

DIVERSITY TOOLS IN PRIVATE RELATIONSHIPS: A FRENCH POINT OF VIEW

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INTRODUCTION

Commenting on issues as various as consumer law, same-sex marriage, and alternative methods of lawmaking might seem an impossible task. Indeed, these topics belong to different fields of legal knowledge and involve different concerns. Ostensibly, nothing is common between the long-established sets of rules now known as “consumer law,” the recent claim of gay rights advocates to marriage, and the subtle way regulation by network erodes the traditional vision of law as a body of rules produced exclusively by sovereign nation-states’ lawmaking institutions. However, examining the French legal system shows that all of these issues may be viewed through a single prism: the one offered by the dialectic of unicity and diversity. Indeed, among the goals aimed at by the founders of the modern French legal system was the establishment of a unified system of law that would be reached through equality. Therefore, the development in the 1960s of unique sets of rules for specified categories of people (e.g., consumers) was in many ways a twist in the ideal, inherited model. After a short historical review, this Essay discusses the issues raised by the introduction of diversity to this model.

I. THE FRENCH REVOLUTION OR THE ESTABLISHMENT OF MANDATORY UNITY

Under Monarchy French citizens were classified by reference to their status: they were regarded as noble or bourgeois; masters or servants; landowners or land workers; Catholics, Protestants, or Jews. Each of these categories corresponded to different sets of rights. The French Declaration of Human Rights, an outcome of Revolution ideology, established that there were no longer any differences between human beings.¹ Consequently all were equal and enjoyed similar rights. This is best exemplified by the issue of marriage: whereas under Monarchy French citizens could only marry under their own religious rules; under the new Civil Code only civil

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1. Declaration of the Rights of Man and of Citizen art. 1, Aug. 26, 1789, *reprinted in THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY* 77, 78 (Lynn Hunt ed. & trans., 1996).

marriage existed.² Therefore, not only Catholics, but also Protestants and Jews could marry under the uniform civil law. Jean Carbonnier, famous legal writer and late Dean, termed this outcome “la gloire cachée de la Révolution Française” (“the hidden glory of the French Revolution”).³

Unfortunately, this new equality principle was not immediately applied to everyone. On the contrary, it took considerably longer for some groups, who, for contemptible reasons, were expelled soon after the Revolution from the new circle of legal equality. For example, the Jews, who were regarded as usurers, were subject to specific rules in loan contract following two decrees—one in 1806 and the other in 1808.⁴ The West Indians, who had been freed by the Revolution, were put back to slavery after 1802.⁵ These groups were thus denied the right to complete civil equality. However, apart from these discriminatory rules, which progressively disappeared during the nineteenth century, the French Revolution expanded the principle of equality in all branches of the law.

II. CONTRACT LAW AS A PARADIGM FOR UNATTAINABLE EQUALITY

The idea that all people were equal applied not only to family and personal matters, but also to contracts. In this area, all rules—even those that favored specified groups—based on the idea that some people were different from others progressively disappeared.⁶ This had two effects in contract law: (1) anyone could enter into a contract, and (2) all parties were regarded as equal. No one could claim special protection. These rules were consistent with the principle of equality and furthered the Civil Code’s goal of creating a unified body of identical rules everywhere in France. Contracts (and therefore contracting parties) had to be treated exactly the same in Burgundy as they were in Normandy. This was not the case under Monarchy. These rules were philosophically consistent with the principle

2. Jean Carbonnier, *Sur un air de famille*, in *LA FAMILLE, LA LOI, L'ÉTAT*, at xii (Irène Théry & Christian Biet eds., 1989).

3. *Id.*

4. JEAN-LOUIS HALPÉRIN, *HISTOIRE DU DROIT PRIVÉ FRANÇAIS DEPUIS 1804* (1996).

5. *Id.*

6. A few rules remained even in the Civil Code for poorly educated people. According to a provision of former section 1326 of the Civil Code, written proof for some contracts was not mandatory for the poorly educated, based on the idea that it was obvious that they could not read or write. These groups were listed as follows: craftsmen, plowmen, wine growers, and day workers. Apart from this, all contracting parties were treated equally, which meant that all enjoyed similar rights. Natacha Sauphanor-Brouillaud & Céline Bloud-Rey, *Catégories de personnes et droit des contrats*, in *DIFFÉRENCIATION ET INDIFFÉRENCIATION DES PERSONNES DANS LE CODE CIVIL: CATÉGORIES DE PERSONNES ET DROIT PRIVÉ 1804–2004*, at 157 (Université Paris 13, *Études Juridiques* No. 23, Pascale Bloch, Cyrille Duvert, & Natacha Sauphanor-Brouillaud eds., 2006).

French lawyers call “*autonomie de la volonté*,” according to which everyone's will is supposedly free by nature. If all contracting parties are free and equal, there is no reason to distinguish them by any means other than the position each has in the contract relationship (e.g., creditor or debtor).⁷ Contracting parties' positions are abstract categories, independent of individual personal situations such as health, wealth, and age. This phenomenon is usually perceived as the French progression toward equality, in the formal sense of the term, according to which rights-bearers are regarded as abstract individuals.

Consumer law undermines that perception. Based on the idea that consumers are special contracting parties, consumer law challenges the idea of equality in the formal sense of the term and consequently dismantles the pure system of contract law. However, one issue raised by this conception of consumers as special contracting parties in need of special protection is that no one is by nature a consumer, like someone is a man or a woman. This definitional issue has not been seriously addressed until recently.

Recent debate among legal scholars over the extension of the scope of consumer law reveals the everlasting tension between diversity and unicity, difference and sameness. Originally consumer law considered two kinds of people that seemed clearly defined: the consumer, who was a weak party in need of special protection, and the professional, who did not need such protection. But the criteria for distinguishing consumer from professional soon blurred upon the realization that one can be a professional in one field but not in another. For instance, the Cour de cassation ruled that a real estate agent deserves consumer law protection when buying an alarm system, even if the agent does so for professional purposes, because knowledge about alarm systems is not regarded as a real estate agent's usual skill.⁸ More recently, the enactment of a 1999 European Community (EC) directive on consumer law fostered a large debate between legal scholars. The debate focused mainly on what legal code was most suited to collect the new law. This led to an unusual delay in the enactment of the text. Up to that time, all EC consumer law directives had been codified in the French Consumer Law Code, and most scholars contended that should also have been the case for the new directive. They argued that consumer law was a specialized set of rules that should not expand further into other branches of

7. *Id.*

8. Première chambre civile [Cass. 1e civ.], April 28, 1987, Bull. Civ. I., No. 134; D. 1987 somm. 455, obs. Jean-Luc Aubert; JCP 1987 II 20893, note Gilles Paisant; Jacques Mestre, *Obligations et contrats spéciaux: Obligations en général*, 86 REVUE TRIMESTRIELLE DE DROIT CIVIL 532, 537 (1987); D. 1988 1, note Philippe Delebecque.

law.⁹ However, other scholars made two arguments in favor of codifying the new text in the Civil Code: (1) from a theoretical point of view, they argued that consumer law already had deeply changed the basic categories of contract law; (2) from a practical point of view, they argued that anyone can be a consumer, and therefore the protective measures set up by consumer laws should benefit any contracting party, whether professional or not.¹⁰

The directive was ultimately enacted in the Consumer Law Code,¹¹ but the debate highlights some trends of diversity law. By its nature, diversity law is the product of a dynamic interaction between difference and sameness. On the one hand, the acknowledgment of difference justifies different sets of rules for people who are not actually equal to others; on the other hand, sameness between and among individuals calls for equal treatment, and therefore, some who are regarded as professionals on some occasions should on other occasions be regarded as consumers. This criteria volatility shows that diversity law is always changing according to the way society itself changes.

This call for ongoing change according to the renewal of the needs expressed by some specific groups is largely sustained, in the French context, by the expansion of what some political philosophers have termed the “Human Rights Ideology.”¹² Indeed, Professor Antonioli has stressed the increasing awareness that private rights, even those that seem as matter-of-fact as consumer law remedies, can be considered to be fundamental rights.¹³ At one time, this proposition would have been deemed unthinkable because human rights were primarily considered to be protections against the state or state agencies; they were not considered to be legal tools that applied to private relationships. However, it has become obvious when scrutinizing French contract litigation that plaintiffs increasingly tend to

9. Daniel Mainguy, *Propos dissidents sur la transposition de la directive du 25 mai 1999 sur certains aspects de la vente et des garanties des biens de consommation*, JCP 2002 I 183; Gilles Paisant & Laurent Leveneur, *Quelle transposition pour la directive du 25 mai 1999 sur les garanties dans la vente de biens de consommation?*, JCP 2002 I 135; Olivier Tournafond, *De la transposition de la directive du 25 mai 1999 à la réforme du code civil*, D. 2002 chronique 2883.

10. Patrice Jourdain, *Transposition de la directive sur la vente du 25 mai 1999: Ne pas manquer une occasion de progrès*, D. 2003 point de vue 4; Denis Mazeaud, *Transposition de la directive sur la vente du 25 mai 1999: La parole est à la défense . . .*, D. 2003 point de vue 6; Geneviève Viney, *Quel domaine assigner à la loi de transposition de la directive européenne sur la vente?*, JCP 2002 I 158.

11. Gilles Paisant, *La transposition de la directive du 25 mai 1999 sur les garanties dans la vente de biens de consommation: Ordonnance du 17 février 2005*, JCP 2005 I 146.

12. MARCEL GAUCHET, *LA DÉMOCRATIE CONTRE ELLE-MÊME* (2002).

13. Luisa Antonioli, *Consumer Law as an Instance of the Law of Diversity*, 30 VT. L. REV. 845, 871 (2006).

base their claims on human rights principles.

Two examples of this new tendency can be given. Both involve housing litigation, and both were based on a combination of sections of the European Convention of Human Rights and articles 6 and 1134 of the Civil Code.¹⁴ The first case raised the issue of whether a flat owner could legally restrict the right of the tenant to house anyone she wanted in her flat. The contract prevented her from housing her boyfriend and her son; the Cour de cassation ruled that such a provision was unlawful under section 8 of the European Convention of Human Rights, which protects the right of everyone to a “normal family life.”¹⁵ In the second case, an orthodox Jewish couple claimed that using an electric lock on the Sabbath was forbidden under their religious beliefs; therefore, refusal by the house owner to install a mechanical lock violated their freedom of thought and religion protected by section 9 of the Convention.¹⁶ The court did not uphold the claim. It ruled that freedom of religion did not imply that the couple could force the owner to satisfy their demand. However, by so ruling, the court did not deny that section 9 of the Convention pertained to the case. These two examples clearly show that in judges’ minds fundamental rights are binding not only on states and institutions but also on private individuals. Human rights are binding on states as a protection of individual freedom and on individuals as a way of forcing them to respect each other’s differences. Thus, human rights tend to define private relationships as well.

III. SAME-SEX MARRIAGE OR HOW TO BE DIFFERENT BUT EQUAL

However, human rights have been called upon recently in a more traditional fashion in the debate over same-sex marriage. Indeed, the way some gay activists made their claim to equality proved to be very similar to the method used by famous liberationist movements, such as the

14. Article 6 provides that no contract shall violate law nor morality, whereas article 1134 provides that all contracts, provided they have been “legally made,” shall be performed by the contracting parties. C. CIV., arts. 6, 1134. Thus, article 1134 implies that contracting parties must respect not only law and morality as mentioned in article 6 of the Civil Code, but also any superior provisions such as the one made in the European Convention.

15. Troisième chambre civile [Cass. 3e civ.], Mar. 6, 1996, JCP 1997 II 22764, note Nguyen Van Tuong; Troisième chambre civile [Cass. 3e civ.], Mar. 6, 1996, JCP 1996 I 3958, obs. Christophe Jamin; D. 1997 167, note Bertrand de Lamy; Jean Hauser, 95 REVUE TRIMESTRIELLE DE DROIT CIVIL 579, 580 (1996); Jean-Pierre Marguénaud, 95 REVUE TRIMESTRIELLE DE DROIT CIVIL 505 (1996); Jacques Mestre, 95 REVUE TRIMESTRIELLE DE DROIT CIVIL 892, 898 (1996).

16. Troisième chambre civile [Cass. 3e civ.], Dec. 18, 2002, AJDI 2003 182; Jean-Pierre Marguénaud, 102 REVUE TRIMESTRIELLE DE DROIT CIVIL 371, 383 (2003); Jacques Mestre & Bertrand Fages, 102 REVUE TRIMESTRIELLE DE DROIT CIVIL 282, 290 (2003).

antisegregation movements.¹⁷ The core of the gay activist's strategy was to constantly denounce the state's discrimination against homosexuals, which in their view denied them full citizenship. If this strategy did not fully succeed, at a minimum it led to a 1999 law establishing a new civil institution called "pacte civil de solidarité," which may be compared in some ways to U.S. civil union.¹⁸ As the new law was very controversial, it is interesting to focus on the arguments that were made for and against it and on the strategies used both by opponents and advocates.

A first point to be noticed is the uniqueness of the lawmaking process itself: the law was originally written by gay rights groups with the support of a few daring deputies who were continuously monitoring the progress of the gay-rights movements in other European and North American countries. Foreign experiences with gay-rights issues thus informed the lawmaking process in a way that should not be neglected. The unusual lawmaking process that created this law—made at first by citizens with the example of other citizen campaigns and achievements—shows, as Arianna Pretto-Sakmann pointed out, that diversity law must also be understood as diversity among law suppliers.¹⁹ Politically, the debate over the proposed law revealed a blurring of the political spectrum: not all right wing deputies were against it, nor were all left wing deputies in favor of it. While in the United States, as Greg Johnson explained, some Christian officials campaigned successfully against same-sex marriage,²⁰ in France, the French Catholic Church's opposition to the law was nugatory.²¹ However, a strong opposition arose from self-declared, leftist intellectuals under the unexpected form of a secularized mystique called upon to defend national unity.²² This opposition provided an easy disguise for some Catholic legal scholars willing to fight the new law.²³ They indeed made the argument that allowing same-sex marriage would undermine the French Revolution's "hidden glory," that is to say, as mentioned above, civil marriage for everyone, regardless of religious affiliation.²⁴ In their view, creating a new

17. Cyrille Duvert, *Le droit jetable? À propos des débats sur l'homoparentalité*, LE DÉBAT, Sept. 2004, at 179.

18. Law No. 99-944 of Nov. 15, 1999, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 16, 1999, p. 16959; C. Civ., arts. 515-1 to 515-8.

19. Arianna Pretto-Sakmann, *Private Suppliers of Law: Diversity for Lawmakers*, 30 VT. L. REV. 927, 927 (2006).

20. Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 881, 889 (2006).

21. Suzanne Daley, *French Couples Take Plunge That Falls Short of Marriage*, N.Y. TIMES, Apr. 18, 2000, at A1, available at <http://digbig.com/4qref>.

22. Irène Théry, *Le contrat d'union sociale en question*, ESPRIT, Oct. 1997, at 159.

23. Philippe Malaurie, *Un statut légal du concubinage? Cuc, Pic, Pacs et autres avatars du mariage*, 118 RÉPERTOIRE DU NOTARIAT DEFRÉNOIS 871 (1998).

24. *Id.*

kind of union for same-sex couples would be a step towards claims by other communities: if some categories of people could obtain a unique form for their union, it would be impossible to refuse other unique forms to other categories of people.²⁵ For some, this would necessarily lead to the toleration of culturally different, unacceptable ways of making or unmaking unions, such as those found in Muslim and Hebrew law.²⁶ The underlying issue was, and still is, the political and intellectual debate over “communitarianism,” which has recently become highly controversial in France. However, another argument could be made to those who suggest that creating civil union will necessitate creating other unique unions: French family law already opened the path to legal pluralism a long time ago. Indeed, a law passed in 1975 under the influence of the late Dean Jean Carbonnier aimed at adapting to the diversity of French society by offering four ways to divorce, among which one was specially tailored for the Catholic, allowing Catholic spouses to oppose divorce on the ground of their religious beliefs.²⁷ Therefore, it could be argued that if French law already provided for different types of divorces, then there is no reason why it should not also provide for different types of unions. Parliament finally chose this latter view, and French family law now offers three types of union: marriage, which applies only to opposite-sex couples; “concubinage” (domestic partnership) for nonmarried couples whose rights are now guaranteed under the Civil Code whether they are same sex or not; and “pacte civil de solidarité” or “pacs” (civil union), which applies both to opposite- and same-sex couples.

The debate did not end, however, after the law was passed. Gay rights activists soon resumed campaigning for marriage, denouncing, as some did in the United States, the new civil union as a second-class marriage.²⁸ On the side of advocates, a very aggressive strategy was chosen. From a theoretical position, a few scholars, who in an unusual way in French academia had openly advocated the gay-rights cause, claimed that refusing gay and lesbian people the right to get married was discriminatory under the European Convention of Human Rights.²⁹ Despite the lack of public support for their position, they used similar arguments to those Greg Johnson mentioned: they compared banning same-sex marriage to racially

25. *Id.*

26. *Id.*

27. Law No. 75-617 of July 11, 1975, J.O., July 12, 1975, p. 7171. This provision, usually referred to as “clause d'exceptionnelle dureté,” was instituted by article 240 of the Civil Code and repealed by a May 26, 2004 act. Law No. 2004-439 of May 26, 2004, J.O., May 27, 2004, p. 9319.

28. Daniel Borillo, *Homosexualité et liberté matrimoniale*, TÉMOIN, May–June 1998, at 75.

29. *Id.*

discriminatory laws under segregation. More practically, a case was brought by gay-rights groups in order to create precedent.³⁰ Despite the high likelihood that the union would be declared null and void, two men, helped by a southwest village mayor who had publicly advocated same-sex marriage, were married in the village's town hall.³¹ As expected, the marriage was nullified by both the tribunal and the court of appeal,³² which allowed the spouses to take their case to the Cour de cassation. The case is now pending before the French Supreme Court and there is much speculation as to the way judges will deal with this hot potato. Among the arguments made by the "spouses" is the fact that the Civil Code does not provide any definition of marriage, and therefore same-sex marriage should be regarded as valid, according to the saying "*ubi lex non distinguit non distinguere debemus.*" While admitting that no such definition exists in the Civil Code, opponents reply that most articles imply that spouses must be man and woman. For example, article 144 refers to the age of the "man" and the "woman."³³ However, most Civil Code provisions on marriage refer to "the spouses" in a sex-neutral way, and it is undoubtedly for this reason that opponents of same-sex marriage have suggested that a new law should be passed, officially stating that "marriage is a union between a man and a woman."³⁴

30. Sixième chambre civile [Cass. 6e civ.] Bordeaux, Apr. 19, 2005, D. 2005 1687, note Eric Agostini.

31. *Id.*

32. *Id.*

33. C. CIV., art. 144.

34. Alain Sériaux, *Une définition civile du mariage (prière d'insérer)*, D. 2005 chronique 1966.