FAMILY IN MUTATION

I. —A FAMILY, WHY?

1. Family between Nature and Culture

This paper presents some new theoretical perspectives such as evolutionist psychology and the attachment theory. Those theories may help judges in their decision making, since the child's interest is their first priority.

What is the influence of genetics on the law? An overview of probationary genetics (i.e. using the gene as a way of proof) and sanitary genetics (i.e. using the gene as a way to know and improve the health of individuals) will illustrate the well known concepts of scientifization, biologization of law but also, more pioneering, of "genetization" of society. Does not the body by the certainty of its genes expressed through DNA tests and evidence impose itself as the best proof of identity, filiation, crime of health of the individual? The part played by biological truth in filiation right will be presented in a wide perspective underlining the rise of probationary and sanitary genetics through examples coming from family, criminal, persons, labor, insurance and health law.

Allowing couples of the same sex to adopt erases the myth of fathering which has been ruling our relationship's system and leads to question the future of Assisted Human Reproduction and of carnal filiation.

2. The Couple: An Issue of Love or of Money

In the present time, Law has no reason to take an interest in love and, in this field, leaves a wide room to freedom. The question is touchier when the couple comes in. It is necessary to distinguish between the couple falling within the scope of the instant, which remain largely outside the law and the couple wishing to live a long-lasting love. In the last case, it is this very demand that lead to the intervention of the law, which will offer patterns, henceforth diversified, and construct a protecting system according to the foreseeable nature the parties are expecting.

3. Childhood: Happiness and Sufferings

4. The Family, Which Support?

Inheritances are like the shadow, in the law of succession, of family links. This contribution intends to determine in which measure the deep changes the family is undergoing today have an influence on succession law by investigating one after the other the two bedrocks on which family traditionally rested: alliance and relationship.

The French law dealing with protected adults is uncertain concerning the role of the family, wavering between trust (in particular by stating the principle of family priority) and mistrust (for example by putting at the same level professionals and family when enacting the protective measures). The lawmaker chose to give to the guardianship judges certain means in order to allow them to face some difficulties arising from the family. The tools at the disposal of the judge are real: the judge can avoid appointing a member of the family or set up bodies of control. Once the family appointed, their actions may be controlled. But due to the lack of financial means, the actions of the guardianship judge are in many respects inadequate. And yet, it is the responsibility of the judicial power to turn the family into a partner or an opponent.

5. Subject, Family, Social Order

In classical Athens (Vth-IVth centuries BC) it was essential to respect family links, in particular filial devotion. This explains the various controversies stemming from the teachings of the Sophists and Socrates, competing characters of knowledge but sharing a relativistic approach of parental relations. Aristophanes, Xenophon and Plato took part in working out as well as defending the Socratic character corrupting youth. Another essential point in the education of young people was the room occupied in poetical narrative by family violence: Plato and Aristotle have worked out fine theories about the role sometimes formative sometimes nefarious of great archaic and classical poets, while clearly distinguishing between epic and tragedy.

The penetration of the individualistic ideology into international private law entails some disruptions affecting the objectives as well as the methods of the matter. Due to the influence of the evolutionary interpretation proposed by the European Court of Human Rights, fundamental rights are more and more interfering with the treatment of international family relationships. Used as a way to support some processes of regulation such as public order or the method of recognition, they contribute to redrawing their outline, risking thereby to modify the conditions and limits of the coordination of legal orders.

These antagonisms between the two disciplines are not however irreducible. They primarily reveal a crisis of the concept of fundamental law whose borders, in international private law more than elsewhere, need to be rethought.

A family is built on a basic idea so powerful that the law is constructed around it. However if the paradigm changes, then all the rules change too, with the force of obviousness. And in the 70' the paradigm has changed. Before, during millenniums,

the basic idea was that the family was a group. According to time or period, the group experienced variations in its outlines, the place attributed and the powers given to its various members but the notion of a group was accepted. The family as a group was inserted into the social group, guarded by the State. Since the 70' the family has become a project elaborated by one free and self-sufficient person. This project, conceived by a person wishing to establish the family that suits him, is materialized when an individual meets with other individuals whose family's project crosses its own project. This gives birth to made-to-measure and porous families, where everyone comes and goes according the swings of affection, thanks to the contractual tool. This adjustment of desires meets the pattern of the market. In concrete terms the market of the ideal family cater for the satisfaction of various projects, all legitimate since they are deliberate. Their link is affection, their center is the child. The market offers new services, such as the ideal spouse and even more the ideal child, who became a jewel. The idea of market has triumphed.

II. — ASSISTED HUMAN REPRODUCTION, WHICH FUTURE PROSPECTS?

The French law of 17 May 2013 allowing couples of the same sex to adopt, by weakening the model of carnal begetting, raises the issue of a potential reform of the legal frame for Assisted Human Reproduction.

1. The Stakes of a Reform

Assisted human reproduction in not merely a technical gesture contributing to the birth of a child: the legal choices are deeply rooted in the filiation relationship, a key to family law. Resorting to AHR creates a set of individual claims coupled with a major stake for the evolution of kinship. Behind the satisfaction of individual cravings a recomposition of social structures is looming. The claims to personal autonomy have logically led to submit national laws to the filter of human rights. While acknowledging a right to the respect of the choice to become parent, the European Court of Human Rights has until now been essentially cautious by hiding behind a self-limitation, quite typical in fundamental rights matters when choices of society are at stake.

By setting as main criterium for AHR the requirement of a couple uniting a man and a woman suffering from a pathological infertility certified by a physician and by condemning surrogacy (a perversion of AHR) in the name of public order, the lawmakers have firmly rejected the use of these techniques for a right to a child. Questioning this restrictive frame would allow any single being to have a child without sexuality, which does not answer any medical issue. The desire for a one sided kinship, without a bind with begetting, serves in fact as an excuse for opening the market of fecundity. No more does transforming the child into some merchandise, begotten by agreement and whose filiation only rests on intent, answer a legal point. On the contrary these reforms sanctioning a filiation for personal reasons would entail breaking up the civil status of the child, blurring motherhood, altering presumptions of paternity and supplanting adoption.

Opening assisted human reproduction to couples of the same sex would break the body of the rules at the crossroad of which it stands, bioethics law and family law. The break with ethics law would come from the questioning of the principles structuring the matter set by the two important French laws of 1994 and that have not changed since. As far as positive law goes, the legislation of AHR is built on the pattern of natural begetting and serves a medical purpose. The reform of AHR would also entail a break with the rules of family law, despite the acknowledgement of homosexual parenthood by the law of 2013. If homosexual parenthood was admitted, it was indeed by means of adoption. But adoption and AHR do not serve the same purpose and do not raise the same difficulties.

2. Procreative Tourism: Consolidate or Repress Unlawful Acts?

Taking advantage of the variety of national rights about assisted human reproduction in general or surrogacy in particular, many homosexual or heterosexual couples attempt to achieve abroad the parental project they cannot carry out in their country. What fate is awaiting the children born from these practices? The French Cour de cassation, invoking fraud, refuses to acknowledge the filiation of these children, at the risk of putting them in an untenable situation. Other countries try to find the right balance between assertion of the principles of internal law and respect for the rights of children. In view of the diversity of legal systems and of the limits of national answers, the path of an international cooperation for fighting "procreative tourism" could be worth an exploration.

French criminal law incriminates some behaviors and practices where Assisted Human Reproduction is concerned, which sometimes leads some couple to realize abroad what is forbidden in France. To accept the effects of this bypassing in French law ineluctably implies the self-destruction of criminal law. What can be done in front of such strategies of diversion? Contrary to what one might think at first, French criminal law has today the means to repress such behaviors even if they could be perfected through easy to obtain technical improvements. However this does not answer the more fundamental issue, which is to know if it is suitable to repress these situations created abroad.

3. Exemples From Abroad

While exposing the rules of positive Belgian law and the practices in force in Belgium, the author intends to show how political decisions can follow on from each other, up to the point of eventually abolishing the following day what was the day before considered as limiting the discretionary freedom of the actors of assisted human reproduction. Is the "right to selfdetermination" of the individual becoming the norm, even when conceiving a child and building its identity is the issue?

English law widely opens the way to Assisted Human Reproduction. Thus any couple, whatever its matrimonial mode, as well as single women, can access it. English law does not restrain itself to this only opening concerning those who benefit from AHR; it also gives the possibility to bear a child beyond death as well as beyond the body. Liberal and pragmatic, English law questions the choices made by French positive law.

4. Accessing Assisted Human Reproduction: Which Modalities?

Today, allowing access to Assisted Human Reproduction is specially disputed for women in couple and single women. The stance of the States of the Union are still diverging but all those who admitted adoption for couples of the same sex also opened Assisted Human Reproduction to women's couples. This evolution invites us to come back on some of the arguments conjured up for or against this agreement. Without any wish to convince, the point is just to become aware of the stand, specially philosophical or political, that tends to be adopted when someone decides to support some position or other.

On the content of the reform: Allowing insemination for couples of women would have many consequences, among which: allowing Assisted Human Procreation to anyone with the desire for a child, *i.e.* generalization of artificial procreation; conceiving a child deliberately deprived of the right to know its father and to be raised by him (art. 7 ICDC), such a process could engage the liability of the protagonists toward the child; conceiving a child purposefully deprived of its fatherly lineage, in order to be made eligible for adoption, which would constitute an abuse of the institution of adoption intended to give a child in want of its original family an adoptive family and not to crown the process of making a child eligible for adoption.
On the opportunity of the reform: the reform, beyond intentions and desires, is inappropriate due to the damages it would entail, in particular for the children it affects.

5. Surrogacy Tomorrow?

If everybody agrees today to think that surrogacy takes place in unbearable conditions in countries such as India, Ukraine or even Nigeria, some people believe however that an "ethical" surrogacy is possible. In fact, this is a contradiction in terms, because surrogacy is not and cannot be ethical for it runs in itself counter to many fundamental principles: it organizes the disposal and the merchandization of women's bodies in order to produce, abandon and deliver a child for others. Moreover its practical implementation raises a whole series of unsolvable questions. No frame can avoid these effects since they are the very subjects of surrogacy.

MISCELLANEOUS STUDIES

The object of the present contribution is certainly not revolutionary because it is about the eternal question of the definition of Law. However, the operated theoretical and epistemological choices are perfectly innovative and audacious. Indeed, it is suggested to answer this question by adopting a syncretic posture, by considering as valid all the significant theses and by trying to overtake them to establish "the" theory of Law.
In this second part, some applications are proposed. They testify to the qualitative pluralism imprinting the Law. The results are treated by means of graphic representations, which insures an unusual but modern and intuitive perception of the rules. Besides, the Law is put in perspective with the notion of the efficiency of the rules (by concentrating only on their material and symbolic effectiveness).

A classical text from the Italian legal literature of the first half of the eighteenth century, but little known outside Italy, the treaty De' difetti della giurisprudenza (On the Defects of Jurisprudence, 1742) is the work of historian and philosopher Lodovico Antonio Muratori who was from Modena. Since he was opposed to the alterations, which had changed the common law inspired by Justinian principles, his treaty embraces the passion of the century for a new legal rationality. Partly dependent on the design of unification of the Roman law developed by Jean Domat, Muratori's critical thinking feeds in its turn Beccaria's draft to streamline the right to punish. Thus, between the time of consolidations and the growth of codification, Muratori proposes to assemble into a single volume a collection of judicial rulings gathering all court decisions approved by the best lawyers or pronounced by the most important courts. So doing casts a new light on the vexata quaestio of the interpretation of laws, suggesting the implementation of a jurisprudential code. Under what conditions is it possible to codify all court decisions?

The problematic and paradoxical idea of the « collective individual » is classically used in the philosophy of social sciences in order to describe non-biological or non-physical entities like nations, states, and institutions. This article examines these particular realities, presuming that in order to imagine them concretely, we must acknowledge their materiality; just as we ordinarily consider that distinct individuals are equipped with a body that ensures their unity and constitutes their being. We must then ascertain the nature of this very original body, one which Ernst Kantorowicz helps us to understand when he considers the origins of the « corpus mysticum » concept. Through an analysis of realities like the crowd, the legal entity, the territory, and the people, this article attempts to see if something concretely fleshes out to collectivities.