Who is Breaking with Tradition? The Legal Recognition of Same-Sex Partnership in France and the Question of Modernity

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INTRODUCTION

Contrary to the manner in which it is often presented, the struggle for legal recognition of same-sex couples does not constitute a departure from the foundations of modern family law in France. The process of modernization of family law started at the end of the eighteenth century, spurred by emerging principles valorizing the autonomy of the individual and free choice with respect to individual civil status. The French Revolution of 1789, as well as the Napoleonic civil code of 1804, reimagined the institution of marriage as a contract founded on the abstract will of the respective parties, rather than as a union of the flesh established by religious sacrament. In this secular conception of marriage, which is constitutional in nature, the religious ceremony is devoid of any legal consequence, and citizens, to be legally married, must validate their union in front of a representative of the state. The current political claims of the gay and lesbian movement emphasize these same principles, albeit in a slightly more radical form.

Despite the secular principles underlying French family law, French citizens have not acceded to same-sex couples the fundamental right to marry. The systematic refusal of judges to acknowledge homosexual unions, even in the most limited manner, has triggered a political movement to support these couples. As a result of this mobilisation, France passed a law that grants limited rights to homosexual unions: the *Pacte Civil de Solidarité* (Civil Solidarity Pact), or PaCS. Nevertheless, during the parliamentary debate, politicians carefully avoided the question of equality between heterosexual and

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homosexual couples. Thus, the PaCS is not an equivalent to marriage either in its form or in the rights it grants.

The general principles and evolution of French family law should have permitted a discussion of equality between couples, independent of the sex of the partners. Yet when a mayor, encouraged by a group of intellectuals and supported by a fraction of public opinion, performed the first same-sex marriage, the French judicial system refused to recognize the equality issue raised by this union. The judges' interpretation of the civil code had nothing to do with the bases of family law; in fact, their decision was based on Judeo-Christian morals. The ruling of the judges highlights the limits of the French legal system. When same-sex marriage is discussed, incoherent paradoxes abruptly reveal the influence of a heterosexist legal ideology. The arguments against recognition of same-sex marriages represent a break with modern values and a return to canonical and familialistic ideology.

The controversy, in my analysis, is not between people who oppose same-sex marriage and people who support it. The real controversy takes place between those who defend a canonical vision of the institution of marriage and those who support a strict assertion of modern law. This Article will thus be divided in three parts: First, I will present an analysis of the struggle for recognition of same-sex couples, stressing the differences between the PaCS and marriage. I will then discuss the political mobilisation for same-sex couples, which culminated in the marriage of two men in the town of Bègles in southwest France. Finally, I will demonstrate how the political claims of the gay and lesbian community are logically consistent with the modern tradition of French family law.

I. THE STRUGGLE FOR RECOGNITION OF SAME-SEX COUPLES IN FRANCE: THE PACS

The HIV epidemic in France dramatically brought to the fore the precarious legal position of people with AIDS, particularly as members of a couple. Other than the right to shared social security (granted in 1993),[1] same-sex partners had no rights before the PaCS was promulgated. In 1997, in *Velela v. Weil*, the highest civil court in France (*Cour de Cassation*) held that the doctrine of *concubinage* (cohabitation; common-law marriage) cannot be applied to homosexual unions.[2] Having decided that there is no legal equivalent to heterosexual *concubinage* for same-sex couples, the Court held that when one member of such a couple dies from AIDS, the lease of an apartment cannot be assigned to his surviving partner. In a prior case, decided in 1989, the Court

1. Decree No. 93-678 of Mar. 27, 1993, Law of Dec. 21, 1992, J.O. Mar. 28, 1999.
2. Cass. 3e civ., Dec. 17, 1997, Bull. civ. 1997, III, 151, No. 225.

likewise held that a male steward could not purchase a reduced price air ticket for his male partner.[3] The Court said that the notion of "free union can only be applied to a couple consisting of a man and a woman."[4]

As the French courts repeatedly refused to recognise same-sex partnerships, the enactment of a specific law seemed like the only way to find a suitable solution. Following the European dynamic started in Denmark ten years earlier, French law introduced a new form of relationship in 1999: the PaCS. The PaCS is open to any two individuals, regardless of gender.[5] The PaCS aims at introducing an intermediate status for non-marital unions, between civil marriage and *concubinage*. This status permits, in particular, the recognition of non-marital homosexual unions. Even though the French legislature wanted to differentiate strongly between the PaCS and civil marriage, it did not go so far as to create a special form of contract reserved only to same-sex couples, as in Northern Europe. After a complex debate and amidst strong public sentiment, both for and against the bill,[6] the law was finally passed and signed by President Chirac on November 15 1999. Thus, France became the seventh country in Europe to formally recognize same-sex unions.[7]

Like marriage, the PaCS is an act of will that immediately creates a legal situation and produces juridical consequences. The PaCS modified the civil code and also amended the Social Security Code, the Labor Code, the rules regarding the right of foreigners to reside in France, the General Tax Code, and several laws dealing with civil service.[8] However, the conditions governing the formation and termination of a PaCS are much more flexible than those applicable to civil marriage. There is no obligation to publicize the existence of a PaCS, nor is it subject to medical requirements. The termination of a PaCS is also much easier than divorce; one partner may terminate the PaCS by notifying the other partner.

The PaCS is a contract concluded between two adults to organise their life in common—i.e. a common residence and sexual relationship. Your proposed partner must be 18 years old, capable of entering into contracts, must not be married or party to another PaCS, and cannot be your parent, grandparent, child, grandchild, parent-in-law, brother, sister, uncle, aunt, nephew or niece.

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3. Secher v. Air France, Cass. soc., July 11, 1989, Bull. civ. 1989, V, 311, No. 515.

4. *Id.* at 311.

5. For a more detailed analysis of the PaCS and how it differs from marriage, see Daniel Borrillo, *The Pacte Civil de Solidarité in France: Midway Between Marriage and Cohabitation*, *in* THE LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A CONFERENCE OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 475 (Robert Wintemute & Mads Andenæs eds., 2001).

6. For a political history of the PaCS, see DANIEL BORRILLO & PIERRE LASCOUMES, AMOURES ÉGALES? LE PACS, LES HOMOSEXUELS ET LA GAUCHE (2002).

7. For a comparative study of European laws, see the International Research Project on Same-Sex Unions in Europe, http://www-same-sex.ined.fr/publica.htm (last visited April 7, 2005).

8. Law No. 99-944 of Nov. 15, 1999, J.O., Nov. 16, 1999, p.16959.

The union must be declared at the registry of the county court. Partners joined by a PaCS undertake to help one another mutually and materially, and they are jointly liable to third parties for debts contracted by either one of them.[9] However, the French law does not permit the partners to adopt a child jointly, to have joint parental authority over the child of one partner, or to have access to medically assisted procreation. The PaCS does not include inheritance without will or survivor's pension. A residence permit is automatic for foreign partners in case of marriage, but it is only discretionary, after one year, for parties to a PaCS.

Far from banishing discrimination or providing an equivalent legal framework, the PaCS both practically and symbolically restricts same-sex couples to an inferior status, as compared to different-sex couples. The conjugal hierarchy, at the top of which we find marriage, reveals the existence of a logic that serves as political justification. It is impossible to analyse this conjugal hierarchy without taking into account the phenomenon that is its foundation: sexuality. Indeed, all the arguments against a full recognition of same-sex unions are based on a common vision that states first that heterosexuality and homosexuality are different in nature, and that then draws political consequences from this statement. In this vision the right to marry can be only granted to heterosexual couples because of their specific sexual practice. This conjugal hierarchy reflects a sexual hierarchy, in which heterosexuality is the most legitimate practice.[10]

In 2001, the PaCS garnered massive approval in the public opinion (70%), and five years after its enactment, even the right wing government wants to improve the law. Since its enactment, 144,225 PaCS have been recorded, and 17,624 dissolutions.[11] Yet, even as the PaCS began to seem acceptable, the idea of same-sex *marriage* remained radical and controversial. On March 17, 2004, philosopher Didier Eribon and I co-wrote a manifesto that was published in the newspaper *Le Monde*.[12] The manifesto, signed by key figures from the intellectual and artistic world such as Jacques Derrida, Alain Touraine and Michèle Perrot, argued that fighting homophobia also implied ending discrimination between same-sex and different-sex couples in the context of marriage. Thus, we invited political authorities to marry same-sex couples:

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9. *Id.* at art. 515-2.

10. Daniel Borrillo, *Pluralisme Conjugal ou Hiérarchie des Sexualités: La Reconnaissance Juridique des Couples Homosexuels dans l'Union Européenne*, 46 McGILL L.J. 875 (2001).

11. It is impossible to know whether the couples who have signed a PaCS are homosexual or heterosexual, because the law forbids this information from being collected. Also, since the PaCS is not a public act and does not modify individual's civil status, only general and neutral statistics are available.

12. *Manifeste pour l'égalité des droits*, LE MONDE, Mar. 17, 2004, at Horizons-Débats, *available at* http://www.petitiononline.com/egalite/ (last visited April 7, 2005).

The French constitution states that all citizens are equal before the law. This fundamental principle is not applied when rights such as the right to marry are denied to gay and to lesbian individuals. We thus demand that French judges follow the examples of Ontario, British Columbia and Massachusetts. We demand that the Parliament follow the example of the Netherlands and Belgium. We demand that French mayors follow the example of the mayor of San Francisco and perform same-sex marriage ceremonies.[13]

Noël Mamère was the only one to answer our call.

II. THE FIRST SAME-SEX MARRIAGE

On June 5, 2004, former Green Party presidential candidate Noël Mamère, mayor of the Bordeaux suburb of Bègles, conducted a marriage ceremony for two men, Bertrand Charpentier and Stéphane Chapin. Supported by a group of activist lawyers, Mamère had reasoned that there was nothing in French law to prohibit such a ceremony, and that he would appeal any such challenges to the European Court of Human Rights.[14] Since the civil code does not define marriage as a union between a man and a woman,[15] Noël Mamère's gesture aimed to start the debate and compel French politicians to express their opinion on this point. This tactic was undeniably successful: To thwart gay marriage, the French right wing—which up until this time had been opposed to the PaCS—proposed to improve it.[16] The socialist opposition, which had also traditionally rejected the idea of gay marriage, declared that it would sponsor a bill to legalize it.

In response to Mamère's gesture, the French Minister of Justice stated that same-sex marriages would be considered legally null and called for judicial intervention to stop the ceremony.[17] On July 27, 2004, the court in Bordeaux declared the marriage null and void.[18] The public prosecutor, representing the national government in opposition to the marriage, advanced the legal argument that the French Civil Code speaks several times of a *husband* and a *wife*, and thus it implies different genders. The judge agreed, deciding that "this justification is inherent to the function of marriage, which is generally

13. *Id.*

14. http://www.noelmamere.org/article.php3?id_article=365 (last visited April 20, 2005).

15. C. CIV. art. 144 ("L'homme avant dix-huit ans révolus, la femme avant quinze ans révolus, ne peuvent contracter mariage." / A man before the age of 18, and a woman before 15 complete, are incapable of contracting marriage.). This provision does not state that the union is necessarily that of a man and a woman; it only establishes the minimum age of consent.

16. Dominique Perben, Ministre de la Justice, LE PACTE CIVIL DE SOLIDARITÉ, RÉFLEXIONS ET PROPOSITIONS DE RÉFORME. (Nov. 30, 2004), *available at* http://www.justice.gouv.fr/publicat/rapport-pacs.pdf (last visited April 7, 2005).

17. Guillaume Tabard, *Dominique Perben: "Le Mariage Entre Homosexuels Est Contraire à la Loi,"* LE FIGARO, Apr. 28, 2004.

18. T.G.I. Bordeaux, 1e ch. civ., July 27, 2004 (unpublished).

considered as the foundation of family."[19] Shortly after the ceremony took place, the Interior Minister instituted disciplinary procedures against Mamère, who was suspended for a month.[20]

The legal situation is still unclear, as the annulment of the marriage has not yet been confirmed by the highest court in France. Still, same-sex marriages likely will not become legal without a change in the statutes governing marriage. On May 11, 2004, Socialist Party leader François Hollande announced that he would ask his party to file a draft law to render such marriages unequivocally legal.[21] However, other party leaders, such as his partner Ségolène Royal and former Prime Minister Lionel Jospin, publicly disapproved of same-sex marriages. The disagreements within the Socialist Party have prevented the party from presenting the bill in Parliament, despite Hollande's promise.

III. BREAKING WITH TRADITION, OR RADICALIZING THE TRADITION INSTITUTED BY MODERNITY

In the context of the French legal tradition, it seems to me that Noël Mamère's interpretation of same-sex marriage, and not the Bordeaux court's decision, is the correct one. Indeed, by joining the concept of marriage and family, which implies that procreation is the main objective of marriage, the French court's interpretation of the institution of marriage is more akin to the canonical law of the Ancien Regime than it is to modern French law. Since the French Revolution, marriage has been understood as a contract, which is founded on the consent of both parties and which can be ended by either party.[22]

The philosophers of the Enlightenment questioned the idea of a sacred union *ad vitam*. Montesquieu, in his *Lettres Persanes*,[23] ridiculed the indissolubility of the Christian marriage, and Voltaire, in his *Dictionnaire Philosophique*,[24] emphasized the fact that marriage is a contract of secular law. According to Voltaire, contract and sacrament are two different things: The first has civil consequences, while the latter has consequences only in regard to the church. He proposed to separate the two notions and to render marriage dissoluble by divorce. Modern law resembles Voltaire's model; individuals

19. *Id.*

20. For a political history of gay marriage, see generally DIDIER ERIBON, SUR CET INSTANT FRAGILE: CARNETS, JANVIER-AOÛT 2004 (2004).

21. http://www.maire-info.com/articles/archive.asp?param=4356

22. *See generally* JEAN-CLAUDE BOLOGNE, HISTOIRE DU MARIAGE EN OCCIDENT (1995).

23. BARON DE MONTESQUIEU, *Lettre CVIII*, *in* LETTRES PERSANES 241 (Jean Starobinski ed., Gallimard 2003) (1721).

24. VOLTAIRE, DICTIONNAIRE PHILOSOPHIQUE (Raymond Naves ed., Editions Garnier Frères 1954) (1765).

today may choose to celebrate a religious marriage, which is devoid of any legal consequence, provided it takes place after the civil wedding. And the advent of the Napoleonic civil code did not end the right to divorce.

The shift from canonical law to modern family law took place during the 18th century, when the modern legal requirement of consent replaced the requirement of consummation proper to canonical law. In canonical law, consummation implied the union of the male and female bodies (*copula carnalis*), without which consent to marriage was legally worthless. In this canonical conception of the marriage, the difference between sexes is an essential condition to marriage; the very existence of the act requires the element of heterosexuality. According to the canonical law, procreation is one of the major objectives of marriage, and the spouses are considered to become only one flesh.[25]

In modern French law, consent, rather than consummation, forms the basis of validity for the act of marriage. What matters is no longer the physical act itself, but its psychological implications. The Civil Code does not define marriage but merely rules that: "There can be no marriage where consent is wanting."[26] The end of the sacramental vision of marriage not only implied the renouncement of the consummation (as *conditio matrimonii*), but also the total and definitive dissociation between marriage and procreation. Indeed, the reproductive capability or intent of the partners was never a condition for marriage, nor is sterility *per se* a cause of nullity for the marriage contract. The legal recognition of *in extremis* and posthumous marriages in Article 171 of the Civil Code serves as definite proof that marriage and procreation are conceptually separate in French law. In France it is legally possible to marry a corpse but not someone alive and of the same sex!

In effect, according to the Civil Code, the nullity of a marriage contract results from flaws in consent. Consent is nothing else than a manifestation of will, which is not gender-dependent; in the context of French law, will does not have a gender. Thus, I maintain that the extension of the right to marriage for same-sex couples is a logical consequence of the theory of consent. With the exception of the classic impediments to marriage,[27] the validity of the juridical act only depends on the free commitment of the parties; the only legitimate objections are those based on the theory of consent: absence of consent, error, or faulty consent. The legitimacy of the act is no longer founded on the substance of the act (i.e., the actual meeting of male and female bodies) but on its form (i.e., the meeting of two wills).

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25. 1983 CODE c.1061, §1.
26. C. CIV. art. 146.
27. C. CIV. art. 147 (prohibiting bigamy); C. CIV. art. 161 (prohibiting incest).

Therefore, the demands of the lesbian and gay movement do not constitute a departure from tradition, but, on the contrary, these demands are in keeping with the tradition of marriage as contract, defined by the French Revolution and reaffirmed in the Napoleonic Civil Code. The evolution of family law in France shows that marriage must be understood as the union of two wills, not as the meeting of two different sexes. Since the reform of the Civil Code in 1972, the terms "husband" and "wife" have been almost systematically replaced by the gender-neutral term "spouses."[28] Roles in the family are no longer clearly distributed according to sex; men and women, as partners and parents, are given the same rights and obligations and their roles are interchangeable.

In this context, to deny the right to marry to same-sex couples, by citing the difference between the sexes as an essential condition to marriage, is not only inconsistent with the French legal tradition but also constitutes a legal counter-revolution. This conservative revolution privileges a religious vision of marriage, founded on the union of two fleshes, and a hygienistic conception of union, based on procreation. This conception of marriage privileges a metaphysical vision of the institution based on an essentialist notion of the family. The arguments against same-sex marriage are founded on an instrumental vision that often implies the substitution of the individual as subject of law (citizen) with the Family as the subject of law (in capitals and as a natural unit). These arguments evidence a kind of nostalgia for the conservative ideology of marriage and family that had its climax during regime of Marechal Pétain.[29]

In contrast, in the modern legal system, marriage constitutes a commitment regardless of the intent to procreate. Within the modern system, it is the family that must be at the individual's service and not the individual at the service of the family as an institution. According to Jean Carbonnier, "family is today less an institution than it is an instrument, a means to achieve self-realisation . . . it is a form of the right to be happy that is implicitly guaranteed by the state."[30] Hence, marriage appears as the archetypal *intuitu personae* contract in which the free choice of the partner seems to be a fundamental right. No rational argument can be opposed to the claim of gays and lesbians that does not risk instituting a legal system closer to the ecclesiastic sacrament (or the hygienist ideology) than to the French civil law. Furthermore, if we push the arguments of same-sex marriage's objectors to the extreme, and insist upon the relationship between marriage and procreation, we may likely need to forbid, for instance, contraception within marriage, or question the equality of children

28. *See, e.g.*, C. CIV. art. 212-226 (explaining the duties and rights of spouses).

29. *See* RÉMI LENOIR, GÉNÉALOGIE DE LA MORALE FAMILIALE (2003). During this period of French history, a bill was introduced that would make the Family into a full subject of the law.

30. JEAN CARBONNIER, ESSAIS SUR LES LOIS 171 (1979) (translation mine).

born in the marriage to those born out of wedlock, or refuse to grant family rights to unmarried parents.

Beyond issues of equality and discrimination, extending the right of marriage to homosexual couples signifies the defense of modernity within the theory of law. The question of modernity shapes the geography of this controversy. It is why the terms of the controversy are not constituted between, on the one hand, experts on the institution of marriage (e.g. religious authorities, political leaders, and law professors), and, on the other hand, gay and lesbian activists. Instead, the geography of this controversy is much more classic; the line is drawn between the proponents of modern, secular liberalism and the supporters of metaphysical conservatism.