Homosexual individuals, same-sex couples and homoparental families

Daniel Borrillo

Homosexual individuals, same-sex couples and homoparental families:
an analysis of French legal reality

Daniel BORRILLO

The individual gets everything, the couple gets only a little and the family gets nothing: that is how one could briefly describe French legal reality in terms of rights of homosexuals. Actually, while the individual is protected by the law, same-sex couples do not benefit from the same protection level as heterosexual partners. It is in terms of family law, especially as far as filiation is concerned, that the unions between homosexuals encounter the most significant difficulties.

My article aims at analyzing these three levels of legal approach, in order to provide the reader with a survey of the situation in France within the European and international framework.

1. The homosexual individual

A. The long road towards full decriminalization of homosexuality

France was the first country in the world to decriminalize sodomy. As in all occidental countries, before the French Revolution, there were several norms severely condemning homosexuality. Inspired by the philosophy of the Enlightenment, the first revolutionary Penal Code of 1791, as well as the Napoleonic Code of 1810, ceased to criminalize "unnatural morals". Political liberalism and the secularization of the public order led the State to stop interfering in the private lives of consenting individuals who have attained their majority. Nevertheless, the highly praised French liberalism needs modulating. Actually, as Jean Danet [1] points out, the silence of the Penal Code was

[1] J. DANET, *Discours juridique et perversions sexuelles (XIX^e et XX^e siècles)*, Nantes, Presses Universitaires de Nantes, 1977.

accompanied throughout that period by extremely repressive jurisprudence towards homosexuals and by extremely violent medical – psychiatric treatment.

A century and a half later, on 6 August 1942, a few months after the enactment of the law on the status of Jews, France reintroduced into its Criminal Code a provision penalizing homosexuality: Marshal Philippe Pétain amended the Penal Code by introducing the crime of "indecent and unnatural acts with young persons under twenty-one and of the same sex as the perpetrator" [2], whereas for heterosexual acts, the majority was fixed at thirteen. Following the liberation in 1945, General de Gaulle maintained this criminalization by moving it to the chapter on "offences against public decency" (Article 331, para. 2 of the Penal Code). Moreover, in 1946 a provision, which would subsequently become part of the general statute of civil service, stipulated that: "No one may be appointed to a public function if he is not of good morals", thus justifying discrimination. Furthermore, an article in the Labour Code stipulated that: "The master must behave towards his apprentice with due diligence, supervise the apprentice's conduct and morals, both within and outside the house, and warn his parents (...) about any licentious tendencies he might display", thus legitimating dismissals due to bad morals. On 1 February 1949, the Prefect of the Paris Police issued the following regulation: "at all dances (...) men are forbidden to dance with each other".

Later on, as part of the fight against certain social scourges, a law of 30 June 1960 put homosexuality on the same level as procurement or alcoholism. A Decree of 25 November the same year, completed the repressive mechanism by adding indecent exposure as an aggravating circumstance to Article 331, when such an act was committed by individuals of the same sex. Furthermore, in 1968, France adopted the classification of the World Health Organization (founded in 1965) with respect to mental illnesses, which includes homosexuality alongside fetishism, exhibitionism, necrophilia...

A law of 23 December 1980, amending penal provisions concerning rape, maintains the offence based on the age difference, according to whether the intercourse takes place between persons of the same sex or between persons of the opposite sex. In its Decision 80-125 of 19 December 1980, the *Conseil constitutionnel* (or Constitutional Council) considered the law as being consistent with the Constitution [3].

Following the mobilization of the homosexual movement, the Ministry of Home Affairs on 11 June 1981 addressed a note (a *circulaire*) to the police hierarchy, prohibiting "filing of information on homosexuals, discrimination and especially anti-homosexual suspicions". The following day, the Ministry of Health ceased to include homosexuality in the list of mental illnesses as organized by the World Health

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[2] Article 334 of the former Penal Code: "Shall be punished by six months to three years imprisonment and by a fine of 2,000F to 6,000F: 1° any person who, in order to satisfy the passions of another person, habitually arouses, favours or facilitates the debauchery or corruption of young people of either sex, under the age of twenty-one, or to satisfy his own passions commits one or several indecent acts or acts against nature with a person of the same sex under the age of twenty-one" (Law 742, *Gazette officielle*, 27 August 1942, p. 2923).

[3] 80-125, *RJC*, I-88.

Organization. On 22 June 1982 the Quilliot law (concerning housing) was passed, abolishing the obligation for homosexuals to use their apartments with due diligence. On 4 August 1982 the socialist majority at that time, together with the other left-wing parties voted Law 82-683, thus putting an end to the age difference between heterosexual (fifteen years) and homosexual (eighteen years) relations. Lastly, on 13 July 1983 a new law abrogated Article 40 of the Civil Service Code stipulating that a public servant had to be of "good morals". Since these first measures, several legal provisions have been enacted to protect gays and lesbians against discrimination, both at the civil and penal levels [4].

As a consequence, within a few years the law has gone from the sanctioning of homosexuality to the sanctioning of discriminations against homosexual individuals.

B. Criminalisation of homophobia

As for the legal mechanism related to protection against different discriminating phenomena, we ought to differentiate between material actions (job denials, dismissals, hindering economic activities...) and abusive, slanderous or inciting to discrimination discourse.

1. Material acts

In France there has been a legal mechanism to provide protection against discrimination (material act) which under the heading of the notion of "morals" has enforced protection in terms of labour law and criminal law since 1985.

Thus, the constitutional principle of equality has been supplemented by an anti-discrimination principle established in Article 225-1 of the Penal Code [5]. It should be pointed out that this general principle does not make it possible to punish all acts of discrimination, but only those listed in Article 225-2 of the said Code [6].

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[4] D. Borrillo, "Statut juridique de l'homosexualité et droits de l'homme", in *Un sujet inclassable? Approches sociologiques, littéraires et juridiques des homosexualités*, *Cahiers gai kitsch camp*, 28, February 1995, p. 99-115.

[5] Article 225-1 of the Penal Code: "Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance, surname, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, trade union activities, membership or non-membership – real or alleged – of a given ethnic group, nation, race or religion. Discrimination also comprises any distinction between legal persons by reason of the origin, sex, family situation, physical appearance, surname, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, trade union activities, membership or non-membership – real or alleged – of a given ethnic group, nation, race or religion of all or of some members of these legal persons".

[6] Article 225-2 of the Penal Code: "Discrimination defined by Article 225-1 committed against a natural or legal person shall be punished by two years' imprisonment and by a fine of 30,000 euros when it consists: 1° in refusing to supply goods or services; 2° in obstructing the normal exercise of any given economic activity; 3° in refusing to hire, in sanctioning or

On a penal level, the following acts of discrimination are penalized :

- refusing to hire a person,
- sanctioning or dismissing a person,
- subjecting an offer of employment to a condition based on one of the factors listed in Article 225-1 [7].

Likewise, where the discriminating party is a public authority, the following acts of discrimination are penalized:

- refusing the benefit of a right conferred by the law and/or
- hindering the normal exercise of any economic activity [8].

Besides the penal protection provided for cases of discrimination in civil life situations (refusal to hire, refusal to rent...) and in terms of job engagements (hiring, sanctioning, dismissal and subjecting an offer), there are numerous provisions that are specific to labour law (company rules, remuneration, qualification, transfer, career planning, etc.) [9].

As far as public sector employment is concerned, the norm to be enforced is Article 6 of Law 83-634 of 13 July 1983 (amended by Law 2001-1066 from 16 November 2001 on combatting discrimination [10]). Finally, the mechanism is completed by Article 432-7 of the Penal Code [11].

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dismissing a person; 4° in subjecting the supply of goods or services to a condition based on one of the factors listed in Article 225-1; 5° in subjecting an offer of employment, an application for a traineeship or a period of in-service training to a condition based on one of the factors listed in Article 225-1; 6° in refusing to admit a person to any of the training courses referred to in Article L. 412-8, 2° of the Social Security code".

[7] Article 225-2 para. 3 and 5 of the Penal Code.

[8] Article 432-7 of the Penal Code.

[9] Article L. 122-35 of the Labour Code: "The company rules (...) shall not contain provisions that prejudice employees in their employment or occupation by reason of their sex, morals, sexual orientation (...)". Likewise, Article L. 122-45 of the Labour Code provides: "No person shall be excluded from a recruiting procedure or from access to a traineeship or to a period of in-service training, and no employee shall be sanctioned, dismissed or subjected to direct or indirect discrimination with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of his origin, sex, morals, sexual orientation (...). No employee shall be sanctioned, dismissed or subjected to the direct or indirect discrimination acts listed within the previous paragraph in terms of the normal exercise of the right to strike. No employee shall be sanctioned, dismissed or subjected to direct or indirect discrimination acts for having given evidence of acts defined in the previous paragraphs or for having reported such acts".

[10] Article 6 of Law 83-634 of 13 July, 1983 (modified by law 2001-1066 of 16 November 2001): "No discrimination, direct or indirect, shall be made between civil servants by reason of their political, trade union, philosophical or religious views, their origin, sexual orientation, age, surname, state of health, physical appearance, handicap, or their membership or non-membership – real or alleged – of a given ethnic group or race".

[11] Article 432-7 of the Penal Code: "Discrimination defined by Article 225-1, committed against a natural or legal person, by a person holding public authority or in charge with a public

The contribution of the Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation has been essential for the status of homosexual employees. Prior to the adoption of this Directive and despite the protection provided by French law, only one decision had been delivered at the highest level of national jurisdiction [12]. This shows how ineffective the system was. In a ruling of 17 April 1991, *P... c. Association Fraternité Saint-Pie X*, the *Chambre sociale* of the *Cour de Cassation* decided that the dismissal of a sexton on account of his homosexuality could constitute a wrongful breach of the employment contract, and therefore an act of discrimination, if the employer fails to produce proof confirming that "bearing in mind the nature of his duties and the purpose of the company (...) the employee's conduct" causes "significant trouble" within this company. According to the *Cour de Cassation*, it was not legitimate to invoke the employee's homosexuality as being contrary to the catholic tradition (as the Court of Appeal in Paris emphasized in the quashed judgment). Nevertheless, if the "morals" of the employee caused disruption in the company, such dismissal would not be wrongful. The Court of Appeal charged with the reexamination of the judgment quashed in *cassation*, did in fact take on board the objection by deciding in the case in question that "the dismissal of this employee on the grounds of his homosexuality and the fact that he is HIV-positive ensues from a motive exclusively related to his private life and cannot constitute a real and serious reason for terminating the contract, since the employee's behaviour outside the company, which falls within the exercise of his freedoms, cannot justify a dismissal apart from the clearly specified disruption which such behaviour is liable to provoke within the collectivity it constitutes, seeing that the unreserved adherence of the employee to the catholic faith is beyond doubt" [13].

In other circumstances, the case-law did consider the dismissal of a homosexual justified. In a judgment of 28 January 1993, the Court of Appeal in Montpellier, reached such a conclusion in a case where the employer accused the employee "of having worked for a competing company and of having committed provocative indecent acts, namely homosexual acts with a handicapped person, also an employee of the company".

In other respects, most decisions of the tribunals and appeal courts refer to the professional advantages linked to the life of a couple.

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service mission, in the exercise or on the occasion of the exercise of its tasks or mission, is punished by three years' imprisonment and by a fine of 45,000 euro where it consists of
1° refusing the benefit of a right granted by the law;
2° hindering the normal exercise of any given economic activity".

[12] There are several case-law precedents related to homosexuality, but they concern rather the family (divorce for reason of misconduct, child custody, visiting arrangements, maintenance...), the respect for private life... and not employment or occupation related issues.

[13] Cour d'Appel, Paris, 4 November 1992, "Informations rapides du recueil Dalloz", *Dalloz*, p. 125.

Ever since the enforcement of the new system, the circumstances have become significantly more favourable to the homosexual employees. In a decision of 20 January 2003 the *Conseil de Prud'hommes* (the Industrial Tribunal) of Martigues ordered a company to pay 130,000 Euro, in damages for discrimination on grounds of sexual orientation and moral harassment of a homosexual employee [14].

Ultimately, Article 47 of the law of 18 March 2003 has modified the Penal Code, by stipulating that certain crimes committed by reason of the sexual orientation of the victim will be aggravated in terms of sanction [15]. Such aggravating circumstance applies especially to murder, violence, threat, sexual assault and robbery (Articles 221-4, 222-3, 222-8, 222-10, 222-12, 222-13, 222-18-1, 222-24, 222-30).

2. Insulting, defamatory speeches or discourses inciting to discrimination

For more than thirty years, the associations for the defense of the gay and lesbian rights, as well as the rights of other members of civil society (associations for the defense of human rights, feminist movements, associations combating HIV, consumer groups...) have been demanding the alignment of the legal system concerning verbal outrages against individuals because of their sex or sexual orientation with the existing systems against offences, slander and incitement to hatred towards a person or a group of persons by reason of their origin or membership in a given ethnic group or religion. Thanks to an amendment of the law of 29 July 1881 on the freedom of the press, a system combatting the discourse on racial hatred was adopted in 1972 in France. Ever since then, the system has improved and case-law has allowed a borderline to be drawn between a simple opinion on the one hand and insulting, defamatory remarks or a discourse inciting to discrimination on the other hand. It is no longer possible to say, without incurring unpleasant consequences, that "black people are inferior to white people" or that "Jews constitute a lobby that is against national interests".

Unlike the Anglo-Saxon legal system, in which freedom of expression is an absolute value, the French penal law restricts such freedom by considering that an insulting remark cannot be disseminated in the same manner as an opinion. Of course the antiracist laws did not abolish racism. However, they have allowed the introduction into the law of some values that are the very basis of our life in a society claiming to be lay and democratic. This symbolic dimension of penal law functions as an axiological parameter for such purpose. Those sanctions were not inserted in the French law as a consequence of a more or less "capricious" will of the minorities;

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[14] Conseil de Prud'Hommes de Martigues, 20 January 2003, *Philippe Boutin c. TNT Jet Sud Est*, unpublished.

[15] Article 132-77 of the Penal Code: "Under the circumstances provided for by the law, the sanctions incurred for a crime or an offence, are aggravated when the infringement was committed by reason of the sexual orientation of the victim. The aggravating circumstance defined in the first paragraph is realized when the infringement has been preceded, accompanied or followed by remarks, written documents, use of images or of objects or by any acts that have degraded the honor or consideration of the victim or of a group of persons of which the victim is a member, by reason of their real or alleged sexual orientation".

they represent a relatively efficient answer to a heavily colonial and racist past, which presented the exclusion of given categories of the population as being a normal fact and finally made the rhetoric justifying inequalities common place. Similarly, the mobilization of the associations fighting for the enlargement of the legal protection of homosexuals is clearly connected with a political and social context that – from the debate on the *Pacte civil de solidarité* (or Civil Solidarity Pact, the *Pacs*) to the marriage of Bègles [16] – is characterized by the steady increase of slanderous remarks about gays and lesbians [17].

Headline III of Law 2004-1486 of 30 December 2004 concerning the establishment of the *Haute autorité de lutte contre les discriminations et pour l'égalité* (or the supreme authority fighting against discrimination and for equality) has amended the law of 1881 on *freedom of the press*, making it possible to sanction insulting and defamatory speeches and discourses inciting to discrimination by reason of sexual orientation.

This evolution of penal law has clearly engendered a transformation of the "geography of discrimination". Actually, it has moved from the penal field (which has become the area where anti-homosexual behaviour or phrases are criminalized) to the civil area and more specifically to family law. The spectacular evolution of penal law has not been accompanied by a similar progress in terms of family law.

2. The same-sex couple

Even if the law of 15 November 1999 about the *Pacs* acknowledges the legal existence of same-sex couple (both the *de facto* union and the "*Pacsed*" couple), the equality relating to marriage is far from being guaranteed in France. Homosexual couples are inferior from a legal point of view. Unlike marriages, the *Pacs* does not grant any rights with respect to filiation. The *Pacs* does not automatically and immediately concede a residence permit to one's foreign partner. When concluded between a French person and a foreigner, it does not allow the latter to acquire the French nationality. It does not grant the right to a survivor's pension in case one of the partners dies. The *Pacs* does not give any right of succession *ab intestat*/right of intestate estate and does not allow the use of the partner's name. The partners who have signed the *Pacs* do not have the right to claim any insurance benefit in case of an industrial accident and they have no old age insurance. The *Pacs* unions are not recognized outside the French territory.

In France, the sex difference can still be considered as a *conditio sine qua non* for the access to the right of getting married. In a decision of 27 July 2004 concerning the marriage of Bègles [18] the *Tribunal de Grande Instance* in Bordeaux considered

[16] See *infra*.

[17] See the collection of insulting letters sent to Noël Mamère and published by S. Simon, *Homophobie en France 2004*, Latresne, Le Bord de l'eau, 2004.

[18] Based on his interpretation of the absence of a definition of family in the Civil Code, Noël Mamère, the Mayor of Bègles and municipal officer has celebrated a marriage between two men on 5 June 2004. He has been dismissed from his position for one month by the

that marriage constitutes the union between a man and a woman. Consequently, the union of two persons of the same sex was cancelled. The justification put forward by the Tribunal when denying such right to a couple consisting of two men is to be found in the "traditional function of marriage, commonly seen as being the foundation of a family". The Court of Appeal in Bordeaux confirmed that decision through a ruling of 19 April 2005.

Let us examine more closely the reasoning of the Tribunal and of the Court of Appeal of Bordeaux.

When the Tribunal stated that marriage is indissolubly connected with family life or when the Court points out that "marriage is an institution aiming at the union of two persons of different sex, allowing them to found a so called legitimate family, the sexed notion of man and wife being the reflection of the sexed notion of father and mother" – both of these statements can lead to two interpretations: either it can mean that marriage is an institution that aims at legitimating the family (which is contrary to the reform of 1972 regarding the equality of filiations and to the case-law of the ECHR, which, according to Article 8 of the European Convention on Human Rights, considers the relationship between a single person and his/her child as constitutive of a family life) or it can mean that marriage is an institution associated with the idea of procreation (but this view is contrary to the *substantive* French law).

A. The substantive French law

Procreation has never been a condition for the celebration or the validity of marriage. Marriage and filiation are dealt with separately in the Civil Code [19] : they refer to different legal systems and their realities have never been subordinated one to the other. So, from a legal point of view, procreation is neither a condition, nor a finality of marriage. Actually, sterile couples and women having reached their menopause have always had access to it. Besides, the law of 28 December 1967 decriminalizing the use of contraceptive methods confirms the fact that there is no reproduction obligation and no need to envisage a parental project to get married. Moreover, the very ancient acceptance of posthumous marriage, according to Article 171 of the Civil Code is the absolute confirmation of such dissociation.

Examples of adoptions by one unmarried person [20], the recognition of a child born in adultery and the legal protection assigning the status of family to a mother and her child clearly point out the dissociations existing between marriage, family and filiation. There are other proofs confirming the dissociation between marriage and filiation, such as, on the one hand, the reform of 1972, which cancels all bans based

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Minister of Home Affairs. The department of public prosecution has solicited the annulment of that marriage before the *Tribunal de Grande Instance* in Bordeaux. The cancellation enforced by the tribunal is currently under appeal at the Court of Appeal in Bordeaux.

[19] Marriage is referred to in Headline V, biological affiliation in Headline VII, while adoptive filiation is dealt with in Headline VIII of Tome I "Person related issues".

[20] Since the passing of the law from 11 July 1966 a single person (married or not married) is allowed to *plenarily* adopt a child.

on the adulterine nature of the filiation and, on the other hand, the protection of the single mother receiving the same legal treatment as a family consisting of a married couple with or without children. In France, marriage most certainly represents the most frequent family foundation, but it would be untrue and anachronistic to maintain that it remains a monopoly.

The modern notion of marriage

Marriage is an institution that socially legitimates the union of two persons, for the purpose of mutual solidarity, based on mutual affection. As Dean Carbonnier remarked, "*La famille est moins une institution qui vaudrait par elle-même qu'un instrument offert à chacun pour l'épanouissement de sa personnalité (...) c'est une forme de droit au bonheur implicitement garantie par l'Etat*" [21]. Hannah Arendt considered marriage as an essential choice and as one of the most important existing rights. In 1959, expressing her view in a debate on inter-racial marriages in the United States, Arendt declared that the right of marrying whoever we want – regardless of colour of his/her skin or race – is an elementary human right, compared to which the right to education, the right to sit anywhere we wish on a bus, the right of going to whichever hotel or entertainment place actually appear to be minor rights. According to Arendt, even the political rights, such as the right to vote and almost all the rights listed by the Constitution are secondary rights compared to the indefeasible human rights to life, to freedom and to the search for happiness, as stipulated in the Declaration of Independence. For Arendt, the right to housing and the right to get married undoubtedly belong to the rights listed in this last category [22].

In France, according to this very spirit, the Constitution of 1946, as well as the European Social Chart, stipulates that the State must guarantee the full development of individuals and of families, since such development is necessary to a real democratic life. In a decision of 13 August 1993, the *Conseil constitutionnel* points out that the freedom to get married and to have a normal family life belongs to the fundamental rights and liberties.

If most French authors and most French case-laws are against the enlargement of marriage to same-sex couples [23], this is due to arguments relying more on prejudices and fantasy, than on rational, legally grounded reasoning [24]. Thus, as far

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[21] "Family is less a valuable institution in itself, it is rather an instrument provided for each of us, enabling the development of one's personality (...) it is a form of the right to happiness, implicitly granted by the State" (J. CARBONNIER, *Essais sur les lois*, Defrénois, Répertoire du notariat, 1979, p. 171).

[22] See Dissent Magazine, in *Courrier international*, 290, May 1996, p. 5.

[23] According to all the authors sexual duality is a *sine qua non* condition of marriage. The Court of Cassation has even gone further, with respect to the discrimination of the same-sex couple, since in 1989 and 1997 it twice refused to recognize the *de facto* concubinage of two persons of the same sex.

[24] D. BORRILLO, "Fantasmes des juristes vs Ratio juris: la doxa des privatistes sur l'union entre personnes de même sexe", in D. BORRILLO et E. FASSIN (dir.), *Au-delà du Pacs. L'expertise familiale à l'épreuve de l'homosexualité*, Paris, PUF, 1999, p. 161.

as the legal recognition of the homosexual union is concerned, there seems to be a negative consensus among the experts on civil law: homosexuality is considered as a pathology [25] or a sin [26] and therefore the affection of an individual for another person of the same sex cannot find any legal recognition. "*Il y a urgence à définir le couple parce que Sodome réclame droit de cité*" – as stated in the introductory report of a paper gathering the opinions of some specialists in family law [27]. The lack of arguments is accompanied by an appeal to common sense, to biological truth or to moral order, as if such "evidences" could put an end to a discussion which has only begun and which is far from being ended, in the belief that all these instances could form, by themselves, a reason strong enough to justify the denial of a fundamental right to certain couples.

According to these views, there are several reasons against the acceptance of the same-sex couple. The procreative aim of the union systematically appears to be the main argument that prevents the homosexual couples from having access to marriage. In this context, Jean Hauser notices that: "*Le couple n'est un sujet de droit que parce qu'il répond à deux fonctions essentielles. Une première fonction politique qui en fait une petite famille au sein de la grande, une seconde fonction évidente parce que naturelle et d'ailleurs liée à la première qui est celle de la procréation*" [28]. If

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[25] "*Il ne peut donc y avoir de mariage homosexuel (...) certains pays, comme le Danemark, admettent un "mariage" entre homosexuels. C'est une institution aussi difficile à comprendre qu'à admettre socialement et moralement*" ("There can be no solemnized homosexual marriage (...) some countries, such as Denmark, accept though the "marriage" between homosexual persons. It is difficult both to understand and to socially and morally accept such an institution") (P. MALAURIE, *Droit Civil – La famille*, Paris, Cujas, 1989, p. 67). "*En aucune manière le couple homosexuel ne devrait être assimilé au couple hétérosexuel (...) pas de contrat d'union civile incestueux, homosexuel, pédophile ou polygame*" ("Under no circumstances the homosexual couple should be assimilated to the heterosexual couple (...) there should be no incestuous, homosexual, pedophile, or polygamous civil union contract") (P. MALAURIE, note relative à l'arrêt du Conseil d'Etat du 9 octobre 1996, *Recueil Dalloz, Jurisprudence*, 1997, p. 119).

[26] "*Nouvelle preuve que le contrat d'union civile profite surtout à ceux qui souhaitent entretenir entre eux des relations sexuelles. Surtout nouvelle borne moralisatrice qui, après avoir basé un statut civil ou social sur des actes contre nature, se refuse cependant à tout permettre. Pourquoi ceci plutôt que cela? Question de degré dans la transgression, sans doute*" ("A new proof confirming the fact that the civil union contract brings benefits mainly to those who want to get involved into sexual relationships. That is mainly a moralizing landmark which, after having grounded a social or civil status on acts against nature, does not allow everything. Why this and not that? That is no doubt a question related to the level of transgression" (A. SERIAUX, "Etre ou ne pas être: les ambiguïtés juridiques de la constitution légale d'un contrat d'union civile", *Chroniques Droit de la Famille Juris-Classeur*, March 1998, p. 7).

[27] "It is urgent to define the couple, because Sodom claims its rights over the city" (in Cl. BRUNETTI-PONS (dir.), *La notion juridique de couple*, Paris, Economica, 1998, p. 1).

[28] "The couple is only a subject to law because it corresponds to two essential functions. The first one refers to its political role, which transforms it into a smaller family within the larger one, while the second function, being a natural one, is obvious, connected to the first and refers to procreation".

reproduction is an essential function of marriage, "*N'y a-t-il pas un abus de minorité*", François Gaudu asks himself, because "*dans la volonté d'obtenir un statut, non pour un cadre de la reproduction mais pour un comportement sexuel, il peut sembler qu'il y a une véritable indiscrétion (...). En posant le statut du mariage le droit renvoie simplement à cette banalité que nous sommes tous nés d'un homme et d'une femme*" [29]. "*Ce n'est pas là une appréciation d'ordre moral et subjectif*", notices Jean-Luc Aubert "*mais une constatation biologique élémentaire. Et cette évidence continue de s'imposer même si l'on tient compte des évolutions contemporaines – je ne me hasarderai pas à parler de progrès, tant la palette est contrastée – de la procréation scientifique: l'union homosexuelle n'est pas* a priori *orientée, c'est le moins qu'on puisse dire, vers la constitution d'une famille. De ce point de vue, elle n'incline pas à une reconnaissance – au sens de consécration – sociale*" [30]. If the matrimonial relationship is assessed rather in terms of procreation than in terms of intimate relationship between two individuals and if filiation plays such a central role with respect to the nature of the matrimonial act, this should also be reflected both in the theory of nullities and in divorce cases. But, as we have already pointed out, the incapacity of procreation or the lack of a parental aim does not represent an obstacle to the union, or a reason that could lead to its dissolution.

The danger incurred by the children is also invoked by certain legal experts, in order to deny homosexuals the right to get married. As far as that issue is concerned, François Gaudu admits that "*(...) le véritable enjeu, depuis le début, est de permettre aux couples homosexuels de se procurer des enfants (...) l'excès prépare le retour du bâton*" [31]. Laurent Leveneur confesses his concern when writing that: "*Sans doute les couples homosexuels auront-ils la satisfaction d'obtenir la réalisation de l'un de leurs désirs, mais à l'évidence au prix de l'intérêt de l'enfant qui doit pourtant être la considération primordiale en la matière. Puisque l'engrenage doit inéluctablement aboutir à des résultats inacceptables, c'est l'engrenage lui-même qu'il faut se garder d'enclencher*" [32].

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[29] "Is it not a minority abuse", François Gaudu asks himself, because "in the will to obtain a certain status not for reproduction, but for a sexual behavior, there seems to be some real indiscretion (...). While establishing the status of marriage, the law simply refers to this triviality according to which we have all been born of a man and a woman" (F. GAUDU, *A propos du contrat d'union civile: critique d'un profane*, Paris, Dalloz, 1988, vol. 2, p. 20).

[30] "It is not a moral and subjective statement", notices Jean-Luc Aubert, "it is an elementary biological observation and this fact keeps on imposing itself, even if we consider the contemporary evolution – I would not dare talk about progress, since the range is so wide and contrasting – of scientific procreation: the homosexual union is not oriented *a priori* – to say the least – towards the establishment of a family. From this point of view, it does not incline to a social recognition or acknowledgement" (J.-L. AUBERT, commentaire de l'arrêt 1807, Ch. civ., Cour de Cassation, 17 December 1997, *Dalloz Jurisprudence*, 1998, p. 114-115).

[31] "(...) the stake, from the very beginning, is to allow the homosexual couples to get children (...) An excess calls for the return of the club".

[32] "Probably homosexual couples will have the satisfaction of seeing one of their wishes come true, but most certainly, at the cost of the child's interests, although the child should be

Irène Théry also expresses her opposition to marriage between persons of the same sex, starting from an essentialist (pre-legal) interpretation of it. Actually, as the sociologist underlines "*la raison pour laquelle le couple homosexuel n'a pas accès au mariage est que celui-ci est l'institution qui inscrit la différence des sexes dans l'ordre symbolique, en liant couple et filiation*" [33]. She concludes by saying that "*c'est donc pour préserver la culture, et non la nature, que, jusqu'à présent, tous les pays occidentaux ont refusé d'instituer une quelconque forme de filiation unisexuée*" [34]. L. Khaïat explains better the stakes of such issue by pointing out that "*le respect de l'intimité de la vie privée doit être assuré par le droit. Chacun est libre de choisir son enfant : celui qui a hérité de ses gênes, celui que porte sa compagne, celui qui a été conçu grâce aux gamètes d'un donneur fraternel ou d'une donneuse compatissante. Le droit ne saurait s'immiscer dans l'élaboration d'un lien privé entre deux personnes*" [35].

Lacking legal arguments that could justify the denial of marriage rights to homosexual couples, civil law specialists do not hesitate to resort to theological arguments. Bernard Beignier shows that: "*Le canon 1096 du Code (canonique) de 1983 le dit bien mieux que le Code civil: "(...) le mariage est une communauté permanente entre l'homme et la femme, ordonnée à la procréation des enfants par quelque coopération sexuelle. Le mariage est une communauté qui a vocation à engendrer, ce ne peut être le désir d'une union homosexuelle*" [36].

God, culture, children or biology are, in the opinion of those authors, obstacles to the recognition of gay and lesbian couples.

It is really necessary to clarify the legal boundaries of the debate relating to the right to get married. All the more since, despite the metaphysical impulses of certain law professors, marriage must be – above all – considered as a cultural phenomenon. This formal union is actually the outcome of a social construction that is regularly

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of primary concern in this issue. Since the process will unavoidably yield unacceptable results, one should refrain from engaging in it" (L. Leveneur, "Les dangers du Contrat d'Union Civile ou Sociale", *La Semaine Juridique*, 50, 1997, p. 4069).

[33] "The reason why the homosexual couple is not granted access to marriage is the fact that marriage is an institution which relies on the sex difference as a symbol, connecting the couple to filiation".

[34] "Therefore, it is in order to preserve culture and not nature that up to now all western countries have refused to legitimize any form of unisex filiation" (I. Théry, "Le CUS en question", *Notes de la Fondation Saint-Simon,* 1997, p. 26).

[35] "The respect for the intimacy of one's private life is to be granted by the law. Everybody is free to choose his child: the one who has inherited his genes, the one who is borne by his partner or the one who has been conceived thanks to the gametes of a fraternal donor or of a compassionate female donor. Law should not interfere in the creation of a private link between two persons" (L. Khaïat, *Vérité scientifique, vérité psychique et droit de la filiation,* Toulouse, Erès, 1995, p. 17).

[36] "Canon 1096 of the (Canonical) Code from 1983 puts it better than the Civil Code: "(...) marriage is a permanent community between a man and a woman, oriented towards the procreation of children, as a result of sexual cooperation. Marriage is a community whose vocation is to engender children and that cannot be the wish of a homosexual couple"

subjected to change [37]. It is this very "constructivist" perspective that will allow us to go beyond an "essentialist" [38] image of marriage.

Marriage is not based on reproduction. Though the putative fatherhood, known as *pater is est quem nuptiae demonstrant*, remains a rule of evidence, it has lost its meaning as substantive rule since the reform of 1972. Actually, such presumption would most properly function in a patriarchical and male vision, tending not necessarily to reflect the biological reality of filiation, but rather to maintain the family order and, through this, the social order. The claiming of this presumption [39] – a genuine fiction serving a conservative family policy – ultimately means restoring the preeminence of an anachronistic idea which awards marriage the monopoly of the family foundation.

Marriage does not find its legitimacy in natural law. On the contrary, every reference to Nature is unacceptable in modern law, because the latter relies on general principles which do not owe anything to natural order. Natural order are deceptive terms referring to a framework inspired by unalterable biological or anthropological elements and natural order becomes therefore a metaphysical order. Rather than reproducing nature, law has a social function and as such it organizes its system around a certain number of fictions, making a peaceful and fair settlement of human relations possible. Issues such as objective responsibility, personality of legal persons, adoptive filiation, legal theory on absence or even fideicommissary substitutions for instance have nothing of a natural essence. Law has a function [40], rather than a nature. Invoking nature when talking about traditional marriage was merely a means of subjecting the woman to her husband's authority.

("Une nouvelle proposition de la loi relative au CUS. Copie à revoir", *Droit de la famille*, Jurisclasseur, Chroniques, April 1997, p. 4).

[37] See J.-Cl. Bologne, *Histoire du mariage en Occident*, Paris, Lattès, 1995.

[38] In 1904, one hundred years after the final sanctioning of the contract based and lay marriage in Napoleonic Code, G. Renard defines marriage as being "*une institution primordiale soustraite, dans son essence aux variations législatives et dont aucune volonté privée ou publique ne saurait modifier le type naturel et immuable*" ("a basic institution that eludes the legislative variations by its essence and whose natural and unalterable character could not be changed by any public or private will") (quoted by J.-Cl. Bologne, *op. cit.*, p. 327).

[39] Similarly to what Irene Théry has pointed out in her report addressed to the Ministries of Justice and of Social Affairs: "*En effet, le mariage dans notre culture n'a jamais été l'institution du seul couple, mais aussi et d'abord le socle de l'établissement et de la sécurité de la filiation. "Le cœur du mariage, ce n'est pas le couple, c'est la présomption de paternité", rappelle le doyen Carbonnier*" ("As a matter of fact, in our culture marriage has never been an exclusive institution of the couple. It has also and mainly been the pedestal of affiliation establishment and security. "The heart of marriage is not the couple, but putative fatherhood", as dean Carbonnier reminds us") (I. Théry, Couple, filiation et parenté aujourd'hui: le droit face aux mutations de la famille et de la vie privée, rapport adressé aux ministres de la Justice, de l'Emploi et de la Solidarité, May 1998 p. 24).

[40] "The so called traditional family, as a haven of morality and security, anchored by a tightly united couple – the father going to work and the mother staying at home and taking care of the children – and extending its benefits to the ancestry, has never existed in reality, since it

In the name of natural order, patriarchical ideology has invented the myth of the stable and solid traditional family. But, as Stéphanie Coontz has shown, "*la famille dite traditionnelle, havre de moralité et de sécurité, ancrée par un couple soudé – papa au travail et maman à la maison s'occupant des enfants – et étendant ses bienfaits aux ascendants, n'a jamais existé qu'en pensée puisqu'elle cumule des propriétés apparues à des époques et dans des régions différentes de l'espace social*" [41].

In the meantime, significant changes have taken place in family life and despite the reactions of people nostalgically attached to stable marriage and to good old days, marriage has nowadays found its legitimacy in the very instability of individual freedom, in the freedom to get together and to separate. The introduction of divorce based on mutual consent in 1975 allowed spouses to decide themselves about the future of their relationship. Moreover, the matrimonial institution lost its monopoly on legitimate filiation, because since the reform of the Civil Code in 1972 the children born of married parents and those born out of wedlock have benefited from almost the same rights.

Pluralism, the dissolution of the traditional notion of family, and the diversification of household patterns – far from representing a degradation of family [42] – are the undoubted sign of the democratic aspect gained by it and a sign of the higher individual development of its members. As A. Benabent has remarked, "*l'évolution individualiste suivie par notre droit des personnes depuis la fin du siècle dernier a entraîné un déplacement de l'angle de vision sous lequel est examiné le mariage. On tend à le considérer moins du point de vue de l'institution familiale dont il est le pivot que du point de vue de la personne des époux*" [43]. Actually, according to Carbonnier, "*L'histoire de notre droit du mariage depuis cinquante ans est l'histoire d'une libération continue*" [44].

The lesbian and gay claim for the right to marry is a step forward in that democratization process. The legal claims of lesbians and gays are also to be seen

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accumulates features that have appeared at different times and in different regions of the social space". For a more detailed analysis of the law – nature – politics relationship see the article of Y. Thomas, "Le sujet de droit, la personne et la nature", *Le Débat,* 100, May-August 1998, Paris, Gallimard, p. 85-107.

[41] L. Wacquant, commentaire de l'ouvrage de St. Coontz, *The Way We Never Were: American Families and the Nostalgia Trap*, New York, Basic Books, 1992, in *Actes de la Recherche en Sciences Sociales "La famille dans tous ses états"*, 13 June 1996, p. 102.

[42] The current worries concerning the degradation of family already existed a century ago (see S. Mintz, "Regulation on the American Family", *Journal of Family History*, 14, 1989, p. 387-408).

[43] "The individualistic evolution, followed by our civil law since the ending of the past century has induced a shift in the point of view when examining marriage. We now tend to consider it less from the viewpoint of a family institution – the axis of which it is – and more from the viewpoint of the two spouses in person" (A. Bénabent, "La liberté individuelle et le mariage", *RTDC*, III, 1973).

[44] "For fifty years, the history of our marriage law has been the history of a continuous liberation" (J. Carbonnier, "Terre et ciel dans le droit français du mariage", *Etudes Ripert*, Paris, LGDJ, 325, p. 328).

as part of a political line which transcends them and in which other groups have already participated. The denial of the right to marriage to same-sex couples is based on a monolithic and essentialist idea of such union, which is closer to a sacrament than to a civil contract. There are no legal arguments for prohibiting homosexual marriage; if the natural or religious moral order is cited as a resort, it is likewise in former times when this argument was used to condemn the union of infidels, to ban mixed marriages or to justify domination over women. These social actors, formerly outside the norm, have reshaped the institution of marriage, developing in it a more democratic character.

The preceding has allowed us to show that different categories of persons have progressively acceded first to the sacrament and then, after its secularization, to the marriage contract. The Revolution annulled the monopoly of the Church over matrimonial issues and established the basis for a fundamental change in marriage. Thenceforth it has become a legal act and therefore a lay act. The Revolution brought a change in nature, and from whence nuptiality no longer depended on religious law, but exclusively on civil law.

Because of the lack of legal arguments, the recent decisions of the *Tribunal de Grande Instance* and of the Court of Appeal in Bordeaux have been founded on clear opinions, illustrated by some historical examples, such as the preliminary discourse on the Draft Civil Code of 1804, as the ancient fundamental rule concerning the putative fatherhood or the relics of terminological residues in the Civil Code which keeps using terms like "husband" and "wife" instead of "spouses" as in most of the other articles of the Code. The arguments produced by the judges in Bordeaux in order to defend the heterosexual nature of the matrimonial institution are all the less convincing since the international situation has evolved in the opposite direction.

B. On the international level

Same-sex couples already have the right to marry in the Netherlands and in Belgium. Spain will soon be the next country to extend marriage to homosexual unions, while Sweden has announced the setting up of a parliamentary commission that is going to regulate this issue.

However, the Tribunals have not been waiting for the Parliament to hand down their decisions. For more than ten years, decisions on such matters have been increasing in number in the United States.

On 5 May 1993, the Supreme Court of the State of Hawaii stated in *Baehr v. Lewin* case that denying civil marriage to homosexual couples would be discrimination and as such contrary to the State Constitution, unless the concerned authority could show "compelling State interests" for banning such unions. Since the so-called interest was not shown, the only way to continue denying the right to marriage to homosexual couples was by resorting to a referendum, in order to modify the Constitution [45].

On 20 December 1999, the Supreme Court of Vermont handed down a similar decision. As far as the *Baker v. State* case was concerned, the Supreme Court of

[45] Hawaii Supreme Court, *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44, 5 May 1993.

Vermont considered that "It is equally undisputed that many opposite-sex couples marry for reasons unrelated to procreation, that some of these couples never intend to have children, and that others are incapable of having children (...) The law extends the benefits and protections of marriage to many persons with no logical connection to the stated governmental goal" [46].

On 10 June 2003, in *Halpern et al v. Attorney general of Canada et al.*, the Court of Appeal of Ontario concluded that the common law definition of marriage was contrary to the provisions of the Canadian Charter of Rights and Freedoms. It reformulated the definition of marriage as being "the voluntary union for life of two persons to the exclusion of all others". To the argument concerning procreation, the Court of Appeal of Ontario replied: "Importantly, no one, (...), is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry". In its survey on the proportionality of marriage denials incurred by same-sex couples, the Court of Appeal of Ontario considered that "The ability to "naturally" procreate and the willingness to raise children are not prerequisites of marriage for opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to have any". The Court pointed out that "An increasing percentage of children are being conceived and raised by same-sex couples" and that "same-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts" [47].

On 1 May 2003, the Court of Appeal of British Columbia came to the conclusion that the heterosexual common law definition of marriage [48] was contrary to the Canadian Charter of Rights and Freedoms. From now on marriage should be defined as "the lawful union of two persons to the exclusion of all others" [49].

To the same purpose, on 18 November 2003, the Supreme Court of Massachusetts delivered a decision in the case *Hillary Goodridge and others v. Department of Public Health*. The Court decided that "Fertility is not a condition of marriage, nor is it grounds for divorce". The Court defined marriage as being "the voluntary union of two persons as spouses, to the exclusion of all others", considering that a marriage denial to a same-sex couple was not compatible with the constitutional principles of respect for individual autonomy and equality before the law. As for the argument concerning procreation and family, the Supreme Court of Massachusetts considered that the State "affirmatively facilitates bringing children into a family regardless of

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[46] Supreme Court of Vermont, *Baker v. State* (98-032), 20 December 1999, p. 29.

[47] Court of Appeal of Ontario, *Halpern et al v. Attorney general of Canada et al.* (2003), 65 O.R. (3e) 201.

[48] "The voluntary union for life of one man and one woman to the exclusion of all others".

[49] Court of Appeal of British Columbia, *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251 (CanLII).

whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual". The Court added that "The "best interests of the child" standard does not turn on a parent's sexual orientation or marital status" and that "There is thus no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the "optimal" child rearing unit". The Supreme Court of Massachusetts specified that: "While the enhanced income provided by marital benefits is an important source of security and stability for married couples and their children, those benefits are denied to families headed by same-sex couples". In other respects, the Court states that "Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized". In fact, in Massachusetts, a same-sex couple has been allowed to adopt a child since 2000.

Less than one year after the Massachusetts decision, on 19 March 2004, the Québec Court of Appeal decided that the right of marriage established by the Civil Code of Québec should be open to all partners, regardless of their sex [50]. On 14 July 2004, the Court in Yukon also decided to extend the right of marriage to same-sex couples [51]. On 9 December 2004, the Supreme Court of Canada delivered a favorable opinion to the government, with respect to the extension of marriage to same-sex couples, thus confirming the lower tribunals' decisions. A draft legislative proposal is currently under discussion in the Canadian Parliament.

C. *The political function of marriage*

The reaction to the marriage of Bègles and the intention of the French conservative government to improve the *Pacs*, in order to avoid the debate on the extension of marriage to same-sex couples raise again the question regarding the function of marriage in an open society, such as the French one today. It is obvious that marriage no longer founds a family and that concubines or single-parent families are protected in the same manner as marital families. If marriage no longer serves for the legitimization of filiation or the establishment of a family, what then is its function?

Its function is not a legal, but a political one.

The conjugal order that places marriage at the top of the couple oriented legal hierarchy implies the existence of a certain logic that functions at the same time as its political justification [52]. All the arguments opposing the full recognition of

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[50] *Ligue catholique pour les droits de l'homme c. Hendricks*, 2004 IIJCan 20538 (QC C.A.)

[51] Supreme Court of the Yukon Territory, *Dunbar & Edge v. Yukon (Government of) & Canada (A.G.)*, 2004 YKSC 54 (CanLII).

[52] D. Borrillo, "Pluralisme conjugal ou hiérarchie des sexualités: la reconnaissance juridique des couples homosexuels dans l'Union européenne", *McGill Law Journal*, 46, August 2001, p. 877-922.

homosexual unions are based on the same idea which consists of the differentiation of sexualities (homo- and heterosexuality) and the drawing of political consequences from this. The distinction between heterosexual unions and same-sex couples also refers to the sexual practices specific to each of the above mentioned unions. Just as it is impossible to designate a non-married couple without resorting to the notion of marriage, it is impossible to speak about the conjugal order without taking into account the essential phenomenon it relies upon i.e. sexuality.

The view according to which the institution of marriage must be reserved exclusively to heterosexual couples is due to the fact that they are supposed to have a certain type of sexual intercourse. Thus, the sexuality order emerges concurrently to the conjugal order, placing heterosexuality – through marriage – on a pedestal, as a model, as a canon according to which all sexualities are to be interpreted. While conjugal order places marriage at the top of its hierarchy, it only states the supremacy of heterosexual intercourse [53]. In the course of the debate relating to the *Pacs*, the psychoanalytical discourse denounced "the global economy of the *Pacs*", that did not have any other goal but to establish the almost absolute equivalence between homosexual and heterosexual couples [54]. Actually, if the law disturbs, this is not due to what it is, but rather to what it could lead to – the cancellation of the distinction between homosexuality and heterosexuality.

Yet, the promotion of heterosexuality is not officially a mission of the State. The fact that the Tribunal and the Court of Appeal of Bordeaux referred to the "*fondation d'une famille*" or "foundation of a family" as a justification for heterosexual marriage, as being the only one capable of procreation, somehow establishes the supremacy of heterosexuality over homosexuality. This type of appreciation raises a major political question with respect to fundamental rights and to the rule of law.

As the Court of Ontario remarks, the denial of marriage to same-sex couples implies the preservation of the privileged status of heterosexual couples. Such a privilege can no longer be justified in a free and democratic society.

3. The homoparental family

Since 1966, the law allows any individual, without any distinction whatsoever [55], either a single or a married person who is not separated *de corpore,* to adopt a child, on the condition in this latter case that the spouse approves [56]. Similarly, the law allows

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[53] The moral and physical superiority of vaginal heterosexual intercourse has been defended by J. Finis in his famous article named "Law, Morality and Sexual Orientation" (1993-4), *Notre Dame Law Review,* p. 1049. See also R. George, *In Defense of Natural Law,* Oxford, Clarendon Press, 1999. See the comments of N. Bamforth, "Same-Sex Partnerships and the Argument of Justice", in R. Wintemute & M. Adenas (ed.), *Legal Recognition of same-sex partnerships,* Oxford, Hart Publishing, 2001, p. 31f. On the arguments against homosexuals see D. Herman, *The Antigay Agenda, Orthodox Vision and the Christian Right*, Chicago University Press, 1997.

[54] Article by A. Magoudi in *Le Monde*, 9 October 1998.

[55] O. Laget, *L'adoption par une personne seule*, thèse doctorat en droit, Lyon II, 1972.

[56] Article 343-1, para. 2 of the Civil Code: "If the adopting person is married and not separated *de corpore,* he/she will need the approval of his/her spouse, unless the spouse finds himself/ herself in the impossibility of expressing his/her will".

arried couples to adopt a child [57], whereas such opportunity is neither granted to ıhabiting couples, nor to "Pacsed" couples.

As far as the integration level is concerned, adoption, as regulated by French .w, can be either "simple" or "plenary". In the first case, the tie of adoptive filiation annot replace biological filiation; it is juxtaposed and allows the adopted child, nderage or major of age, to preserve the connection with his/her biological family, s far as succession rights or the keeping of one's surname is concerned. However ve must point out that for underage children, parental authority falls to the child's .doptive parents, thus excluding any sharing of this authority with the biological ıarents. Even if at present it is *not* impossible for homosexuals to resort to "simple" ıdoption procedure, jurisprudence and doctrine reprove such practices, since they aim ıt institutionalizing a couple relationship [58].

In France, "plenary" adoption is the most common procedure. Unlike "simple" adoption, it replaces any previous filiation, it is irrevocable and the child loses every connection with his/her biological family, except when the adoption concerns the spouse's child [59].

Each of these two patterns of adoption is bound by its own legal system. Moreover in the case of the "plenary" adoption of children under fifteen and who are in State care or who have been abandoned from a judicial point of view or who are foreigners, the adoption is pronounced in judicial terms only after an administrative inquiry concerning the living conditions offered by the applicant with respect to family life, education and psychological support. This procedure is sanctioned by the delivery of an authorization. This appears to be an *a priori* inquiry allowing for the assessment of the applicant's capacity to adopt, even if the applicant has the judicial capacity to do so. Unlike "plenary" adoption, "simple" adoption does not require any previous authorization and it is pronounced by the judge after it has been ascertained having checked whether the parents meet the legal conditions, i.e. that they are more than twenty-eight years old or that they have been married for more than two years [60].

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[57] Article 343, para. 1 of the Civil Code: "Adoption may be applied for by a married couple who have not been judicially separated and have been married for more than two years or are both over twenty-eight years of age".

[58] Before the adoption of the *Pacs* and faced with the impossibility of organizing common life, certain same-sex couples would resort to the *simple* adoption procedure, in order to ensure inheritance by succession though this practice was blamed by jurisprudence (Cour d'appel, Riom, 9 juillet 1981, *JCP*, 1982 II, 19799, note ALMAYRAC, also published in *RTDC*, 1984, 306, obs. RUBELLIN-DEVICHI; Judgments of *Tribunal de Grande Instance* of Paris, 3 February and 3 November 1982, published within the enclosed annex to P. RAYNAUD, "Un abus de l'adoption simple: les couples adoptifs", *Dalloz* 1983, chron. 39).

[59] Article 356 of the Civil Code : "Adoption assigns to the child a filiation that replaces its primary filiation: the adopted child no longer belongs to his biological family, under the reserve of the marriage bans listed by Articles 161 to 164. However, in the case of adoption of the spouse's child the primary filiation ties with this spouse and his/her family continues to exist. Moreover, it engenders the effects of an adoption by both spouses".

[60] Except for the adoption of the spouse's child.

As far as "plenary" adoption is concerned, it is not available to same-sex couples, since they cannot get married. For individuals – gays or lesbians – the situation is not favorable either, since administrative jurisprudence considers that the adoptive person's homosexuality can represent a legitimate obstacle to the adoption of a child.

A. Social emergence of a "homosexual parenthood"

For a long time, gay and lesbian parents have had to face different problems related to filiation. Concerning the custody of their own child as well as concerning the right of access/droit de visite to the child (in the context of a divorce) or the exercise of parental authority, justice has decided against the homosexual father or mother in many cases dealing with family disputes [61]. The Court of Appeal in Paris transferred for instance the custody of the children, which had initially been assigned to the mother, to the father, "for psychological reasons" and because the mother frequently saw her girlfriend in the presence of the children, whereas the father provided a better equilibrium than the pseudo-home of the mother, with the intermittent presence of her girlfriend [62]. Similarly, the Court of Appeal of Grenoble stated that the homosexual relations of the mother, at her domicile, had induced psychological disturbances for the children and therefore represented the serious reason required by Article 292 of the Civil Code to modify the assignment of the parental authority, by transferring this authority to the father [63]. The Court of Appeal in Rennes has denied to a father the capacity of exercising his parental authority over his children, considering that his homosexual relations were immoral and incompatible with the exercise of parental authority over underage children, and that they would be prejudicial to their health, their morality, their upbringing and their schooling [64].

A decision of the European Court for Human Rights has put an end to this jurisprudence, by stating that the denial of enforcement of his parental rights to a homosexual father is contrary to the principle of protection of private and family life (Article 8) and that it represents a discrimination contrary to Article 14 of the European Convention for Human Rights [65].

The innovation introduced by the current situation is not so much the recognition of a pre-existing family life, obtained with the decision *Salgueiro da Silva*, but rather the institutionalization of filiation ties *ex nihilo*. In this context, the development of a political claim was made possible through the organization of homosexuals into

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[61] D. Borrillo, "La protection juridique des nouvelles formes familiales: le cas des familles homoparentales", *Mouvements*, 8, March-April 2000, p. 54-59.

[62] Cour d'appel, Paris, IRE ch., section des urgences, 16 March 1984, juris-data no. 022604.

[63] Cour d'appel Grenoble, ch. des urgences, 20 July 1988, juris-data no. 88-44724.

[64] Cour d'appel, 6e ch., section 1, 27 September 1989, juris-data no. 048660.

[65] ECHR, *Salgueiro da Silva Mouta c. Portugal*, 21 December 1999, appl. 33290/96 (http://www.echr.ceu.int/hudoc). For a more detailed study on such evolution, see Th. Formond, Les discriminations fondées sur l'orientation sexuelle en droit privé, PhD, Université de Paris X-Nanterre, 2002.

ɔciations fighting for the full recognition of family rights, and mainly of those .ted to filiation. The *Association des parents gays et lesbiens* (APGL) founded in ;6 counts nowadays more than one thousand and five hundred members. Despite its itical action, it did not manage to introduce the filiation rights for same-sex couples he *Pacs*. Moreover even the membership in the *Union Nationale des Associations miliales* has been denied to the APGL and it has recently been excluded from the *nseil Supérieur de l'information sexuelle* [66].

However, according to the polls, 7 % of homosexuals and 11 % of lesbians are rrently parents and 30 % of them want to become parents. Despite this increasing mand, the law dodges this issue. The so called bio-ethical laws from 1994 deny to ıgle women the access to medically assisted procreation. Only sterile heterosexual ıuples, within the age limits enabling procreation, can have access to such a ·ocedure [67]. "Plenary" adoption by spouses is reserved only to married couples ıd the surrogate maternity is strictly prohibited by French law. Therefore a large ımber of lesbians are inseminated in Belgian, Spanish or English hospitals, while verseas French gay couples sign surrogate maternity contracts in order to fulfill a arental project. Despite the regular and constant actions of the associations for the efense of homosexual rights, the *Pacs* does not change the rules governing filiation.)nly the members of a heterosexual couple can become parents and the French legal ystem gives no chance whatsoever to a double male or female adoption of a child [68]. Nevertheless, as we have already pointed out, beyond the issue of the homosexual ɔouple, it is the very capacity of the individual to have access to adoptive filiation that French and European case-law seems to call into question.

B. *Refusal by the* Conseil d'Etat *and confirmation by the ECHR*

From 1990 onwards, the place of filiation within the "procreative order" based on the sex difference progressively shows through in the administrative control of the conditions of life offered by the applicant, for the delivery of the authorization. The chairmen of the *Conseils généraux* in charge of this delivery rejected the requests

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[66] P. Krémer, "Le conseil supérieur de l'information sexuelle fermé aux gays", *Le Monde*, 16 September 2002.

[67] Article L. 2141-2 of the Public Health Code: "Medically assisted procreation is meant to meet the parental demand of a couple. Its aim consists in remedying to the infertility whose pathological nature has been medically diagnosed. It can also aim at avoiding the transmission to a child of a particularly serious illness. The man and the woman must be both alive, must have the age to procreate, they must be married or they must be able to produce evidence of a cohabitation of at least two years; they must previously have consented to the embryos' transfer or to insemination".

[68] One must also point out the parliamentary initiative of the deputy Noël Mamère from the green party who, on 20 March 2002, submitted to the national assembly a draft bill (3671) tending to allow non married couples to adopt a child together. Yet, this bill was not discussed and it was sent to the *Commission des lois*.

submitted by singles – men or women – because of the mono-parental character of the adoption project [69].

And yet, the *Conseil d'Etat* decided in 1991 to extend its control over refusals of authorization, in order to censure each error of appreciation, including those not manifest, of the *Conseils généraux*, maybe inclined to choose, among the applicants, the ones corresponding to a bi-parental family model [70]. So, on 24 April 1992, the State Council quashed the refusal of authorization for a man whose "repressed homosexual tendencies" had been noticed by the Administration, as there was no precise element which might jeopardize the child's interest [71]. However, this decision already shows the limits of the administrative judge's sympathy for gay or lesbian singles: sexual orientation does not represent an obstacle provided it be concealed.

Since 1994, the administrative jurisdictions have turned the case-law around, by establishing the principle of the bi-parental family suggested by the position of social workers, psychologists or psychiatrists in charge of the inquiry for the request for authorization – a position which defines the psychical construction of the child with reference to male and female features. On 18 February 1994, for instance the *Conseil d'Etat* validated a refusal of authorization by stating that the adoption project of a female applicant revealed the "absence of any father image" and that the child was considered a "remedy for loneliness" [72]. Similarly, the Administrative Court of Appeal of Paris confirmed on 25 February 1996, the authorization rejection enacted by the administration with respect to the request of an unmarried woman who, according to her personal life concept, wanted to avoid the risk of failure in a couple relationship and thus obstructed the father function or the father representation [73]. The decision of the *Conseil d'Etat* of 25 October 1995 is even more significant, since it quashed an authorization rejection because the female applicant, according to the investigators' reports, did not reject the idea of the father presence within the family unit [74]. From then on, the adoptive person must either live with a partner at the time of the adoption request or start a family life within a certain time. It is only on these conditions that the case-law accepts the adoption by a single person.

It is not by chance that the case-law changed in 1994. Actually, in 1994 the French Parliament, after a long debate, finally adopted the so called bio-ethical laws in which medically assisted procreation plays a major role. For the first time, the law defined

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[69] Décision du président du Conseil Général des Yvelines du 2 mars 1988, sous Conseil d'Etat, 4 novembre 1991, *Rec. Lebon*, p. 372-373. In this case, the authorization application was submitted by a school teacher.

[70] Conseil d'Etat, Sect. 4 novembre 1991, *M. et Mme H., Département des Yvelines c. Mlle L., M. et Mme C., Rec.*, p. 361, 372, and 373, concl. Patrick Hubert, p. 362f.

[71] Conseil d'Etat, 24 avril 1992, *M. T., Rec. Tables*, 718, *Revue administrative*, 1992, 328, Obs. H. Ruiz-Fabri.

[72] Conseil d'Etat, 18 février 1994, *Mme Francous, Rec. CE*, p. 79 ; *D.*, 1994, *IR*, p. 78.

[73] Cour administrative d'appel, Paris, 25 février 1996, Département de Seine-Saint-Denis.

[74] Conseil d'Etat, 27 octobre 1995, Département de Saône-et-Loire, no. 161788.

the couple as being the union of a man and of a woman and it stated that, to have access to artificial procreation, the couple should have reached the age of procreation and have proved the sterility of its members. This provision engenders consequences beyond the simple technique of medically assisted procreation and affects the whole legal logic of filiation [75].

On 9 October 1996, the *Conseil d'Etat* reaffirmed its doctrine, going even further, if the candidate admitted his/her homosexuality [76]. In this case, the applicant, Philippe Fretté, a Physics teacher at the French High School of London, the guardian of the child of a deceased friend, had not concealed his homosexuality to the social investigator, and had even explained that he was having a stable relationship with a man living in Paris and that he envisaged living with this man on his return to France. Despite the applicant's qualities and the promise of a regular and amicable feminine presence for the child, the administration refused to deliver the authorization. The *Conseil d'Etat* validated this refusal by notifying that, considering his living conditions and despite his undeniable human and educational qualities, the applicant did not offer sufficient guarantees concerning family, education and psychological support to adopt a child [77]. One of the arguments of the government representative used to justify the refusal of the authorization was precisely the rule that governs medical assistance to procreation, which is legally exclusively reserved to heterosexual couples.

In two decisions of 12 February 1997 [78], the *Conseil d'Etat* confirmed this solution with respect to a homosexual woman, repeating the same justification word for word.

The law of 15 November 1999 that sanctioned, with the *Pacs*, the unions of homosexuals did not question this jurisprudence [79] (this law does not provide for joint

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[75] On 25 November 1999 in an official study the *Conseil d'Etat* reminds us that the law has denied the surrogate maternity, the access to the medically assisted procreation to homosexual couples and to women that no longer have the proper procreation age. The aim was not to sanction a certain moral order, but to give to the child to be born the affective environment that would be the most naturally appropriate to ensure his harmonious development and to reject correlatively the recognition of any right to having a child, in *Les lois de Bioéthique: cinq ans après,* Paris, La documentation française, 1999, p. 32.

[76] For a more detailed analysis see D. Borrillo & Th. Pitois, "Adoption et homosexualité: une analyse critique de l'arrêt du Conseil d'Etat du 9 octobre 1996", in *Homosexualités et Droit*, Paris, PUF, 2nd ed., 1999.

[77] Conseil d'Etat, 1re et 4e sous-sections réunies, 9 octobre 1996, req. no. 168 342; Département de Paris, *JCP,* 1997, édition G, jurisprudence, 22766, p. 34-38.

[78] Conseil d'Etat, 12 février 1997, arrêt *Parodi* no. 161454 et arrêt *Bettan* no. 161455, comm. du gouv. Mme Maugüé.

[79] Article 515-1 of the new Civil Code defines the *Pacs* as a contract that has been concluded between two natural persons major of age, of different sex or of the same sex, in order to organize their common life. Article 515-8 of the same Code defines cohabitation as being "a *de facto* union, characterized by a life in common and by its stability and continuity, between two persons of different or of the same sex, who live together as a couple".

adoption, for adoption of the husband's/wife's child, for shared parental authority, for access to medical assistance to procreation) [80].

Two decisions of the Administrative Courts of Appeal of Douai and Nancy in October and December 2000 [81] resume identically the reasoning of the *Conseil d'Etat*. The administrative jurisprudence persists in reducing adoptive filiation to an imitation of sexual reproduction, which became the general pattern through the anthropological and psycho-analytical *vulgate* of the sex difference. Its acknowledged finality consists, at least in France, in imprisoning parenthood in an immutable model, since it is considered as being universal and unalterable, independently of time and place [82].

The issue was finally submitted to the European Court for Human Rights by Philippe Fretté whose refusal of authorization by the administration had been confirmed by the above mentioned decision of the *Conseil d'Etat* [83]. He maintained before the European Court that the right to respect for family and private life, as stipulated by Article 8 of the Convention, had to be ensured without any discrimination relying on the person's sex for instance (Article 14), the applicant claimed to be the victim of discrimination based on his sexual orientation. By a decision of 26 February 2002, the Court of Strasbourg, with a majority of four votes out of seven, confirmed the legitimacy of the French decision rejecting the application for authorization to adopt. First of all, it considered that this decision was mainly determined by the confirmed homosexuality of the applicant. In addition, it considered that the decision "to reject the applicant's application for authorization pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure". Ultimately, it stated that this differentiating treatment was objectively and reasonably justified by:

1) the existence of a wide margin of appreciation which must be left to the authorities of each of the contracting States, considering the absence of a common ground on the question,
2) the division of the scientific community over the possible consequences of a child being adopted by one or more homosexual parents,
3) the wide differences in national and international opinion,
4) the fact that there are not enough children up for adoption to satisfy the demand.

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[80] The situation has got worse in some respects, since by virtue of the jurisprudence of the *Conseil d'Etat* lots of individuals who have concluded a *Pacs* conceal this situation, being afraid not to be granted the authorization.

[81] Cour administrative d'appel, Douai, 26 octobre 2000, *Carbonnier et Galat c. Dép. du Nord*, arrêt no. 97DA01790, www.Jurifrance.Com ; Cour administrative d'appel, Nancy, 21 décembre 2000, *Emmanuelle X c. Dép. Jura*, *Dalloz*, 2001, no. 20, Jurisprudence, p. 1575.

[82] For a more detailed analysis of the expert discourse, see E. FASSIN, "La voix de l'expertise et les silences de la science dans le débat démocratique", in D. BORRILLO and E. FASSIN (dir.), *Au delà du Pacs*, Paris PUF, 2nd ed., 2001.

[83] D. BORRILLO and Th. PITOIS-ETIENNE, "Différence des sexes et adoption: la psychanalyse administrative contre les droits subjectifs de l'individu", *Revue de Droit de McGill*, 49/4, October 2004, p. 1035-1056.

This decision deserves criticism for several reasons.

First of all, as far as the legitimate aim is concerned, the European Court implicitly believes that homosexuality represents a danger for the health and rights of the child, without explaining the grounds for such statement of principle, since the decision does not justify it by means of *de facto* or *de recto* arguments. If we follow the Court's implicit logic, we see that such argument amounts in fact to interpreting homosexuality if not as a disease, at least as a circumstance that may disturb the child or may condition him in terms of sexual orientation, which should be kept to the "healthy" pattern of heterosexuality. This incitement to heterosexuality seems to be extravagant at the least. A democratic State should not privilege a particular form of sexuality, as it should not encourage the prevalence of a certain race or religion. Regardless of their being Caucasian or black, atheists or believers, homosexual or heterosexual, all citizens should enjoy the same legal treatment.

Moreover, the interpretation of the Court with respect to the community of ideas on such issue is also questionable. All Member States of the Council of Europe which acknowledge the individual right to adopt, do not explicitly deny it to homosexuals. In that sense and according to the principle that what is not prohibited by the law is allowed, one can say that there is a community of viewpoint which consists in subordinating the right to adopt to the sexual orientation of the adoptive person.

The second argument about the division of the scientific community over the possible consequences of a child being adopted by one or more homosexual parents, is not supported by any scientific research. Though the applicant had submitted the conclusions of several studies, during the debate, the French State merely confined itself to referring to an inexistent scientific controversy. Actually, most investigation has proved that the sexual orientation of the parents does not have any impact on the child's psychological development [84]. In 1995, a report of the American psychological Association had already concluded that none of the forty-three studies carried out in the United States had revealed any specific disorders among children borne of homosexual parents or raised in homoparental families [85]. An English study concerning young adults coming from single parent families – half of them having been educated by heterosexual mothers and the other half by lesbian mothers – pointed out that there was no difference between the two groups, either in terms of the frequency of psychological disorders, or in terms of proportion of homosexuals. The American Academy of Pediatrics, which includes 55,000 practitioners, is categorical when declaring that there is no scientific reason justifying the exclusion of a homosexual individual or couple from a parental project [86]. The PhD in medicine defended by Stéphane Nadaud about the children raised in homoparental families comes to the

[84] F. L. Tasker, S. Golombok, *Grandir dans une famille lesbienne. Quels effets sur le développement de l'enfant?*, Paris, ESF, 2002.

[85] http://www.apa.org.

[86] E. Jardonnet, "Homoparentalité et intérêt de l'enfant", *Le Monde*, 25 June 2002.

same conclusions [87]. In addition, a committee of experts appointed by the Swedish government in 1999 examined the conclusions of forty international studies, as well as those of an *ad hoc* inquiry ordered for Sweden. These surveys induced the above-mentioned committee to recommend not only the possibility of adoption for same-sex couples, but also the access to medically assisted procreation for single women or for lesbian couples [88].

The third argument based on the wide differences in national and international opinion used by the European Court for Human Rights seems superficial at the least. Public feeling may of course inspire the morals or the informal norms of societies, but it should not be considered as a source of law. Democracy of opinion cannot be of relevance to the principles that govern establishment and enforcement of the legal norm.

The final argument about the small number of children up for adoption seems questionable, both in terms of content and form. As for content, it is questionable because subordinating the availability of a right to its actual exercise is not allowed. For example, the right of property does not depend on the availability on the market and the right of free movement is not conditioned by the number of airlines. Of course, an abstract right that could never be materialized is useless; however, as far as the Court's arguments are concerned, if the children available for adoptions are few in Western Europe, the number of those waiting for adoption is much larger in other parts of the world. Actually, research done by Unicef shows that nowadays there are more than ten million orphan children who could be adopted [89].

The set of arguments produced by the Court – that in its opinion justifies a discriminating treatment of homosexuals – appears to be of little relevance. Likewise, the principle of the "reasonable relationship of proportionality between the means employed and the aim pursued" has not been observed. Of course, the child's interest should prevail over the adults' rights, but the aim pursued by the Court is achieved at the cost of complete and absolute exclusion of gay and lesbian adoptive parents. Actually, such a decision not only takes a position on the destiny of a particular child, but also on that of all children who could be adopted. It not only concerns one applicant in particular, but in fact all homosexuals claiming the right to adopt. At this point, we can say that in general and *in abstracto* homosexuality represents a legitimate obstacle to the right to adopt a child.

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[87] *Approche psychologique et comportementale des enfants vivant en milieu homoparental. Etude sur un échantillon de 58 enfants élevés par des parents homosexuels*, Thèse pour le diplôme d'état de docteur en médecine, Université Bordeaux II, 2000.

[88] *Children in Homosexual Families, Report of the Commission on the Situation of Children in Homosexual Families*, Stockholm, Graphium/Norstedts AB, 2001 (http://www.fritzes.se/). Subsequently to its recommendations, the Parliament adopted a law on 6 June 2002 (entered into force in February 2003) authorizing the adoption of children by homosexual couples.

[89] UNAIDS/UNICEF/USAID, *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program Strategies,* July 2002 (http://www.unicef.org/publications/files/pub_children_on_the_brink_en.pdf).

This decision is all the more astonishing as it overturned the decision of the ECHR of 21 December 1999 in the case *Salgueiro da Silva Mouta v. Portugal*. This case concerned the exercise of parental responsability by a homosexual father who had been deprived of such responsability because of his ex-wife's intrigues. The Lisbon Court of Appeal accepted the wife's claim, considering that "the child should live in a family environment, a traditional Portuguese family (...)" and that "children should not grow up in the shadow of abnormal situations". The European Court condemned Portugal, arguing that the difference in treatment applied by the Lisbon Court of Appeal was "based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention" [90].

In 1994, the European Parliament had already made a pronouncement in the same sense. In a resolution of 8 February, it invited the Commission to submit a draft recommendation with respect to the equality of homosexuals' and lesbians' rights, in order to put an end to all restrictions of their rights to be parents or to adopt and raise children.

C. *The incidence of the European decision on the jurisprudence of the* Conseil d'Etat

Since the Decision in the *Fretté* case, the *Conseil d'Etat* was called on to determine the validity of a refusal of authorization opposed to a young woman involved in a stable homosexual relationship. Through a Decision of 5 June 2002 [91], the administrative jurisdiction confirmed the refusal of authorization and based this on three rather questionable arguments. First of all, the *Conseil d'Etat* considered that whereas Article 343-1 of the Civil Code permits adoption by single persons, this does not preclude the possibility that the administrative authority may check whether or not the applicant offers within his/her family or among his/her environment a paternal or maternal image or model. Moreover the decision states that the Administration has not made any legal error and that the inquiry is legitimated by the obligation to check whether the applicant would offer a suitable home, which would meet the needs and best interests of the adopted child, from a family, child-rearing and psychological perspective [92]. In case the presence of a paternal or maternal image or model constituted a condition from a family perspective, neither the administrative authority, nor the *Conseil d'Etat* tried to show that the concerned applicant, E. Berthet, did not provide an opposite sex model. Now it was in fact possible to identify such a model within her family (brother, uncle...) or among her friends. What is worse, by refusing to examine the specific living conditions, the administrative judge deprived himself of the possibility of checking whether, according to the social services inquiry, the applicant actually provided such paternal image or model.

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[90] ECHR, *Salgueiro da Silva Mouta v. Portugal*, 21 December 1999, appl. 33290/96 (http://www.echr.ceu.int/hudoc).

[91] Conseil d'Etat, 5 juin 2002, *E. Berthet c. décision du conseil général du Jura*, Req. no. 230533, *AJDA*, July-August 2002, p. 615-623.

[92] Article 4 of the Decree from 1 September 1998.

Secondly, the *Conseil d'Etat* considered that by basing its refusal on the applicant's lifestyle – a euphemism referring to her homosexuality – the Administration had not at all founded its decision on a position of principle about the sexual orientation of the female applicant and has not applied an unreasonable differentiated treatment in the sense of Articles 8 and 14 of the European Convention on Human Rights. This argument was surprising, since it ignored or pretended to ignore the wording of the *Fretté* decision which explicitly states that homosexuality authorizes a discriminating treatment based on the interest of the child to be adopted. One can therefore wonder why the French judge ignored the European Court's motivation. The latter can be criticized but it has proved to be efficient against homosexual parenthood. Possibly the French judge wanted to preclude any argument that could justify a discriminating treatment of homosexuals. Therefore, the *Conseil d'Etat* is bound to accept all refusals of authorization, provided that the applicant cannot offer, according to its jurisprudence, a dual paternal and maternal image or model. It is true that it imposes this condition on non married heterosexual individuals and it validates the refusals but only after an appreciation *in concreto*, by pointing out the *de facto* elements in the administrative inquiry that justify such solution. In the *Francous* decision for instance, the *Conseil d'Etat* validated the refusal of authorization after having noticed that the child was less desired for him/herself, than for the purpose of helping the applicant to put an end to her loneliness, and consequently the child could have suffered from the absence of a paternal image [93]. But such an evaluation has not been carried out for a homosexual applicant since the *Conseil d'Etat* alleged *in abstracto* the impossibility of providing an image of the opposite sex. There is a *petitio principii* against adoption by gays and lesbians which finds its expression in the last argument of the decision mentioning the positive features of Miss Berthet's personality. These features are not those pointed out by the Administration in its enquiry, but the comments of the Administrative Court of Appeal, according to which considering her lifestyle and despite her undeniable human and educational qualities, the applicant did not offer sufficient guarantees from a family, child-rearing or psychological perspective to adopt a child.

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[93] Conseil d'Etat, 1re et 4e sous-sections réunies, 18 février 1994, *Mme Francous*, *Juridisque Lamy Conseil d'Etat et Cour administrative d'Appel*, vol. II, no. 142.912 ; *Rec. Lebon* 1994, 619 : "The file documents suggest that by rejecting the authorization request for adoption, for the double reason that the adoption project of the applicant reveals the "*absence of a paternal image*" and that the child was less desired for him/herself than as a means to put an end to the loneliness of the adopting person (...), the Chairman of the *Conseil général* (...) who has not based his opinion exclusively on the matrimonial status (...) did not inaccurately apply the legal and statutory provisions". See also the decision of the Cour administrative d'appel de Paris (IIe chambre), 25 avril 1996, Département de Seine-Saint-Denis, *Juridisque Lamy Conseil d'Etat et CAA*, II/95, PA03481 : the hosting of an adopted child "is not compatible" with the conception of life of the adopting woman, "considering that she wanted to avoid the risk of failure of a couple relationship and so to occult the paternal function or representation for the child".

Once more the *Conseil d'Etat* goes beyond the problem of homoparenthood, to cast doubts on the monoparental family. Actually, this new condition based on the sex difference introduced by jurisprudence would oblige the unmarried adoptive single woman or man to behave towards the child as if she/he were meant for life in heterosexual couple. This new case *E. B. vs. France* is currently pending before the ECHR; on the basis of this case the Court might begin to modify its case-law in the field.

D. Legal "bricolage" *in the French manner*

Leaving the adoption issue aside, let us now focus on the evolution of another figure of parenthood, also used by same-sex couples: co-parenthood. This legal reality refers to the relationship between an underage child and the partner of his/her legal parent. After a long period of evolution (analysed previously), a new jurisprudence has begun to emerge in France. A decision delivered on 27 June 2001 by the *Tribunal de Grande Instance* of Paris allowed a woman to adopt the three underage children of her female partner for the very first time. The two women had been living together for more than twenty years and they had been educating their daughters together, ever since birth. Since there was no paternal filiation, the children regarded the two women as their two parents. One of them was their biological mother and the other one was their social mother. Thanks to that "simple" adoption judgment, the children have now both surnames of their parents. The adoptive filiation had been added to the biological filiation and provided these three children with the guarantee of protection regarding their relationship with their two mothers, regardless of the hazards of life. But since *simple* adoption transfers the entirety of the parental responsibility to the adoptive parent, the biological mother was deprived of her parental responsibility, which appeared to be nonsense. They had to request delegation of the parental responsibility according to Article 377-1 of the law of 4 March 2002 on parental responsibility; this was granted in July 2004.

The decision of the *Tribunal de Grande Instance* of Paris that granted to the aforementioned couple of women the shared exercise of parental responsibility on 2 July 2004, three years after another French Court had authorized in 2001 the *simple* adoption of the children of one of these women by her partner shows the precariousness of the homoparental families : they had to resort to this legal "*bricolage*" in order to obtain rights that are less than those that are automatically granted to married couples. Actually, the delegation of parental authority concerns only co-responsibility in the exercise of parental authority and it does not imply sharing the authority in itself. This jurisprudence makes the extreme legal precariousness of homoparental families evident.

E. The international situation

The French situation contrasts with the evolution in legislation in other western countries. As a matter of fact, over the past few years, we have witnessed a constant change in the field of the recognition of parental rights to the advantage of same-sex couples. From the simple sharing of parental responsibility for the benefit of the step-parent to the putative motherhood for lesbian couples, the law tends to settle the

problems that homosexual parents still have to face today by putting an end – totally or partially – to the discriminations of which they are victims.

While France does not concede any parental right to homosexual couples, a certain number of States in the European Union and in North America provide such acknowledgement. Norway, for instance, allows, by legal decision, the transfer of parental responsibility to the surviving partner of a homosexual couple, regardless of the existence of a partnership contract [94]. Since 2001, Germany has been authorizing the joint exercise of parental responsibility for couples bound by a registered partnership contract [95]. In Denmark, the partner of a child's biological parent may adopt the child, if he/she is involved in a registered partnership contract and, of course, if the other biological parent is either deceased or deprived of his parental authority [96]. In Great Britain, homosexual concubines as a couple can adopt a child and since 2002 adoption of the partner's child has been allowed [97].

Since 1 February 2003, Sweden has authorized the adoption of the partner's child and the joint adoption of a child provided that the couple is bound by a registered partnership contract. Besides, homosexual concubines may become an adoptive family.

In the Netherlands, married or unmarried same-sex couples lawfully exercise their parental responsibility over the jointly adopted child or over the child of one of the partners [98]. More recently, on 16 February 2004 the autonomous community of Navarre became the first province of Spain to adopt a law authorizing the adoption of a child by stable homosexual couples, just as for married couples.

In several States of the United States, the adoption of the partner's child is now possible. Joint adoption is also allowed particularly in New Jersey, Vermont, Connecticut and Massachusetts. On 10 September 2002, the Supreme Court of South Africa recognized the right of homosexual couples to adopt children.

Québec seems to be the place where the most significant step forward has been taken. The law of 6 June 2002 established civil union and new filiation rules allowing for the sharing of parental responsibility and *plenary* adoption by same-sex couples. But it also established a presumption of motherhood to the advantage of the female partner of a woman who has given birth to a child by means of medically assisted procreation methods, provided that the couple – even living in a free union – had resorted to such technique in order to realize a parental project. The law of Québec will remain, in the evolution of family law, as the law that has definitively shaken the

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[94] The Children's Act of 8 April 1981, no. 6, para. 36.

[95] Law of 16 February 2001 establishing the *Lebenspartnerschaftsgesetz*.

[96] Law 360 of 2 June 1999 modifying the law on registered partnership of 16 June 1989.

[97] On 5 November 2002, the House of Lords, after the House of Commons voted an amendment modifying the "adoption and children bill" allowing unmarried couples and gay and lesbian couples to adopt a child.

[98] Articles 227, 251, 252, 253 et 282 of the first Book of the Dutch Civil Code.

ralist ideology [99] which used to claim and still claims today that filiation should ased on procreation [100].

Conclusion

The legal protection of homosexuals in France is grounded on a schizophrenic icy that relies on the dissociation of the individual from his couple and from his acity to establish filiation ties. Where the right wing, which was at the time in the position, led a fierce campaign against the *Pacs*, the socialist left wing planned grant some rights to same-sex couples, but at the same time denied them the right get married and the right to filiation [101]. As far as this issue is concerned, there ems to be a consensus within the French political class. As a matter of fact, unlike e situation in the United States where the extension of the concept of marriage to me-sex couples seems to be far more problematic than the recognition of the right to doption, to medically assisted procreation or to the sharing of parental responsibility, France, the denial of the right to get married was closely connected with the onsequences that such a situation might induce in filiation law. At this stage and aced with the confusion engendered by the French jurisdictions (partly supported by he ECHR) the autonomy of the law in the process of creation of a filial tie must be re-ffirmed [102]. The reform of family law in 1972 started privileging "parental function" nd getting detached from the sexual assignment of family roles. Dean Carbonnier, the author of that reform, even mentioned the "hermaphrodization" of a law that replaced the notions of "husband and wife" or "father and mother" by "spouses" and "parents", thus pointing out that, from the legal point of view, conjugality and parentality represent above all a function – i.e. a normative constraint implying a certain number of rights and obligations. Despite the importance that the reform gave to biological reality, the individual kept the first place [103].

The so-called bioethical laws of 1994 broke with that evolution [104], rooted in a voluntarist and liberal conception of family. The successive reforms would no longer be made in the name of spouses' liberty or in the name of filiation equality but in the

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[99] In Western Australia, the Artificial Conception Act of 1985 amended in 2002 stipulates in Article 6A that when a woman living as a couple with another woman resorts, with the approval of her partner, to medically assisted procreation, she will be considered as the other parent of the child, ever since the conception.

[100] For a more detailed analysis, see M.-Fr. Bureau, "L'union civile et les nouvelles règles de filiation: tout le monde à bord pour redéfinir la parentalité", in *L'union civile, nouveaux modèles de conjugalité et de parentalité au 21e siècle. Actes du colloque du Groupe de réflexion en droit privé sous la direction de Pierre-Claude Lafond et Brigitte Lefebvre*, Québec, Yvon Blais, 2003.

[101] D. Borrillo and P. Lascoumes, *Amoures égales? Le Pacs, les homosexuels et la gauche*, Paris, La Découverte, 2002.

[102] See Th. Formond, *op. cit.*

[103] G. Raymond, "Volonté individuelle et filiation par le sang", *RTDC*, 1982, p. 538.

[104] D. Mehl, *Naître? La controverse bioéthique*, Paris, Bayard, 1999.

name of "sex difference" and of the "proper psychical structuring of the child" [105] in order to avoid the "loss of meaning", "the identity crisis", "the dictatorship of facts" and "the lack of landmarks", to mention only a few of the phrases used by the most recent reports on the reform of family law [106]. Thenceforth, "the Oedipus complex" or the "symbolic order" could seemingly be substituted for the democratic will. This represents a political failure but also a failure of the law, insofar as it is no longer the judicial judge who decides who may adopt and who may not, since the refusal of authorization prevents his intervention. The decision depends on the psycho-anthropological *vulgate* – that of the social investigators [107], taken over by the *Conseil d'Etat*, the investigators becoming thus the new holders of an "adoption license".

However, by the joint effect of the internal logic of law, of the concern for equality with respect to children and parents and of a pragmatic approach towards the parentality issue, the recent evolution of filiation law in some of the Member States of the European Union or in some States of North America has forecast a change in the jurisprudence of the European Court for the Human Rights, a change in the direction indicated by the political instance that represents the will of the European citizens. As a matter of fact, on 4 September 2003, the European Parliament: "Calls once again on the Member States to abolish all forms of discrimination – whether legislative or *de facto* – which homosexuals still suffer from, in particular concerning the right to marry and adopt children" [108].

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[105] For remarks about this new "law metaphysics" see *Au-delà du Pacs. L'expertise familiale à l'épreuve de l'homosexualité*, *op. cit.*

[106] I. THERY, Couple, filiation et parenté aujourd'hui..., *op. cit.*; Fr. DEKEUWER-DÉFOSSEZ, Rénover le droit de la famille. Proposition pour un droit adapté aux réalités et aux aspirations de notre temps, rapport adressé au ministre de la Justice (Paris, La documentation française, 1999).

[107] The social investigators only resume what was already decided by a majority of psychologists from within the French media.

[108] European Parliament Resolution on the situation as regards fundamental rights in the European Union (2002), 4 September 2003, para. 77.