
THE CURRENT REFORM OF FRENCH LAW OF DIVORCE

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Reform of French family law and, within it, of divorce has been in the pipeline since the late 1990s (See Françoise Dekeuwer-Defossez, *Rénover le Droit de La famille*, Report to the French Minister of Justice, September 1999,

<http://www.ladocfrancaise.go.../dekeuwer&fichier.htm>; see also 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).

French law of divorce was substantially amended in 1975 when the Divorce Reform Act nr 75-617 (the 1975 Act) came into force. By introducing in the law divorce by mutual consent, the French legislators recognised the importance of pluralism of moral, philosophical and religious beliefs as well as the diversity of family situations and experiences. The main objective of the 1975 Act was to 'de-dramatise' divorce. While it still is a difficult personal experience for those involved, the procedures were designed to reduce the element of conflict inherent to divorce. Those innovations were meant to render divorce based on fault marginal. For that purpose, the 1975 Act created two forms of divorce by mutual consent: joint request and by acceptance of a unilateral request. However, despite those innovations and despite the inroads made by divorce by joint request in the French legal landscape, divorce based on fault has not been made redundant as predicted in 1975, and still forms the basis for nearly half the total of divorce cases.

There are, of course, other reasons for proposing a reform or, less

radically, an adaptation of the 1975 Act to the mutations of the French society: complexity, length and costs of proceedings, resentment of the parties, etc. All these reasons would justify a re-shaping of the French law of divorce. This is precisely the object of the recent Act of 26 May 2004 relating to divorce (the 2004 Act). This Act was debated and passed by the French Parliament within 6 months following, in accordance with art 45 of the French Constitution, a declaration of emergency. The purpose of this article is to present, analyse and assess this Act, against the background of the 1975 Act, and its likely outcomes, with particular emphasis on causes and consequences.

The French conception of divorce

There are four possible attitudes towards divorce that can translate into law, two being:

- a ban on termination of marriage;
- a unilateral termination of marriage (eg repudiation or for incompatibility of personalities).

Between those two extremes, there are two moderate attitudes which, while recognising the necessity of divorce, do not accept divorce based on a unilateral decision of one of the partners:

- mutual consent;
- the recognition of divorce as a necessity (divorce based on fault) or divorce as a remedy to the breakdown of the relationship.

Historically, French law of divorce has oscillated between those four conceptions and went through periods of prohibition and recognition of divorce, thus reflecting the moral, religious and sociological context of each historical period.

The law of divorce before 1975

It was undeniably under the influence of the Roman Catholic Church, for

which the indissolubility of marriage became dogma after the Council of Trent in 1563, that divorce was not permitted under the *Ancien Régime* (the social and political system of France which existed from the end of the sixteenth century to the outbreak of the French Revolution in 1789). During that period of time, the Church had enjoyed a complete monopoly over legislation and its application in matrimonial matters. Canon Law only allowed nullity of marriage. Dissolution of marriage by nullity was more common, however, as there were many more causes available for the annulment of a marriage under Canon law than under Civil law. Furthermore, those who found it intolerable to live with their spouse could request *séparation de corps* (judicial separation of spouses), which allowed spouses to live separately without terminating their marriage.

This dogma was increasingly challenged during the eighteenth century by the Enlightenment philosophers, for whom the citizens' individual freedoms could not be restricted in any way by the permanent character of marriage. Under their influence, the legislators of the French Revolution passed the Act of 20 September 1792 (the 1792 Act) to legalise divorce. This was done on the same day as that of the adoption of the Act that established the principle of a civil marriage (however, during the French Revolution, a religious ceremony was still allowed and could take place before the civil one), which was regarded then as a simple civil contract under the 1791 Constitution (see R. Szramkiewicz, *Histoire Du Droit Français De La Famille* (Daloz, 1995), at pp 75-80). The 1792 Act allowed divorce for a wide range of reasons such as mutual consent, allegation by one of the spouses of incompatibility of personalities and other specific legal causes (eg dementia, criminal conviction, serious insult, desertion of the spouse for at least 2 years, etc). At the same time, and probably as a reaction to its religious origins, judicial separation was viewed as unnecessary and abolished by the 1792 Act. Following the passing of this Act, the number of divorce cases significantly increased during the Revolution. Early figures showed that trend, notably in Paris where, over a

12-year period 13,000 divorces out of 55,000 marriages (24%) were granted (see Szramkiewicz, op cit, at p 80).

Under the *Code Napoléon*, the French Civil Code of 1804 (the Civil Code), as a result of the secularisation of marriage, the principle of divorce was maintained but the principle of indissolubility of marriage was also re-established, derogations from which were limited. The grounds for divorce were therefore fewer than under the Revolution period: divorce could be granted either on the ground of fault or by mutual consent, in which case the requirements were less lenient than under the Revolution period (See V.D. Roughol-Valderon, 'Le Divorce par Consentement Mutuel et le Code Napoléon' [1975] *Revue Trimestrielle de Droit Civil* 482). Furthermore, the procedure for divorce by mutual consent was longer and subject to dissuasive requirements (for example, even adult couples had to obtain the consent of their parents and had to give up half of their property to their children). In this context, judicial separation re-introduced by the Civil Code became a more convenient alternative to divorce, especially for those who were no longer willing to live with their spouse but whose religious or moral convictions went against the idea of divorce. As a result, the number of divorce petitions dropped dramatically.

The rules set out under the Civil Code were applied for just a decade. Under the *Restauration* period (from 1815 to 1848, the monarchy was restored under the reigns of Louis XVIII, Charles X and Louis-Philippe I), Catholicism was again declared the official religion of the State and divorce was abolished by the Bonald Act of 8 May 1816. In compliance with Canon law, judicial separation was maintained.

As it was of a political nature, this law was at the mercy of any political change but, surprisingly enough, the prohibition of divorce survived the various political regimes that followed the fall of the Monarchy in 1848. The principle of indissolubility of marriage remained unchallenged under the Second Republic (1848-1851), the Second Empire (1851-1871) and during the first 10 years of the Third Republic.

It was in the anti-clerical

atmosphere of the early years of the Third Republic that Alfred Naquet, law professor and MP, drafted a number of private bills in favour of the legalisation of divorce. The third bill finally led to the adoption of the Act of 27 July 1884 (the 1884 Act). Following a passionate debate, at a time when State and Church were not yet separated, the 1884 Act legalised only one form of divorce, that which is based on fault. Divorce by mutual consent or by unilateral decision were no longer part of French positive law. Divorce was then regarded as a sanction either against the spouse who had rendered married life intolerable or against both spouses, in which case a divorce decree was granted on the basis of *torts réciproques* or *torts partagés* (shared fault/responsibility).

The 1884 Act and its subsequent amendments (the Act of 18 April 1886 which simplified the divorce procedure; the Act of 15 December 1904, which allowed the adultery spouse to marry the person with whom he had an affair; and the Act of 6 June 1908, which allowed the conversion by court order of judicial separation into divorce even in the case of the request being made by the 'guilty' spouse) resulted in a steady increase of divorce to the point that it alarmed conservative people: the number of divorce cases jumped from 3,000 in 1885 to 13,000 in 1910, 15,000 in 1913, 20,000 in 1926, 21,000 in 1931, 23,000 in 1936 and reached 24,000 in 1939. The Far Right Vichy Government attempted to curb this trend by passing the Act of 2 April 1941, which barred divorce petitions within the first 3 years of marriage, made the procedure much longer and defined the causes of divorce more restrictively. After the war, this Act was not repealed but emptied of its substance and the number of divorce cases kept growing from 30,000 in 1953 to 53,000 in 1974.

The reform of 1975

From 1884 to 1975, only one cause of divorce was officially recognised in French law: fault. The 1975 Act dramatically changed the French conception of divorce. Fault as a cause was not abolished (see arts 229 and 242 of the Civil Code) but the 1975 Act introduced three more causes:

- (1) *consentement mutuel*: mutual consent by joint request of both spouses (see art 231 of the Civil Code);
- (2) *divorce demandé par un époux et accepté par l'autre*: mutual consent by unilateral request accepted by the respondent, also known in French as 'double aveu' or 'aveu indivisible' (see former art 233 of the Civil Code); and
- (3) *rupture de vie commune*: breakdown of the relationship/common life (Article 237 of the Civil Code enabled one of the parties to petition for divorce after they had lived apart for at least 6 years, or under art 238, where the respondent's mental health had seriously deteriorated over a period of 6 years so as to render 'common life' intolerable).

Under the 1975 Act, French law of divorce was mainly characterised by its pluralism - which was a response to the diversity of matrimonial crises - in sharp contrast with the monolithic approach that predominated until then.

Assessment of the 1975 reform on divorce

The reasons for the 1975 reform

Until 1975, the various changes in the law of divorce were based on political conceptions. The 1975 reform was the result of the imperfections and weaknesses of the framework set out in the 1884 Act and of sociological changes in France.

Fault as the sole cause of divorce under the 1884 regime had a dual drawback:

- on the one hand, it led to the antagonism between the spouses being exacerbated as the 'innocent' spouse could make substantial gains such as *pension alimentaire* (maintenance/alimonies), *dommages et intérêts* (compensatory payments), care/custody of the child(ren), and the keeping of the benefits of married life; the post-divorce period was made even more difficult as a result; and
- on the other hand, those wishing to divorce amicably by mutual consent had no alternative but to resort to faking a divorce based on fault.

The 1975 reform was also the consequence of a change of mentality and social behaviour which appeared in the 1960s: greater permissiveness of morals and social behaviour was increasingly tolerated; individual happiness became a supreme value; and more and more women starting a professional activity. In this context of social change, the traditional conception of family was shattered and marriage was then perceived as an obstacle to individual happiness and development.

The 1884 Act no longer met the needs of a changing French society. The law was no longer in synchronisation with social reality. The growing dichotomy between the law and social reality was made even more acute by a major opinion poll conducted in the early 1970s (See *Le Divorce et les Français* : Vol 1, *Enquête d'opinion* (PUF, 1974); Vol 2 : *L'Expérience des Divorcés* (PUF, 1975)). The majority of those questioned in that poll were in favour of a reform on three major aspects of divorce: a widening of the causes of divorce (but the French remained attached to the idea of a fault-based divorce); a 'de-dramatisation' of the divorce procedure; and a less conflicting post-divorce period. A reform was then justified.

Based on the results of this opinion poll and on reforms that had already taken place in various European countries, a first draft was drawn up in 1973 by Professor J Carbonnier at the request of the Ministry of Justice and opened to public consultation. The Bill, approved by the French *Conseil d'Etat* (the highest administrative court) and the government, was passed by the French Parliament on 11 July 1975 along the main lines of the Carbonnier draft. The Divorce Reform Act nr 75-617 came into force and was incorporated into the Civil Code on 1 January 1976, amending arts 229-310 of the Code (Amongst the many commentaries, see J. Carbonnier, *La Question du Divorce - Mémoire à consulter*, (1975) Dalloz, Chron at p 115; P. Raynaud, *Les Divers Visages du Divorce*, (1976) Dalloz, Chron at p 141); J.-Cl. Groslière, *La Réforme du Divorce* (Dalloz, 1976); R. Lindon and A. Bénabent, *Le Divorce en France* (Litec, 1984)).

The objectives and principles of the 1975 Act

The reform of 11 July 1975 was articulated around three major principles, which were revealed by the opinion poll. The first key principle was to open up the institution of divorce by creating and recognising new causes of divorce. While fault-based divorce was maintained (the principle that any harm caused by someone's fault must be redressed is a constitutional principle; see *Cons Const, Decision 99-419, DC, 9 November 1999, OJFR 16.11.1999, at p 16962*), mutual consent was re-introduced in the law and breakdown of the relationship as a ground was newly created.

The second key element of the reform was an attempt to 'de-dramatise' the whole divorce procedure. The original intention was to prevent divorce proceedings from intensifying the tension between the two spouses. To that end, divorce petitions would be dealt with by a specialised judge, the *juge aux affaires matrimoniales* (judge for matrimonial matters. Originally, this judge would have exclusive competence to grant divorce by mutual consent and would act only as a conciliatory judge during the first stage of other divorce cases. He would also deal with any litigation arising after the divorce decree was granted. Furthermore, with the view to pacifying the whole divorce process, *pactes amiables* (amicable settlements) covering the issue of children, the name of the wife after the divorce and jointly-owned property were also encouraged under the 1975 Act on the principle that a settlement agreed by the spouses had more chance of being complied with than any solution imposed by the court. The purpose of the 1975 Act was to bring about closer cooperation between the litigants and the courts, the role of this specialised judge being not only to make judicial decisions but also to help the spouses find an agreement.) (The *juge aux affaires matrimoniales* became the *juge des affaires familiales* (family judge) under the Act of 8 January 1993, which increased the judge's powers by ensuring that the whole divorce procedure takes place before him, notably its second phase at the end of which the divorce decree is pronounced.

Finally, in order to limit the possibility of litigation after divorce, the 1975 Act provided that a complete divorce settlement had to be concluded by the time the divorce decree was granted by the court. The Act provided that, in principle, *prestations compensatoires* (ancillary/financial relief) should take the form of payment of a capital sum and, where resources did not allow it, of payment of an allowance. The Act nr 2000-596 of 30 June 2000 on *prestations compensatoires* in divorce cases was passed in order to mitigate the severity of lump sum payments by authorising the payment of the capital sum over a period of 8 years and, in exceptional cases by reason of the health or age of the creditor, by way of a *rente viagère* (life annuity).

Critical assessment of the 1975 reform

In 1999, in her report to the government, Françoise Dekeuer-Défossez put the question as to the relevance and the timeliness of reforming a law that had been in force for only 25 years, and as to whether only some of its provisions, such as those on ancillary relief (as was the case in 2000), should simply be polished up (*Rénover le Droit de La famille*, op. cit. at p 73). However, she further stated that such alternative was insupportable as:

'the expectation of reform ... [was] great, amongst both the general public and lawyers practising in that field. The general view [was] that the law of 1975 [had] only partially met the expectations that it raised, that there [was] a gap between the law and the present state of society, and that it (was) only with great difficulties that it (was) applied properly by the courts.' (ibid, at p 73 (translation by this author)).

The number of divorce cases has increased dramatically over 40 years. From 30,000 in 1960, it reached 39,000 in 1970 and 60,000 in 1976. It further jumped to 81,000 in 1980 and 100,000 in 1985 to finally peak at 120,000 in 1995 and stabilise at around 115,000 cases per year on average. In 1970, for every 100 marriages, 11.3 divorce decrees were granted. This figure

jumped to 38 in 2001. This increase in divorce cases may be explained by a variety of reasons but it is undeniable that the liberalisation of divorce under the 1975 Act has played a major role. However, although statistical data show that some of the objectives of the 1975 Act were met, the overall assessment of the divorce regime can only be negative on three counts: causes, procedure and consequences.

With respect to causes, although it is undeniable that the introduction of mutual consent as a ground for divorce was a major step forward, it is also true to say that this was no longer satisfactory as the needs of those who wished to divorce without having to rely on the respondent's accord or fault were not addressed. The issue of a need for a ground for divorce is even raised by some academics since the idea of cause reflects a logic of indissolubility of marriage (see A. Bénabent, who also believes that it might be time to legalise a 'divorce by persistent unilateral request', *Droit Civil de la Famille* (10th edn, Litec, 2001), at p 138)). Under the 1975 Act, divorce based on fault should have been marginalised. However, reality shows that, although the important proportion of divorce by mutual consent is a direct consequence of the legislators' attempt to 'de-dramatise' the procedure and give spouses more responsible choice, divorce by joint request and by unilateral request accepted by the respondent peaked to 40 and 13% of divorce cases respectively. Divorce following the breakdown of the relationship and de facto separation remained very marginal, representing only 2% of all divorce cases. This clearly means that 45% of divorce petitions are still based on fault. As Dekeuer-Défossez pointed out:

'[m]anifestly, the Act of 1975 failed to eradicate the temptation [for the parties] to blame the other in order to obtain some financial or moral benefit, or to offer a satisfactory solution to those who have agreed on the principle of separation but cannot reach a general agreement on its details.' (op cit, at p 73 (translation by this author)).

The necessity to keep fault as a

ground for divorce is called into question as it is often futile to designate one of the parties as the 'guilty' one during long and exhaustive proceedings that feed on hatred and resentment (see the views and arguments of a family judge on this issue: Ganancia, 'Pour un Divorce du XXIème siècle' (1997) Gaz Pal Doctr 662).

Furthermore, the practice of divorce petitions based on faked fault, either for procedural expediency or for questionable financial interests, did not disappear (the reasons for such misuse of divorce proceedings are clearly dealt with in P. Gélard, *Report on the Divorce Bill*, Report nr 120 written on behalf of the Senate Committee for Constitutional laws, Legislation and universal Suffrage, Parliamentary Session 2003-2004, at 18-19 (available at: http://www.senat.fr/rap/103-120/103-120_mono.html)). With respect to divorce resulting from the breakdown of the relationship, the 1975 Act surrounded the procedure by so many financial and moral safeguards in favour of the respondent (the objective was to avert the possibility of repudiation of a spouse by the other who wished to start a new life with a younger partner) that it rendered this form of divorce inefficient. As a result, in France, unlike in many other countries, divorce proceedings are rarely initiated on that ground (see Dekeuwer-Défossez, op cit, at pp 73-74 ; see also P. Delnatte, *Report on Divorce Bill nr 1338 as adopted by the Senate*, Report nr 1513 on behalf of the National Assembly Committee for Constitutional laws, Legislation and General Administration of the Republic, at p 12, available at: <http://www.assemblee-nationale.fr/12/rapports/r1513.asp>).

With respect to procedure, it is undisputable that, as a result of its relaxation under the 1975 Act, the number of 'amicable' divorce cases considerably increased (see J. Rozier, *Information Report on the Divorce Bill nr 389*, Senate Parliamentary Session 2003-2004, report nr 117, at p 18, available at: http://www.senat.fr/rap/r03-117/r03-117_mono.html). However, in the case of divorce other than by mutual consent, the procedure itself played a

role in aggravating tensions between the parties (see P. Gélard's report, op cit, at pp 19-20). For instance, in divorce based on fault, the proceedings are too often used by the parties as a slanging match and, in divorce by mutual consent based on a unilateral request, the petitioner must give evidence in court that life with the respondent has become intolerable and the respondent must recognised that this is the case.

The proceedings tend to be too long also (ibid, at 20-21). In 2001, the average length of divorce proceedings was 12.8 months; a divorce decree is granted 9.2 months after a joint request is made but after 18 months on average in fault-based divorce cases (see Ministère de la Justice, *Annuaire Statistique de la Justice* (Documentation Française, 2003)). The average length of divorce proceedings based on fault is severely criticised as this could lead to aggravating the accusations made by each party against the other, thus poisoning their negotiations.

Equally, proceedings are too formalistic. For example, in joint request proceedings, the spouses still have an obligation to attend two court hearings, separated by a compulsory 3-month period of reflection, even in cases where there is no application for custody of the children or for financial relief. Such requirement has been unanimously criticised for being superfluous and a source of complications for couples who may have lived separately for years and have started a new life after separation. Equally, in divorce proceedings based on a unilateral request accepted by the respondent, the parties are required to exchange written submissions. Furthermore, the length of the initial stage of the proceedings tends to delay the adoption by the court of necessary interim measures.

Finally, and most importantly, the 1975 Act does not provide many pathways between the various divorce procedures and the possibility for the parties to switch procedure is therefore too restricted. Article 246 of the Civil Code made it certainly possible for the parties who had initiated divorce proceedings on the ground of the breakdown of the relationship to ask the court, at a later stage, to grant a divorce decree

on the ground of mutual consent. However, new divorce proceedings have to be initiated on this new ground. Furthermore, such alternative is open at the conciliatory stage of the original proceedings only, before the court has made a decision on the merits. Moreover, it is not possible to substitute proceedings based on the breakdown of the relationship for those based on fault or vice-versa.

Regarding the consequences of divorce, the 1975 Act did not live up to its promises. The major objective of the 1975 Act was to force the parties to agree on a divorce settlement by the time the divorce decree was granted. In this respect, the principle was that the payment of *prestations compensatoires* (financial relief) would take place in the form of a single capital sum payment. However, a difficult financial situation experienced by a majority of couples - either they do not have such capital sum or the capital sum is too small - means that this form of payment is rarely effective and that *prestations compensatoires* have to be paid by way of a *rente mensuelle* (monthly allowance) or *viagère* (life annuity). Furthermore, under the 1975 Act, *prestations compensatoires* could not be reviewed at a later stage, even in the case of sudden change in the financial circumstances of the parties (except where a lack of review would have dire consequences for one of the parties). It was not until the Act of 30 June 2000 on financial relief that such review was made possible. Finally, under the 1975 Act, the decision on financial relief had to be made before *liquidation du régime matrimonial* (the settlement of accounts between spouses) which can usually be completed after the divorce decree has been granted (for a complete and detailed critical analysis, see Gélard's report, op cit, at pp 21-27).

Regarding children, it is self-evident that any decision on parental authority or responsibility, support and contact cannot be made irrevocable. For that purpose, the 1975 Act was amended by the Acts of 22 July 1987, 8 January 1993 and 4 March 2002 as a result of the evolution of child law towards parental responsibility and equality. The 1987 Act replaced the concept of child 'custody' by that of 'parental

authority'. It allowed it to be exercised jointly by both divorced parents (See M.-F. Nicolas-Maguin, *Pouvoirs du juge et Volonté des Parents dans l'Exercice en Commun de l'Autorité Parentale Prévu par la Loi du 22 juillet 1987* (1988) Dalloz, Chron at p 307)). The Act of 1993 laid down the principle of joint parental authority after the divorce (See H. Fulchiron, *Une Nouvelle Réforme de l'Autorité Parentale. Commentaire de la Loi no 93-22 du 8 janvier 1993 à la Lumière de l'Application de la loi 'Malhuret'* (1993) Dalloz, Chron at p 117). The 2002 Act (nr 2003-305) gives parents the freedom to make any agreement on the exercise of parental authority and have it validated in court. The courts have an obligation to validate such agreement so long as they are satisfied that the interests of the child(ren) are sufficiently protected and that the parents have freely entered into this agreement. The separation of the parents does not affect the rules on the transfer of parental authority.

Like many reforms, that of 1975 raised a number of hopes that would inevitably lead to disappointments. Despite having made a number of necessary improvements in the regime of divorce, the overall assessment of the 1975 Act can only be a mixed one. Over twenty-five years of implementation revealed a number of important weaknesses. There has been therefore a general consensus among legal academics and practitioners upon the need for a new reform (see, notably, P. Courbe, *Droit de la famille* (2nd edn, Armand Colin, 2001), at p 119, para 260; A. Bénabent, op cit, at p 137, para 230. See also J. Rozier's report, op cit; P. Gélard's report, op cit; G. Levy, *Information Report on Divorce Bill nr 1338 as adopted by the Senate, National Assembly Parliamentary Session 2003-2004*, Report nr 1486, available at <http://www.assemblee-nationale.fr/12/rap-info/i1486.asp>; and P. Delnatte's report, op cit).

The reform under the Act of 26 May 2004

The Divorce Bill nr 389 was first tabled before the Senate, the upper chamber of the French Parliament

during its 2002-2003 session. Two years earlier, a Private Bill (Private Bill nr 3189 (2000-2001) of 26 June 2001. See P. Gélard, Report nr 252 (2001-2002)) tabled by F. Colcombet MP (Socialist Group) went through a first reading in the National Assembly, the lower chamber, on 10 October 2001 and in the Senate on 21 February 2002. This Bill aimed to abolish fault as a ground for divorce and to allow divorce within the first year of marriage - even against the will of one of the spouses - thus abolishing the necessary 6-year separation period. It also proposed to abolish certain specific consequences inherent to divorce granted on the ground of the exclusive liability of one of the spouses (*torts exclusifs*) or to divorce following the breakdown of the relationship. This Bill was substantially amended by the Senate which was not prepared to abolish fault as a ground for divorce.

In October 2001, another Private Bill was also tabled before the Senate by Senator N. About (Private Bill nr 12 (2002-2002)), the objective of which was to substitute divorce on objective grounds (*divorce pour cause objective*) for divorce based on fault. Both bills were made redundant following the re-election of President Chirac and the subsequent change of government and parliamentary majority in June 2002. In October 2002, Mr Christian Jacob, the Minister in charge of Family Affairs, announced a new reform of divorce law based on the Senate's preparatory works.

The Divorce Bill number 389 was designed as the first step of a much wider reform of family law. Following the emergency procedure, this Bill became the Act nr 2004-439 relating to divorce on 26 May 2004 (published in the Official Journal of the French Republic nr 122 of 27 May 2004, at p 9319). The new Act will come into force on 1 January 2005.

General considerations

One of the most striking characteristics of the Divorce Bill was how well it was received by both Houses of Parliament on the one hand and by academics and practitioners on the other. It was perceived globally as a 'balanced, well thought-out' Bill (see Gélard's report, op cit, at p 33), which brought about a pacifying reform, respectful of the institution

of marriage (see Delnatte's report, op cit, at p 15). Such consensus (see Rozier's report, op cit, at p 23) over a new draft piece of legislation is usually exceptional, especially in an area such as family law. However, this is not too surprising as the Bill was the product of a well orchestrated and fruitful collaboration between the legislator and legal academics and practitioners (in December 2002, the Minister of Justice and the Minister in charge of Family Affairs called upon the setting-up of a working group, bringing together 22 MPs, academics and practitioners, with the view to drawing up together the bases of this reform).

The content of the reform

Compared to other European legislation on divorce, French law, which recognises four grounds for divorce, could be regarded as one of the most complex within the EU. However, the new Act of 2004 creates an innovative architecture for the grounds for divorce, instigates greater relaxation of divorce procedures and substantially re-thinks the consequences of divorce. It is primarily concerned with rationalising the various divorce routes and procedures, notably by setting up an initial common procedure as well as pathways between them.

The grounds for divorce

Article 1 (new art 29 of the Civil Code) of the Act preserves one of the peculiarities of French law: plurality of grounds for divorce. There still are four grounds couples may choose from: mutual consent; *acceptation du principe de la rupture du mariage* or *divorce accepté* (acceptance of the breakdown of marriage); *altération définitive du lien conjugal* (permanent alteration of married life) and fault.

Against the proposals put forward by Colcombet and About in 2001, both Houses of Parliament chose not to abolish fault as a cause of divorce as it was felt that this would be out of line with the conception and perception of divorce in the French society. The decision to keep this ground is generally perceived as being in coherence with the duties and obligations of marriage (See Delnatte's report, op cit, at pp 13-

14; see also F. Dekeuwer-Défossez, *op.cit.*, at pp 85 and I. Théry, *op.cit.*, at pp 113-115). However, art 5(II) of the 2004 Act limits its scope of application to the most serious cases of breach of duties and obligations of married life rendering it intolerable, in particular cases of domestic violence. Also its article 23 abolishes article 243 of the Civil Code, which allowed one of the spouses to petition for divorce on the ground that the other was found guilty of a criminal offence.

Divorce by mutual consent is simplified under art 2 (amending arts 230 and 232 of the Civil Code) of the new Act: when the spouses agree on the principle of their separation and on the consequences of it, they can petition the court by joint request to which a separation agreement consolidating their divorce settlement will be attached. Following a single hearing (instead of two originally), the agreement is to be ratified in court provided the court is satisfied that the spouses have given their free consent and that the agreement protects effectively and in a balanced way the interests of each spouse and those of the children (see new art 232).

The second form of divorce by mutual consent under the 1975 Act, ie by unilateral request as accepted by the respondent is replaced by a new ground: acceptance of the breakdown of marriage, also referred to as *divorce-résignation* (divorce by resignation). Under art 3 (amending art 233 and 234 of the Civil Code), divorce can be requested by one of the spouses or both and will be granted on the basis that they both have accepted that their relationship has irretrievably broken down, irrespective of the facts that made their married life intolerable.

Finally, the main innovation under this Act is the substitution of the ground of *altération définitive du lien conjugal* for that of *rupture de vie commune* (see Art 4 which amends arts 237 and 238 of the Civil Code). Under new art 238 of the Civil Code, divorce can be granted on the ground that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition or occurring between the court order recognising the failure of

conciliation and the presentation of petition (the deterioration of the mental health of the respondent is no longer a cause of divorce under new art 238 as was the case under *rupture de vie commune*; see above at p 3). The former requirement of 6 years of separation prior to divorce proceedings has therefore been abandoned. A new article 246 of the Civil Code also provides that, where both spouses have filed a divorce petition concurrently, one based on fault and the other on the ground of permanent alteration of married life, the court may grant a divorce decree on the latter ground after dismissing the petition based on fault. In this case, indeed, the court can only come to the obvious conclusion that the marriage has irretrievably been altered as both spouses have requested its termination.

The procedure

Although procedural provisions will be further specified by implementing regulations, the 2004 Act lays down the main guidelines.

Procedure is considerably simplified and made flexible enough to allow for any subsequent change in the parties' petitions. In order to keep open the avenues of conciliation, arts 10 (amending art 251 of the Civil Code) and 13 (amending art 257 of the Civil Code) have set up a common initial procedure for divorce *contentieux* (divorce other than by mutual consent) whereby the grounds for divorce need not be specified in the original application for divorce. It is only after conciliation has failed that the parties may decide on which ground they wish to present their petition.

Article 7 (amending art 247 of the Civil Code) also creates pathways between the four procedures available, thus enabling the parties to reconsider their course of action at any stage in the divorce proceedings. The parties may request, at any time in the proceedings, that, should they reach an agreement, a divorce by mutual consent be granted by the court (art 247). Equally, they can request from the court a divorce decree on the ground of acceptance of the marriage breakdown even if the proceedings were initiated on the ground of fault or permanent alteration of married life (art 247-1). Finally, in proceedings

based on permanent alteration of married life and where the respondent has presented a petition based on fault, the original petition may be modified to take account of the respondent's faults (art 247-2).

Furthermore, the Act encourages the parties to reach, at any time in the proceedings, full or partial settlement, which can then be ratified in court (see arts 11 (amending art 252-3 of the Civil code) and 17 (amending art 268 of the Civil Code)).

The consequences

With respect to the consequences of divorce, the 2004 reform is articulated around three principles. First, the relaxation and the improvement of the regime of *prestations compensatoires* as amended by the Act of 30 June 2000: *prestation compensatoire* is now the sole form of financial relief as the duty for one party to support financially the other (*devoir de secours*) in the form of a monthly reviewable *pension alimentaire* (maintenance) is abolished under art 23 (repealing arts 282-285 of the Civil Code on *devoir de secours* after the divorce). *Prestation compensatoire* is calculated according to better defined criteria. In particular, it can take a variety of forms to adjust to the variety of estates by allowing the combination of various capital sum payments, or of a capital sum payment with an allowance (*rente*). If the principle of a capital sum payment remains, the 2004 Act gives the parties the freedom to decide how the *prestation compensatoire* should be paid.

Secondly, the protection of the weakest party: besides the usual financial relief granted to the economically weakest party, specific financial compensation can be granted in special cases. For instance, art 17 (amending art 266 of the Civil code) provides that *dommages et intérêts* (compensation) can be awarded to the party who faces exceptionally grave consequences, either in the case of a divorce granted against that party on the ground of permanent alteration of married life or of the divorce being granted on the ground of *torts exclusifs* (exclusive fault) of that party's spouse. Also, art 22 (amending art 220-1 of the Civil Code) gives powers to the court to evict a violent

spouse from the family home by ordering *résidence séparée* before a divorce petition is filed if that spouse represents a serious threat to the other spouse or the children. However, such interim measure becomes lapsed if no divorce petition or application for judicial separation is made within 3 months. This provision aims to protect the victim who, generally, is the one who is forced to leave the family home.

Thirdly, a full and swift divorce settlement: with the view to avoiding the occurrence of a settlement of accounts as between spouses after the divorce decree has been granted - which can lead to further and lengthy litigation - the objective of the 2004 Act is to encourage the parties to prepare the basis for a settlement at as early a stage as possible. To that end, the court can take a number of interim measures, notably to appoint a notary to draft a settlement agreement (art 12 amending art 255 of the Civil Code). Also, art 13 of the Act provides that, unless the divorce petition contains a draft settlement for all pecuniary and property interests, it will be deemed inadmissible. If no settlement is agreed before the divorce decree is granted, the court can order it to be completed within strict time-limits (art 17 amending art 267 of the Civil Code).

General assessment

It is arguable that the 2004 Act can be presented as a significant overhaul of the French regime of divorce in a generation. It is without any doubt a balanced and well thought-out reform, which has the merit of modernising and simplifying divorce proceedings, making them more flexible and adapting them to the changes of the French society, while re-affirming and respecting the value of marriage. The Act enshrines the principle of a complete freedom to divorce by substantially reforming divorce following the breakdown of the relationship and replacing it with divorce for *altération définitive du lien conjugal* following a 2-year separation. In stark contrast with the situation under the 1975 Act, where this ground was marginally used, the new provision should definitively have the effect of encouraging divorce petitions on this ground, all the more

Features

so since, unlike in English law, consent of the other spouse is not necessary.

Under a simplified divorce process - one single hearing for divorce by mutual consent; one core procedure for other forms of divorce and the emphasis on conciliation - and with the possibility of modifying the ground for divorce at any time in the proceedings, the parties will be less pressurised and will be more inclined to negotiate and reach an agreement at an early stage.

However, with respect to the grounds, it is regrettable that the law-makers have not taken this opportunity to replace fault with an objective cause for divorce. It does not seem to make great sense to preserve this ground and, at the same time, to limit its impact by either limiting its scope of application to what could amount to unreasonable behaviour or by offering alternative routes.

All in all, the secret of the success of this reform clearly lies with its meticulous preparation before it was debated in Parliament and notably with the wide consultation process it underwent. It is certainly more likely to live up to its promises than the 1975 Act.