

# Article

## **Debates on Same-Sex Parentage: Main Arguments in France**

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### ABSTRACT

*The debates on same-sex marriage have been heated in France. It is particularly interesting to note that the arguments mobilized were not legal. The question of marriage and adoption was not posed empirically, but ideologically. Many arguments from anthropology, religion and political philosophy were used to argue against the reform. The question that can be asked is why these arguments have had so much space in France?.*

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## I. INTRODUCTION

While debates are underway in the French Parliament on the opening of assisted reproductive technology (ART) to lesbian couples and single women, the diverse arguments raised for and against the admission of same-sex parent families are more relevant than ever.

Same-sex parenting involves very different situations. The French National Institute for Demographic Studies estimated the number of children raised in same-sex families to be between 24,000 and 40,000.<sup>1</sup> This statistic covers various social realities. Children may be issued from a previous heterosexual union,<sup>2</sup> a joint parental project as a result of artisanal or ART practiced abroad, or even a surrogate motherhood undertaken abroad in the case of gay couples.

In response to these situations and in order to recognize the diversity of family lifestyles, France chose to allow marriage and adoption to same-sex couples through legislation in 2013. The law of 17 May 2013 has thus recognized second-parent adoption and even joint adoption. As we can see, France has chosen to recognize same-sex parenthood as a result of marriage.

This is a singularity, since the foreign countries that have opened parenthood to same-sex couples have also separated this issue from the one of marriage. In Canada, the opening of adoption to same-sex couples and ART to lesbian couples in the various provinces preceded the opening of marriage to same-sex couples at the federal level by several years.<sup>3</sup>

Similarly, in Europe, several countries have opened access to ART to lesbian couples long before they legislated on the issue of marriage. This is particularly the case of the Netherlands, Spain, Sweden and the United Kingdom.<sup>4</sup> Belgium opened marriage to same-sex couples in 2003, without giving it any effect with regard to filiation.<sup>5</sup> When adoption and then ART were then opened to same-sex couples, they were opened to all homosexual

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1. Patrick Festy, *Le recensement des familles homoparentales, Homoparentalités. Approches scientifiques et politiques* [The Census of Homoparental Families], in HOMOPARENTALITÉS : APPROCHES SCIENTIFIQUES ET POLITIQUES [HOMOPARENTALITY: SCIENTIFIC AND POLICY APPROACHES] 109, 109-116 (M. Gross ed., 2006).

2. Martine Gross, Jérôme Courduriès & Ainhoa de Federico de la Rua, *Morphologie des familles homoparentales en France en 2012* [Morphology of Homoparental Families in France in 2012], in HOMOSEXUALITÉ ET PARENTÉ [HOMOSEXUALITY AND PARENTHOOD] 205, 205-212 (J. Courduriès & A. Fine eds., 2014).

3. Dominique Goubau, *Le mariage pour tous, dix ans après L'expérience canadienne* [Marriage for All, Ten Years Later, The Canadian Experience], 2013/7-8 REVUE DROIT DE LA FAMILLE [FAMILY LAW] 62, 64 (2013).

4. Haut Conseil à l'Égalité entre les femmes et les hommes [High Council for Equality between Women and Men], Contribution au débat sur l'accès à la PMA [Contribution to the Debate on Access to Assisted Reproduction], no. 2015-07-01-SAN-17, 17 (adopted on: May, 26 2015).

5. Belgian law of 13 February 2003 opening marriage to persons of the same sex.

couples, regardless of their matrimonial status.<sup>6</sup> In the United Kingdom, same-sex couples were granted the right to adopt in 2002,<sup>7</sup> even before the creation of the Civil Partnership<sup>8</sup> or the access to marriage.<sup>9</sup>

Amongst the States that have recognized marriage to same-sex couples, all of them have opened ART to lesbian couples as well, with the exception of Germany and France, until the adoption of a new law.<sup>10</sup>

Indeed, the European legislation has recently moved rapidly with regard to access to ART. In 2018, 28 States within the Council of Europe have allowed access to it for female couples.<sup>11</sup> Homosexual women can therefore access ART in 28, out of a total of 47 Member States.

The same is not true for gay couples, since surrogacy remains prohibited in France regardless of individuals' sexual orientation. Surrogate motherhood does not therefore raise questions specific to same-sex parenthood, so it is beyond the scope of the current question, which is why it will not be addressed in this study.

In this paper, I have chosen to highlight the main arguments at stake in the debate on same-sex parenthood. Some are more specific to the opening of medically assisted reproduction, while others are common to adoption.

I have decided to study them in the form of a non-exhaustive list to try to understand the relevance of each argument and to take stock of the real issues facing homo-parents.

## II. THE RELIGIOUS ISSUE

Although France is a secular state with secular law, the influence of religion, especially the doctrine of the Catholic Church, has been significant since 1999 with regard to the Civil Solidarity Pact and, since 2013, the Act on same-sex marriage and adoption. This is still true today with regard to the opening of medical assistance for procreation.

While the three major monotheistic religions have a distinct position on the conditions of access to medically assisted procreation,<sup>12</sup> Catholicism is

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6. Belgian law of 18 May 2006 amending certain provisions of the Civil Code in order to allow adoption by persons of the same sex and Belgian law of 7 July 2007 on medically assisted procreation.

7. Adoption and Children Act, (2002) | Current Law (Eng.). This law opens adoption to all singles and couples, whether heterosexual or homosexual.

8. Civil Partnership Act, (2004) | Current Law (Eng.).

9. *Id.*

10. Marriage (Same Sex Couples) Act, (2013) | Current Law (Eng.).

11. The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, Rainbow Europe, <https://rainbow-europe.org/#8621/8682/0>.

12. BRIGITTE FEUILLET-LE MINTIER & PHILIPPE PORTIER MINTIER, DROIT, ETHIQUE ET RELIGION: DE L'ÂGE THÉOLOGIQUE À L'ÂGE BIOÉTHIQUE [LAW, ETHICS AND RELIGION: FROM THEOLOGICAL TO BIOETHICAL AGE] (2011); SÉVERINE MATHIEU, L'ENFANT DES POSSIBLES: ASSISTANCE MÉDICALE À LA PROCRÉATION, ÉTHIQUE, RELIGION ET FILIATION [ASSISTED HUMAN REPRODUCTION, ETHICS, RELIGION AND AFFILIATION] (2013).

considered to have the most radical position, prohibiting any medically assisted technique that could separate procreation from marital status. By comparison, Judaism is the most flexible religion on this issue, allowing medical assistance with donation,<sup>13</sup> while Islam takes an intermediate position and admits medical assistance only on a homologous basis.

When the 2013 law was adopted, it should be noted that various religious authorities were consulted in order to give their opinion before Parliament.<sup>14</sup> These consultations attest to the social role of religions in the public and political spheres. However, the arguments developed were not so much theological as secular.

With regard to filiation, it was argued that gender difference is the *sine qua non* condition for the transmission of human life and that “it is a fact that is not religious” (Cardinal André Vingt-trois).

This is a significant evolution in the intervention of the religious fact in the public sphere, which no longer involves authority and dogma, but demonstrations and slogans.

However, these consultations did not hinder the envisaged reforms: involving the opponents was simply a matter of appeasing those in the debates.

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### III. POLITICAL PHILOSOPHY ISSUE

Another argument has emerged in the debates on the limits of legal creation.<sup>15</sup> The nature of things and especially the procreation of children through the carnal union of a man and a woman have been called into question as a basis and as a limit to the rules of law relating to filiation. It has been argued that parentage should be based on parentage, in a real or fictitious manner, such as adoption or medically assisted reproduction with donors. Therefore, filiation should be within the limits of the model of begetting by

13. One could call Israel’s very flexible position on the opening of the GPA “the Israeli paradox of bioethics”, even though personal and family issues are governed by religious law. The explanation comes from the fervent natalist politics of this state, and the favour given to the progress of science as well as the conciliation found with the principles of the Torah: S. Lavi, *La loi juive est-elle favorable à la science ? Le cas des technologies de reproduction en Israël [Is Jewish Law Favourable to Science? The Case of Reproductive Technologies in Israel]*, in DROIT ET RELIGION [LAW AND RELIGION] 447 (Raymond Boudon ed., 2012).

14. Assemblée Nationale [National Assembly], *ouvrant le mariage aux couples de personnes de même sexe [opening marriage to same-sex couples]*, No. 628 (Jan. 17, 2013) (statement of Erwann Ninet), <https://www.assemblee-nationale.fr/14/rapports/r0628-tl.asp>; Sénat [Senate], *ouvrant le mariage aux couples de personnes de même sexe [opening marriage to same-sex couples]*, No. 437 (Mar. 20, 2013) (statement of Jean-Pierre Michel), <https://www.senat.fr/rap/112-437-1/112-437-1.html>.

15. Rémy Libchaber, *L’ordre juridique et le discours du droit, Essai sur les limites de la connaissance du droit [Judicial Order and Law Speeches. Essay on the Limits of Legal Knowledge]*, 13 DROIT, DÉONTOLOGIE & SOIN [LAW, ETHICS & CARE] 515, 515-16 (2013).

carnal procreation, the failing of which the law could overthrow the anthropological structures of kinship and even admit a plurality of parents.<sup>16</sup>

It has also been argued, in this line, that the civil status indication that the child has two mothers would consist in a lie intended to make the child believe that he or she was born of two women.<sup>17</sup> This reminds us of the slogans of the “Manif for All” and “The Protest for Everyone” demonstrations (the anti-gay marriage Tea Party), one of which was: “a father, a mother, we do not lie to children!”

The controversy has continued with the denomination of such same-sex parents, a topic which has also emerged in relation to adoption. Choosing to name both women “mothers” would deny the fact that filiation is based on begetting, while choosing to name them each “parent” would deny the gender difference.<sup>18</sup>

This way of thinking about filiation is not new, and forms part of an old historical perspective that belongs to the Middle Ages. It should be recalled that the commentators of the Digest, while trying to find limits to political power, based themselves on a passage from Aristotle’s *Physics*, according to which law, like art, should imitate nature.<sup>19</sup> Adoption law was then built on the idea that adoption is only a fiction that imitates nature and, as such, necessarily follows its limits, at the risk of creating legal monsters.<sup>20</sup>

16. Aude Mirkovic, *L’assistance médicale à la procréation pour les femmes célibataires et les personnes de même sexe: l’implosion de la parenté et la filiation* [*Assisted Reproduction for Single Women and Same-Sex Individuals: The Implosion of Kinship and Parenthood*], 2010/9 DROIT DE LA FAMILLE [FAMILY LAW] 14, 14-18 (2010).

17. In this sense, see the critical position of the psychoanalyst JEAN-PIERRE WINTER, HOMOPARENTÉ [THE HOMOPARENT] (2011).

18. Monette Vacquin & Jean-Pierre Winter, Non à un monde sans sexes ! [No to a world without sex!], *Le Monde* (The World, Dec. 4, 2012),

<https://www.lemonde.fr/idees/article/2012/12/04/non-a-un-monde-sans-sexes17995043232.html>;

Jean-Louis Renchon, *Une filiation monosexuée? [A Monosexual Parentage?]*, in PARENTÉ, FILIATION, ORIGINES: LE DROIT ET L’ENGENDREMENT À PLUSIEURS [PARENTHOOD, PARENTAGE, ORIGIN] 237 (H. Fulchiron & J. Sosson eds., 2013). Some still consider that the appointment of fathers and mothers places filiation within a gender-structured social framework and that it would be a good idea to abandon it in favour of the neutral term parent, see Daniel Borillo, *Pour une théorie du droit des personnes et de la famille émancipée du genre [For a Theory of the Rights of Individuals and of the Family Emancipated from Gender]*, in DROIT DES FAMILLES, GENRE ET SEXUALITÉ [FAMILY LAW, GENDER AND SEXUALITY] 7, 8 (N. Gallus et al. eds., 2012). To this, it should be possible to answer two things: that it is not necessary to emancipate oneself from gender in order to be a parent of the same sex, and that it is not necessary to deny the difference between the sexes in order to emancipate oneself from gender.

19. ARISTOTLE, *PHYSIQUE* II 63 (H. Carteron ed. and trans. 1990); Ernst Kantorowicz, *E. La souveraineté de l’artiste [The Artist’s Sovereignty]*, in MOURIR POUR LA PATRIE [DYING FOR THE FATHERLAND] 3, 3-21 (E. Kantorowicz ed., 1984).

20. Bartole, ad D. 1, 7, 15, 2: “In adoptione . . . ars imitatur naturam in quantum potest . . .”. On this theory, see FRANCK ROUMY, L’ADOPTION DANS LE DROIT SAVANT DU 12E AU 16E SIÈCLE [ADOPTION IN LEARNED LAW FROM THE 12TH TO THE 16TH CENTURY] 122 (1998). Yan Thomas, *L’institution juridique de la nature (remarques sur la casuistique du droit naturel à Rome) [The Legal Institution of Nature (Remarks on the Casuistry of Natural Law in Rome)]*, 6 REVUE D’HISTOIRE DES

To brandish even today this idea that any filiation is based on a mimicry of the nature of things reveals two failings that must be denounced.

This analysis models filiation on carnal procreation. It conceives of this model as the only one that can be legally instituted, and therefore gives precedence in law to the biological meaning of filiation. However, this concept has been widely discussed and rejected, particularly when it has come to reflecting in a contemporary way on adoption. Moreover, the Constitutional Council was not mistaken when it stated, ruling on the constitutionality of the Act of 17 May 2013, that “no constitutional requirement imposes either that the adoptive character of the filiation be concealed or that the family ties established by the adoptive filiation imitate those of biological filiation”.

The above analysis also deflects the jusnaturalist philosophy, under which aegis it is sheltered, and which is far from being unambiguous. To claim that there would be no other limits to the power of the legislator than the nature of things is total ignorance of the notion of natural law. It is only necessary to recall, for example, the philosophical current of the 17th and 18th centuries as well as that of the Revolutionaries’, which irrigated the conception of human rights.<sup>21</sup>

What is opposed to the creation of law is not so much the consideration of the nature of things, as the consideration of certain values and the search for justice. To the question “should we allow same-sex couples to be parents?”, it is not possible to simply answer “no, because they cannot procreate naturally”; we must especially ask ourselves why this openness would be necessary and what values the law would then carry by accepting it.

However, rejecting from the outset the values of justice, equality and non-discrimination, natalist policy, or even access to equal health conditions for all in the name of nature alone, is certainly blinding.

Moreover, to claim that there would no longer be any limit to adoption or medical assistance on the grounds that the model of carnal procreation would no longer be followed is totally phantasmagorical.

The law sets conditions for access to adoption or medical assistance that must also be respected by prospective same-sex parents. For example, some people have expressed concern about the age requirement in medically assisted procreation, if its model is no longer carnal procreation. However, it is clear that the age at which a woman can access medically assisted reproduction is justified because of the risks incurred by the woman and child

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FACULTÉS DE DROIT ET DE LA SCIENCE JURIDIQUE [JOURNAL OF HISTORY OF FACULTIES OF LAW AND LEGAL SCIENCE] 27, 27-44 (1988).

21. André-Jean Arnaud, *Philosophie du droit de l'homme et droit de la famille* [*Philosophy of Human Rights and Family Law*], in INTERNATIONALISATION DES DROITS DE L'HOMME ET ÉVOLUTION DU DROIT DE LA FAMILLE [INTERNATIONALIZATION OF HUMAN RIGHTS AND THE EVOLUTION OF FAMILY LAW] 1, 3 (M. Meulders-Klein & F. Dekeuwer-Défossez eds., 1996).

during a late pregnancy. In practice, doctors assess the pregnancy success rate, which decreases with age, taking into account the ageing of the eggs,<sup>22</sup> which is therefore an important criterion taken into account in practice for access to ART.<sup>23</sup> It can also be argued that it is in the child's interest to have parents of a sufficiently young age to ensure their child's education.

Another example is the concern about the number of parents. Some have argued that if the model of medically assisted adoption or procreation is no longer that of carnal procreation, nothing would hinder the construction of a plural kinship with more than two parents. However, here again the fear seems in vain, because the demand for adoption or access to medically assisted procreation concerns couples of women or men who have a common parental project,<sup>24</sup> and sometimes single persons, but arrangements with more than two parents come up against the practical reality of raising a child together.

#### IV. ANTHROPOLOGICAL ISSUE

Another argument regularly intervenes in the debates and has thus been put forward in France, in particular by the National Ethics Committee and the Academy of Medicine.<sup>25</sup> It is of an anthropological nature, in particular on the opening of medically assisted reproduction to female couples and single women.

The demand for donor artificial insemination (DAI) by female couples and single women would be an anthropological novelty residing in the use of technology instead of the sexual act to access procreation. Thus, according to the Ethics Committee, the anthropological novelty lies in the situation created

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22. Since late pregnancies are more likely to succeed in the event of oocyte donation, one day it will be necessary to consider the age limit, generally linked to the reimbursement of 43 years, for access to the AMP.

23. Manon Vialle, *L'«horloge biologique» des femmes: un modèle naturaliste en question. Les normes et pratiques françaises face à la croissance de l'infertilité liée à l'âge* [*The Women's Biological Clock: A Naturalist Model in Question. French Standards and Practices in the Face of Growing Age-Related Infertility*], 21 ENFANCES, FAMILLES, GÉNÉRATIONS [CHILDREN, FAMILIES, GENERATIONS] 1, 1-23 (2014).

24. Martine Gross & Jérôme Courduriès, *Le recours à l'AMP dans les familles homoparentales : état des lieux. Résultats d'une enquête menée en 2012* [*The use of AMP in same-sex families: current situation. Results of a survey conducted in 2012*], 9 Socio-Logos, la revue de l'Association française de sociologie [Socio-Logos, the Journal of the French Association of Sociology], <https://journals.openedition.org/socio-logos/2870> (2014); Martine Gross, Jérôme Courduriès & Ainhoa de Federico de la Rua, *Morphologie des familles homoparentales en France en 2012* [*Morphology of Homoparental Families in France in 2012*], in HOMOSEXUALITÉ ET PARENTÉ [HOMOSEXUALITY AND PARENTHOOD] 205, 212 (J. Courduriès & A. Fine eds., 2014)

25. COMITÉ CONSULTATIF NATIONAL D'ETHIQUE [NATIONAL CONSULTATIVE ETHICS COMMITTEE], Opinion on societal requests for recourse to the AMP, Opinion No. 126, June 15, 2017; COMITÉ CONSULTATIF NATIONAL D'ETHIQUE [NATIONAL CONSULTATIVE ETHICS COMMITTEE], Contribution du comité consultatif national d'éthique à la révision de la loi de bioéthique [Contribution of the National Consultative Ethics Advisory Committee to the revision of the bioethics law], Opinion No. 129, Sep. 25, 2018.

for the child who will have no father, whereas “in all other known situations, the children have, or have had, a father whose absence occurs randomly”. Thus, adopted children have a biological father “even if he is unknown in most cases”.

Likewise, the National Academy of Medicine stressed in a report of 18 September 2019 that “the deliberate conception of a child without a father” would constitute “a major anthropological rupture that is not without risk for the psychological development and fulfilment of the child.”<sup>26</sup>

This argument of anthropological rupture was also used in 1999 and 2013 regarding adoption by a same-sex couple. Theories supporting the existence of an anthropological rupture or a disruption of the symbolic order linked to gender difference have widely been relayed by lawyers. The existence of the “essential anthropological structures of our kinship system based on the alliance of a man and a woman, on paternal and maternal bilinearity” has thus been invoked.<sup>27</sup> Many jurists have embraced, in a questionable and debatable way, a so-called structuralist thought, and summoned to support their demonstration at times Lévi-Strauss, Jacques Lacan, and Pierre Legendre, insisting on the importance of the symbolic order, understood as the necessary difference between the sexes and generations, in the construction of kinship.<sup>28</sup> As the American anthropologist Gayle Rubin has demonstrated,<sup>29</sup> Lévi-Strauss’ doctrine is based on two inseparable elements: the prohibition of incest and the exchange of women, which imply that the system thus theorized is based on an implicit heterosexual norm.<sup>30</sup> She concludes: “at the most general level, the social organization of sex rests upon gender, obligatory heterosexuality, and the constraint of female sexuality.”<sup>31</sup>

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26. Académie Nationale de Médecine [National Academy of Medicine], Rapport sur le Projet de loi relatif à la bioéthique [Report on the draft law on bioethics] (2019).

27. Catherine Labrusse-Riou, *La maîtrise du vivant: matière à procès [Assisted Procreation, a Challenge for the Law]*, in ÉCRITS DE BIOÉTHIQUE [BIOETHICS WRITINGS] 126 (C. Labrusse-Riou ed., 2007); Dominique Fenouillet, *Propos introductifs [Introductory Remarks]*, in LA FAMILLE EN MUTATION, ARCHIVES DE PHILOSOPHIE DU DROIT, TOME 57 [THE CHANGING FAMILY, ARCHIVES OF PHILOSOPHY OF LAW, VOLUME 57] 269 (R. Sève ed., 2014). Union Nationale des Associations Familiales (UNAF) [National Union of Family Associations], *Les questions du mariage, de la filiation et de l'autorité parentale pour les couples de même sexe [The Issues of Marriage, Parentage and Parental Authority for Same-sex Couples]* (2012), [https://www.unaf.fr/IMG/pdf/dossier\\_d\\_analyse\\_mariage\\_et\\_filiation\\_v\\_finale.pdf](https://www.unaf.fr/IMG/pdf/dossier_d_analyse_mariage_et_filiation_v_finale.pdf).

28. On the history of this movement of thought, see CAMILLE ROBCIS, *THE LAW OF KINSHIP: ANTHROPOLOGY, PSYCHOANALYSIS, AND THE FAMILY IN FRANCE* (2013); MARCELA IACUB, *LE CRIME ÉTAIT PRESQUE SEXUEL: ET AUTRES ESSAIS DE CASUISTIQUE JURIDIQUE [THE CRIME WAS ALMOST SEXUAL: AND OTHER ESSAYS IN LEGAL CASUISTRY]* (2009); MICHEL TORT, *LA FIN DU DOGME PATERNEL [THE END OF PATERNAL DOGMA]* (2007).

29. Gayle Rubin is Associate Professor in the Department of Anthropology at the University of Michigan.

30. Gayle Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 157-210 (R. Reiter ed., 1975).

31. *Id.* at 179. “At the most general level, the organization of social relations between the sexes is based on gender, mandatory heterosexuality, and the constraint of female sexuality”.

The influence in the public debate of discourses based on structural anthropology thus partly explains the strength of heteronormativity in French filiation law: the sexual otherness of the parental couple is perceived as an element essential to the realization of the anthropological function of filiation. It also explains why the prospect of opening marriage to same-sex couples has been considered by some to be an “anthropological rupture.”<sup>32</sup>

## V. PSYCHOANALYSIS ISSUES

The combination of law and psychoanalysis is also very present in the debates. Thus, the Ethics Committee, like the Academy of Medicine, is concerned about the opening of ART to women, with regard to “the father’s place in the family structure and his function in the development of the child’s personality and identity”.

Two fears are expressed. The first fear is that the father’s absence will not allow the child to perceive, in addition to the mother’s role, “sexual difference and male-female otherness”. The fear is that children raised by same-sex parents may not perceive gender difference and even their own sexual identity.

The second fear concerns the impossible psychological development of a child deprived of a father, his unconscious being unable to represent the symbolic scene originating from birth. The opinions of psychiatrists and psychologists referring to the symbolic dimension of bisexual filiation, which is supposed to reflect the act of begetting, are thus mobilized on a recurrent basis during debates on family reforms or bioethics.<sup>33</sup>

Such is therefore, for psychoanalyst Jean-Pierre Winter, the gap in monosexual filiations: “He is told that he is the child of a couple who obviously cannot have children; he is therefore asked to be the witness of the impossible.”<sup>34</sup>

This principle of plausibility was invoked during the debates preceding the law of 17 May 2013, by certain opponents to the opening of adoption to

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32. Yves Lequette, *L’ouverture du mariage aux personnes de même sexe: clarification et réflexions* [Opening marriage to same-sex people: clarification and reflections], in *L’OUVERTURE DU MARIAGE AUX PERSONNES DE MÊME SEXE* [THE OPENING OF MARRIAGE TO PEOPLE OF THE SAME SEX] 13-23 (Y. Lequette & D. Mazeaud eds., 2014).

33. See, e.g., the hearing of P. Lévy-Soussan by the Fact-Finding Mission on the Revision of Bioethics Laws of 11 March 2009, <https://www.assemblee-nationale.fr/presse/communiqués/20090309-01.asp>.

34. WINTER, *supra* note 17, at 74; JEAN-PIERRE WINTER, *L’AVENIR DU PÈRE: RÉINVENTER SA PLACE?* [THE FUTURE OF FATHER: REINVENTING HIS PLACE?] (2019). The author develops in particular a reflection on the opening of the GPA to women’s couples, considering that such a reform would amount to legally affirming “that a father is optional”.

same-sex couples.<sup>35</sup> Pierre Lévy-Soussan, a child psychiatrist and psychoanalyst, stated during his hearing before the Senate Law Commission: “The filiative transplant works under only one condition: if the child can fantasize that he could have come from this man and this woman.”<sup>36</sup>

This reference to the “symbolic representation” of the father and his role in the “unconscious of the child” also calls for a certain discourse by psychoanalysts on the existence of the “third separator,” in other words, and very briefly, of the prohibition of incest.

We know that psychoanalysis has presented many complex developments on the way of thinking about the Oedipus complex in light of different sexual orientations, but in the end we always come back to these trivial and dangerous questions: how should we think about sexual otherness and the prohibition of incest for a child whose parents are of the same sex?

As if homoparenthood would bring sexual otherness and the taboo of incest in its wake.

This call to the unconscious of the child and to the symbolic representation of the father also forces us to renew the questioning of the relationship between law and psychoanalysis. We see how some opponents implicitly summon analytical theories to question the consequences of homoparenting. The process is not new and in many cases, psychoanalysis, thus instrumentalized, tends to become clearly prescriptive.<sup>37</sup>

In his book “The Law of Kinship,” Camille Robcis, a historian and professor at Cornell University,<sup>38</sup> states: “France is of course not the only country where the question of the political and social organization of sexuality and reproduction has arisen intense passions, but the arguments and rhetoric deployed during these debates have revealed a specifically French polemic.

35. It should be noted that the same argument is now being used in the debate on opening up medically assisted reproduction to female couples and single women. For example, Rémy Libchaber believes: “It is not a question of whether it is good for a child of today to be raised in a gay or single-parent environment: he is then endowed with a father, known or ignored, living or dead, present or not, likely to include him in a lineage—whether real or partly fantasized. This registration will no longer be possible with an expanded MPA, which leads to the crucial question: should the existence of structurally fatherless children, conceived solely on the basis of gamete matching, be institutionalized?” Rémy Libchaber, *L’ouverture de l’assistance médicale à la procréation à toutes les femmes* [*The Opening of Medically Assisted Procreation to All Women*], 2018 RECUEIL DALLOZ [DALLOZ COLLECTION] 1875, 1875 (2018).

36. Sénat [Senate], *Projet de loi ouvrant le mariage aux couples de personnes de même sexe* [Bill opening marriage to same-sex couples] (May. 17, 2013) (Hearing of P. Lévy-Soussan by the Senate Law Commission), <https://www.senat.fr/rap/112-437-2/112-437-23.html#toc3>.

37. LISA CARAYON, *LA CATÉGORISATION DES CORPS: ÉTUDE SUR L’HUMAIN AVANT LA NAISSANCE ET APRÈS LA MORT* [CATEGORIZATION OF BODIES: STUDY OF HUMANS BEFORE BIRTH AND AFTER DEATH] 465 (2016). Markos Zafropoulos, *Du Père mort au déclin du père de famille. Où va la psychanalyse?* [*From the Dead Father to the Decline of the Family Father. Where does Psychoanalysis Go*], 29 FIGURES DE LA PSYCHANALYSE [FIGURES OF PSYCHOANALYSIS] 199, 199 (2014).

38. ROBCIS, *supra* note 28, at 23.

Indeed, the debate in France focuses almost exclusively on structuralist anthropology and psychoanalysis-- and, more precisely, on Claude Lévi-Strauss and Jacques Lacan.<sup>39</sup>

Camille Robcis details how these theories have spread to parliamentarians through “intermediary figures,” i.e. specialists-- sociologists, anthropologists, psychoanalysts--who have taken part in the political debate on the occasion of the various family reforms since the early 20th century.<sup>40</sup> These experts, each in their own discipline, have defended the idea that sexual difference within the family is a “fundamental pillar of the social contract.”<sup>41</sup>

Camille Robcis points out that it is a matter of questioning the political functions of kinship and noting that blood-based kinship remains at the heart of a certain conception of the social order or its legal variant, public order.

As explained by the historian Camille Robcis, the question of kinship is intimately linked to the one of the nation. The rules on the establishment of filiation actually determine the acquisition of the French nationality, the issues of family reunification and citizenship, especially the European one, rules which have been highly mobilized with the development of migration and globalization.

One can therefore easily realise that it might be hoped, more or less consciously, and in a more or less visible way, to limit the concept of filiation, in order to indirectly control immigration and supervise the globalisation phenomenon.

## VI. THE EQUALITY ARGUMENT

In contrast to these arguments against same-sex parenthood, equality and non-discrimination are invoked in calls to allow access to adoption and medically assisted reproduction.

### A. *Non-Discrimination on the Basis of Sexual Orientation in Adoption*

Non-discrimination was first successfully invoked in relation to adoption by a homosexual person. A French woman who had been refused approval to adopt a child on the grounds of her sexual orientation brought an action before

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39. *Id.*

40. In the third chapter of the book, entitled “La diffusion du structuralisme dans la sphère publique française (The Circulation of Structuralism in the French Public Sphere)”, the author demonstrates the decisive political influence during the 20th century of Georges Mauco, André Berge and Françoise Dolto, all three psychoanalysts, for whom sexual difference was at the root of all psychological and social organization. With regard to the more recent reforms, which have questioned the heterosexual norm in family law, the author also mentions the influence of “intermediate figures” such as the anthropologist Françoise Héritier or the philosopher Sylviane Agacinski. *Id.* at 102-40.

41. *Id.* 273.

the European Court of Human Rights on the basis of Articles 8 and 14 of the Convention.

In its decision of 22 January 2008,<sup>42</sup> the European Court condemned France, pointing out that the criterion of the absence of a paternal referent as a basis for refusing accreditation is used to mask discrimination on the grounds of sexual orientation. The ECHR judges affirmed that “in the circumstances of the present case, it is permissible to question the merits of such a ground, the ultimate effect of which is to require the applicant to establish the presence of a referent of the other sex among her immediate circle of family and friends, thereby running the risk [of] rendering ineffective the right of single persons for authorization” and that “that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant’s application on the grounds of her homosexuality.”<sup>43</sup> The Court added, “the fact that the applicant’s homosexuality featured to such an extent in the reasoning of the domestic authorities is significant”.<sup>44</sup> The Court concluded that this difference in treatment constituted discrimination on the basis of sexual orientation.<sup>45</sup> Since this judgment, public administration can in principle no longer refuse to grant authorization to a single person or a couple on the grounds of their homosexuality. However, the length of adoption procedures and the persistence of a reference to heterosexual couples in the practice of social workers still leave homosexuals with little chance of adoption in practice.

#### B. *Non-Discrimination on Grounds of Sexual Orientation in Medically Assisted Reproduction*

The argument of equality and non-discrimination was then mobilized in the controversy surrounding the opening of medically assisted reproduction to women couples.

This argument is whether access to medically assisted procreation for heterosexual couples and its prohibition for homosexual couples, especially female couples, does not constitute unequal treatment on the grounds of sexual orientation. It should be noted that it is on the basis of equal treatment that many European countries have accepted the use of medically assisted reproduction for same-sex couples, such as Belgium, Denmark, the

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42. Case of E.B. v. France, App. No. 43546/02 (Jan. 22, 2008), <http://hudoc.echr.coe.int/eng?i=001-103948>.

43. Case of E.B. v. France, App. No. 43546/02, ¶ 73.

44. Case of E.B. v. France, App. No. 43546/02, at ¶ 95.

45. Case of E.B. v. France, App. No. 43546/02, at ¶ 96, 97.

Netherlands, the United Kingdom and Sweden.<sup>46</sup> These States have advocated, in the name of equal treatment and non-discrimination, neutrality with regard to sexual preferences in access to kinship.<sup>47</sup>

For adoption, the equality argument has achieved its end. From the moment marriage has been open to same-sex couples, adoption has also been open to them since it was allowed for heterosexual married couples.

For medically assisted reproduction, the issue of equality has been more difficult to grasp. Indeed, the condition laid down by the law for access to medical assistance was the existence of medically observed pathological infertility. However, it was difficult to accept that female couples were in the same situation as heterosexual couples, as no medical infertility could be accepted in their case.

For a time, therefore, the Constitutional Council,<sup>48</sup> the Council of State<sup>49</sup> or the European Court of Human Rights<sup>50</sup> considered the conditions of access to medical assistance, which reserved this technique for heterosexual couples, to be in conformity with the principle of equality. For the European Court of Human Rights: “while French law provides that anonymous donor insemination is available only to heterosexual couples, it also states that it is to be made available for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease”.

Therefore, heterosexual couples’ pathological infertility would be contrary to same-sex couples’ social infertility.<sup>51</sup> For some people, infertility would be “accidental”--which makes it possible to consider medically assisted procreation to be a palliative instrument--while for others, it would be

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46. Council of Europe, Commissioner for Human Rights, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2011), <https://rm.coe.int/discrimination-on-grounds-of-sexual-orientation-and-gender-identity-in/16809079e2>.

47. Cathy Herbrand, *La loi sur la procréation médicalement assistée en Belgique: reflet de la diversité familiale?* [*The Law on Medically Assisted Procreation in Belgium: A Reflection of Family Diversity?*], in *LE DROIT DES FAMILLES: GENRE ET SEXUALITÉ* [FAMILY LAW: GENDER AND SEXUALITY] 321 (N. Gallus ed., 2012).

48. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-669DC, May 17, 2013 (Fr.).

49. The Highest Administrative Court affirms that “by restricting access to medically assisted procreation to couples composed of a man and a woman, living, of childbearing age and suffering from medically diagnosed infertility, the legislator has understood that medically assisted procreation is intended to remedy the pathological infertility of a couple without which they would be in a position to procreate” in line with the Constitutional Council, that “couples composed of a man and a woman are, with regard to procreation, in a different situation from that of couples of persons of the same sex” Conseil d’État [CE] [Highest Administrative Court] D.P. III, decision No. 421899, ¶ 5, 6, Sep. 28, 2018 (Fr.).

50. *Gas and Dubois v. France*, App. No. 25951/07, ¶ 63 (March 15, 2012), <http://hudoc.echr.coe.int/eng?i=001-103948>.

51. Aude Mirkovic, *L’assistance médicale à la procréation: Quelles modalités d’accès? [Medically Assisted Reproduction. What Modalities?]*, 57 *ARCHIVES DE PHILOSOPHIE DU DROIT* [PHILOSOPHY OF LAW ARCHIVES] 445, 445 (2014).

“structural.”<sup>52</sup> The logical consequence was that the opening of medically assisted procreation to same-sex couples would not be necessary in the light of the principle of equality, but that such an opening would still aim to change the meaning of the use of medically assisted care, which would no longer be in the medical field.<sup>53</sup>

However, there was a flaw in this reasoning on the criterion of pathological infertility. Indeed, it has been shown that in practice doctors also provide consultations to couples who have not in fact been medically diagnosed with pathological infertility. Actually, there is no infertility medically diagnosed in about 15% of the heterosexual couples in care.<sup>54</sup> As CCNE pointed out in 2017, the borderline between pathological and societal infertility is fragile: some infertility, described as idiopathic, has no identified cause.<sup>55</sup> This management, despite the absence of a medical cause of infertility, testifies to the relativity of the notion of pathological sterility of the couple.<sup>56</sup>

Once it had been accepted that heterosexual couples might have access to medically assisted reproduction despite the absence of a medical diagnosis identifying pathological infertility, it was no longer clear how such an argument could continue to be invoked against female couples.

For this reason, the equality argument has been able to flourish more easily.

## VII. SOCIOLOGICAL ARGUMENTS

Finally, we must note another approach of homoparentality which is beginning to emerge in France, and which concerns the development of children raised in these families.

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52. Thomas Escach-Dubourg, *Pas encore d'AMP pour toutes! : Note sous CE, 28 septembre 2018, n° 421899* [No MPA for all yet! : Note under CE, September 28, 2018, number 421899], 2019(9) ACTUALITÉ JURIDIQUE, DROIT ADMINISTRATIF [LEGAL NEWS, ADMINISTRATIVE LAW] 533, 533 (2019).

53. Claire Neirinck, *Réforme de la PMA: la création de la famille par convenance personnelle* [PMA Reform: Creating a Family for Personal Convenience], 2013/2 DROIT DE LA FAMILLE [FAMILY LAW] 1, 1 (2013).

54. Inserm - La Science Pour La Santé [Science For Health], *Assistance médicale à la procréation (AMP): Des techniques pour aider les couples infertiles* [Medically assisted reproduction (AMP): Techniques to help infertile couples], <https://www.inserm.fr/information-en-sante/dossiers-information/assistance-medecale-procreation-amp> (last visited Jan. 20, 2021).

55. Comité Consultatif National d’Ethique pour les sciences de la vie et de la santé [National Consultative Ethics Committee for Life and Health Sciences], *Avis du CCNE sur les demandes sociétales de recours à l’assistance médicale à la procréation (AMP)*.

56. Anne-Marie Leroyer, *L’accès à l’assistance médicale à la procréation: Quelles modalités?* [Access to Medically Assisted Reproduction: What are the Modalities?], in *LA FAMILLE EN MUTATION, ARCHIVES DE PHILOSOPHIE DU DROIT, TOME 57* [THE CHANGING FAMILY, ARCHIVES OF PHILOSOPHY OF LAW, VOLUME 57] 425-43 (R. Sève ed., 2014).

It is indeed curious to note that France has shown very little interest in the sociological approach to homoparental families.

Yet, we know that research on the future of children raised in these families is important and long-standing in other countries.

It is worth noting the research carried out by Susan Golombok, Director of the Centre for Family Research at the University of Cambridge, which has been studying “non-traditional” families for over forty years through countless longitudinal studies. In her conclusions, presented in 2017 at the 15th Congress of the Swiss Psychological Association, she states: “The quality of interpersonal relationships within a family is more important for a child’s development than the structure in which it grows up”. At this conference, Susan Golombok also dispelled the preconceived idea that family structure would have an impact on children’s sexual orientation.

Another notable study was published in 2018 by Nanette Gartrell. A doctor and a psychiatrist, she has been the director of the National Longitudinal Lesbian Family Study since the 1980s. This follow-up study, founded by lesbians, is the first long-term research on female couples’ children. Since 1986, using questionnaires and interviews, an international team of researchers has followed 77 children of lesbian mothers, from birth to the age of 25. These young people are no different from the general population in terms of their mental health.

In France, there have been no similar studies, while more than 200 bibliographical references from studies conducted mainly in the United States and the United Kingdom, but also in Belgium and the Netherlands, have been identified.

The first French publication focusing on the development of these children, entitled “Approche psychologique et comportementale des enfants vivant en milieu homoparental”, dates from 2000 and was produced by child psychiatrist Stéphane Nadaud. He studied a cohort of 58 children, between 4 and 16 years of age, all raised by homosexual parents.

He draws two main conclusions from this, similar to the aforementioned works: “First, the behavioural profiles of this population do not seem to differ from those of the general population”. It also “demonstrates that the parent’s homosexuality does not seem to involve risk factors for the child per se”. Among the children who participated in his research, “those who seem to have suffered the most are those born into a family of heterosexual parents, who have then experienced the separation of their father and mother and who are afterwards eventually raised in a homoparental family”.

The only other emblematic study published in France on this issue dates from 2005: two psychology professors, Benoît Schneider and Olivier Vecho, explored thirty years of publications on homoparenthood and child

development, which showed that so far there was no evidence that these children were more vulnerable.

Launched in 2014, the Devhom survey will be the next major French study. The first results are expected in 2020. Led by a multidisciplinary team of 15 researchers--sociologists, anthropologists, clinical psychologists and psychoanalysts--it is the "first large-scale study on homoparental families in France". A total of 150 families have been recruited for the quantitative research axis. But only about twenty children are included in the panel of qualitative interviews.

Psychopathology professor Alain Ducouso-Lacaze, who coordinates the Devhom study, says that he has asked about 20 children aged 9 to 10, raised by homosexual couples, to draw their families. "All children represent the succession of generations in a banal way: they draw grandparents, parents and then them. Never the donor".

What these studies highlight is that the educational role of same-sex parents is the same as the one of opposite-sex parents. The analysis challenges the stereotypical idea of the non-interchangeability of paternal and maternal functions.

This is probably the most significant argument in debates about same-sex parenthood today. It raises the question of the place and role of fathers and mothers in the education of a child. However, we are rooted in cultures where we are told that both the masculine and the feminine have natural specificities that cannot be seen to evolve.

It is this questioning of gender stereotypes related to the place of each parent that same-sex relatives put before each of us. Are we ready to admit that there is no natural assignment to our gender identity that would send us back to having a specific role in the education of a child and to changing our culture on these issues?

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# 同性婚下的親子關係： 法國的主要論述

Anne-Marie Leroyer

## 摘 要

關於同性婚姻的辯論在法國一直很激烈，而特別值得注意的是，被提出的論點有許多皆非法律問題。尤其婚姻和收養的問題多是立基於意識形態，而非經驗。又，許多來自人類學、宗教和政治哲學的論點被用來反對改革。因而，我們可以問的問題是，為什麼這些論點在法國有這麼大的空間？

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