy has re-surfaced. Napoleon attached great importance to this order of events, fearing that otherwise, in the villages of Vendée and Brittany, people would continue to believe that they were married solely by virtue of the church wedding. He had instructed priests, on pain of a criminal sanction, to ensure that the civil ceremony was held first. Yet, if one recalls the existence of the Act on separation of Church and State, charges of absurdity will be laid against a State which declares that it does not recognise any cult but nevertheless claims that it must be obeyed by all of them. On the strength of this argument⁵, towards 1990 the draft reform of the Penal Code abolished this offence. However, attention was drawn to the fact that immigrants were arriving in France from countries where a religious ceremony sufficed to conclude a marriage : were they not going to fall into a trap ? The 1994 Penal Code maintained the offence, but in an amended form. It is no more than an offence constituted by repeated conduct : whilst unyielding hostility towards civil marriage remains punishable, it is open to a minister of religion in an urgent case to conduct a wedding in extremis. In fact, surveys have*

³ See J. Rubellin-Devichi et al., *Droit de la famille*, 1999, no. 593.

⁴ The theory of *religious fact* (or of *religion as a simple fact*), developed by Coulombel (*Rev.tr.de dr. civ.*, 1956, 1) and L. de Naurois (*ibid.*, 1962, 241) explains in particular why the baptism, marriage and death registers of the various Churches can be utilised by the courts as presumptions supplementing or replacing civil status registers, in the context of Art. 46.

⁵ For its rebuttal, see Th. Revet, *JCP*, ed. G, 1987, I, 3309.

revealed that amongst North African immigrants it is not unusual for a marriage more islamico to precede the town-hall marriage⁶. It is true that, looking from the outside, it may be difficult to distinguish a rather festive engagement party from a marriage. *Spon salia per verba de futuro or de praesenti ? – our medieval law knew this ambiguity*⁷.

c) *Principle of the secularity of civil status may be held in check by other principles. These are not real exceptions, but the effect of the rational limitation required by the temporal and geographical field of application of any legal rule.*

- *On the temporal level, the rule of non-retroactivity of laws means that, for the authorities, documents drawn up by the various religious authorities have the same legal validity as documents drawn up by the local civil status authority, as regards anything ante-dating the latter's creation. This is why it is possible to go back as far as Ancient Law in proceedings concerning inheritance or the right to a family name*⁸.

- *On the geographical level, norms of private international law can lead to the recognition in France of religious law, when this is brought in by the foreign law they designate as applicable. And if those norms comprise a self-regulating mechanism under the cover of what is called international public policy, it will be seen that this is not because of a reversion to the principle of secularity, but for extrinsic reasons (for example, a cultural tradition that condemns polygamy, or the protection of women against repudiation).*

*The regime of civil status, and notably of marriage and divorce in international law, is of a complexity that cannot be summarised in a few lines*⁹. It seemed more important to enquire whether international law had not had an impact on domestic law. Here, Muslim immigration amongst the general population has had a specific and trenchant effect. The fine distinctions of the conflict of laws have vanished under the reality of the situation of foreigners and, in the melting-pot of towns and suburbs, the latter has, by an effect of contagion, coloured the situation of the French.

⁶ See Edwige Rude-Antoine, *Le mariage maghrébin en France*, 1990, pp. 104 et seq.

⁷ *In the 1970's, there was, for reasons that escaped us, an unexpected recurrence of the conflict between the two types of marriage. This recurrence was imputable to civil marriage itself, which was starting to evolve. This was the time when cohabitation amongst young people – which was to grow to the point of covering today (1999) an estimated 20% of couples – was beginning to become more frequent. Could these cohabitants not have asked a minister of religion to marry them in a religious ceremony ? They could have done so without contravening the primacy of civil marriage, because literally what their religious marriage short-circuited would not have been a marriage. After the passing of the Act on divorce, in 1975, Cardinal Marty, the Archbishop of Paris, put the question bluntly : « I do not see why the law continues to prevent priests from celebrating the religious marriage of people who are not married civilly ». The threat or the initiation of a practice could be read into this statement. In point of fact, nothing of the kind occurred. Probably canon lawyers of the old school intervened, pointing out that canon-law marriage was not an exchange of just any consents before a priest and that what was required was consent to marriage in the full sense and not to cohabitation. They could, however, come to a different conclusion if faced with cohabitation institutionalised in an agreement recognised by the State, such as the Civil Solidarity Pact.*

⁸ *It can be noted in passing that, as this century draws to a close, the increase in genealogical research motivated by purely private curiosity (stimulated by the alleged right of everyone to know his origins) has imperilled the fragile paper used for parish archives.*

⁹ *On the whole of this question, see E. Rude-Antoine, L'immigration face aux lois de la République, 1992, and F. Dekeuwer-Défossez et al., Le droit de la famille à l'épreuve des migrations transnationales, 1993.*

Foreign or French, who can tell, quite apart from the complications of double nationality and mixed marriages ? Is the Algerian, whose personal status was previously regulated by the Charia as codified by Algerian law, going, on becoming French, to relegate it in his mind to a pure matter of religion ? Boundaries are becoming tangled and obliterated, but the principle of secularity is finding it difficult to find its landmarks again in such a situation.

II

In this part of my presentation, which I said would be critical, I shall not deal with the radical criticism which the Churches and religious organisations have always directed at the principle of secularity. It is part of their natural vocation not to be satisfied with neutrality on the part of the State, in which they detect a measure of disdain, and to claim from the State, each of them for itself and itself alone, an alliance or even allegiance. In the current balance of forces, little is to be expected, or even learnt, from criticism of this kind, which boils down to a conflict of principles.

Yet there is a less ambitious kind of criticism which proceeds by way of an analysis of substantive law and its theoretical weaknesses and practical drawbacks, and aims at proposing reforms that could improve it. It was after the Liberation that there was a growth around our topic of enquiries of this kind. Two factors stimulated this growth : scientifically, there was enthusiasm for comparative law, which cast light on systems that are less secularising than ours ; and ideologically, there was, if not a lesser attachment to the principle of secularity, at least an increasing indulgence towards criticism of it. The two World Wars had contributed more than a little to a spreading of such indulgence – especially the Second War, with the Vichy interregnum which had appeared to be on the point of abandoning the principle, a development against which the subsequent Republics did not react as much as they thought. An essential point to note is that these critical ideas took shape in, and scarcely emerged from, intellectual circles – lawyers, philosophers and sociologists. Parliamentarians and Governments were affected only at a late stage, when Islam came on the scene, bringing in its wake the problems of immigration.

Most of the critical arguments cleverly contrast the principle of secularity with another principle of incontrovertible and almost constitutional weight, namely free will. Religious freedom, which is supposed to be the basis for secularity, is set against another freedom, namely freedom of contract and especially of association. Contract is here fulfilling its social role, in that it is the means of achieving diversification in the face of laws that aim at standardisation (and are Jacobinical on occasion). The philosophy of free will is reflected in public law in the technique of options in the matter of status. In the past, so-called colonial legislation regularly had recourse to this technique : for example, a native was offered an option between two types of marriage, one in accordance with the laws of metropolitan France and the other in accordance with local custom, the latter being shaped by the cultural – and finally very often religious – particularities of the race.

However, the option can conceivably exist without one of its branches being necessarily religious. That was precisely the case of the first proposal made during the period in question. The suggestion had been made as early as 1945 by Léon Mazeaud as the solution to the problem of divorce¹⁰. The formal proposal was submitted in 1947 by Henri Mazeaud to the Committee on Reform of the Civil Code, of which he was a member¹¹. These were two highly-reputed civil lawyers, who were respected by everyone. The broad outline of this proposal was that the future spouses would have declared at the civil ceremony that they were entering into a marriage for life, that could accordingly not be dissolved so long as they lived and, tacitly, could not be the subject of a divorce. It would have been a Catholic marriage de facto but not de jure, thus preserving the principle of secularity. However, the authors were mainly motivated not by religious considerations but rather, in a Gaullist perspective, by the national interest : their disapproval of divorce was designed to protect the family and the birthrate. Nevertheless, they did not succeed in convincing the Committee. It was easy to object that the option they proposed would not be really voluntary, for would it be possible to find loving couples who would have included the prospect of breakdown in their plans or Churches who would give them their blessing ? It remains the case that Henri Mazeaud's initiative did not make its appearance in discussions in France on problems relating to marriage without leaving any trace : the taboo of the unity of the institution had been broken and the idea of an alternative kind of marriage had been introduced. Even though its promoters deny it, this idea was to resurface in 1998 in the form of the civil solidarity pact. This pact may well have been invented for a completely different kind of clientele, but its outline could once again confer a religious dimension on marriage.

Paradoxically, a frank legal pluralism, operating between all religions and philosophy in mutual respect, might seem more appealing and be more readily accepted than the dual system that Henri Mazeaud confined to the narrow framework of the civil marriage. Instead of the future spouses being able to choose only between a pseudo-religious marriage and a devalued ceremony, appearing to be a marriage solely for want of religion, each couple will have the marriage that matches their beliefs, will give it the meaning that corresponds to their faith and will invite thereto the minister of their religion or the official of their Republic. Comparative law has made us familiar with foreign countries where the State manages quite calmly a variety of kinds of marriage, whether religious or not, all capable of producing civil effects. And philosophers will tell us that this is the ultimate conclusion of religious freedom, as included in the catalogue of human rights. It is perhaps not very enlightening to stop at Article 10 of the Declaration of 1789. But France is completed by Europe. Article 9-1 of the European Convention sets out what is meant by religious freedom, namely the right to manifest alone or in community with others one's religion in practice, worship and observance. Observance, so much the better !

The phrase in community with others was suggestive. However, this could be taken further. The United Nations was to draw up, after a declaration concerning children and before one concerning animals, a declaration of the rights of legal persons. Do they not already have the right to be punished ? However, sociology does not need to follow the route of subjective rights in order to grasp the reality of groups, whether large or small, and of communities of all kinds, whether ethnic, cultural or religious (the labels may overlap). It will apprehend them in their demographic reality and in their collective mentality, in

¹⁰ Recueil Dalloz 1945, Chron. pp. 1 et seq.

¹¹ Sitting of 5 December 1947, Travaux of the Committee, vol. III, pp. 493 et seq.

phenomena of memory, communion and hope. What else is needed to legitimise a legal being ? It is by spontaneous vitality that a Church or a philosophy imposes itself as an autonomous entity, and imposes the autonomy of its norms, its marriage and even its civil status (the State retaining just the role, which for it is so consubstantial, of statistician). What would be the result of this ? A pluralist society, of the kind that exists elsewhere and will become more widespread under the pressure of immigration, the major phenomenon of our time.

That is the language of the sociologist¹². But it is not the language of our Governments, whoever they may be. They could change matters only by changing the Constitution : it is no longer just the secular Republic that would have to be deleted from Article 1, but also the indivisible Republic – an expression that takes us back well into the past, to the time when the Montagnards exterminated the Girondins. The community concept of the Anglo-Saxon kind astonishes the French. They see in it the constraints of a ghetto and not the self-fulfilment of a group. It is in the name of the immigrant's liberty that they make his integration their ideal. Integration against all kinds of pluralism ? It depends. Against ethnic pluralism, for certain : its existence is not recorded but is denied behind the concept of nationality. Against cultural pluralism, full confidence is placed in the school-room. But the case of religious pluralism, flanked by philosophy, is very different. For that pluralism France cannot offer a broad whole in which immigration can be integrated. It did not develop the civil religion dreamt of by Rousseau¹³ and it has no State religion since the time of Louis-Philippe. It was thought for a long time that, through the school, Jules Ferry had created a quasi-religious State morality, of a neo-Kantian flavour, but even that disappeared. If there must be integration, it will come about through secularization. Some will call this a vacuum and others, an open space.

¹² On this aspect of the problem, an essential collection is the works of Norbert Rouland : Aux confins du droit, 1991, L'Etat français et le pluralisme ; histoire politique des institutions publiques, 1995 ; Introduction historique au droit, 1998 ; and the article in the journal *Droits et cultures*, 1998 (2), pp. 217 et seq., and, in collaboration with S. Pierre-Caps and J. Poumarède, *Droit des minorités et des peuples autochtones*, 1996.

¹³ Du contrat social, Book IV, 8. This idea has remained in the back of people's minds (cf. the *Jugendweihe* in the F.R.G.). Closer to home, there are two examples which resemble symptoms of an uncomfortable feeling left by the secularization of civil status – 1. the civil (or civic or Republican) baptism. This is a practice inaugurated under the IIIrd Republic by anti-clerical mayors with the agreement of families of the same persuasion. The declaration of birth is followed some time afterwards by a ceremony at the town-hall where the child is entrusted to the protection of the Republican and secular institutions, the parents undertaking with the support of the godfather and godmother to bring him or her up in accordance with the cult of reason, fraternity etc... This practice has never been more than very occasional ; all the same, even today, one can find in a provincial newspaper a report that, here and there, it has been followed. The presence of the mayor obviously does not confer on the event the authenticity of a civil status event. However, it has a historical patina that makes it something more than a mere question of folklore. The parties act under the aegis of an Act of 22 prairial of year II (8 June 1794). It is true that there is some doubt as to whether this Act is still in force. What is more, one cannot tell whether the Act, which was voted in the middle of the festivities for the Supreme Being, was designed to assist Robespierre or, on the contrary, to embarrass him, for it is well known that members of the Convention were already caricaturing in the background his passion for the priesthood. 2. A proposal was made in 1998 to ritualise recognition of children born out of wedlock. Having observed that many of the fathers of such children, once they had been persuaded to sign a recognition, take absolutely no further interest in the child's education, judges and sociologists suggested that the exercise be bolstered by a certain solemnity, in that the father, in the presence of the mayor and witnesses (who if need be would be called upon to act in place of the parental authority), would undertake to fulfil his paternal duties with constancy and love. But would that suffice ?