Same-sex couples, marriage and filiation[1]:
Beyond the critique of the aporias of antidiscrimination rhetoric

Translation by Dr Stephanie Anderson of "Couples de même sexe, mariage et filiation: Par delà la critique des apories de la rhétorique antidiscriminatoire", in H. Fulchiron (ed.), *Mariage-conjugalités, parenté-parentalité*, Paris, Dalloz, 2009. For a presentation of the book see:
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Homosexual marriage: for or against? Same-sex parenting: for or against? The formulation of these questions seems to force its way into public opinion, as if it went without saying that references made to people's sex ("same-sex" couples, "same-sex" parents) and to their sexual orientation ("homosexual" couple, "homosexual" filiation) could be treated as interchangeable. However, this conceptual confusion, which reduces the *gendered* dimension to the *sexual* dimension, is very problematic,[2] and it becomes a source of out-and-out incoherencies when there is debate over issues of law, such as the possible transformation of our right of marriage or our right of filiation. That is why we should be aware of a problem that is too often overlooked. It is in fact from this initial stage of the formulation of the issues that, without our necessarily being aware of it, all the reasoning that goes into our collective consideration about these issues becomes slanted, and that then we are at risk of becoming locked into alternatives that offer no solution.

The more we formulate the questions from the slant of sexual orientation by choosing the adjectives "homosexual", "heterosexual" and "bisexual", the more the idea that the key issue of the debates about marriage and filiation is actually to pass judgement on people's sexuality and especially homosexuality starts to take insidious hold. However, today, a clear majority of those in our society think that we should not make judgements about a dimension of psychological life

[1] For discussion about the notion of "filiation" used in French by Théry and our translation as "filiation", see our preliminary note in the English translation:"Is the anonymity of donations of begetting really 'ethical' " (doc-7 on this web site).

[2] For discussion about the French vs. English terms of sexué/sexuel = gendered / sexual, see our preliminary note in the English translation "Gender: a question of personal identity or a mode of social relations?" (Inaugural Lecture, Centre M. Bloch (EHESS, Berlin), 20 octobre 2009), doc-4 on this web site.

that is part of private life, and consider that our having ceased classifying people according to their sexual orientation represents a definite advance in democratic values. Furthermore, such a focus on sexuality makes it impossible to deal with what really is of public concern when questions are raised about same-sex marriage and same-sex parenting, and what is well and truly the *gendered* and not *sexual* dimension of the problem: are we in the process of telling ourselves that there is no longer either man or woman? Do we have to accept that our ideal of equality presupposes abolishing any reference to people's sex or to the gender of social relations, leaving only disembodied individuals and neutralised social relations? We know, certainly, that such a revolution in moral standards and of the law is argued for by certain ideologues who like to see themselves as very radical, consider it "discriminatory" to make any reference to the categories of man and woman, deem oppressive any masculine/feminine distinction, and dream of transforming us into "pure" individuals, or into completely disembodied "egos" or "selves" ["'*moi*" in the original French] with reference to a radically dualist conception of the person (a self who is the possessor of a body). The kind of fantasy which consists of resolving a problem by ordering its suppression causes a slight shiver down the spine, given how much it reminds us of the ghastly utopias that looked to create a "new man". And certainly we should emphasise that it can find some support in the extraordinary audience that *antidiscrimination rhetoric* has succeeding in gaining today not only in political debate, but (as a number of contributions to this work impressively show) in legal debate itself, and right up to the highest level. Nevertheless, I believe for my part that an operation that results in the *disembodiment* of people's sex and the *neutralisation* of the gender of social relations is neither a serious option nor, especially, an option that is socially likely to happen, and that it would pay to see how truly absurd it is rather than raising a hue and cry as if there were really a threat that sex/gender would be abolished and that the masculine/feminine distinction of kinship statuses would be obliterated. In reality, it is possible to institute a same sex-marriage and to grant rights to same-sex couples as regards filiation, not only without expunging reference to the sameness of sex, but by aspiring to treat homosexuals as *men and women like others*. This aspiration presupposes that we do not erase the plurality of situations and kinship relations according to whether they involve two women, two men, or a man and a woman, as dreamt about by the proponents of equality via a single model of gender neutralisation, but conversely that we ask ourselves how we might be able to transform our right of marriage and filiation so that it becomes at once common to all and pluralist. But if

we are to be able to become engaged in following this path towards legal pluralism without abandoning the ambition to make the latter an integral part of our common universe of meaning and values, we still need to gain a perspective on the devastating effects of the tendency of our culture to confuse these two very different dimensions of a relationship – its gendered dimension and its sexual dimension. When we think back over the debate about the PACS of 1998-99 this is the problem it should encourage us to reflect upon.

A small step back: the French debate over the PACS

Let us go back to what occurred with the PACS debate. Strong emotions were stirred up over proposed legislation concerning contracts of civil union (CUC), contracts of social union (CUS), then a pact of civic interest (PIC), finally ending, at the conclusion of a year of highly charged parliamentary debate and a polarised media debate, in a vote on the law of the Pacte d'union civile et sociale (PACS) [Pact of civil and social union] and common-law marriage. The spectacle of a country like France becoming so unhinged was quite astonishing from a sociological perspective. It bore so little correspondence to the basic evolutions of our society which sociological enquiries were pointing to – regular progress, year by year, in the acceptance of homosexuality by public opinion – that it appeared almost artificial. The comparison with neighbouring countries heightened this impression. At exactly the same time, Switzerland and Germany, at the conclusion to what were usually calm discussions, voted for contracts between partners granting, to same-sex couples who wished to establish their union legally, many more rights than the PACS. Other countries, particularly in Northern Europe, had created these civil unions nearly ten years earlier; Great Britain was getting ready to do so. Finally, same-sex marriage was at this time beginning to be discussed in Europe and it has since been legalised in the Netherlands, Belgium and Spain.

Unless we think that France is broadly more intolerant and "homophobic" than most European countries, which is not really plausible, it is easy to see what has stirred up passions in this way. These years were marked by our collective inability to turn this law into a question that everyone shared, when the option of not legally establishing a same-sex partnership differentiated us from the majority of other countries, inevitably multiplying and complicating the legal issues. It was difficult to know if the draft bills that succeeded each other before the start of the parliamentary debate concerned couples or all kinds of dyads (couples, fraternal associations

[*fratries*], friends), if they created a civil union or a private contract, if they were closer to marriage or to common-law unions. As it happened, far from the expected legal clarification engaging with the debate in the Assembly, the project on the PACS immediately struck a hurdle without there being any alternative proposition, leading observers to think that its opponents only wished for one thing, to prevent any advance in the rights of homosexuals. A full-scale political and media confrontation then started up, in which the orators whipped themselves into a frenzy with their diatribes about homosexuality and heterosexuality, homophilia and homophobia, while all the legal issues were pushed into the shade or left hanging unresolved, including the issue of knowing what, in actual fact, was the type of bond that the reform was to establish: the bond of a couple, or a bond of friendship? In retrospect this seems so astonishing that it is difficult to recall that one of the major objectives of the Minister of Justice at the time – who defended the PACS to the end as a contract concerning two friends or two colleagues just as much as two lovers – was *not* to establish the same-sex couple in law. What most of our contemporaries soon forgot but that jurists remember is that it required, after the vote on the law, advice from the Constitutional Council to clarify the interpretation of the PACS and to come down on the side of a legal contract relating only to couples! Many examples could be given of the divide between the legal issues and the public and media debate over the PACS: was it a private or a public institution?; would there be a change in civil status or no such change?; would there be a right to the acquisition of French nationality or no such right?; would it grant the status of heir to the surviving partner or no such status?; would it grant the right to marry a person other than the partner if the agreement under the PACS had not previously been broken, or no such right?; would there be a judicial procedure in the case of the agreement being broken or no such procedure?; what would be the amount, extent and waiting periods for fiscal and social rights relating to the PACS? All of these basic questions, which engaged the very meaning of the draft bill under discussion were practically unknown to the ordinary citizen. A senior student, at the height of the heated emotions of the winter of 1998-99, summed up the situation perfectly: "*Everyone is for or against the PACS, but no one knows what is in it.*"

And so a kind of overheated mix of ideological confrontations and the uncertainty of the law fed into each other, while the legal questions never reached the public arena. Without idealising the situation in other countries, it seems that the possibility for all their citizens to come to grips with the legal issues involved so that they could understand them and discuss them has

been a factor in the greater calmness of the debates elsewhere and the greater progress in laws applying to same-sex couples.

Today there has been a significant change in attitude in our country. Time has passed, thinking has continued to evolve, and all of the major political parties have now gauged the full importance of a social question that involves how we think about the way we live together in a democratic society. There is certainly the feeling that first and foremost everyone wants to see a calmer debate that is responsible and productive. But are we going about this in the right way? Are we giving our fellow citizens all the means necessary for them to take ownership of the legal issues? These are the questions that cannot be avoided in questioning the role of the law in relation to same-sex marriage or same-sex parent filiation. By way of illustration I shall take a single example, that of same-sex marriage.

Same-sex marriage: the issue of the presumption of paternity

There is talk in the media about "homosexual marriage". However, we are aware that the law ignores the categories of "homosexual", "heterosexual" and "bisexual". And in any case these are very recent and can not in any way be taken as given. Michel Foucault, as is well known, has devoted particular study to the constitution of new categories by the *scientia sexualis* of the 19th century which created the notions of homosexual and of heterosexual and turned them into identities. In place of the very old stigmatisation of sodomy among a whole range of sexual sins it substituted a veritable *specification* of the homosexual being:

> The homosexual of the 19th century has become a character: with a past, a history and a childhood, a temperament, a form of life; a morphology too, with an indiscrete anatomy and perhaps a mysterious physiology. Nothing of what he is in every aspect of his life [*ce qu'il est au total*] escapes his sexuality […]. It is consubstantial with him less as a habitual sin than as a distinctive nature. Homosexuality appeared as one of the figures of sexuality when it was displaced from being the practise of sodomy on to a kind of internal androgyny, a hermaphrodism of the soul. The sodomite was a relapsed heretic, the homosexual is now a species.[3]

This specification of homosexuality brought about unprecedented stigmatisation. For a long time it condemned individuals to dissimulation, secrecy and silence, until the social movements of the

[3] Cf. Michel Foucault, *Histoire de la sexualité I. La volonté de savoir*, Paris, Gallimard, 1976, p. 59.

second half of the 20th century allowed homosexuals in Western democratic societies to begin "to turn the stigma around", and to demand as something they could be proud of and something entirely normal what they had previously lived with as something shameful and socially deviant, indeed as something that was viewed as mental pathology. In this new context, the law has not changed: it had nothing to say about homosexual individuals in the past (leaving this terminology to doctors, psychiatrists and psychoanalysts), and it has no more to say about them today. In the new context in which forms of discrimination in relation to sexual orientation are explicitly condemned by law, it is important to emphasise that this silence in our legal language is in keeping with our basic values of the equality of persons and of respect for private life. Indeed, we know that, contrary to what the *scientia sexualis* of the 19th century declared, there is no objective definition of such categories. However, certain "pop" psychologists and some religious fundamentalists today claim to be in possession of the *truth* as to the cause and meaning of the sexual orientation of individuals, and raise the stakes by forecasting the "destructive" effects of the homosexuality of parents on their children, and even on future generations. Wouldn't a calm and enlightened debate be encouraged by recalling that the language of the law does not recognise "heterosexual" or "homosexual" couples but only couples "of different sex" and "of the same sex"? This allows us to see immediately that the legal issue of the debate about marriage does not in any way concern *sexual* relationships – and *a fortiori sexual* psychology – but rather *gendered* social relations: man/woman, woman/woman, man/man.

Marriage has seen many changes through history, but it has always been defined in law as a relation of different sexes, between a husband and a wife. And that one of them had homosexual inclinations was much more frequent than is believed as Marcel Proust brings out so strongly in *A la recherche du temps perdu*: marriage "of opposite sex" did not prejudge, or at least not entirely, the inclinations and sexual practices of individuals… The legal question which is posed is therefore that of a major change not in moral standards (marriage has never been "forbidden" to homosexual individuals), but in the definition of the marital union: it could also become the union of two people of the same sex. This change concerns everyone, since it goes to the meaning of one the most important institutions of our society. It is therefore quite logical for our fellow citizens to want to participate directly in a debate which concerns every one of them. "For?" or "against?" – yet they do not always have at their disposal the legal information allowing them to take on board the whole set of issues involved, meaning that there is a risk here

of inequality between the legal experts and their fellow citizens, which is very damaging for democratic debate.

As far as civil law goes, the main question raised by the possibility of a change to the definition of marriage is that up until now this institution has not only been a bond between a couple. It includes, as the senior jurist Carbonnier has so strongly emphasised, the *presumption of paternity*, overlooked in the debates in the media but that for his part he considered to be "the very core of marriage". This presumption is actually a presumption of begetting as it can be dismantled, with certain conditions, by genetic proofs. This rule is part of the engagement undertaken in marriage: for a man, to marry a woman is to declare himself in advance father of the children that she is likely to bring into the world in the course of the marriage. We can easily understand the meaning of this anticipated paternal recognition in the "yes" of the wedding vows, expressing the fact that the couple undertakes to live together and share their lives by getting married. For the wife as for the husband it makes begetting an integral part of the signifying world of trust and giving one's word, and more broadly it makes human biological reproduction an integral part of the socially instituted world of kinship, always already there, and that is why a dispute over paternity is never a clear-cut case. It would therefore be especially useful to spell out how, in the hypothetical case of a same-sex marriage, this question would be treated. The media debate, which is usually limited to the couple, prevents us from seeing that different avenues would be opened up as to the presumption of paternity:

a) The widening of the presumption of paternity to same-sex couples. This possibility seems absurd, but it should be noted that Canadian law relating to civil unions has introduced a "presumption of maternity" for the partner of the mother in female couples (without, however, creating a presumption of paternity for male couples).
b) The suppression of the presumption of paternity for all marriages, which would bring about a major upheaval in different-sex marriage.
c) The maintenance of the existing presumption of paternity for couples of different sex, without creating a "presumption of maternity".

These alternatives show that the meaning of a redefinition of marriage is a little more complex than is believed. If they were discussed, everyone could then form an opinion more adequate to the task of anticipating all the issues of law and to debate them with full knowledge of the facts, and with more reason than emotion. There would then be a realisation that, among

the trends favourable to the institution of same-sex marriage in France, there exist not one but in fact two different options:

–First option: the presumption of paternity is extended to all couples. Certain militant trends, the emblematic expression of which can be found in the positions developed in their writings by the jurist Daniel Borillo and the sociologist Eric Fassin, defend the idea of "the equality of sexualities" via the abolition of any legal reference to the categories of man and woman or to the masculine/feminine distinction. In fact they consider that any reference to people's bodies or to the gender of relationships is a proof of "biologism": that is why, for example, these authors have been quite strongly criticised in the Association des parents et futurs parents gays et lesbiens (APGL) [Association of Gay and Lesbian Parents and Parents-to-be], because the Association, far from being indifferent to the physical dimension of our condition or to the gendered dimension of social life, defended the right of the child "to know its origins".[4] With logical consistency, these authors consider that the notion of presumption of paternity does not have to remain what they see as a "heterosexual privilege" and find it reasonable to extend it to same-sex couples, in the form of a presumption of maternity for the female partner or the wife of a mother and a presumption of paternity for the male partner or the husband of a father. It can be seen then that the demand for homosexual marriage signifies for them the "neutralisation" or "legal asexualising" of marriage, which would be neither the union of a man and a woman, nor the union of two men, nor the union of two women, but the union of two "egos", two individual selves ["*deux 'moi'*" in the original French], understood as pure psychological interiorities (sexual but not gendered) and each possessing a body whose gendered identity would now be considered in some way as a "private" matter.

– Second option: the pluralism of marital law. An example of this option can be found in the draft bill that was introduced into the Assemblée nationale by the Socialist Party in 2006, and whose objective was to establish same-sex marriage in law. In this project, which has never come under discussion in the Assemblée, the presumption of paternity is maintained as it has always been for marriages of opposite sex; on the other hand, it is not proposed that the presumption of maternity be created for couples of two women or the presumption of paternity for couples of two men. The option is therefore that of a new law of civil marriage which is both common and pluralist. Civil

[4] For an example of this important debate, and one which divides the militants in the homosexual cause quite deeply, see the polemic conducted against the APGL by Fassin and Borillo in Cadoret (ed.), *Homosexualités, enjeux scientifiques et juridiques*, Paris 2004.

marriage transformed in this way would be common since it would be a unique institution now allowing the bonding together, through a public undertaking made before the mayor, of three categories of couples: not only couples of opposite sex as was always the case, but also same-sex female couples and same-sex male couples. Refusing to deny that these different couples involve gendered beings, in other words men and women of flesh and blood, this new marriage would be pluralist as well, as it would only entail relations of filiation mediated by the presumption of paternity for couples in which the bond was between a man and a woman, as has always been the case. In the other cases, the civil marriage would, in actual fact, involve conjugal bonds only and not the connecting of these conjugal bonds with bonds of filiation.

This second option, as we see, is very different from the preceding one since it does not turn marriage into an "asexual" institution in order to bring about an abstract form of equality through a single model but, instead of that, seeks to bring about this equality between couples of opposite sex and same sex-couples by making modifications to the institution of marriage that go in the direction of an institution which is more plural. This choice does not mean that any right as to filiation must as a matter of principle be set aside for homosexual individuals or same-sex couples, but implies that it would go through channels other than that of marital law in the narrow sense of the term: through possible adjustments to the right to adoption, to the right to medically assisted reproduction, or to the right to parental authority, whether the people involved are married or not. It can be observed that in this second option the choice that consists of *pluralising civil marriage* is not unrelated to that of creating instead, besides marriage (maintained as a bond of opposite sex), a "civil union" without presumption of paternity, as England has done recently. When it comes to rights, the two solutions are really very close. It is in some way the labels which differ. The establishment of a "same-sex civil marriage" or a "same-sex civil union": in the end the distinction between these two choices and these two possible avenues essentially involves the symbolic dimension of social life. This dimension is clearly of critical importance, and doubtless there would be much to gain if, finally, we could start to be able to debate it as such, rather than continuing to confuse, as we do today, two possibilities as radically different as same-sex marriage *with*, or conversely without, presumption of paternity/maternity…

The diversity of situations grouped together in the category of same-sex parenting

This kind of clarification of the debates, distinguishing carefully between the gendered and the sexual, would no doubt be especially useful in relation to same-sex parenting as the media's "for or against" is even more heated in this area, sometimes dominated entirely by supposed psychological "knowledge" about homosexuality and utterly removed from the relevant legal problems. In fact very different situations are actually brought together under the term "same-sex parenting". For its part, the Association des parents et futurs parents gays et lesbiens (APGL) has shown this quite clearly in all of its publications. There is therefore a great deal of work to be done on the legal level to open up this question and to spell out its different aspects by putting them back into the context of our common law. A number of cases can be perfectly well incorporated into the existing law; the problems encountered are therefore for the most part cultural, creating situations of insecurity for parents and children. Others concern situations of discrimination because of homosexual orientation (we can think, for example, of some divorced fathers whose ordinary rights and duties are limited by judicial decision, or of unmarried candidates for adoption who are not approved despite the recent overturning of the case law of the European Court of Human Rights). Still other demands concern the relations of gender in filiation and question the legal principles governing cases of medically assisted reproduction and the ethics of reproductive technology in general, adoption or blended families in general, and the overall organisation of our system of kinship. In this last instance, the great problem is that there is still not enough awareness that these demands serve above all to shed light on major societal questions *common to all* (such as multi-parenting situations) which we should equip ourselves to tackle properly and with a broad brush, instead of emphasising their specificity by pointing the finger at this or that category of our fellow citizens.

The more we succeed in thinking about the diversity of these situations, the less we shall be tempted to set apart "the" same-sex parent family by considering it to be "species" of family that is radically different from others, and the more we shall construct a collective debate equal to the task of tackling the great social issues in question. That is why, in my opinion, whether we are dealing with marriage or filiation, it is important today that we do not let ourselves fall into the trap of mounting a sterile opposition to antidiscrimination rhetoric. It is true that this rhetoric is now crashing down like a huge wave sweeping away any reflection on the difference between persons and statuses, and makes gendered social relations literally unthinkable, as it generally

makes unthinkable the asymmetry of social statuses [*dissymétrie statutaire*] which is nevertheless a major feature of the vast majority of the relations in which we are involved in social life. And it is also true that antidiscrimination rhetoric prevents us from realising that the equal involvement of both sexes in filiation is a major social and cultural value, which has absolutely nothing natural about it and by definition demands that we do not pretend not to know that we are men and women and not abstract and disembodied "egos" ["*moi*" in the original French]. That is why we must dare to swim against the tide and criticise the aporias of this rhetoric, as a number of contributions in this book do in a way that is brilliant, solid and convincing. But this critique can become a trap, if it leads us to believe that our right of marriage and filiation cannot evolve without destroying itself, on the pretext that those who want to bring about legislative and social change so often employ contestable or incoherent rhetorical justifications. Let us be able to criticise, but let us also be able to hear what goes beyond the rhetoric. Let us be able to distinguish between the different range of possible social and legal options instead of collapsing them all together, as usually happens with the media's "for or against" where everything is mixed up together, giving the impression that there is only one conception of "homosexual marriage" and only one situation of "same-sex parenting". Let us show that we can be sensitive to the profound movement that has come out of the transformation of our perception of the emotional relationships of same-sex couples– and this calls on us, too, to show that we can preserve but also transform the institutions of civil marriage and filiation in contemporary democratic societies.