2009: The French paradox or egalitarian utopia (overview of a nation that once was great)[1]

I am grateful to the conference's coordinators who invited me to talk about the legal situation of lesbians and gays in France, with regard to family law.

One ought to think that France, a nation that gave birth to the Enlightenment philosophy as well as to French Revolution and its ideals of Freedom, Equal and Fraternity, should be on top of the legal treatment of lesbians and gays.

But I have to say that it is absolutely not the case.

Of course, progresses have been made since 1982, date of the decriminalization of homosexual conducts.

However we are still far from achieving a true equal treatment, as it is the case for example in Holland, Belgium or Spain.

I am consequently forced to depict an almost shameful portray of the situation of lesbians and gays in France, with regard to what it should be considering our History.

I will first expose the questions of marriage and unions of same sex persons, and then turn to the questions of parenting and parental rights of lesbians and gays.

I- Marriage and unions

The conjugal status open to lesbian or gay couples show a clear unequal legal treatment since it varies depending on the sexual orientation of citizens.

Lesbians and gays have two possibilities to protect their couple: PACS and cohabitation; whereas heterosexuals have the choice between three possibilities: marriage, PACS and cohabitation. And this difference of treatment is based solely on sexual orientation.

1.1. From the refusal of the "Cour de cassation" to acknowledge homosexual cohabitation in 1989 to the PACS in 1999

The story of the fight for a conjugal status starts in year 1989, when the "Cour de cassation", the highest French Court, refused to acknowledge that a couple composed of two men could be qualified as "cohabitants"

[1] : L'auteur remercie Celine Rivat pour la traduction

or as a *de facto* couple, a very basic status that allows a narrow legal protection setting up in particular the possibility for the surviving cohabitant to benefit from the transfer of the lease of his/her deceased partner.

The claims for a legal status for homosexual couples was born with this refusal, coupled with the strength of the AIDS' epidemic at that time.

The adoption of the "pacte civil de solidarité" (civil partnership – "PACS") is the result of a 10 years long political process who ended with the adoption of the law of 15 November 1999 setting up the PACS.

The PACS is a legal tool that aims at governing several situations that do not necessarily call for a unique answer: same-sex couples as well as heterosexual cohabitants who could already benefit from a legal protection through cohabitation or marriage.

The PACS settles the alliance link but does not deal with all the questions related to filiation (parental rights, adoption, medically assisted procreation) which are governed by common law.

In between marriage and free union, the PACS is attractive at first because of its apparent simplicity.

However it implies a strict formalism at the time of its conclusion since it is necessary to write down a contract; in its effects it offers less rights and sets up less obligations than marriage; and its dissolution can be complex when the partners do not agree.[2]

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[2] :

- Enregistrement au greffe du Tribunal d'instance et non en mairie, (d'un côté, un symbole de chicane, de l'autre, un symbole de la citoyenneté);
- Impossibilité de faire, de son vivant en cas d'urgence, un don d'organe au partenaire, alors que la loi le permet entre époux;
- Attribution éventuelle (sous réserve de l'appréciation des préfectures) d'une carte de séjour temporaire d'un an alors que le conjoint à droit à une carte de résident de 10 ans ;
- Aucun droit à la nationalité alors que le conjoint étranger d'un ressortissant français dispose d'un droit à la nationalité après 2 ans de mariage;
- Précarité du régime de l'indivision auquel il peut être mis fin à tout moment sur le fondement l'article 815 du code civil ;
- Imposition commune à partir de la 3eme année, qui suit l'enregistrement du PaCS ;
- Obligation de faire un testament pour que l'autre partenaire puisse hériter ;
- Droits d'enregistrement plus élevés que ceux appliqués aux époux (abattement de 57.000€ au lieu de 76.000€ pour les époux et imposition à 40% sur la somme de 15.000€ puis à 50% pour le surplus) ;
- Aucune attribution au survivant du PACS de l'allocation veuvage du prédécédé;
- Droit du travail : il existe encore de nombreuses différences de traitement entre les pacsés et les époux ;
- Pas de transmission du nom ;
- Pas d'adoption possible par le couple ;
- Pas de partage de l'autorité parentale ;
- En cas de désaccord sur la rupture, obligation de saisir deux juges au lieu d'un en cas de divorce (le Tribunal de grande instance pour les questions patrimoniales et le Juge aux affaires familiales pour les questions relatives aux enfants).

In parallel and in the same law, the legislator gave a definition of cohabitation that includes same-sex persons, but as I said earlier cohabitation offers a minimum of legal protection (compensation in case of an accident, transfer of the lease and social protection in case of accident or decease).

Civil marriage was never contemplated.

1.2. Equality into play: the marriage of Bègles

The question of civil marriage entered into play following a dramatic affair. In January 2004, a man was severely harmed because of his homosexuality (he was covered with gas and severely burnt).

During the following weeks, politically committed intellectuals sent a public call to fight against homophobia; this fight implies necessarily a real equal rights to be set up: this means opening civil marriage to all couples and the opening of adoption and medically assisted procreation (***Manifeste pour égalité***, published in a well-known French journal on 31 March 2004).

In this context, a politician member of the Greens' Party (ecologic party), Noël Mamère, publicly declared that he would proceed with the marriage of homosexual couples living in his town and willing to get married.

A couple of men showed up and the first civil marriage between two men was pronounced in Bègles on 5 June 2004, with incidents you could not even imagine.

Immediately, the highest representative of the State contested it (the Prime Minister and the Minister of Interior intervened solemnly), and declared this marriage illegal and suspended Noël Mamère of its functions of mayor and of course seized the courts of an action aiming at invalidating the marriage with a speed that no French court had experienced before.

1.3. Internal judicial recourses

The High Court of Bordeaux was seized by the Prosecutor and decided in July 2004 that the marriage was void, then Bordeaux's Appeals Court confirmed this analysis, but nonetheless noted the quality of the legal arguments invoked.

In the end, the Cour de cassation, seized by the Bègles' husbands, decided on 13 March 2007 in a landmark judgement:

"(…) *Whereas, according to French law, marriage is the union of a man and a woman, that this principle is not contradicted by any dispositions of the European Convention on Human Rights nor by the European Union Charter on Fundamental Rights which is not binding*".

Which French law did the Court invoke? Article 20 of the Construction code? Article 141 of the Criminal code? Article 144 of the Civil code? No one knows and the Court refrained from giving a textual basis to its analysis.

1.4. The recourse before the ECHR

The husbands then seized the ECHR on 6 September 2007 (req. 40183/07).

On 7 April 2009, the Chamber to which the case was assigned said that the request should be transferred to the French government for observations.

The French government is due to answer before 8 September 2009.

On 7 July 2009, the FIDH, Ilga and AIRE and International Commission of Jurists have made their observations as third parties.

Case to be followed of course, but in the meantime, lesbians and gays in France do not have the same choice as heterosexual persons who can marry, conclude a PACS (and they do), or cohabit.

Such is the reality of equal treatment in France: a principle applied with discrimination.

Let us turn to the question of inequality with regard to parenting and parental rights.

II- Parenting and parental rights

Since the end of the 60', family in France and more generally in European and occidental countries, has undergone a deep transformation. Initially it was based on marriage in the perspective of setting up a family with children and in which the sexual roles of the parents were clearly and strictly established, family has, because of the changes in our society, changed deeply.

In forty years, our familial landscape changed under the effect of the constant decreasing of marriages, the consequent increasing of divorces and free unions, the apparition of methods of contraception and medically assisted procreation, which change drastically the link between sexuality and procreation that can be completely disconnected.

Similarly, our society has seen the growth of single parents, recomposed families, homoparental families while adoption has never been so successful and while the PACS was open to every couple leading to a conceptual revolution of the notion of couple which today not only means two persons of different sex but also two persons of same sex. The evolution reached such a point that we can today talk about "families" rather than "family".

In this context of perpetual evolution of familial "models", the question of the legal protection of children raised by a lesbian or gay couple arose.

I will not examine the hypothesis of a child born of heterosexual parents, one of them realising afterwards his/her homosexuality, since, in this case, the child is linked to both its parents who consequently provide the child for legal protection.

Today, whereas the homosexuality of one of the parents can still be seen as an obstacle in practice, with regard to parental rights, such situations have made commonplace, and homosexuality is not a matter generally held against the homosexual parent as it used to, probably because the ECHR condemned firmly any restriction to parental rights based on sexual orientation in its judgement Salgueiro Da Silva.[3]

II.I. How to get a child?

There are at least two options: plenary adoption or medically assisted procreation.

2.1. Plenary adoption

A particularity of French law is that it allows adoption by a single person [4].

The single person must obtain an administrative approval by undergoing the control of social workers.

Once the approval is obtained, the single person can file a request before the competent authorities, which will attribute him/her a child in the aim of its adoption.

For many years, French administration refused to give its approval to single homosexual persons, while nothing in French law sets forth that homosexuality is a valid cause for refusal.

[3] : *CEDH*, 21 décembre 1999, Salgueiro Da Silva/Portugal, req 33290/96 ;

[4] Plenary adoption allows the replacement of the original filiation link with the filiation link created by the adoption.

France was however condemned by the ECHR in the case E.B/France on 22 January 2008 because the administration had refused to deliver its approval to a lesbian.

The story of Emmanuelle B could have stopped there if she had not filed in Spring 2008 a new request and suffered a second refusal, as unjustified as the first one, since it is based on her sexual orientation once again.

Recourses have been filed before the administrative Court and the High Authority fighting against discrimination and I expect a decision before the end of the year.

In the meantime the client will turn 47 years old…

In conclusion, with regard to this case, one can say that administrative refusals will now be based on misleading motives and not directly on sexual orientation anymore, in the aim of covering the illegal motive.

2.2. Medically assisted procreation

In France there is currently a wide debate concerning the reform of Bioethical laws, but the fecundation in vitro with donor is not open to lesbians and surrogacy is forbidden or more precisely, contracts dealing with surrogacy are illegal and therefore can be invalidated.

In both cases, couples have to go abroad and get a child that will legally have only one parent. This parent can transfer his/her name, his/her inheritance and has parental rights.

The other parent or *de facto* parent, can not transfer anything and the child is discriminated against legally compared to a child raised by a man and a woman.

II.II. How to legally protect the child?

A child wanted by two women or two men will be linked only to one adult, while it is raised by two adults who both ensure a parenting and educational role.

French law does not deal expressly with such a case, however there exist, in the body of rules that a citizen could invoke, two rules that one can use, namely "simple" adoption and the delegation of parental rights.

These two legal tools have different effects. "Simple" adoption will create a filiation link between the child and the adopting person (which means transfer of the name, succession, and parental rights) while delegation of parental rights only concerns one of the effects attached to

the legal qualification of parent: parental authority that disappears when the child reaches its majority.

2.1. "Simple" adoption

a) What is "simple" adoption?

Simple adoption creates a filiation link between the child and the person adopting it.

This adoptive link is added to the original filiation link and consequently, the adopted child has two parents, as children born from a heterosexual relationship do.

The law forces the original parent to renounce its parental rights in favour of the adopting person, unless the original parent being the spouse of the adopting person (article 365 of the Civil code), which seems to be impossible for now for a same sex couple.

Nothing in French law provides for a limitation of simple adoption based on the sexual orientation of the adopting person.

However, the analysis of judicial practice shows that French courts are reluctant to pronounce the simple adoption of a child by the same sex *de facto* parent and the Cour de Cassation quashed any possibility of simple adoption in its two judgements of 20 February 2007.

• At first, the Cour de cassation stated in these two cases that the requested adoption could not be pronounced because the mother would loose its parental rights in favour of the adopting person.

Such analysis is rather paradoxical since the transfer of parental rights is a legal condition provided for in article 365 of the Civil code.

It is even more paradoxical since the filing of an adoption request without such a consent would be declared inadmissible.

One can see the scope of this paradoxical injunction of the Court: the imperative article 365 of the Civil code forces the birth parent to transfer its parental rights to the adopting person and the Cour de cassation refuses the adoption because the birth parent agrees to transfer his/her parental rights to the adopting person.

The Cour de cassation refuses to apply article 365 of the Civil code and re-writes the law in a manner that was uncalled for because article 365 is very clear and does not need to be interpreted, compared to other texts.

In reading between the lines, the Cour de cassation uses the interest of the child as a control criterion for the lower judges. One can question the relevancy of such an argument, even more considering that it consequently forbids simple adoption for all the cohabiting couples and all the couples that concluded a PACS.

• Then, the Court argued on voluntary delegation of parental rights. It stated that it was impossible to pronounce a delegation of parental rights after having pronounced a simple adoption since "*the adoption of a minor child is aimed at providing parental rights to the adopting person only*". There would therefore be a contradiction between requesting simple adoption on one hand and voluntarily transfer parental rights on the other hand. Such a statement calls for three observations.

First observation: The Court confuses the object and the effects of simple adoption.

Requesting simple adoption is aimed at creating a filiation link between the adopting and the adopted persons, meaning the transfer of a name and inheritance.

Simple adoption, as a result of its effects and not its object, transfers parental rights to the adopting person. If one wants to obtain parental rights, one files a request seeking the delegation of parental rights.

Second observation: in its argument, the Court created a link between two legal tools, on one hand simple adoption and on the other hand delegation of parental rights.

It interprets the law in a way that defies common sense. Simple adoption aims at creating a filiation link that has one side effect according to the law: the transfer of parental rights. Such a side effect does benefit the child. Therefore it should be corrected by a delegation of parental rights.

There is no reason for the Court to exclude such a possibility of correcting this side effect by a delegation of parental rights. The Cour de cassation, in setting aside this possibility, creates an uncalled for legal object.

It creates an artificial link between adoption and delegation of parental rights that is wrong in view of family policies and that clearly contradicts the interest of the child.

This is so true that the high court of Paris already judged that "*the request for a delegation of parental rights is not in this case contrary to the law, even more since it is in accordance with the interest of the children as it was shown that their biological mother cared daily for them and that they lived together*" (Paris High Court, 2 July 2004, n° RG : 04/33358).

Third observation: At first sight the position of the Court implies the prohibition of simple adoption for all cohabitants and persons who contracted a PACS, regardless of their sexual orientation.

But in looking more deeply into it, the situation of cohabitants and persons who contracted a PACS varies depending on their sexual orientation, because heterosexual couples can escape the obligation set forth in article 365 of the Civil code by marrying each other (in that case there will be no transfer of parental rights) while homosexual couples have no way to escape the rigidity of the rule since civil marriage is not an option for them for now.

Hidden behind an apparent equal treatment lies what is called an indirect discrimination: the position of the Court leads to the fact that a child raised by two women or two men cannot be adopted by the second parent.

As a result, the child suffers from this situation: born in a heterosexual family, both his parents have obligations towards him/her, he/she inherits both parents, and if one dies the other will automatically be entitled to take care of the child. Born in a homosexual family, the biological parent and only he/she must protect the child, who inherits from only one parent and will be put in a stranger's care if the parent were to die.

On 15 June 2007, the ECHR was seized with a request aiming at condemning the refusal of a simple adoption on the basis of articles 8 and 14 of the European Convention on Human Rights (req 25951/07).

b) The recourse before the ECHR

The request was forwarded to the French government, which is due to answer by 15 September 2009. It will have difficulties in justifying the position of the Cour de cassation that leads to the fact that the interest of the child raised by a same sex couple is not taken into account in the same way than the interest of a child raised by a different sex couple; which is even more hard to admit since numerous members of The Council of Europe allow adoption by same sex couples and /or adoption of the child of the cohabitant.

2.2. Voluntary delegation of parental rights

The delegation of parental rights does not aim at incorporating a child in the genealogy of the person who is not the biological parent, but aims at allowing the exercise of the parental rights belonging to the birth parent by the person who shares his/her life with the children, as long as the circumstances so imply, and since the law of 4 March

2002.

The parliamentary work on this law show that the purpose of voluntary delegation of parental rights is to allow to a step-parent, meaning the person who is not the biological parent of the child to "*benefit from a legal status inside the families*".

The most conservative doctrine now states that this delegation is voluntary and does not imply a limitation of the powers of the delegating parent, but to the contrary that it implies a sharing of these powers with the delegatee.

From the reform of March 2002 to the decision of the Cour de cassation of 24 February 2006, the positions of the lower courts used to vary and therefore led to a legal insecurity for the requesting parties, that contradicted the principle of equal treatment.

However, the Cour de cassation clearly stated in its landmark judgement of 24 February 2006 that "*Whereas article 377 paragraph 1 of the Civil code does not forbid that a mother, one and only holder of parental rights, delegates all or in part its exercise to the women with whom she lives a stable and continuous union, as long as the circumstances so imply and the measure is in the child's interest*".

Ever since the courts allow requests seeking delegation, taking into consideration that, when a child was wanted by a woman living with a woman or a man living with a man, this circumstance alone is sufficient to render the delegation of parental rights necessary.

I must conclude in speaking about a draft bill on what we call the rights of the third party, which was presented before the Ministries Council before being withdrawn following an uprising from the most reactionary right-minded politicians.

This draft is not only back in the closet but also it does not even create a status for the *de facto* parent or second parent.

It provides for an improvement of the procedure of delegation of parental rights (no need for a request anymore, the couples would submit a convention that the judge would ratify once it makes sure that the interest of the child is safe) but does not provide for a change with regard to the shared rights: no creation of a filiation link, and therefore no transfer of the name or of the inheritance.

I explained the French exception regarding the principle of equal treatment: While it is stated as a principle, we have seen that our dear principle of equal treatment suffers numerous exceptions as far as sexual orientation is concerned.

However, in 2009, nothing justifies that the people's sexuality leads to a different legal treatment, in the exact same way that today, discriminations based upon sex, the colour of the skin, or religion are not allowed.

For centuries this intolerance has been fought, and this fight must be led right now and anywhere possible, up until French law ceases to acknowledge such a discriminatory situation, that neglects the interest of the child and defies the principle of equal treatment, because of homosexuality.