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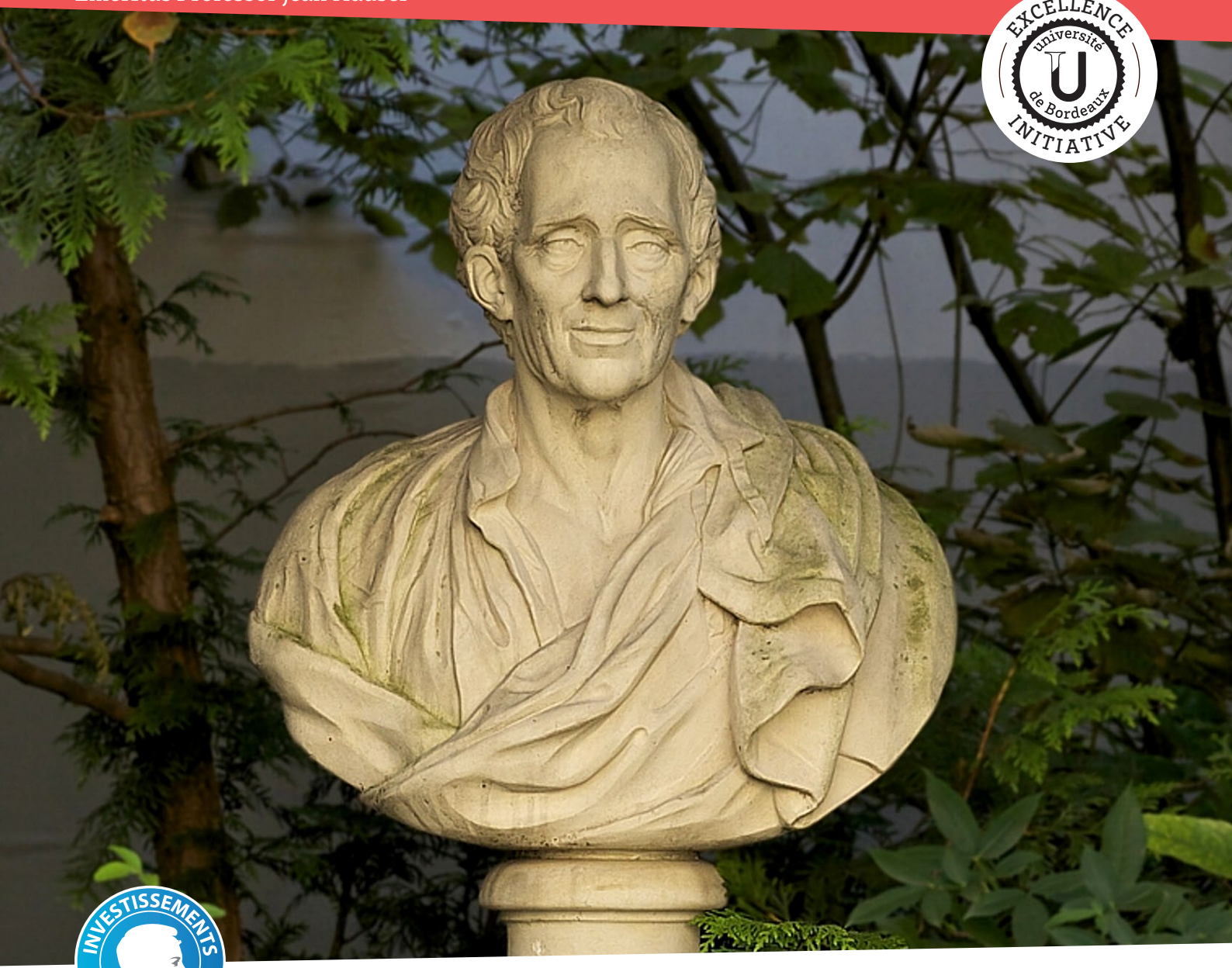

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Civil law – family law:

Marriage and the prohibition on incest

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The prohibition on incest is a constant of humanity long emphasised by ethnology and sociology. However, contrary to what may be thought, it is susceptible to nuances and distinctions within the various marriage laws in existence, quite aside from those differences connected to the civilisations in question (1).

Under European law, the prohibition has never been limited solely to biological incest (be it in the direct or the collateral line), but has often been extended to what French doctrine has termed the sociological prohibition, i.e. between persons related by affinity. Thus the French *Code civil* imposes a prohibition on remarriage between son-in-law and mother-in-law, daughter-in-law and father-in-law, and even between sister-in-law and brother-in-law. In the absence of biological grounds, the risk of social scandal has often been argued but that justification has diminished considerably.

In reality, fine distinctions have always been admitted; in the modern era, some prohibitions have even disappeared altogether. Firstly, a distinction has often been made depending on whether the marriage which yielded the affinity has been dissolved by death or divorce. Where the latter has raised fears of foul play on the part of one person in order to bring about the divorce of his or her son, daughter, brother or sister, the former scenario is considered more acceptable and remarriage may emerge as a happy solution for the family.

Furthermore, these social prohibitions have been diminished in French law either by the disappearance of such cases, or by the admission of dispensations. We could be permitted to wonder whether the non-biological prohibitions on marriage continue to be truly justified when the conditions of marriage in general, together with its social role, have been considerably relaxed.

In French law, there remains a prohibition in the direct line between all ascendants and descendants and persons related by affinity in the same line (Civil Code, Article 161). However, if the marriage producing the affinity has been dissolved by the death of the spouse producing the affinity in question, it is possible to obtain a dispensation from the President of the Republic. There is no dispensation available where the marriage has been dissolved by divorce.

In a case that came before the Court of Cassation in 2013 (2), two people married in 1969. A daughter was born in 1973 before the marriage was dissolved by divorce in 1980. The woman then married her ex-husband's father – her former father-in-law – in 1983 and this without any objection on the part of the French *état civil français* (civil status registry). The second husband, who died in 2005, named his wife as sole legatee. The first husband subsequently invoked the nullity of the marriage contract entered into by his father in 1983, arguing on grounds of moral and successorial interests.

The answer provided by statute left no room for doubt: the abovementioned Article 161 of the Civil Code absolutely prohibits marriages between relatives by affinity and the relevant dispensation may only come into play in the event of death, not divorce.

It is generally admitted that actions for the nullity of a marriage – absolute nullity – is not subject to limitation. In application of those rules, the Court of Appeal at Aix-en-Provence, in its decision of 21st June 2012, therefore declared null and void the marriage celebrated in 1983. That decision was subsequently overturned.

Several years prior to the above, the issue of the conventionality of such a prohibition was brought before the European Court of Human Rights. In its decision in *B and L v United Kingdom* (decision & just settlement) Application no. 36536, 13 September 2005, the Court ruled in similar circumstances that the United Kingdom was in breach of Article 12 ECHR on the right to marry, though this provides that the exercise of this right must be in accordance with national laws. The scope of the decision, however, remained dubious. Indeed, the Court had above all stressed the cumbersome and costly nature of a possible dispensation, where an application had to be made to the UK Parliament itself, without really ruling on the very principle of the prohibition in the case of divorce.

The French Court of Cassation therefore remained free to assess French law in principle. Contrary to all expectations, it overturned the decision of the lower court at Aix-en-Provence when the law itself was perfectly clear, essentially relying on Article 8 ECHR on the right to respect for private and family life. The court held that "*the nullity declaration made in relation to the marriage of Raymond Y… to Mrs Denise X… was, in relation to the latter, such that it constituted an unjustified interference in the exercise of her right to respect for private life when the union, celebrated without objection, had lasted for over twenty years…*". Having been handed down without leave to appeal, the decision of the Court of Cassation was final.

The much-commented decision has consequences on two fronts.

On the one hand, the system of social prohibitions on marriage is legally in question and, bearing in mind the above, one might wonder whether the decision is a call for legislative reform. Indeed, it may be argued that the absolute nature of the prohibition, even limited to the case of divorce, barely corresponds to the reality of modern times. The ease with which a divorce may be obtained; the fact that it is now an integral part of the prevailing mores in all European countries; the complexity of stepfamilies; increasing human longevity which can lead to a multiplication in the number of stepfamily scenarios; all militate in favour of a change in legislation. If we accept the argument, we can envisage two possible avenues for such a change: simply abolishing the prohibition altogether, or extending the possibility of obtaining a dispensation to all scenarios. In the latter case, and in view of the decision discussed above, UK law doubtless ought to make provision for a system other than applications to Parliament. As for French law, it too ought to settle the issue of the potential right of appeal against a decision of the President of the Republic: there is no clear indication as to whether there is such a right; and, if there is, whether it would fall within the remit of either a judicial or an administrative jurisdiction.

However, while the substance of the decision has barely been criticised (the facts of the case being such as to inspire leniency), it has been the topic of lively debate as regards the sources of French

law. French civil law is legalistic and the court does not have the authority to set aside a clear, precise provision, its role being one of interpreting obscure or insufficient statutes (Civil Code, Article 4).

Article 5 of the Civil Code expressly provides that: "[j]udges are hereby forbidden from ruling by way of general and regulatory provisions on cases brought before them". In this instance, the Court has drafted a factual decision that carefully avoids any reproach as to a breach of Article 5, but there then arises a further sizeable obstacle in the form of Article L.411-2, sub-paragraph 2 of the *Code de procédure civile* (French civil procedure code): "[t]he Court of Cassation shall not rule on the substance of cases, unless otherwise provided by law". The Court of Cassation has quite evidently based its decision on the substance of the case here.

Aware as it was of appearing to spark a revolution in terms of the sources of French law, and following a procedure that it otherwise rarely employs, the Court issued a communiqué along with its decision, stressing the fact that its ruling did not constitute a landmark decision and that the rules contained in the Civil Code were still applicable. It may also be accepted that, given the lengthy grounds given on the basis of Article 8 ECHR, the Court applied the Convention directly to domestic law. While this procedure has been employed for the purposes of interpreting particular legal provisions or limiting their scope, it has never been used purely and simply to set aside a statute; the scope of such an action could be considerable and well beyond the bounds of the matter in question.

Thus the social impediments to marriage, which could well be viewed as relics of the past, have led to UK and French law being called very specifically into question. Sometimes smaller issues reveal much bigger ones.

Notes:

(1) C. Levi-Strauss (1948) *Les structures élémentaires de la parenté : la prohibition de l'inceste est-elle naturelle?* Editions Mouton, Paris, p.28-29

(2) Decision n°12-26066, Court of Cassation, First Civil Chamber, 4th December 2013

Judgment no.1389 of 4 December 2013

Case no. 12-26.066

First Civil Chamber

By a judgment handed down on 4 December, 2013, the First Civil Division of the Court of Cassation, has ruled that the nullity declaration issued in respect of the marriage between a father-in-law and his daughter-in-law, the latter having divorced his son, constitutes in relation to the latter an unjustified interference in the exercise of her right to respect for private life when the union; celebrated without objection, had lasted for over twenty years.

The factual circumstances played a determining role in this case, where the annulment of the marriage had been requested and granted by the court of first instance on the basis of Article 161 of the Civil Code which, in particular prohibits a marriage between a father-in-law and his daughter-in-law where the union between the latter and the son of the former has been dissolved by divorce. The husband's son had brought the nullity action 22 years after the marriage had been celebrated, following the death of his father, who had named his wife as sole legatee.

In countering the son's claim, the widow argued that there was a breach of the substance of the right to marry guaranteed under Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, basing her argument on a decision handed down by the European Court of Human Rights on 13 September 2005, concerning the proposed marriage between persons related by affinity claiming many years of cohabitation.

The court of first instance entertained the nullity application, ruling that the prohibition on marriage between a father-in-law and his daughter-in-law, as provided under Article 161 of the Civil Code, was justified insofar as it achieved the legitimate purposes of preserving family homogeneity and, in the present case, the presence of a surviving spouse necessarily brought about prejudicial successorial consequences for this sole heir who therefore had an investment in the annulment.

The Court of Cassation has ruled that the findings of the court of first instance were sufficient to infer that the right to respect for private and family life, within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, had of necessity to result in the in the dismissal of the application for the annulment of the marriage, celebrated without any objection being raised by the Public Prosecutor when the civil status papers produced by the future spouses necessarily revealed the cause of the obstacle to the marriage.

Owing to its basis, the scope of this decision is limited to the case in point. The principle of the prohibition on marriage between persons related by affinity has not been overturned.