

When Laws discriminate instead of introducing more equality : the case of the “Mariage pour tous” law

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The notion of « discriminatory laws »

- In this communication, we will try to show and discuss the way a certain “**legal creativity**” is implemented (in terms of discourse) to respond to changes in society regarding the diverse modalities of union of 2 persons.
- Our focus will be on the fact that these **laws** are **based *not* on the union of people as persons**, but on the **sexuality** of persons - so that they are, *de facto*, **discriminatory, as they create a double standard/norm instead of an equality of treatment**
- Our focus will be on **lesbian mothers (families) who had to get married in order to adopt their non biological child(ren)**

Variety of discursive, related, levels

- Different points of discussion merge from such a topic, which synthesize as:
 - The legal (discursive) notion of "*making & being a family*" (social recognition)
 - The discursive and social place/status of "the other/2nd mother "
 - The place of the "relationship" in the homoparental family
 - The original desire for a child as shaping parenthood (Théry, 2014)
 - The notion of adoption in marriage for all. What it means to "adopt" a (one own's) child—legal/social reciprocal dimension
- Not all points will be fully discussed here

Global Theoretical Framework

- Theory of Speech Acts (Austin, 1962)
- Theory of Performativity (as developed by Butler, 2004, 2005 +)
- French Discourse Analysis
- Verbal Violence (Moise, Romain, Auger, Fracchiolla, Baider et al. since 2008) /Gender Studies
- + Conception of the Laws also as being “social memory frames” (“cadres sociaux de la mémoire” according to Halbwachs (1997))

What the law(s)
say
(union between
2 people)

- France knows a variety of possible unions for 2 persons, including:
 - **Marriage (civil code)**
 - Cohabitation (concubinage)
 - [PACS](#) (civil pact of solidarity) (contract – 1999) *
 - “Marriage for all” (17 May 2013)
- Only “Marriage” modifies the civil status
- “Legal Discourse” both confirms and creates certain situations and related representations, in France, by discriminating, to progressively include (?) instead of including directly.

What the law(s) say about filiation

- The true discrimination operates at the level of **parentage** recognition:
- **Marriage – PACS – Concubinage** → **declaration**
- **Model of heterosexual recognition of parentage**
- “**Marriage for all**” (17 May 2013)
- **Reserved for same sex people** – specific parentage which operates only through adoption by the non biological parent
- (NB: **in case there is no father declared**)

Social effects of Marriage « for all » (Paradoxical name!) :

- ° legitimizes the spouses's status
- ° opens adoption's right for the non bio mother

My research

My actual **research** (Laboratoire d'études de genre et de sexualité UMR 8238), based on a corpus of 18 interviews made with lesbian families over these years **reveals a variety of points that are discriminating in this law**

– and the fact that **the law puts mothers in situations felt violent by the mothers**, especially by the « second mothers »



Points of felt
violence +
evidence of
discrimination

- **Even if they never wanted to get married**, they find themselves obliged to do so to secure their children:

- The **2nd mother** doesn't have any legal/recognized relationship with the child until adoption is pronounced (which takes minimum 6 to 9 months)

→ So if something happens to the biological mother, she can never see her child(ren) again – it entirely depends of the will of the bio mother's family:

9P2: "So I was the one who went to register the birth at the town hall so that I would appear as a third party declaring, but in fact.. it is the only mention of me that existed before the adoption" (N ° 9)

adoption legitimation / security, protection of both parents are at stake (child's interest first)

Getting married for their children's sake/protection

Example 1

Political fears:

- **7P1** : « **we got married in July 2014 (...)** more than a year after the law (...) **I was the one who insisted on 7P2 that she would do so because I was afraid** that we would have a window of shooting a little short and that after all this..., **we didn't know if Hollande was going to be maintained and that if we had Marine Le Pen passing, maybe (...)** that she threatened to annul the marriage for all (...) and therefore I kept saying 7P2, "we have to launch, we have to launch";
 - **and then hey, it was still necessary to also get married even if it was a formality, it is not completely a formality either.** So, finally, we started that in July 2014, so we got married, we didn't have a big party again, (...) well we still marked the occasion, but we didn't do everything the hoopla, we just had a little party at home ». (n°7)
- Couple who was already engaged in a PACS (had a big party for it)
- Marriage was a necessity to get protection / but a burden too

Getting
married for
their children's
sake/protection

Example 2

- 10P1 : « ***that's the reason we got married, in fact (...) it's the one and only reason because I knew 10P1 wanted to be pregnant, and I told her (...) OK, (...) on the other hand, let me warn you, we don't have children, we don't even consider having a procedure if we are not married, just because in my head in fact, that was really the thing which guaranteed with legitimation*** (n ° 10)

Getting
married for
their children's
sake/protection

Example 2

- 9P2: « so there were several things, that is, there was already, the fact that **the child had to be over 6 months old**, so that was the first thing. **Marriage, for us has never been a goal or a wish, nor to get a PACS.** We have a connection to that which is not necessarily ... **well we really got married so that I adopt (the child's name).** **But I don't think we would ever have married or entered into a civil partnership otherwise... for reasons of, I was going to say, of conviction » (n°9)**

Getting
married for
their children's
sake/protection
+ spouse

Example 3

- 8P1: "**we didn't have a plan to get married, no (...)** we lived with all these years without getting married (...) afterwards, (...) I think that the getting older, **independently of the question (of the child) you also ask yourself other questions about the protection of the other;** so maybe we would have gotten married for other reasons such as protection, heritage or I don't know what to imagine (...) we never talked about that, but **personally (...)** I never rocked myself in the illusion of "the princess who marries the prince" (...) because there are women who expect marriage as a kind of realization, a kind of outcome (...) so we had a very simple marriage we had the witnesses and us and we had a great restaurant; **it lasted 20 minutes here it is the end of the ceremony (...)** **once again it is a purely administrative process for me, in any case at that time (departure abroad) (...)** **as a matter of fact I do not carry any romanticism on the notion of marriage**" (n° 8)

Points of felt
violence +
evidence of
discrimination

Mothers concerned by assisted reproduction

→ The **legal necessity to prove that one is the mother, and that one has developed a relationship** with the child whereas it is a common project since the beginning of the meeting (difference with adoption by the spouse: difference of 15 years and different adoption modalities, moreover)

→ **Request letters of testimony, photos, police investigation, wait until the child is 6 months old to complete the paperwork,**

→ Testimonies: n°10

Points of felt
violence +
evidence of
discrimination

10P2: *"we started the procedures when the little one was born, we started to ask everyone (...) for certificates, family members, friends etc. who therefore testified that they were witnesses to the fact that we shared this fight together, that I take care of my child .. (...) **I found it extremely humiliating** (...) then we had a little hassle in retrieving the certificates, it took more or less time and anyway in fact the file could not be submitted before the 6 months of the child, because **the court of Bobigny applies the same rule as for an average couple who welcomes a child for adoption within the home; except** that in fact **it is not at all the same situation** but hey... **I am not welcoming a child, well he was already there**... but they do not make the distinction, so it is after 6 months of the child and in fact from there, **each time documents were missing, the documents had to be redone because the birth certificates after 3 months are out of date. In short... it was an impossible life: each time we had to ask for documents that were out of date, (...) in short, it took 2 years in all and for everything.**" (N ° 10)*

Points of felt
violence +
evidence of
discrimination

Mother 1 (Bio) has to fill in a **declaration** with the **notary** saying **she agrees to her child's adoption by her spouse**. She has then **2 months** of delay for possible **retractation**.

Then, after getting married for the sake of their child, when they had to divorce, they also had to pay (it costs money, often, to get a divorce)

Another **violence/humiliation** etc. goes with the obligation to go through a **police inquiry**

Etc.





**And after 8 years,
... the good news is...**



Bioethical Law modifications

August, 2nd 2021

→ modification
of parentage
recognition

• **Two possibilities are effective in terms of filiation:**

1/ The "**A posteriori joint recognition**"

2/ The "**Anticipated joint recognition**"

1/ the « a posteriori » joint recognition concerns the couples of women, **whether they are married, in civil partnership or in a common-law union** who have had recourse to an assisted reproduction abroad **before the promulgation of the law and whose child is already born.**

→ These couples have **3 years from the promulgation** of the law to carry out this process with a **notary** (i.e. until August 3, 2024) **so that the second mother is recognized as such.**

→ The recognition thus established will be notified in the margin of the birth certificate after agreement of the public prosecutor of their department.

Bioethical Law
modifications
August, 2nd 2021

First case:
August 30th,
2021
Bordeaux

2/ The "Anticipated joint recognition"

Anticipated joint recognition concerns the couples of women, **whether they are married, in civil partnership or in a common-law union** who have had / or are going to have recourse to assisted reproduction, **whether in France** or abroad and including the child is not born yet.

- So that currently pregnant women following an assisted reproduction carried out abroad, can now initiate this process with a notary.

Bioethical Law
modifications
August, 2nd 2021

→ modification
of parentage
recognition

→ This (new) law revision no longer makes marriage necessary to establish filiation.

→ In this, it makes obsolete the major discrimination established by marriage for all (during 7 years) :
(corpora of interviews)

→ While dramatically reducing the heaviness of the procedure (+ the symbolic and collateral costs), **it remains nonetheless discriminating** because it obliges mothers **to have recourse to a notary.**

While heterosexual filiation is based only on a simple declaration

What changes and what doesn't

→ This law concerns only children procreation through Medically assisted reproduction (PMA)

→ It **doesn't work for artisanal procreation** with a man who doesn't want to be a father (but just « give »)

Since the law still considers that there is a lifelong possibility for a man to recognize filiation (genetic testing in particular) (Courduriès)

→ So the concept **of double standard law** continues to be relevant, despite efforts to avoid it

→ It especially **reveals** itself in the fact that **heterosexual couples who go through assisted medicated procreation don't have to go through this process** –

Conclusion 1

- **Moreover**, it leaves on the side all the other types of conceptions where a donor doesn't want to be a father, but really « gives » his sperm: **with the existence of this new law, it even seems to introduce some danger/risk in this type of process as women's couples who won't be using the 2nd/8/21 law might be suspected of « hiding » a potential father under the « donor » 's figure.**
- So that what we see here at work, once again, in **French law at least, seems to be moving towards a fragmentation of cases through a sophisticated and increasingly complex legal apparatus, which ultimately multiplies the exceptions even more.**

Conclusion 2

- The law of the **marriage for all (2013)** but also of that of **2004 on wearing religious signs** which, in reality, targets homosexuals for the first, for the second the Islamic veil - and therefore Muslim **women** much more than other religions (Fracchiolla, 2021).
- However, one can wonder here about the way in which the notion of exception which enters into account in the writing of these laws, tends in reality to a discriminatory treatment of certain categories of people, especially on the basis of their sex or of their religion, and not an undifferentiated one aimed at fair and equal treatment of all.
- Thus, while the laws are supposed to exist for everyone, on a principle of equity, we can see how some, on the contrary, introduce a double standard.
- **Which I have put in evidence the way in which, in this specific case, the law introduces a certain type of violence under the guise of a recognition of rights. Women ++**

Conclusion 2

- They **create categories** within laws which already exist; therefore they create two-speed laws / two standards / as sub-laws or drawer laws,
- They thus introduce discrimination even though they have the appearance of protective laws
- As a matter of fact, these laws participate in what I have called, first regarding gender, **a discursive system of discrimination** which aims at excluding certain people from certain social roles (under the disguise of protection or openness)

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