

# THE EVOLUTION OF THE STATUS OF THE CHILD IN FRENCH FAMILY LAW\*

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Reform of French family law has been in the pipeline since the late 1990s<sup>1</sup>, in particular in the areas of the rights of the surviving spouse Act of 3 December 2001, the legal status of cohabitation (PACS), the family name (Act of March 2002), access to origins (Act of 22 January 2002), parental authority (Act of 4 March 2002) and more recently the law of divorce<sup>2</sup>. However, this impetus for global reform spear-headed by a left-wing government (socialists, communists and greens), was lost after the re-election of President Chirac in June 2002, immediately followed by the come back of a right-wing government. Preference was then given to punctual reforms.

As a result of this piecemeal approach, the status of the child, in particular the issue of the unequal treatment of legitimate and illegitimate children, had not been fully re-addressed until very recently. The purpose of this article is to examine the evolution of the status of the child in French family law, focusing in particular on the issue of filiation where there was a need for establishing a new balance and that of parental authority, where children's rights became its main focus.

## **A. Filiation: Establishing A New Balance**

As Profs. Ph. Malaurie and H. Fulchiron put it, "(...) the law of filiation is a legal technique which is dependent on an ideology. When the ideology changes, the technique transforms itself (...) It is also a corpus with its own coherence – when this coherence breaks down, the whole system begins to change . . ."<sup>3</sup> Under the influence of the Christian doctrine, under the pre-Revolution *ancien droit* and under the original Civil Code, *filiation légitime* (legitimate filiation) was given a favourable and superior status to that of *filiation naturelle*<sup>4</sup> (illegitimate filiation). The law of filiation was then primarily inspired and pre-determined by the superior value given to the institution of marriage and to that of the family based on marriage rather than by the concept of biological reality, which was then less reliable to establish paternity than maternity. Therefore, a simple ideology based on the true legitimate family created a simple law of filiation based on the precedence of legitimate filiation over the illegitimate one.

In the 1930s, a new ideology, that of individualism, which favoured the individual interests of the child, combined with the traditional conception of marriage to create a more progressive law of filiation by extending the scope of legitimacy of children to protect their interests<sup>5</sup>. The rights of illegitimate children certainly improved but overall the doctrine of individualism led to a number of contradictions in a law that became increasingly case-law based.

A new ideology inspired the reform of 1972: to remove the discrimination against illegitimate children, and in particular adulterous ones who were deprived of their rights for circumstances relating to their birth which were beyond their control. This discrimination was not only disapproved of by public opinion but also contrary to many international treaties, notably the European Convention of Human Rights of 1950.

1. *The Foundation of The Modern Law Of Filiation: The Act Of 1972 Equality Between Legitimate and Illegitimate Children.* The Act of 3 January 1972<sup>6</sup> constituted one of the major reforms of French family law in the 20<sup>th</sup> century. It was articulated around two main principles: establishing equality of rights for all children, legitimate and illegitimate ones, and the search for truth in establishing parentage<sup>7</sup>. For the purpose of this article, the emphasis will be put on the first principle.

The first innovative objective of the 1972 Act was to equalise the rights of legitimate and illegitimate children. Whether legitimate or illegitimate, in principle filiation produces the same effects. This principle was established in former Article 334(1) of the Civil Code which stated that "(T)he illegitimate child has, in general, the same rights and duties as the legitimate child in his relations with his father and mother." Furthermore, the 1972 Act aimed at abolishing all discrimination between legitimate children, who were a full part of the families of his parents, and illegitimate children who were left with no links with their parents' families. Under Article 334(2) the illegitimate child "enters in his parent's family"<sup>8</sup>.

Recognising that the natural family is part of the social reality, French law of filiation aligned itself with other Western European countries. It moved close to a complete assimilation of

the rights of legitimate and illegitimate children and, within the latter category, to the removal of all distinctions. The illegitimate child has, in principle, the same rights as the legitimate child with regard to the establishment of filiation<sup>9</sup> and succession rights.

Since 1972, illegitimate children, including those from adulterous relationships<sup>10</sup>, have the right to establish their parentage under Article 334-1. Article 334-8 which provides for the various means whereby illegitimate filiation may be established - *reconnaissance volontaire* (recognition by the parents), *possession d'état*<sup>11</sup> (public acknowledgment by the parent(s))<sup>12</sup> or *autorité de justice* (court order) – apply equally to all categories of illegitimate children. Irrespective of their situation at birth, all illegitimate children can be recognised<sup>13</sup>.

Before 1972, succession law was the major source of discrimination against illegitimate children. Recognised illegitimate children were only entitled to an equal share of the paternal or maternal estate to their legitimate half-brothers or half-sisters. They were also precluded from receiving gifts or legacies from their parents. Applied here, the principle of equality was the major innovation of the 1972 Act which equalized the succession rights of legitimate and illegitimate children with respect to family members including grandparents, uncles, aunts and cousins. Also, like legitimate children, the illegitimate are protected against any gifts to a third party that would be prejudicial to their succession rights<sup>14</sup>.

This principle of equality had a number of exceptions however. Incestuous children and adulterous children were still treated differently under the 1972 Act. Adulterous children<sup>15</sup> had the same rights as other legitimate and illegitimate children with respect to the establishment of parentage but were still discriminated against with respect to their succession rights which were clearly limited. Following the ruling of the European Court of Human Rights against France in the case of *Mazurek*<sup>16</sup>, in which it said that it could find no justification for a discrimination based on the extra-marital birth of a child, the Act of 3 December 2001 on the rights of the surviving spouses and adulterous children abolished all discriminations against those children with respect to succession rights. The 1972 Act did not go as far as to apply the principle of equality to incestuous children. Article 334-10 still prohibits the establishment of their filiation, although this restriction applies to absolute incest only. Filiation can only be established on one side, usually that of the mother.

The Commission chaired by Françoise Dekeuwer-Défossez pointed out that the traditional distinction between legitimate and illegitimate filiation were abandoned in the legislation of a number of Western countries<sup>17</sup> and that these examples were the start of a trend of a legislative convergence in the Western world<sup>18</sup>. However, should such trend exist, this would certainly not be the main reason for following it and for unifying filiation regimes.

Sociologically, it is undeniable that the “natural” family is a family in the same sense as a family based on marriage as most children born within the former are just as much desired and brought up by both parents<sup>19</sup>. Furthermore, the increase in the number of children born outside wedlock<sup>20</sup> is no longer perceived as a result of a break down of the social fabric or an ideological divide between “natural” and legitimate families<sup>21</sup>. On the contrary, the “natural” family has become an integral part of modern society and it could be even argued that a complete assimilation of the legal regimes governing legitimate and illegitimate children would contribute to re-enforce social cohesion<sup>22</sup>.

Symbolically, the primary aim of the law of filiation is to create a legal link between a child and his parents and their families. Considering that, at least in western societies and in France, in particular, the institution of marriage is in decline in favour of other forms of partnerships (cohabitation, registered partnerships, PACS), there is less and less sense in articulating the legal regimes of filiation around the existence or not of a marriage. Conversely, it makes proportionally more sense to link filiation with the idea of individual responsibility of the parents on the ground that the relationship between a child and his parent(s) is fundamentally identical whether it takes place within or outside marriage. Legally and technically, it has been argued that the traditional dichotomy is illogical, and is a source of confusion and complexity. The Act of 1972 had equalised the rights of illegitimate and legitimate children but had maintained the two categories in name. Once the legitimate no longer have superior rights over the illegitimate, what is the point of keeping the distinction in name between those two categories<sup>23</sup>?

While the 1972 Act no longer justified a dichotomy of filiation regimes based on ideological preference and as a result assimilated technical rules governing those regimes, a number of specific and separate rules on the establishment or the challenging of filiation still remain.

Finally, the courts have stretched the interpretation of the general principle of equality as expressed in former Article 334(1) of the Civil Code by using it as a yardstick for the interpretation of other provisions applicable to legitimate children only<sup>24</sup>. In other cases the same principle was set aside where its application would have most appropriate<sup>25</sup>. By doing so, the courts have caused confusion in the application of the principle of equality between legitimate and illegitimate children.

For those reasons, the Dekeuwer-Défossez Commission proposed to abolish the distinction between legitimate and illegitimate filiation, and to unify the rules applicable to children irrespective of their status. This distinction would in turn be replaced by that between *filiation maternelle* (maternal parentage) and *filiation paternelle* (paternal parentage). According to the Commission, this unification process would have the effect of simplifying the rules on the establishment of filiation and on disputes and would automatically lead to the disappearance of legitimation.

On the basis of the Act of 9 December 2004 on the simplification of the law<sup>26</sup>, the Government adopted the *Ordonnance* of 4 July 2005 on the reform of filiation<sup>27</sup> with the view to completing the process of equalisation of rights as between legitimate and illegitimate children by abolishing the distinction between those two categories. Under Article 6 of the *Ordonnance*, the terms “legitimate” and “illegitimate” which were used in Article 311-15 Civ.C. (on conflicts of laws relating to filiation) are simply deleted. Equally, Chapter II of Title VIII on filiation is simply entitled “On the establishment of filiation”. The former two separate chapters on legitimate and illegitimate filiation (Chapters II and II respectively) are no longer.

As a result, the unmarried mother who, unlike the married one, had to recognise her child after birth, will no longer be required to do so. A simple mention of her name on the birth certificate will suffice to establish filiation (see new Art. 310-3 which provides notably that “filiation is established by the birth certificate of the child...”). Equally the rules governing claims for the establishment or the challenging of filiation under new Chapter III of Title VIII no longer make the distinction between legitimate and illegitimate children and were harmonised, and were reviewed notably to protect all children against late claims.

Such radical reform of filiation law which finally recognises that the “natural” family is fully integrated in the French society can only be welcomed even though it comes late and has been implemented by way of delegated legislation rather than by an Act of Parliament<sup>28</sup>, which would have been much more appropriate for such fundamental change in an essential area of family law. However such much waited reform had been anticipated by the abolition of the concepts of legitimate and illegitimate children in the exercise of parental authority.

#### B. *Parental Authority and Children’s Rights: Getting The Priorities Right*

It is quite clear from the reading of the various parliamentary reports<sup>29</sup> on the proposed legislation on parental authority that a reform of this law was necessary as a result of the evolution of and changes in family life. The number of children born out of wedlock has steadily grown to over 300,000<sup>30</sup> and one out of two first children is born out of wedlock. In 1994, more than a third of those children were recognised, in most cases jointly, by both parents before birth. And recognition by the father within a month after the child’s birth was also on the increase with 80 percent in the year 2000<sup>31</sup>. Furthermore, the majority of unmarried parents live together, thus assimilating their relationship to their children to that of married parents.

If marriage is no longer the legal and social institution used by the majority of parents living together, parents tend to marry with the view to legitimating their children, usually after the birth of their first child<sup>32</sup>. Marriage is therefore given a new purpose and role. Equally, one out of four marriages end up in divorce, with two out of three married couples having children caught into divorce proceedings. Non married couples also tend to resort increasingly to courts to deal with parental authority issues<sup>33</sup>. While the majority of children of divorced or separated parents live with the mother<sup>34</sup>, one out of two will have a step-parent<sup>35</sup>.

Those figures showed a new picture of a multifaceted family in an ever-changing society. It was therefore necessary for the French legislator to take those changes into consideration and, in

particular, adapt the rules on parental authority, notably by harmonising those on its devolution and reinforcing those on its joint exercise. While the proposed reform of parental authority law was based on a variety of studies and reports<sup>36</sup>, it is primarily in the report of Irène Théry - on French law facing the evolution of the family and private life - and that of the Dekeuwer-Défossez Commission<sup>37</sup>, that the French legislator found inspiration.

1. *The evolution of the law on parental authority: from inequality to equality.* Rejecting both the principles on parental authority established under the Revolution<sup>38</sup> and the power of the father under Roman law, the authors of the original Civil Code turned to French customary law<sup>39</sup> - in which this authority was exercised in the interests of the child<sup>40</sup> - to firmly re-establish the exclusive<sup>41</sup> authority of the father<sup>42</sup>. This rather despotic form of authority established by the Napoleonic Code was gradually abandoned in the successive reforms of parental authority, leading first to more equality between the parents and then between the children.

Toned down during the second half of the 19<sup>th</sup> Century<sup>43</sup>, the concepts of “*puissance paternelle*” and “*chef de famille*” were deleted from the Code by the Act of 4 June 1970<sup>44</sup> and replaced by that of “*autorité parentale*”, which, in principle, was equally exercised by both parents, at least in the typical case of married and non-separated couples<sup>45</sup>. Unmarried or divorced parents did not enjoy the same rights. For illegitimate children, precedence was given to the mother<sup>46</sup> and, for children of divorced parents, custody granted to one of the parents – generally the mother – carried with it full parental authority<sup>47</sup>. The Acts of 22 July 1987<sup>48</sup> and 8 January 1993<sup>49</sup> corrected this situation of inequality by generalising the principle of joint exercise of parental authority irrespective of the state of the relationship between the parents<sup>50</sup>, and of the status of the child<sup>51</sup>. Under the 1970 Act, the emphasis was put on the interest of the child, which became then the cornerstone of parental authority and the main criterion for state interference. Former Article 371-2 clearly stated that, “Parental authority is established to *protect* the safety, health and morality of the child.” (emphasis added).

Parental authority was therefore not a source of power over the child but a source of protection for him. Its primary purpose was to protect the child by meeting his needs for care, education and guidance. The interest of the child was the condition, the criterion, the measure and the aim of parental authority. Parental authority was then a set of rights (prerogatives) and duties conferred upon parents to be exercised in the sole interest of the child.

However, because the very concept of child interest is a variable one in time and from country to country and can only be fully appreciated in the case of each individual child, a shift towards the recognition that children have rights took place and culminated in the adoption of the UN Convention on the Rights of the Child on 20 October 1989. This new ideology shed a new light on the law of parental authority and naturally contributed to the changes in French law. Having said that, the reference to the interest of the child has not disappeared in the new Act of 2002 on parental authority. Article 371-1 as amended by the 2002 Act provides for a new definition of parental authority which, without over-turning the basic principles, emphasises the rights of the child.

The new provision states that parental authority is a “. . . set of rights and duties having as their purpose the interest of the child.”<sup>52</sup> While the former reference to custody and supervision is no longer – being relegated to means only to achieve an intended objective – parental authority is to be exercised not only to protect the safety, health and morality of the child but also to “. . . ensure his education and help his development, giving him *due respect as a person*.” (emphasis added). Furthermore, the final paragraph of article 371-1 adds that “(p)arents shall take decisions affecting the child in association with him, taking account of his age and degree of maturity”.

While formerly inferred from the general terms of article 213<sup>53</sup> of the Civil Code (title V on marriage), the obligation for the parents to contribute towards the maintenance and the education of the children is explicitly stated. Such obligation continues after the child has reached the age of majority<sup>54</sup>.

3. *A re-unified law of parental authority: the Act of 4 March 2002.* The Act of 2002<sup>55</sup> did not alter the original term of “parental authority” which had been criticised by some in favour of that of “parental responsibility” which is the terminology used in international conventions and other domestic laws. The rationale for keeping the term “parental authority” originally chosen in the 1970

legislation is that “parental authority” has wider implications than that of “parental responsibility” as the former expresses better the intrinsic link between the parents’ rights and duties towards their child(ren). As Théry put it, “(n)ot only parents have responsibilities but also a ‘duty to expect’ towards their children, thus facilitating their social integration. Devaluing this duty would lead to weakening the significance of parentage.”<sup>56</sup> Furthermore, etymologically the term “authority” expresses a recognition on the part of the parents that they are the creators of the child. Parental responsibility cannot be without authority, which confers onto the parents the necessary powers to achieve their mission as parents. The Dekeuwer-Défossez Commission also recognised that, if children’s rights must be re-asserted, children not only have rights but also duties, primarily towards their own parents<sup>57</sup>.

In their respective reports Théry and Dekeuwer-Défossez concluded that there was a need to re-assert the value of parental authority<sup>58</sup>, to reinforce the principle of *coparentalité* (joint exercise of parental authority)<sup>59</sup> without interruption after the breakdown of the parents’ relationship and to reinforce the role of third parties in the child’s life<sup>60</sup>. It is around those principles that the 2002 Act is mainly articulated. But first and foremost, taking up the proposal of the Dekeuwer-Défossez report, the 2002 Act completes the process of equalisation of status of the legitimate and illegitimate children with regard to the way in which parental authority is exercised.

If the Act of 8 January 1993 laid down the foundation of the joint exercise of parental authority for the legitimate and the illegitimate under former article 372 of the Civil Code - albeit in two separate paragraphs – a number of differences still remained and, notably, the predominance of the mother was maintained under former article 374(2) of the Code<sup>61</sup>. Under the 2002 Act, the rules on parental authority are the same, whatever the nature of the children’s filiation. As new article 310-1 provides, “All children whose filiation has been legally established have the same rights and duties in their relations with their father and mother.”

The joint exercise of parental authority is also the norm, save in the case where the child’s filiation is not established within a year of his birth or when established by court order<sup>62</sup>. However, this rule applies irrespective of the marital status of the parents or whether they live together or not. Furthermore, the old requirement under former article 372(2) that at the time the child is recognised, the parents should live together, has been dropped.

The process of equalisation of rights as between legitimate and illegitimate children that had been initiated in 1972 has now been fully completed with the major reforms on parental authority and filiation. This process has been a rather long one and not necessarily one that had been conducted by the French legislator in a logical way or, with respect to the reform of filiation law, in the most appropriate way.

What matters however is that the circle is now complete and that French law has been brought more into line with international laws on children’s rights and a basic sociological reality which could no longer co-exist with any form of ideological and legal discrimination between children based on the marital status of their parents.

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\* All translations are by the author.

<sup>1</sup> See Françoise Dekeuwer-Defossez, *Rénover le Droit de La famille*, Report to the French Minister of Justice, September 1999.

<sup>2</sup> See C. Dadomo, *The Current Reform of French Law of Divorce* [2004] *International Family Law* 218.

<sup>3</sup> See *La famille* (2004, Droit Civil, Defrénois, Paris) at 316.

<sup>4</sup> Although rather awkward, the term “*naturel*” (natural) was preferred to “illegitimate” because of the negative connotation of the latter term and to better reflect the objective of equalisation of rights under the Act.

<sup>5</sup> For instance, courts legitimated children conceived outside wedlock but born during the subsequent marriage of the parents. This new line of case-law was established in the *Degas* case of the Civil division of the Court of Cassation (Cass. Civ., 08.01.1930 [1930] I *Recueil Dalloz Périodique* 51. Legitimacy was then retrospective to the day of conception and no longer only effective as from the day of the marriage. This jurisprudence is now confirmed by Articles 311 and 314 of the Civil Code (Civ. C.).

<sup>6</sup> For commentaries of the Act, see notably, M. Dagot & P. Spiteri, *Le Nouveau Droit de la Filiation* (1972); J. Massip, G. Morin & J.-L. Aubert, *La Réforme de la Filiation* (3rd. ed. 1976, Defrénois, Paris).

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<sup>7</sup> After 1972, the emphasis is put not only on biological truth, thus allowing the child to be directly related to his biological parents (the so-called *vérité du sang*), but also on the sociological truth (*vérité affective*) which led to the adoption of the Act of 25 June 1982 allowing *possession d'état* to be used as a means of establishment of parentage for illegitimate children.

<sup>8</sup> Those two paragraphs were repealed by Article 10-II of the Act of 4 March 2002 on Parental Responsibility and transferred into a new Article 310-1 Civ. C. which provides that "All children whose filiation has been legally established have the same rights and duties in their relations with their father and mother. They enter in the family of both parents". The significance of the provisions of Article 334(1) and (2) remains unchanged therefore. Note that Article 310-1 becomes Article 310 under Article 2 of the new *Ordonnance* of July 4, 2005 on the reform of filiation

<sup>9</sup> However, the establishment of parentage for legitimate and illegitimate children are obviously governed by different rules since, for the former, the parents are married and, for the later, they are not.

<sup>10</sup> The old principle under former Article 335 Civ. C. which denied the right of children from adulterous relationships to establish their parentage was fully abolished in 1972. This evolution of the law in favour of adulterous children was firmly enshrined in the case-law of the Court of Cassation which regards any foreign law not recognising this right as being contrary to public order (see Cass. 1<sup>st</sup> Civil Division., 12 May 1987 [1988] *Gazette du Palais* 321).

<sup>11</sup> See Art. 311-2 now new Art. 311-1 under the *Ordonnance* of 4 July 2005.

<sup>12</sup> The right for illegitimate children to establish their parentage by *possession d'état* is a result of the Act of 25 June 1982 however.

<sup>13</sup> Recognition is not compulsory however, which makes *accouchement sous X* (anonymous childbirth) legal under Article 341-1 Civ. C., thus allowing a mother to request that her admission in the maternity and her identity remain secret. This provision means that the illegitimate child will not be able to search for his biological mother. If no parentage is established, the child will be in the care of social services and eligible for adoption after a period of time of two months (under Article 351(2) as amended by the Act of 5 July 1996) within which the mother may change her mind and either recognise her child or opt for *possession d'état* and bringing him up herself. Note that Article 341-1 becomes Article 326 under Article 2 of the new *Ordonnance* of July 4, 2005.

<sup>14</sup> Despite the general provisions of Article 334 of the Civil Code, this equalisation of rights did not extend to illegitimate children in the case of gifts granted by a parent to a new spouse under Article 1527(2) on the ground that the protection of the children's succession rights applied only to "children of a former marriage". This anomaly was rectified by the Act of 3 December 2001 and the Court of Cassation gave the amended Article 1527(2) retrospective effect on the ground that the discriminatory former provision was contrary to the European Convention of Human Rights (see Cass. 1<sup>st</sup> Civil Division., 29.01.2002 [2002] *Dalloz* 1938).

<sup>15</sup> The term "adulterous" is not used in the Code. Instead former article 334(2) and article 759 Civ. C. referred to a child whose mother or father was married with another person at the time of his conception.

<sup>16</sup> ECHR, *Mazurek v France*, 01.02.2000. Having anticipated this ruling, the Dekeuwer-Défossez report also called for a complete abolition of this discrimination.

<sup>17</sup> See Belgium under the Act of 31 March 1987, the new Civil Code in Québec in force since 1 January 1994 and in Germany with the Act of 16 December 1997.

<sup>18</sup> See Dekeuwer-Défossez, *op.cit.* at 15.

<sup>19</sup> According to Dekeuwer-Défossez, *op.cit.*, only 3 percent of children are born within a single-parent family.

<sup>20</sup> From 6 percent in 1965 to 40 percent in 1997 and 43 percent in 2000.

<sup>21</sup> See Irène Théry, *Couple, Filiation et Parenté Aujourd'hui. Le Droit face aux Mutations de la Famille et de la Vie Privée* (1998, Editions Odile Jacob, La Documentation Française, Paris) at 63.

<sup>22</sup> *Ibidem.* at 63.

<sup>23</sup> This inconsistency in the 1972 Act was emphasized by G. Cornu in "La Filiation" in *Réformes du Droit de la Famille* (1975, Archives de Philosophie du Droit, vol. 20, Sirey) 29, at 43.

<sup>24</sup> See for instance, Court of Cassation, 1<sup>st</sup> Civil Division, 18.12.1990 [1991] *Dalloz*, jurispr. 433.

<sup>25</sup> As in the interpretation of Article 1527 in a way that was unfavourable to illegitimate children, see above footnote 17; Court of cassation, 1<sup>st</sup> Civil Division, 08.06.1982 [1983] *Dalloz*, jurisprudence 19.

<sup>26</sup> Act nr 2004-1343 adopted in accordance with Article 38 of the 1958 Constitution, whereby Parliament authorised the Government to pass legislation in areas of law normally reserved for Parliament, the so-called *domaine de la loi*. This is known as the enabling Act or *loi d'habilitation*.

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- <sup>27</sup> *Ordonnance* nr 2005-759 in Official Journal of the French Republic of July 6, 2005.
- <sup>28</sup> One might venture into speculating that the French Government wanted to avoid a healthy democratic debate on certain aspects of filiation law. It is indeed remarkable that the 2005 *Ordonnance* was adopted on the basis of the enabling Act of 2004 on the simplification of the law. One can hardly imagine that a reform of the law of filiation is a mere issue of simplification
- <sup>29</sup> See M. Dolez, Report on the Bill on Parental Authority, 2001-2002, Report Nr 3117 at 7-8; J. Rozier, Information Report on the Parental Authority Bill, 2001-2002, Report Nr 66 at 7-8.
- <sup>30</sup> This equals to 4 out of ten children as opposed to 50,000 in the early 1970s (i.e. 6 percent of all children).
- <sup>31</sup> As opposed to one third in 1965. The proportion of children not recognised by their father fell to 3 to 4 percent only.
- <sup>32</sup> In 1999, marriages used for legitimating children represented 28 % of all marriages as opposed to only 5.3 % thirty years earlier.
- <sup>33</sup> According to a study conducted by the Ministry of Justice, in 1996, parental authority was exercised jointly by 87 % of divorced couples while this authority was granted exclusively to the mother in 11 % of cases only; see Dolez *op. cit.* at 7.
- <sup>34</sup> Custody of children is usually granted to the mother in 86 % of cases and to the father in only 13 % of cases. As a result joint custody is very rare with 1% of cases.
- <sup>35</sup> In 1990, 950,000 children under 25 lived with a step-parent. The step-parent in question is more likely to be a step-mother as the absent parent – usually the father – is likely to remarry more quickly than the other parent.
- <sup>36</sup> See *Projet du Gouvernement Relatif à la Réforme du Droit de la Famille*, Conférence de la Famille, 11 June 2001.
- <sup>37</sup> See footnote 1.
- <sup>38</sup> The *patria potestas* (for life) in place in the *pays de droit écrit* (South of France where most laws were written) was abolished by the Act of 28 August 1792 and adult children (the majority age was lowered to 21) were no longer subject to the authority of the father which was diminished and diluted; the right to disinherit limited and, above all, parental authority was equally shared between father and mother.
- <sup>39</sup> Customary law was established in the North of France (*Pays de droit coutumier*) and offered in some areas of law resistance to the infiltration of Roman law, which had the greatest influence on the law of *pays de droit écrit*.
- <sup>40</sup> The authority of the father ended with the marriage of the child, his emancipation, and when he reached the age of 25, the age of majority.
- <sup>41</sup> The mother had no say in the exercise of this authority and could exercise it only after the death of her husband, as a guardian and sometimes with a deputy guardian.
- <sup>42</sup> Paternal authority ended when the child reached the age of 21, the legal age of majority or 25, the age of legal capacity to marry of male children without the parents' consent (see original Art. 148 of the Civil Code).
- <sup>43</sup> See R. Szramkiewicz, *op. cit.* at 130 – 131.
- <sup>44</sup> Act nr 70-459 on parental authority (Official Journal, 05.06.1070, 5227).
- <sup>45</sup> See former Article 372 of the Civil Code which read as follows: "During their marriage the father and the mother exercise jointly their authority".
- <sup>46</sup> Former article 374(1) of the Code provided that: "(r)egarding the illegitimate child, parental authority is exercised by the father or the mother who has recognised him, if he has been recognised by only one or the other."  
If both parents had recognised him, then Article 374(2) stipulated that parental authority (was) exercised by the mother only, in which case only a court could grant parental authority to the father or both parents.
- <sup>47</sup> Former Article 373-2 provided that "(I)f the parents are divorced and separated, parental authority is exercised by the parent to whom custody of the child has been granted by the courts..."
- <sup>48</sup> Act nr 87-570 on the exercise of parental authority also known as the "Malhuret" Act (Official Journal, 24.07.1987, 8253).
- <sup>49</sup> Act nr 93-22 amending the Civil Code and relating to civil status, family and the rights of the child, and creating a family judge (Official Journal, 09.01.1993, 395).
- <sup>50</sup> Following the 1987 Act, article 373-2 provided that "(I)f the parents are divorced or separated, parental authority is either exercised by both parents or by the parent to whom a court has granted it..." The

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1993 Act amended this provision by referring to article 287 which stated that parental authority was exercised by both parents and that, should the interests of the child so required, the court could grant parental authority to one of the parents.

<sup>51</sup> Former article 374 (2) of the Civil Code provided that, with respect to illegitimate children, parental authority could be exercised by both parents by joint application to the *juge des tutelles* (judge supervising guardianship). Following the Act of 1993, article 374(1) provided that parental authority was exercised by the parent in relation to whom parentage of the illegitimate child had been established, while paragraph 2 stated that, where parentage had been established in relation to both parents, the mother would have parental authority, save in the case where both parents applied for joint exercise to the regional civil court.

<sup>52</sup> By contrast, the original Bill also referred to the interest of the child as the foundation as well as the purpose of parental authority. This reference to foundation was dropped in subsequent drafts and the Act on the ground that this reference to the interest of the child as a foundation of parental authority denied the actual founding role of the parents; see L. Bêteille, Report on behalf of the Senate Committee for constitutional laws, Legislation and universal Suffrage, Regulation and General Administration, Parliamentary Session 2001-2002, Report nr 71 at 20.

<sup>53</sup> This states that spouses jointly ensure that their family is morally and materially supported and ensure the education of their children and prepare them for the future.

<sup>54</sup> This obligation to support children after they have reached adulthood had been confirmed by the courts but was enshrined in written law only in the case of divorce where the absent parent has to pay maintenance for adult children who are not financially independent (see former article 295 of the Civil Code as repealed by the 2002 Act).

<sup>55</sup> Act nr 2002-305 on parental authority (Official Journal of 05.03.2002 at 4161).

<sup>56</sup> *Op. cit.* at 190.

<sup>57</sup> For that very reason, the rather old-fashioned provisions of Article 371 of the Civil Code were maintained for their strong symbolic value. It provides that "(A)t any age, children shall honour, and show respect to, their father and mother".

<sup>58</sup> Notably by re-grouping the various provisions on the exercise of parental authority, notably those on parental authority after divorce, under title IX of the Civil Code relating to parental authority; see Dekeuver-Défossez at 46 and Théry at 191.

<sup>59</sup> By notably directly linking the joint exercise of parental authority to the establishment of parentage, making the joint exercise of parental authority more flexible, in particular through *résidence alternée* (joint custody), and by encouraging the relationship of the child with each of his parents; see Dekeuver-Défossez at 48-53 and Théry at 191-201.

<sup>60</sup> In particular, step-parents, grand-parents, siblings, etc.; see Dekeuver-Défossez at 56-64. However, the 2002 Act takes up only part of the proposal of the Dekeuver-Défossez report.

<sup>61</sup> See footnote 45 above.

<sup>62</sup> See new article 372(2).