CONCLUSIONS

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*When reflecting on civil status one's thoughts always turn to a consideration of the family, even though civil status sometimes takes account of data unrelated to the family, starting with death or the gallicising of a name, amongst other things. It will probably be apparent that civil status concerns not only civil identity but also membership of society as a whole, as is well reflected by the traditional expression and its etymology. But the point is that this integration into society as a whole, expressed and even manifested by an entry in public registers, is normally accomplished through those special and irreplaceable groupings that are constituted by families. « Without family » or « Traveller without luggage » – it is still by comparison with families that someone who has been abandoned or is amnesic is classified. Hence, incidentally, all the controversies and ambiguities occasioned by « birth given by X » (*accouchement sous X*).*

The family… but which family ? This is a subject of endless interest for historians and lawyers, sociologists or anthropologists, the whole being seen in a broader conception of the status of persons that was so appropriately described by conseiller *Jacques Massip when, with a jeweller's skill, he presented his review of the activities of the International Commission on Civil Status. The family, I said, but which family ? The questions have been put before us as matters of current concern. The lawyer will at once enquire as to what is – or seems to be – current and what is not. Not so long ago we had a « year of the family ». Pleasure was also derived from discourse and dissertation about the new family, and this could bring to mind some comparisons not so much with the new philosophy or philosophies as with «* nouvelle cuisine *». A bold and questionable proposition, for whilst* nouvelle cuisine *is a bit raw, the new family is a bit over-cooked.*

Matters of current concern ? Yes and no. No, because at various times in history there have been lamentations about the state of the family and its future. The fact is that on numerous occasions the family was thought to be undergoing an upheaval, if not a crisis leading to its destruction. That was the case in Rome at the time of Augustus, which explains a rather unsuccessful crusade against celibacy. Centuries later one finds again, on listening to or reading Molière, the leitmotiv*, with a demographic but also a family flavour, that there are no more children. And this resembled a warning glimpse of what we are told today about the decline of the West.*

Should that lead us to relativise somewhat an assessment of the course of events ? Apparently not, because our age is witnessing profound transformations which are at the same time a source of nostalgia and of fascination for the passing generations. It remains true that it is difficult to translate these changes into institutional or contractual terms. The translation is hesitant, difficult and sometimes marked by the unease felt by the law when confronted with the family unit and the lack of logic revealed by the relationship between fact and law. Why should this be surprising, given that the rules governing the family group are profoundly linked to the burdens of history and the requirements of the locality, to the past and the present, that give birth to the future ?

In this respect, the second half of the XXth century is revealing. In this period there have appeared conflicting pressures and successive currents of opinion, contested to a greater or lesser extent, that often denote the profound ambivalence of the law. Look first at the prevailing phenomenon of the liberalisation of morals, that is making a mockery of the law – at least of the law of marriage –, and also of the judiciary and bringing in its train the liberalisation of the law itself. It is rather revealing that in many Western European countries the 1960's saw an increase in divorce, which was then a prime example of a judicial institution, -even before the laws concerned were amended in consequence -, in the direction of a liberalisation of the rules in force. It was as though legal reality had wished to teach the law humility.

In addition to that – or together with and as a result of –, there has been a development of the relations between groups, States and nations. The first signs of this development may well lie far in the past and indeed be lost in the mists of time. Studies – both ethnological and comparative – were directed towards analysing a common denominator of legal systems. Lévi-Strauss also worked in this direction. And even if his assertion that the taboo on incest is a basic feature of the elementary structures of kinship is no longer taken seriously today, the fact is that it now no longer suffices to transcend the ordinary – and actually fragmented – conceptions of the institution of the family. One goes further than in the past, by trying to discern the homo juridicus, *with his fundamental rights and freedoms, his worries and his conflicts at the level of a world facing with recalcitrance a certain imperialism of ideas, opinions and policies.*

Unification or, more realistically, harmonisation are aspirations and requirements of our time. Hence there are a certain number of currents leading to important changes in the way problems are tackled by legal rules. These centripetal, or at least convergent, forces lie at the origin of numerous international conventions, in the preparation of which the International Commission on Civil Status, that is today celebrating a fine anniversary, has played a significant role. Here we have a splendid matter for examination. It is also a subject of controversies, especially those very perceptively initiated by Professor Yves Lequette in a 1994 course at the Hague Academy of International Law. There is not the time, nor is this the place, to come back to that now. Let it suffice, in this respect, to note that there has been a salutary flowering of ideas, a development of the law and, in fact, an affirmation, which is always necessary, of the rule of law. This holds good even though Mr Jean-Marc Bischoff recorded in his survey of the internationalisation of the law of persons a certain rigidity in the international conventions bearing on civil status and also rather natural difficulties in their interpretation ; and likewise even though, in describing the progress made in Italy regarding the automatic recognition of decisions in the matter of the status of persons and of the family, Mr Guido Raimondi, magistrat du Parquet Général *at the Court of Cassation in Rome, was able to detect some remaining grey areas.*

Technology as well as science has been involved, on account of the development of telematics which, as Mr Massip observed, opens « new perspectives for the registration of events and the transmission of information ». The horizon is shifting and broadening with the prospect of the appearence of an international civil status network. Everything is converging towards a transcending – whether this is fortunate or unfortunate is another question – of structures and frontiers, in a context where, as was recalled by Dean Carbonnier in the report read by Professor Catala, we are experiencing « the pressure of immigration, the major phenomenon of our time ».

We are thus arriving at several crossroads of ideas. We encounter : a crossroads between marriage and family, that clearly raises the question as to which takes precedence over the other ; a crossroads between what is public and what is secret ; crossroads between status and contract, between the single and the multiple,

between the conceptual and the casuistic, and even, all things considered, between civil status and the Republican motto of liberty, equality and fraternity.

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Liberty ? What is immediately striking, until now, is the resistance of the law of marriage – I do not mean the law of filiation – to radical or at least direct reforms. We find resistances appearing in three ways, namely through the marriage bond, outside marriage or through imitation of marriage.

Various factors, most often of religious origin -including those in favour of the retention, possibly exclusively, of religious marriage- make it possible to see the reasons for a pluralism and a coexistence of different types of marriage. It is true that French law has been profoundly influenced by the secularization of civil status, the affirmation of laicization and the importance of civil marriage, with a resultant unitary approach over the generations. Even where a certain pluralism has carried the day, it has been possible to detect stability in the rules governing marriage, unlike those which have for a long time governed divorce or filiation.

Nevertheless, since the beginning of the 1990's a singular change is clearly discernible. At the close of a colloquy on demography held in Paris, Dean Carbonnier remarked : « In France, in this year 1991, if there is a question of marriage (as there once was the question of divorce), it is not that there is any idea of taking marriage outside the domain of law and reducing it de lege ferenda *to no more than a private contract. The suggestion that marriage be privatised may well find some support in America, as a tail-end of Reaganism. It cannot be envisaged with us » (INED,* Rev. Population, *no. 3, 1992, supp. p. 746). And the author added : « The question that is useful from the legislative point of view presents itself in the reverse direction. The question of marriage, crudely summarised, is the question of cohabitation ». After analysing the various data and reversing the problem, he concluded that « the question of cohabitation could well conceal the question of marriage, drawing it into a turbulent zone in which not legislating, despite the lures of sentiment and reason which would lead to remedial legislation, could well be the courageous way of legislating ». Ten years later, this penetrating analysis still holds good. It is only that pressures, coming from all directions, have encouraged legislative activism. The question of cohabitation is still the question of marriage, but of a dismantled,* à la carte *marriage, pressing for legislation. Free will has, after its own fashion, brought the principle of secularity into question.*

Outside marriage, the development, in all the countries considered, of the non-marital union, known as the new kinds of conjugality, of cohabitation and of the existence of young couples living, as is said, « together » have profoundly modified the state and condition of family matters. We can readily acknowledge that unions of this kind have always existed, a situation in which the law for a long time took no interest without thereby causing too much inconvenience, inequality or injustice. The view can nevertheless be taken that, if not in the 1960's at least in the following decades – the 1980's are particularly eloquent –, there has been a qualitative leap due to the development of juvenile cohabitation, an increasing mobility of marriage and a multiplication of the stages leading from celibacy to the wedded state.

The striking increase in the number of non-marital unions has even led to greater attention being paid to the notion of the couple, to the point of rejecting the single criterion of a difference of sex, in favour of claims advanced by homosexuals. What then becomes important is to be two. In the end, what then matters homosexuality or even incest ? The two pigeons of the fabulist who « adored each other with tender love » are well and truly brothers. Gay pigeons, so to speak.

In the midst of so many ambiguities, we should, however, note the prestige repeatedly enjoyed by the institution of marriage. There is a phenomenon of imitation, which itself reveals a rather conformist desire for recognition of homosexual couples. Laws and drafts have seen the light of day in the 1990's and the movement is far from over. Professor Jean Hauser grouped the systems into three categories. First, there are numerous legal systems in which the « partnership » – to use the most convenient and indeed the most common expression – is not accepted, even though scattered, special provisions are designed to remedy certain drawbacks arising from the failure to take into account various factual situations, whether or not they are related to what used to be called « special tastes ». More distinctive are those laws that accommodate the « partnership as a commitment », although it is to be noted that the effects of ties of this kind are diverse. Finally, according to a third approach, the mere fact of living together should, irrespective of any factual considerations, entail the same consequences as marriage.

Attention was quite naturally paid to one example of legislation in the second category, namely that of the Netherlands. Professor Katharina Boele-Woelki, of Utrecht University, described the origins and content of the Act of 1 January 1998 on registered partnerships, which enables homosexual or heterosexual couples to have their partnership registered by a civil status official. This union, which is subject to substantive conditions equivalent to those for marriage, entails the same effects as marriage, save for the rules on filiation ; moreover, the essentials of the rules on divorce are omitted, as the partnership can be dissolved by a court at the request of one member of the couple. We must not imagine that the evolution is complete, because since the 1998 reform, which set the machinery in motion, an increasingly active campaign is being pursued and is growing in favour of the opening of the institution of marriage to couples of the same sex. The claim for a right to equality has been followed by a claim for a right to a certain liberty.

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The trend towards standardisation, that was noted many times in the reports and interventions, can be seen in the matter of filiation, where it transcends an observed diversity in functions and roles, to use sociological terminology. Here and there, one finds a different kind of convergence of law and fact, especially since in many situations greater account has had to be taken every day of discoveries and progress in science and technology and in biology and genetics. And the equality that is found is a good example of Aristotle's definition that is as old as it is fundamentally correct : treating equally what is equal and treating unequally what is unequal. In the midst of all that, there nevertheless remains some hesitation – which occasions divergencies – as to how to deal with the question of secrecy, which progresses or regresses according to the various kinds of filiation but also according to the various laws.

*From one place to another, there has been uniformity of action, if one may put it that way. As regards paternity of children born out of wedlock, the report by Professor Dieter Henrich shows a clear increase in recognitions of filiation in German law (from 45% in 1969 to 93.4% in 1995), establishments of paternity by a court thus being increasingly in the minority. On the other hand, one does not find account being taken in Germany of the generally recognised enjoyment of a status (*possession d'état*) as such, and this shows the importance attached to blood ties, although this has not excluded, since recently and on certain conditions, a requirement of consent on the part of the child.*

There has been action but also reaction, the latter being, moreover, frequently found in relation to the determination of the name of both legitimate children and children born out of wedlock. This has occurred despite a whole legislative programme that has notably affected the laws of Western Europe, as was shown with respect to Swiss law by the illuminating report by Professor Suzette Sandoz.

On the subject of the paternity of children born out of wedlock, there are therefore some uniform features but also, again from one place to another, some divergent features. Thus, whilst German law favours above all voluntary recognition, English law seems to give pride of place to the establishment of filiation through court proceedings, as was well shown by Professor Nigel Lowe. The flexible nature of this system will cause no surprise. The prevailing idea remains that in principle no effects are to attach to cohabitation alone. Besides, there is a trend in English law towards extending the availability of official establishment of filiation. This relative convergence is, in its own way, a reflection of the internationalisation of the law of persons that has already been mentioned.

What is found from one place to another coincides at this point with what can be found on the temporal plane. Similarities or differences ? Behind the rules and the solutions, the comparative method has to be used to seek out more fundamental driving forces. How does the passage of time operate ? By allowing what was forbidden or by forbidding what was allowed ? By revealing what was secret ? By shrouding in secrecy what was previously accessible to the public ? The report by Professor Murat on anonymous childbirth and its legal effects correctly demonstrated the questionable nature of the new Article 341-1 of the French Civil Code and the drawbacks surrounding such anonymity, which is largely due to the successful efforts of the adoption lobby. There is reason to fear that this constitutes a step backwards on the part of the law, a step that is moreover incompatible with the international recognition of the rights of the child.

Indeed, an attachment to secrecy characterises the French law on filiation on another point, to be more precise as regards full adoption and the drawing up of a false civil status certificate for the adopted child. This is contrary to a whole trend in ideas and even rules that lead to guaranteeing to everyone a right to discover his or her origins, this being a right that in some places is claimed and even recognised, with certain reservations, in the area of assisted procreation. On this point, the attachment of French law to secrecy can be seen to distance it in a singular fashion from its English or German neighbours. A comparison of the three systems leads to contrasting positions that vary – by two to one – according to which questions relating to filiation are involved. And

there is in this respect every reason to think that, having regard to the progress in genetics, French law will have to evolve, like the laws of its neighbours and Scandinavian laws, in the direction of a retreat for secrecy and an advance for truth. It is probably easy to understand that there are objections, especially the objection that can arise in relation to the ever-increasing affirmation of the secrecy of private life. Yet when this life is of direct concern to several persons, a choice must be made and this will lead a lawyer to lean in favour of light as opposed to darkness. These are all ideas inspired by the report of Professor Françoise Dekeuwer-Défossez.

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Within the family unit, that special grouping which allows and ensures the integration of the individual into society, everyone finds his roots and a way of comprehending the meaning of traditions and of past and bygone conflicts – in short of solidarity. In this one can also detect an echo of the Republican motto. Reconciling liberty with equality has probably given rise at all times to disputes and disappointments, but it has also led repeatedly to the attainment of a harmony that has always been fragile. Then what if fraternity becomes involved ? In truth, it has generally been left aside by the law. Not completely, that is the least that can be said. Thus, in the domestic legal order, we have witnessed reforms of filiation, provisions on organ transplants between brothers and sisters, the adoption of brotherhoods, etc. Again, in the international order, we have observed the very fact of the co-ordination of systems and, as regards its sources, an internationalisation of the law of persons. From all that and from the conclusions drawn from each session by the Presidents, Aldo Dainotto and Rainer Frank, there have emerged illuminating conclusions at the crossroads of the family and of international or national law, with the law coming closer to the family and striving to apprehend it prudently and progressively – « at a dove's pace », as Nietzsche said was how one should approach the truth.