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**REPORT**

SUBMITTED

ON BEHALF OF THE MISSION OF INQUIRY <sup>1</sup>

ON THE FAMILY AND THE RIGHTS OF CHILDREN

Chair

Mr. Patrick BLOCHE

Recorder

Ms Valérie PECRESSE

Members

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**VOLUME I**

**REPORT**

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### **Edited English-language version of the French-language Report on the Family and the Rights of Children**

This document was neither edited nor translated by the French Government.  
The portions selected for translation into English were chosen based  
on their potential policy relevance in other jurisdictions.  
A translation of the original French report's full table of contents is provided,  
identifying the portions that were translated and those that were not.  
The complete list of the Mission's proposals is also provided.  
We are thankful for all those who participated in preparing this document.

An affidavit attesting to the accuracy of this translation appears on the last page.

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(All non-shaded portions are included in this edited version)

For complete original report in French, see

[www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf](http://www.assemblee-nationale.fr/12/pdf/rap-info/i2832.pdf)

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## Preface by the President of the Commission

The Commission for Information on the Family and the Rights of the Child will be remembered for the quality of the testimony presented and the debates that were held. However, I could not vote for the report and I would like to explain why.

In creating a Commission in charge of reflecting on the evolution of the family, the President of our National Assembly hoped to open a debate on the subjects of adoption, single parenting, surrogate mothers, and the activation of our domestic-partnership law. Our purpose here was to present a portrait of the family or, rather, of families of today, leading to consideration of the application of certain civil code rules. With this “road map”, the president was challenging the commission to address sensitive societal questions and to rise above our differences of opinions, asking us to listen serenely to positions we might not agree with, far from the passionate climate that too often debases parliamentary debates about the family.

The challenge was accepted: all points of view were heard and no topic was taboo. The interviews considered the variety of opinions, round table discussions were perfectly balanced debates and reports of these attached to our work show the quality of our work and form a base of reference. In spite of this, the creation of the Commission has provoked some mistrust.

The Commission made four trips outside France in Europe to Madrid, London, Brussels and The Hague, and in Canada to Ottawa, Quebec and Montreal. I wish to thank the personnel in the embassies and consulates of these cities who gave a remarkable welcome to the delegations and organized fascinating meetings with political, administrative, and social leaders who presented us with the solutions adopted in their countries along with their limitations. These travel experiences made us realize that these countries, culturally and geographically close to France, show a great capacity for innovations in their rights for the family and in their fight against discrimination, and that these innovations are realized without shaking the foundations of their society.

I would like to honor President Jean-Louis Debré, who in calling someone to lead the Commission from the political opposition has allowed for an unequalled freedom of expression. I also want to salute the openmindedness of Valérie Pécresse, the Commission’s recorder, who was continuously careful to ask questions without prejudice and to listen to all the arguments, making sure all topics were covered.

Granted, the report does not contest any rights, for example, it does not consider restricting adoption by single persons nor does it want to restrict the possibility of children alternating residence with each parent. Granted, too, the report goes in the right direction in its recommendations about the protection of children and in the fight against forced marriage and I approve of these initiatives becoming part of the road map to be unanimously adopted by the Mission.

But I do not share in the analysis that the report makes about the evolution of our society or the legal consequences it draws in this regard.

The report does not take the full measure of the evolution of various types of families. It does not deny (how could it?) the explosion of out-of-wedlock births, the increased number of reconstructed families, the choices made by many to raise a child alone or with a same-sex partner, the success of the gay-inclusive partnership law that has already affected 340,000 of our citizens. (Translation note: French law does not recognize same-sex marriage, however, in October 1999, the National Assembly passed a gay-inclusive domestic-partnership law called the “pacte civil de solidarité”). When the report speaks of these societal changes, it regrets them. The Commission was supposed to see our society as it is, not as it is imagined by the Commission. I fear that the majority of the members of the Commission prefer to see our society as they wish it would be, showing their preference for the traditional model of the family – a father and mother united in marriage, living together with their children – a model whose erosion the Commission deplures.

Marriage is presented as the only organization for a couple to truly ensure the safety of a child. This leaves little room for couples who choose to have children outside of marriage and for the 400,000 children, nearly half of all those born each year, who are born outside marriage. This calls back in question a recent evolution of our legal rights aiming to treat all children in the same manner, regardless of their parents’ status. Can we still make marriage the foundation of the family when parental rights are now deemed nearly identical for children born in or out of the framework of marriage, when even the notion of illegitimate or legitimate children has been recently stricken from our legal code?

The report shows disproportionate favoritism towards the biological dimension of relationships, considering it as a safeguard for the child. The biological ties between a child and the adults who raise the child have never proved to be the assurance of a good upbringing.

The Commission itself acknowledges this by denouncing, with good reason, the “ideology of the familial ties” on which we still base our concepts of the protection of children and in recommending, in the interests of the child, more frequent recourse to foster homes.

Placing the foundation of the family on biological ties does not take into account the suffering endured by infertile couples and shows little consideration for their ability to raise a child. It overlooks rather too easily a whole section of our civil code in which the presumption of paternity allows the anchoring of a relationship outside of biological ties, awarding custody of the child to the person who is raising him or her and not necessarily to the person who conceived the child. The favoritism showed by the Commission for biological ties leads it to justify the restrictive conditions presently required to adopt conjointly – a different-sex couple, presently married – because of its resemblance to the biological model. It seems we would have to limit adoptions to parents who could appear to the child as if they might have conceived him or her. Should we make a rule of law based on false appearance at a time when our society aspires to greater transparency?

The child’s best interests constituted the commission’s guiding principle. These interests are in truth the most pertinent criteria in determining the evolution of family rights. But the report chose to immediately oppose, in its first section, the rights of children to adults’ aspirations, quickly comparing this to the claims of the rights of the child, without making sure the two are compatible. Nevertheless, in offering to certain couples the possibility to procreate with the help of modern medicine, the law already allows for the fulfillment of the desire to have children when nature is not willing, recognizing in this way a form of a right to children, without the legislature seeing in this an attempt to infringe upon the rights of the child.

The commission too easily rejects the need to respect the principle of equality, which, along with the best interests of the child, should guide, in my opinion, all study of the rights of the family. In this manner, the defense of the rights of the child is used to maintain inequality between all couples: because it should not be allowed to invoke a right to children, a homosexual couple could not benefit from the rights offered by marriage. This position led the Commission to justify that two men or two women who are homosexuals, who love each other and who have built a life together cannot will their possession in the way a married couple is able to and must continue to be considered to be without family ties with one another over which brothers or sisters have precedence. I cannot approve of this discrimination. In the same manner, I cannot condone the reasoning leading the Commission to refuse to reaffirm the rights of any person, be it a homosexual, who is able demonstrate the required qualifications

needed to welcome and raise a child, to be allowed to apply for adoption. This would encourage the hypocrisy of some to hide the existence of a same-sex partner in order to be able to adopt. This also would maintain a territorial inequality, leaving to the general counsels the possibility to exclude *a priori* the adoption requests coming from homosexual persons.

Finally, the report adopts a defensive posture to oppose some of the reforms already adopted elsewhere, in the name of preserving the French model, as if, when facing the solutions adopted by our neighbors, our opinion would necessarily be right. No one denies the rights of the State to preserve its specificity, especially on a topic as fundamental as the family. But this specificity needs to be justified. The English, the Spaniards and the Belgians do not respect human dignity any less than we do. They respect it in a different way than we do, being more attentive in the fight against all discrimination. I think we need not try to teach them lessons in ethics.

Patrick BLOCHE

## INTRODUCTION

Everyone recognizes the role of the family. It remains a basic benchmark of society, the symbolic setting in which relations between the sexes, between generations and between freedom and authority are formed. It is within the family unit that solidarity finds its first expression, respect for others is learned, the first learning experiences take place, and values are passed on. The family is a central link in the chain of social cohesion that must be protected, as article 16 of the Universal Declaration of Human Rights states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Everyone also recognizes, however, how much the family has changed. It has undergone a transformation affecting all Western countries to varying degrees. Historically, family forms have diversified in response to the demands of society and to medical progress. Aspiring to greater autonomy has led to instability in family structures, the signs of which are now an established part of our changing demographics: more divorces, a proliferation of informal unions, and the appearance of unprecedented forms of blended families. The idea of a family “model” is challenged by each person’s desire to choose his or her own family relationships. Lengthening life expectancy is changing intergenerational relations and biological advances offer new possibilities for procreation.

How then are we to protect the basic unit of social life while at the same time dealing with the changes affecting it?

Seeking an answer to this question, on December 7, 2004, at the suggestion of Speaker Jean-Louis Debré, the Conference of Speakers of the National Assembly established a mission of inquiry on the family and the rights of children.

Taking its cue from the title bestowed on it, the Mission decided that the interests of the child should be its central concern. Any reflecting upon the family is bound to take into consideration the profound upheavals that have occurred regarding the status of children, essentially under pressure from international law. The child now has rights and the aspirations of adults can no longer be systematically placed ahead of respect for these rights.

The rights of the child and, more specifically, the international standards adopted to safeguard them were thus the baseline for the Mission’s examination of changes in the family. The United Nations Convention on the Rights of the Child (the New York Convention) indicated the two themes that formed the

basis for its deliberations: the child's right to a family and the child's right to be protected.

First, a child has a right to grow up within a family. This right, recognized in the New York Convention as essential to the development of the child, is founded on the bond of filiation and the exercise of parental authority. Various provisions of the Convention are designed to clarify the extent of the child's right to a family, which is organized in accordance with the best interests of the child during his or her minority: the right to know his or her parents (article 7), the right to be cared for by them (also article 7), the right to maintain ties with both parents (article 18), and designation of the best interests of the child as the paramount consideration in adoption (article 21).

A child also has a right to be protected, including in relation to the members of the child's family when they may compromise the child's development. Article 3 of the New York Convention requires States Parties to "take all appropriate legislative and administrative measures" to afford the child "such protection and care as is necessary for his or her well-being." We must therefore seek a balance between respect for privacy and the guarantees that society must extend to all individuals, particularly the weakest among us.

On the basis of these two themes, the Mission endeavoured to respond to the practical difficulties faced by families. It sought to hear all points of view, irrespective of any taboo, in order to embrace the diversity of society.

Reflecting upon changes in the family means asking ourselves questions about the constituents of the law that underlies it. Noting the changes in the modes of family life, Mission members were called upon to exercise their responsibility as legislators: what should the role of the law be in response to changes in society? Having deliberated, the Mission is convinced that a systematic effort to adapt the law to behaviour would amount to a standard-setting chase from ahead. On the contrary, our standards should enable individuals to grow on the basis of stable, certain and comprehensible criteria. The symbolic power of the law should reflect the need for points of reference expressed by our fellow citizens. As Dean Carbonnier taught, the Civil Code should be amended only with "trembling hands", that is, with much prudence and with no attempt to stimulate social evolution through legislative revolution.

The Mission travelled abroad to take the measure of reforms—spectacular ones in some cases—initiated by certain countries. From its travels has emerged the conviction that globalization and the contractual regulation of our dealings with each other should not prevent each state from preserving its specific character, free of the obligation to model itself on the boldest legislation. Each state exists

to develop its own response to what society seeks, in accordance with its own ethical principles, traditions and political choices.

## PART 1: THE EVOLUTION OF THE FAMILY AS IT AFFECTS THE CHILD: RIGHTS *OF* THE CHILD AS OPPOSED TO RIGHTS *TO* THE CHILD

The Mission chose to begin its deliberations by considering the bases, the evolution and the current state of the family given the need to see France as it is and not as Mission members imagine it to be. The Mission was thus able to gauge the extent to which the family is now child-centred: with the growing instability of couples, the child is increasingly seen as a source of identity for the parents and the basis of the family unit; the child is now desired, chosen, and perhaps even claimed as an entitlement. In the face of this evolution, the Mission is convinced of the need to assert the rights of the child and to ensure these rights are respected.

### I. THE CHANGING FAMILY AND THE VALUE ATTRIBUTED TO THE DESIRE TO HAVE CHILDREN

The term “family” means individuals united by blood or marriage, but it also means the institution that regulates their union. It can mean a group whose members are joined by ties of marriage and filiation and who share a home – a group that used to be referred to as a “household” – as well as a larger group of kin, including relatives and allies, regardless of the relationships they maintain or fail to maintain among themselves. The term can have even a wider meaning when used in the old sense of “house” – that of a noble lineage.

These definitions may seem superfluous since family realities are so much a part of our society. It does seem, however, that in the last few decades, the family has undergone major changes, both demographic and more fundamental, which may have appeared to shake some of its foundations and which are leading to a reappraisal of the concept of family as enshrined in the laws of France.

The Civil Code does not define “family”. Article 213 merely observes, “*The spouses together provide moral and material direction for the family. They provide for the upbringing of the children and prepare a future for them*”, while article 215 mentions the choice of the “*family residence*”. Both these articles specify the rights and obligations of the spouses. The other occurrences of the word “family” relate mainly to family records (the *livret de famille*), the family council and the family name.

While it does not contain, strictly speaking, a definition either, the Code of social action and of families, which largely replaced the Code of the family and

social assistance<sup>1</sup> and whose title emphasizes the plurality of family composition, mentions in article L. 211-1 the groups of persons who can form associations recognized as “family associations”. These have as their “*essential purpose the defence of all material and moral interests, whether of all families or of certain categories of families and [...] group:*

- *families constituted by marriage and filiation;*
- *married couples without children;*
- *all natural persons having legal custody of children by filiation or adoption, or exercising parental authority or guardianship over one or more children of whom they have effective and permanent care...*”

While the first two categories correspond to “traditional” families, the third, introduced in 1975,<sup>2</sup> is intended to cover the diversification of family composition by including among “family associations” those that group parents living alone with their children and families formed outside marriage. Such persons must have both a legal bond with the children (ties of legitimate, natural or adoptive filiation, the exercise of parental authority or guardianship) and care of the children.

These criteria recently led the National union of family associations to approve the association known as SOS Papa [SOS Father]. On the other hand, the Association of gay and lesbian parents and parents-to-be was not approved on the grounds that homosexual parents-to-be who, even though they want children, meet none of the required conditions to form a family association.

## **A. THE FAMILY REMAINS A FUNDAMENTAL VALUE**

### **1. The changes in the family must be considered in their historical context**

Although the press regularly reports on the alleged “crisis” within the family or proclaims its “rehabilitation”, the Mission is convinced this oversimplification does not properly reflect the evolution of the family structure.

#### ***a) Is there a model for the “Western family”?***

The “crisis” within the family refers to what is regarded as the traditional family, that is, the nuclear family consisting of a father and a mother united in marriage and their legitimate children. Such a family is primarily a product of history and of Western culture.

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<sup>1</sup> Most of the provisions of the Code of the family and of social assistance were repealed by article 4 of Order No. 2000-1249 of December 21, 2000 and incorporated in the new Code of social action and of families.

<sup>2</sup> By-Law No. 75-629 of July 11, 1975, amending articles 1 to 16 of the Code of the family and of social assistance, which had been created by the Order of March 3, 1945.

Robert Neuburger sees a cultural oddity in “*the current family, the ‘conjugal’ family, to use Lévi-Strauss’s term, which I call the ‘PME’ family – père, mère, enfant, or father, mother, child.*” He notes that “*the farther back we go, the rarer such families are, including in the history of France, since in this country, the model has long been the peasant family, structured around a patriarch and expanding from hearth to hearth. Children were raised within an expanded group and not by two parents.*”<sup>3</sup>

André Burguière shares this view: “*All our judgments of the current state of the family and its problems – for example, when we talk about the ‘decline’ or the ‘crisis’ of the family – are based on a long history of stability that is by and large a myth.*”<sup>4</sup> He believes that “*as the officialization of an alliance between a man and a woman, but more than that between two families, ... marriage exists in practically all societies*”, but that in the West, it was embraced and promoted by the Church only beginning in the 15th century “*as a way of rescuing the individual from insecurity and solitude.*” The Church insisted on reciprocal donation and the spouses’ free consent, which were embodied in the self-administration of the sacrament of marriage. In the following century, the state, alarmed by the development of the misalliances allowed by “clandestine” marriages based on love matches, imposed strict controls by families over the choice of a spouse, while the Church undertook to restrict sexuality to the conjugal sphere, as witness the near-disappearance of illegitimate births from the second half of the 17th century onwards.

While the foundations of the “traditional” family were thus already in place, it is not the family model of the modern era whose elimination we mourn today. The authority of the father was absolute, including in the choice of a spouse, and limited the autonomy of individuals. Infant mortality, long an impediment to parental attachment to young children, fell only very gradually.

Families in those times were not really more stable than those of today in that the death of a parent and the remarriage of the survivor was such a common occurrence. It was not unusual for a man to have a series of wives or for the children of several unions to live together until the older orphans were scattered among other members of the extended family. While the causes of this phenomenon were very far removed from those at the origin of today’s blended families, this type of cohabitation was relatively common at that time, with fathers remarrying very soon after being widowed so that a woman could take care of their children (and their home).

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<sup>3</sup> Round table of November 2, 2005

<sup>4</sup> Hearing of March 9, 2005.

Appearing before the Mission, François de Singly thus made a clear distinction between this traditional family of pre-Revolution times and the “traditional” family generally referred to: “*What is commonly called the traditional family is itself a modern form of family, the true traditional family having disappeared long ago. Thus it is not really that people are nostalgic for this traditional family, but rather that people are critical of the evolution from what I might call ‘Modern Family 1’, from the end of the 19th century until 1960, to ‘Modern Family 2’*”.<sup>5</sup> The former is based on the model of the woman in the home dependent on her husband, while the latter appeared with women’s autonomy and individualization.

The inescapable conclusion is that, strictly speaking, there is no traditional Western family model. This led Martine Segalen to point out that, although for the last two centuries the family has constantly been thought to be in crisis, “*in reality this manifold and changing institution is in no more danger today than it was yesterday*” and “*the image of the happy, stable Western family is a myth*”.<sup>6</sup>

Claude Martin<sup>7</sup> shares with like-minded commentators the rejection of the nostalgic vision of a mythical Golden Age of the family, which he places in the *Trente Glorieuses*, the 30-year period following the end of World War II, the glory of which is seen as not only an economic phenomenon but also a family phenomenon. This period witnessed, to a certain degree, the high point of Modern Family 1, which François de Singly<sup>8</sup> places between the end of the 19th century and the 1960s.

In fact, whereas World War I had broken up countless families and had major demographic consequences, the years after WWII were marked by a “*family institution... that was then stable and fertile, its stability due to the fact that only one marriage in eleven ended in divorce, and there was a clear distinction and an obvious complementarity between the respective roles of the sexes, which could be summed up as Mr. Breadwinner and Mrs. Housewife.*” With very early and numerous marriages (only one person in ten born in the generations from 1945 to 1950 did not marry), the fertility index for married couples was about 3 and the gross nuptiality index 8 per 1,000 inhabitants.

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<sup>5</sup> Hearing of March 22, 2005.

<sup>6</sup> Hearing of March 9, 2005.

<sup>7</sup> Hearing of February 15, 2005.

<sup>8</sup> Hearing of March 22, 2005.

### *b) The impact on society of changes in the family*

The Mission heard testimony that changes in the family have had a relative impact on society.

For example, after denouncing nostalgia for the Golden Age of the family, Claude Martin questioned the impact on society as a whole of changes in the family. He pointed out that “*contrary to widespread thinking, the evolution of the family is not the cause of such social problems as rising delinquency or the weakening of family solidarity, but the outcome of a series of social changes related, in particular, to developments in the job market, production and consumption patterns, social mores, and the conditions under which parents have to assume their child-raising duties or help their own parents who have become dependents.*”<sup>9</sup>

Eric Fassin asserted, “*Anthropology, as a social science, whether French-speaking or American, refutes the existence of a universal definition of marriage or of the family.*”<sup>10</sup> From this point of view, gradual changes in the family are inevitable and are in themselves neither good nor bad.

In keeping with these relative assessments, Maurice Godelier advanced the basic theoretical position that “*the family is always one element of a system of kinship and nowhere does the family or kinship form the basis of a society.*”<sup>11</sup> The European system of kinship, based on the monogamous nuclear family, is non-linear, with a child “descending” from both his paternal relatives and his maternal relatives. The system is found in different times and places, particularly among the Inuit and the Garia of New Guinea – societies that have had no contact with each other and, in any case, are dissimilar.

However, a majority of the Mission is convinced that individualism and primacy of emotional choices can weaken intra-family solidarity, challenge the ability of parents to assume their responsibilities towards their descendants, and thus have an impact on the organization of society.

Assigning relative importance to the place of the family in society and the social repercussions of changes affecting it is vigorously contested by Charles Melman, who told the Mission that “*the institution of the family... seems to be characteristic of our species in the sense that well before our history began to be written down, and as the expression of an authority of which we know nothing, it brought a man and a woman together to maintain a*

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<sup>9</sup> Hearing of February 15, 2005.

<sup>10</sup> Round table of October 12, 2005.

<sup>11</sup> Hearing of March 9, 2005.

*stable liaison for the purpose of producing and raising children. That is the basic feature of this institution, which moreover forms the social group, which has never been made up of individuals, but rather of families.”*<sup>12</sup>

Most representatives of the major monotheistic religions and some freemasons<sup>13</sup> heard by the Mission also consider the family the basis of society. In the view of Chief Rabbi Sitruk, “*The family is the basic cell of society and all other social structures, however noble they may be, are secondary to it.*” Archbishop of Paris André Vingt-Trois feels that the role of the family justifies its being enshrined in the law: “*Even though it has not taken the modern form familiar in our civil legislation, there has always been a means of handing things down from generation to generation, which is the very basis of continuity and stability in a society. This transmission between generations is primarily effected by the family. It is the legal framework of family life that structures the transmission of life and shapes the future of society.*”

Emphasizing the special place occupied by the family in society gives legitimacy to society’s involvement in the operation of the family unit on behalf of the common interest. Regardless of the answer everyone provides to this question, however, the defence of the interests of children, who everyone agrees are the foundation of any society’s future, unarguably justifies the legislator’s total attention to the conditions under which children are born and raised.

## **2. The magnitude of recent changes should not conceal the permanent aspects of family life**

The magnitude and rapidity of the changes the French family has experienced in the last 40 years or so explain the concerns expressed in the idea of the “crisis” within the family. Demographic data provide clear evidence of these changes, but there are also aspects of family life that are obviously permanent and these must not be underestimated.

### ***a) Undeniable demographic changes***

While the demographic data presented here are for France, ours is far from being the only country affected by these changes. It in fact occupies the middle ground in Europe, as the two tables in Appendix 2 show.

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<sup>12</sup> *Idem.*

<sup>13</sup> Hearings and round table of December 7, 2005.

- ***The decline of marriage as the basis of family formation***

According to the National institute for demographic studies (INED), 394,000 marriages were celebrated in 1970 compared with only 279,000 in 2002. In the case of first marriages, average age at marriage has risen by more than 5½ years since 1970: it now stands at 30.4 for men, and 28.2 for women. Also, whereas only one person in ten born between 1945 and 1950 did not marry, the figure will be three in ten for the generation born in 1970.

This decline in marriage has been accompanied by a growth in informal unions: these are more common, and last much longer, than before. While in the early 1970s, one couple in six began their union with an informal phase, this is true of nine out of ten couples today. In 1975, half of these informal unions developed into marriages within two years, compared with only one in three in 1985 and one in five in 1995. De facto unions are thus becoming a perfectly commonplace way of living together that no longer involves only the very young or those on the margins of society, but is, on the contrary, particularly widespread among men and women who have already experienced a relationship break-up.

Cohabitation is no longer generally followed, as it was in the 1970s, by marriage when the couple wants or is expecting a child; marriage is no longer considered a prerequisite for bringing a child into the world. Moreover, the most visible consequence of this increase in de facto unions and their duration is a proliferation of births outside marriage, which represented 44% of all births in 2002, more than half (56%) of the births of first children, a third of the births of second children, and almost a quarter of the births of third children. Thus, of children born outside marriage in the 1990s, only 40% will see their parents marry and only two out of three before age six.

The proportion of 44% of births outside marriage is relatively high in Western Europe and places France among the leaders in the frequency of this phenomenon, just behind Sweden (56% in 2002), Norway (50%) and Denmark (45%).

- ***The growing fragility of unions***

The generalization of pre-marital cohabitation has not reduced the frequency of divorce, and unions begun outside marriage, whether followed by marriage or not, are more fragile than direct marriages. According to the INED, among first unions begun around 1980, the break-up rate before five years was 11% for unions begun outside marriage and 5% for the rest; before ten years, it was, respectively, 22% and 12%.

There are now 42 divorces per 100 marriages, compared with 12 per 100 in 1970. The divorce indicator went from 11 divorces per 100 marriages at the end of the 1960s to over 30 by 1985; it stood at 38% from 1995 to 2001 and then rose again, to 42% in 2003. This is an annual indicator that includes all marriages subject to the risk of divorce. Since divorce may occur well into a marriage, many years have to pass before we can estimate the frequency of divorce in marriages celebrated in a given year. Thus, the frequency of 11 divorces per 100 marriages is in fact for couples married in 1950; the 30% frequency is for those married around 1970; it should exceed 38% beginning with those married around 1984. Today, it is around year five of a marriage that the risk of divorce is highest, but however long the union has lasted, the risk of a break-up is always higher for those married in a given year than for those married earlier.

Among first unions that began around 1980, whether they took the form of marriage or not, 8% broke up within five years and 17% within ten. For first unions that began around 1990, the proportion of break-ups was almost double before five years (15%) and 28% within ten. When the union began outside marriage, the break-up rate is 17% within five years and 30% within ten. France Prioux, director of research at the INED, therefore concludes that “*conjugal instability is increasing in all categories of union.*”<sup>14</sup>

The greater fragility of unions has consequences for the conditions under which some parents exercise their parental authority: the greater frequency of separations leads to a proliferation of situations in which one of the parents “divorces” his/her child and ceases to fulfill his/her parental obligations.

- ***The growth in single-parent and blended families***

The later start of first unions and the increased frequency of break-ups have led to a reduction in the proportion of people below age 55-60 living as a couple and an increase in the number of people living alone, who represent 14% of the population.<sup>15</sup> Between age 35 and age 50, it is mainly men who live alone, since after a break-up, the children most often live with their mother.

In all, according to the INED, in 1999, nearly 3 million children,<sup>16</sup> or more than one in five (22%), did not live with both their parents: 2.2 million (15.8%) lived with one parent, most with their mother (13.9% of all children), some (1.9%) with their father; 0.8 million children (6.2%) lived with one of their parents and

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<sup>14</sup> Hearing of February 15, 2005.

<sup>15</sup> Most are over 55.

<sup>16</sup> Unless otherwise noted, “children” are persons under 18.

a stepparent. Some 4.3 million young people under 25 lived in a single-parent or blended family.

The term “single-parent” must be used with care, however. Some 95% of children born outside marriage are recognized by their father. Children raised solely by their mother are admittedly more numerous, but there is a father. After a separation, more than 40% of fathers see their child at least once a month. Single-parent families reflect very different situations depending upon the father’s presence among the children.

Because of the time that elapses between a break-up and the formation of a new couple and the lower frequency of the “re-coupling” of separated women with custody of their children, children living in “single-parent” families are substantially more numerous than those who live with a parent and a stepparent. Their proportion in relation to all children rises with their age: 9% of children under 2 live in a single-parent family; this is the case with 14% of those between 7 and 11, and 19% of those between 18 and 24 still living in the family home. Whatever their age, this proportion grew from two to four points between 1990 and 1999. In that time period, in fact, the number of single-parent families with at least one child under 25 grew by more than 240,000, from 1.4 million to 1.64 million, whereas the total number of families with one or more children under 25 fell by 300,000. The number of single-parent families has thus continued to rise, with these families representing 9.4% of all families in 1968, 10.2% in 1982, 15.3% in 1990 and 18.6% in 1999.

In 1999, 0.8 million children under 18 lived with one parent and a stepparent, a figure that rose to 1.1 million for all those under 25. Of the latter group, 0.5 million lived only with those two persons, while 0.6 million lived with a half-brother or half-sister. If we add those children living with both parents and one or more half-brothers or half-sisters, there were 1.6 million young people under 25 living in a blended family, out of the 16.3 million living in the parental home.<sup>17</sup>

The table below shows the diversity of families in 1990 and 1999:

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<sup>17</sup> In addition, 1.9 million under-25s had left the parental home.

**FRENCH FAMILIES WITH AT LEAST ONE CHILD UNDER 25 IN 1990 AND 1999**

	<b>1990</b>		<b>1999</b>		<b>Change 1999/1990 %</b>
	<b>Number</b>	<b>%</b>	<b>Number</b>	<b>%</b>	
<b>“Traditional” families</b>	7,083,000	77.6	6,474,000	73.4	-8.6
<b>Single-parent families</b>	1,397,000	15.3	1,640,000	18.6	17.4
<b>Blended families, including:</b>	646,000	7.1	708,000	8.0	9.6
- no children of the present couple	310,000	3.4	328,000	3.7	5.8
- children of the present couple and a previous union	336,000	3.7	380,000	4.3	13.1
<b>All families</b>	9,126,000	100	8,822,000	100	-3.3

Sources: INSEE, *Étude de l'histoire familiale* [study of family history], 1999, and *Enquête Famille* [family survey], 1990.

• **Smaller families started later**

Average age at marriage has risen substantially. While there is less and less of a connection, average age of mothers at the birth of children has also risen considerably. According to the National institute for statistics and economic studies (INSEE), the average age of mothers<sup>18</sup> was 27.6 in 1960; it fell to 26.5 in 1977 before rising to 28 by 1987, 29 in 1995 and 29.6 in 2004.

In 1980, 35.85% of mothers were between 15 and 24 at the birth of their first child, 56.08% between 25 and 34, and 8.07% 35 or over. In 2001, these percentages were 17.42, 65.9 and 16.68, respectively. The average age of women at the birth of their first child is now approaching 28, whereas it was below 24 in the early 1970s. It has risen by two years over the last decade.

After reaching a low of 1.1% in the 1970s, the proportion of children born to a woman over 40 was 3.4% in 2004, well below the 6.5% recorded in 1901, but this figure recently attracted the attention of the Superior council on population and the family. The council was concerned about the trend towards increasingly late pregnancies in general and first pregnancies in particular. It stressed the additional risks that delay entails both to the child and to the mother, such risks being especially high for women experiencing a late first pregnancy.

It should be noted, however, that the rising average age of mothers has not had a serious effect on the birth rate in this country. The fertility rate for France,

<sup>18</sup> All births, regardless of family rank.

which was 1.89 children per woman on average in 2000, compared with 1.7 in the mid-1990s, places us atop the European Union together with Ireland (1.98), the Community average before the 2004 expansion standing at 1.45.

While France's fertility rate is respectable, family size is nevertheless shrinking gradually, as the following table shows:

**FRENCH FAMILIES BY NUMBER OF CHILDREN UNDER 18, FROM 1968 TO 1999<sup>19</sup>**

<b>Number of families</b>	<b>1968</b>	<b>1975</b>	<b>1982</b>	<b>1990<sup>20</sup></b>	<b>1999</b>
<b>Total (millions)</b>	12.1	13.2	14.1	15.4	16.1
<b>With no children (%)</b>	44.0	44.3	46.1	51.3	53.9
<b>With children (%)</b>	56.0	55.7	53.9	48.7	46.1
- 1 child	22.6	23.6	23.4	21.3	20.6
- 2 children	17.0	18.0	19.4	17.9	17.2
- 3 children	8.8	8.3	7.7	6.9	6.3
- 4 children	4.0	3.2	2.2	1.7	1.4
- 5 children	1.8	1.4	0.8	0.5	0.4
- 6 or more children	1.8	1.2	0.5	0.3	0.2
<b>Total number of children (millions)</b>	14.6	14.8	14.3	13.7	13.3
<b>Average number of children per family with children</b>	2.16	2.02	1.88	1.84	1.79

Sources: 1968, 1975 and 1982 censuses, used at 1/20; 1990, survey at 1/4; 1999, supplementary use.

Families with more than three children<sup>21</sup> are increasingly rare: they represented only 4% of families with children under 18 in 1999, compared with 15% in 1968.

### ***b) Unchanging factors***

While the statistical and sociological data show indisputable changes, this does not mean we should underestimate the things that do not change.

- ***Four-fifths of children live with both their parents, married or unmarried***

As the INED noted in 1999, 73.4% of families with children under 25 matched the traditional family pattern and 78% of minors lived with both their parents.

<sup>19</sup> The table does not give the number of children per couple, but the number of children in families, defined as anyone living in the same household as his or her parents, regardless of age, if he or she has no spouse or child living in the household with whom he or she would constitute a family if an adult. These families include single-parent families. The composition at a given date is used.

<sup>20</sup> In 1990, the number of families was calculated using the new definition of children of families; compared with the old definition, only the total number of families and the number of families with no children of the age specified are different.

<sup>21</sup> Includes only children from 0 to age 18. If children up to age 24 are included, 9.2% of families had more than 3 children in 1968, compared with fewer than 3% in 1999.

Appearing before the Mission, Robert Rochefort, director general of the Centre de recherche pour l'étude et l'observation des conditions de vie, which researches living conditions, estimated that 85% of children under 15 lived with both their parents. It seemed to him that *“the factors favouring stability ultimately triumph over the factors driving change”* and that *“families are thus resisting, for the time being, the developments sometimes proclaimed by reports, where one woman in three, during her lifetime, will experience a family break-up that will leave her living alone or that almost one marriage in two will end in divorce.”*<sup>22</sup>

The INED does not hesitate to include unmarried parents in what it calls the traditional family pattern because the choice between marriage and an informal union has no great impact on family life. True, informal unions break up more easily and on average do not last as long as marriages, but the rise in divorces makes the difference relative. While the presumption of paternity constitutes the essence of marriage, children born out of wedlock are nevertheless very widely and promptly acknowledged by their parents.

In a study published in January 1999,<sup>23</sup> the INED estimated that more than a third of children born outside marriage in 1994 had been acknowledged before they were born, jointly in almost all cases. Some 82% of children were recognized by their father within one month (compared with only a third of children born outside marriage in 1965 and 1970), and 92% were ultimately recognized. Some 94% of babies recognized by their father within a month were living at that time with both their parents, whereas the proportion was only about 80% in the late 1960s and early 1970s. In 1999, 89% of children born outside marriage were recognized before the age of one month and the INED estimates that 95% of children born outside marriage in 2002 will receive paternal recognition. About 40,000 children older than one month born in 1999 lacked paternal recognition, but at age 1, the number had dropped to no more than 30,000. Lastly, only 15,000 children born in 2002 are expected to remain without paternal recognition, about as many as in the 1960s, when fewer than 6% of births took place outside marriage.

Thus, being born outside marriage now only rarely affects acknowledgment or filiation of children. Since the law no longer distinguishes between legitimate and natural children, the situation of such children is similar, and birth outside marriage does not really make any difference to the upbringing or life of the child.

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<sup>22</sup> Hearing of March 2, 2005.

<sup>23</sup> “Naître hors mariage [Born out of wedlock]”, *Bulletin mensuel d'information de l'INED*, No. 342, January 1999.

Thus, Irène Théry was able to follow Claude Martin and state, “*Today, all things being equal, it is felt that family living, consumption patterns and the way children are raised show no significant differences based on whether or not the parents are married. It is now common for natural and legitimate families to coexist under the same roof, with no distinction in their daily lives. Differences in social bonds are much more significant than differences in legal status.*”<sup>24</sup>

- ***The increasing prevalence of mothers working outside the home has had little impact on the division of labour between spouses***

In Europe, France is unusual in combining expanding fertility and a high level of participation by women in the labour market. In March 2001, almost 80% of women between 25 and 49 were working, with the result that a large majority (nearly 6 out of 10) of couples with children were both employed. This proportion falls as the number of children rises: while 64% of couples with two children were both working, the proportion was down to 44% among couples with three children. While this trend should herald what Claude Martin calls “*a new contract between the sexes’ and the disappearance of the Mr. Breadwinner stereotype relying on the domestic and childrearing labours of Mrs. Housewife*”,<sup>25</sup> it must be said that this is not really the case.

Two-thirds of the housework and caring tasks is still handled by women, who devote twice as much time to this work every day (five hours, on average) as men. Claude Martin adds, “*This inequality is all the more marked since we are talking about hard-core domestic labour (errands, cooking, dishwashing, laundry, ironing)* and he concludes, “*In short, changes in thinking seem to run ahead of changes in practises.*”<sup>26</sup>

Robert Rochefort made the same observation before the Mission, noting the distinction between domestic and parental tasks: men assume only 30% of the former, but 40% of the latter. He further estimated that “*it would be a mistake to believe that Frenchmen favour the elimination of all distinction between men’s and women’s roles.*”<sup>27</sup>

While Robert Neuburger notes that “*women can act as fathers today without that causing problems*” and “*some men make perfectly satisfactory moms,*

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<sup>24</sup> Irène Théry, *Couple, filiation et parenté aujourd’hui. Le droit face aux mutations de la famille et de la vie privée* [Couples, filiation and parenthood today: changes in the family and in private life, in relation to the law], Paris, Odile Jacob – La documentation française, 1998, p. 44.

<sup>25</sup> Claude Martin, “Familles et générations : grandes tendances [Families and generations: major trends]”, in *L’état de la France 2003*, Paris, La Découverte, pp. 74-80

<sup>26</sup> Hearing of February 15, 2005.

<sup>27</sup> Hearing of March 2, 2005.

which was not the case forty years ago”,<sup>28</sup> the separation between the parental role and the sexual identity is only relative and affects only a small part of daily family life.

Lastly, whatever the outward changes, the distribution of labour within the family largely continues to reflect a “traditional” model.

### **3. The French are very much attached to the family**

While a certain form of “traditional” family is tending to evolve, it is mainly the institutional aspect of the family that draws criticism, whereas its emotional dimension is still cherished.

#### ***a) The family: a value, rather than an institution***

Robert Rochefort analysed opposition to the institutional dimension of the family as follows: *“The changes in family living patterns are not separate from all the institutional crises. The family remains central to social life, but feels the full force of institutional criticism, just as marriage is no longer an institution but remains a value. It is exactly as if the institutional dimension of the family were being rejected, the better to reinforce the idea that it corresponds to genuine values that the institution tended to obscure. For example, while divorce is increasingly accepted, 80% of the French believe it is possible to live an entire life with the same person. Similarly, more of them believe today than did ten or twenty years ago that if people marry, it is because they are deeply in love.”*<sup>29</sup>

Martine Segalen observes the same tendency. She believes that deinstitutionalization affects the couple more than it affects the family itself: *“Our colleague, Louis Roussel, author of La Famille incertaine [The uncertain family], a book that came out in 1989, talks about the ‘deinstitutionalization of the family’. It is true that marriage has lost its magic for young people, although 285,000 marriages are celebrated every year. The couple based on love and equality between the sexes is not institutionalized, but the birth of a child brings about a reinstitutionalization. Filiation is recorded in the civil register, whether the couple is married or not.”* The decline of marriage is the result of many factors, not least among them the cost of the celebration, now seen as a must, which was not at all the case in the 1970s. More fundamentally, however, *“the rejection of marriage is a refusal to subject a couple’s*

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<sup>28</sup> Round table of November 2, 2005.

<sup>29</sup> Hearing of March 2, 2005.

*relationship to forces other than feelings. Love is essentially a private matter, which leaves no room for the interference of the state.”*<sup>30</sup>

***b) The family: an emotional dimension that has become vital***

While the institutional character of the family no longer appears essential, its social usefulness has also greatly diminished in recent centuries, particularly under the pressure of social demands. As André Burguière explained to the Mission, “*The main social functions of the family were gradually transferred to the state. Justice, production and consumption, education, health, which in the Middle Ages were almost entirely the responsibility of the family unit, were henceforth entrusted to the public authorities... The family and the couple thus lost most of their helping functions, now assigned to what is called the welfare state. Since it releases individual aspirations, this development should not be seen exclusively as a deterioration to the extent that it leads to an enhancement of human rights, for example, with respect to countering paternal authority, or to an assertion of social and national bonds as opposed to the exclusive nature of blood ties.*”<sup>31</sup>

Lastly, the family remains a “*refuge in times of crisis*”, which is why, according to Mr. Burguière, Latin countries, where the family culture is strong, tolerate high rates of unemployment more readily than other countries do. Robert Rochefort also feels that “*the family remains a safe haven in an uncertain, disturbing and hostile world.*” Some 60% of the French answer in the affirmative when asked “Do you agree that the family is the only place where you feel free and relaxed?” compared with 70% twenty-five years ago, the decrease being attributed to the increase in the number of people who have experienced one or more separations.

The family, in fact, has an emotional function that is all the stronger because, in reality, this is the only dimension it has retained. Moreover, in Mr. Burguière’s view, the family is “*perhaps the last religion—in the etymological sense of that term—in a secularized world: it connects us, in a mysterious way, with other individuals, in particular with those who have died. The deep attachment to family is related also to the commonly held idea that the family is a world where costs are not counted, where the laws of the marketplace do not apply. This is a myth, of course.*” This respect for the emotional function of the family finds expression in a paradoxical return to the ideal of marriage based on love and the freely given consent of the spouses.

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<sup>30</sup> Martine Segalen, *Sociologie de la famille* [Sociology of the family], Paris, Armand Colin, 2000, p. 131.

<sup>31</sup> Hearing of March 9, 2005.

According to a survey by the French Institute of public opinion (IFOP) in 2000 and despite observed behaviour, 66% of the French say they prefer marriage to de facto union and 98% see the family as a positive model.

## **B. FAMILY TRAJECTORIES HAVE DIVERSIFIED AND TEND TO BE STRUCTURED AROUND THE WISHES OF THE CHILD**

### **1. A development with multiple causes**

In the West, over the last four decades, the family has evolved – transforming itself. *“In any case, why should the family remain unchanged in societies that are rapidly changing?”* asks Claude Martin.<sup>32</sup> *“In order to be understood, therefore, the transformations within the contemporary family must be related to the societal changes that surround and shape it. In fact, family life is not the only kind of organization that has undergone profound change. Everything has changed with regard to French households during this period: the labour market, modes of production and consumption, globalization of the economy, and so on.”*

This analysis is similar to that by Emile Durkheim in his *Introduction à la sociologie de la famille* [Introduction to the sociology of the family]: *“The family of today is no more or less perfect than that of days gone by: it is different because the communities in which it lives are more complex.”*

While the stable traditional nuclear family corresponded to years of continuous growth and full employment experienced by a society based on a strict division of roles between the sexes, our post-industrial society has given rise to a family that is more flexible, non-statutory and vaguely outlined.

#### *a) The rise of individualization*

André Bruguière<sup>33</sup> stressed the transfer of the main social functions of the family to the state, a phenomenon that enabled the family to become centred once more on its emotional dimension.

François de Singly<sup>34</sup> emphasized that the process of individualization is characteristic of the evolution of modern societies. Related to the evolution of the world of ideas and to more favourable economic conditions, the phenomenon has led to the ascendancy of the principle of choice, which has

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<sup>32</sup> Claude Martin, “Familles et générations : grandes tendances”, op. cit.

<sup>33</sup> Hearing of March 9, 2005.

<sup>34</sup> Hearing of March 22, 2005.

moved from the public to the private sphere. As soon as one chooses a spouse, one relinquishes family ties. Love becomes the basis of the union and a destabilizing factor for the family.

Initially, when ‘Modern Family 1’ reigned, individualization was limited to men, while women remained little individualized because of their economic dependence on their husband. Then “*women achieved individualization through gainful employment, education and the loosening of their dependent relationship with their husband.*”

Another milestone was reached with the individualization of the child, who was accorded certain rights and who has attained autonomy at an ever-earlier age. However, Mr de Singly<sup>35</sup> observed that ‘Modern Family 2’, the result of the growing individualization of its members, is also less and less autonomous with its steadily growing recourse to third parties in the form of psychologists or psychoanalysts.

Each individual now aspires to self-realization, a process that can lead him/her to remain united with his/her spouse only for as long as the union is fully satisfying. He/she no longer works things out and does not hesitate to break up a union, be it common law or legalized through marriage. Thus, as Martine Segalen puts it, “*The concept of the together-forever couple of the 1960s, whose plans were all long term, would give way to an embrace of the ephemeral.*”<sup>36</sup>

#### ***b) Affirmation of the principle of equality***

The first step in the affirmation of the principle of equality concerned men and women. There can be little doubt that this affirmation has not yet been fully realized in practice. Despite a series of legislative provisions, in the working world, career and salary inequalities persist. Sociologist François de Singly points out that they are less apparent between men and women than between fathers and mothers. Pay differences between single people are not especially significant, whereas they begin to widen as children are born. Mr. de Singly notes that “*we are still influenced by the old model that working women have not overturned: it is primarily the man’s responsibility to generate income. Thus, when a child is sick, the fact that it is the mother who stops working is regarded as a given.*”<sup>37</sup> Thus, behaviour changes slowly, but the principle of equality continues to be asserted. It has been reflected in the Civil Code since passage of the Law of June 4, 1970, which replaced the concept of “paternal authority” with “parental authority” shared between the father and the mother.

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<sup>35</sup> Hearing of March 22, 2005.

<sup>36</sup> Martine Segalen, *Sociologie de la famille*, op. cit.

<sup>37</sup> Hearing of March 22, 2005.

Incorporating the loss of some of the father's authority, this change in wording led not only to an equalization of status between father and mother, but also to a change in the relationship between parents and their children. François de Singly thus speaks of a "*contemporary family that is more democratic: the wife and the child – the two dominated persons in past generations, the two 'minors' – are no longer seen in the same way. Both have acquired rights.*"<sup>38</sup> Thus, the child has also acquired autonomy and, while not his or her parents' equal, at least in law, is increasingly consulted. The place of the child within the family has therefore changed.

This affirmation of the principle of equality finds expression today in the claim for equal rights between couples, whatever their sexual orientation. According to Maurice Godelier,<sup>39</sup> such claims are appropriate to democratic European societies, in which minorities claim the same rights as the majority enjoys. While, except in special cases, a homosexual parent shares parental authority over a child born of a previous heterosexual union and may obtain custody, the claims of associations for the defence of the rights of homosexuals relate to access for same-sex couples to marriage, adoption and medically assisted conception.

### *c) Scientific advances*

Owing to the development of contraception and the legalization of the deliberate termination of a pregnancy, the birth of a child is almost always desired. Nature is thus subordinated to the independent decisions of men and women. This initial upheaval in filiation has been followed by a second: medically assisted conception. Scientific progress makes it possible to deviate even farther from biological rules: through medically assisted conception with a donor (of gametes), a woman can give birth to a child of which she is not the biological mother or of which her companion is not the biological father.

Thus, scientific advances enable previously infertile couples to have a family.

The quantitative importance of such practices should not be overestimated and their use is very strictly controlled in France.<sup>40</sup> In 2000, 11,000 children were

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<sup>38</sup> François de Singly (ed.), *Enfant – adultes. Vers une égalité de statuts ?* [Children and adults: towards equal status?], Universalis, 2004, p. 17.

<sup>39</sup> Hearing of March 9, 2005.

<sup>40</sup> As we will see, article L. 2141-2 of the Code of public health states that: "*Medical assistance with conception is intended to respond to the parental desires of a couple. Its purpose is to remedy infertility whose pathological nature has been medically diagnosed, or to prevent the transmission to the child or to a member of the couple of a particularly serious disease. The man and woman forming the couple must be alive, of childbearing age, married or able to prove that they have been living together for at least two years, and must give prior consent to the transfer of embryos or to insemination. [...]*"

born as a result of medically assisted conception. This figure represents 1.5% of total births. Only 1,000 of these births, however, were the result of insemination with a donor. By comparison, 5,000 children are adopted every year in France. Thus, while the number of *in vitro* fertilizations is constantly increasing to overcome the sterility of many couples, the cases in which medically assisted conception leads to a split between the progenitor and the parent remain very rare (around 0.1% of births).

The very fact that this possibility exists, medically speaking, raises a series of legal and ethical issues. It would in fact enable single women or women living as a couple to bring a child into the world with the help of an anonymous donor, as well as enable male couples to use a surrogate mother to achieve filiation, particularly as such practices have now been legalized in neighbouring countries.

Professor of medicine Henri Atlan reveals even more dizzying prospects in describing the development, over the medium term, of an ectogenesis technique: an artificial uterus allowing human embryos to develop outside a woman's body from fertilization to birth.<sup>41</sup> Recent debates about human cloning also attest to how reproductive science can violate the rules of nature.

The Law on bioethics of 2004, intended as a preventive measure, makes human cloning a crime against humanity. An international initiative to outlaw the practice is being led at the UN by Germany and France.

In the field of procreation and satisfying the desire for children, the legislator must be careful not to play the role of the sorcerer's apprentice and must keep ethical safeguards in place.

## **2. The diversification of family composition**

The value systems among families do not differ fundamentally regardless of the different legal relationships between their members, but family composition has varied greatly over time. The "traditional" family was founded by marriage; children were born and grew up within it before leaving to start families of their own; the parents then found themselves a couple once again until one of them died. Today, as François de Singly explained to the Mission, every man and woman follows a personal life cycle that goes through various stages. Thus, family life may be experienced in a number of forms, from the traditional one –

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<sup>41</sup> Henri Atlan, *L'utérus artificiel* [the artificial uterus], Paris, Seuil, 2005.

<sup>41</sup> Hearing of March 22, 2005.

organized around marriage or not – to episodes of single parenthood and on to blends of varying longevity. However, “*a person does not change value systems as he or she passes through marriage, divorce, being single and then forming a new couple. Simply put, individualism is a system that generates various stages in our personal life cycle.*”<sup>42</sup>

Robert Rochefort refers to the “experiential” temptation: “*We legitimize only what we consider positive after experiencing it. Because experiences sometimes turn out badly early in adulthood, the family is constructed empirically, chaotically, in a process of trial and error.* Marcela Iacub offers a similar analysis, believing that separation or divorce, rather than being considered personal failures, “*should be seen as experiences related to our freedom that, like any other such experience, can involve suffering and hidden desires, but at the same time enable us to understand ourselves and to understand other people.*”<sup>43</sup>

This wide variety of family situations during a lifetime and this impermanence in family life disrupt the places and roles of family members. In particular, parents’ ability to provide continuity in carrying out their duty to their children despite these changing situations is challenged.

In the extreme, we can see a dissociation of the three components of parenthood: the biological role (that of procreation), the legal role (that of the fount of parental authority) and the social role (the day-to-day raising of the child) could, in some blended families, cease to be assumed by the same person. Thus, a second husband may take care, on an everyday basis, of his spouse’s offspring, with whom he has no biological or legal connection, while his spouse shares parental authority with the children’s father. If the children were adopted or born of a medically assisted procedure with a donor, their legal father is not their biological father.

### **3. The child as the essential basis of the modern family**

The family is increasingly centred on the child. In the face of changes in family life and conjugal relations in particular, the child appears to be the only enduring reality. Whereas in the past, marriage was the prerequisite for the formation of a family, today the prerequisite is essentially the presence of children.

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<sup>42</sup> Round table of April 13, 2005.

Martine Segalen told the Mission, “*Studies show that when a member of a family lives with a spouse outside marriage, that person is considered to belong to the family only from the birth of a child on.*”<sup>44</sup> In the increasingly frequent absence of marriage, therefore, it is indeed the child that makes the family. In fact, by making the relationship between his/her parents irreversible, the child brings each of them into the other’s family, something a childless common-law relationship does not necessarily do.

Children are increasingly sought as a source of identity for the adult, and the desire for children is assuming greater and greater value. Ms Segalen pointed out that the concept of “a desire for children” is a recent one because in societies without contraception, children arrived naturally without being truly chosen. Having children was something that happened unbidden and served as a rite of passage into adulthood. Since women have been able to control births, things have changed radically. Ms Segalen believes that the couple, formed solely around the concept of love, wants to “*find an image of itself via the child*”<sup>45</sup> and that the parents thereby prolong their own existence. She stresses that the media glorify the desire for children.

André Burguière believes that the desire for children recently became individualized: “*People want a child for themselves.*” Thus, this desire is “*both more relative and more intense than ever.*”<sup>46</sup> This means that it is no longer reserved for heterosexual couples, but shared by single men and women and same-sex couples. And it is developing into a right to children that society should allow for. Such a development is at odds with the ethical principles enshrined in the laws of France, particularly the prohibition against making children the subject and source of a transaction.

### **C. IN A GLOBALIZED WORLD, FAMILY LAW REMAINS THE PRODUCT OF A CULTURE AND OF A NATION’S POLICY CHOICES**

The celebration of the desire for children and the movement to transform this desire into a right to have children are common to contemporary Western societies. The law reflects these phenomena to a greater or lesser degree from country to country since this is a sensitive subject that nations must address, each nation having its own traditions and its own values to defend. While globalization accelerates the homogenization of certain aspirations and the

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<sup>44</sup> Hearing of March 9, 2005.

<sup>45</sup> Hearing of March 9, 2005.

<sup>46</sup> *Idem.*

dissemination of certain practices, it should not necessarily entail an alignment of national laws with whichever law is the most permissive.

### **1. Globalization and the possibilities for circumventing French law**

Family law, particularly with regard to filiation, has in some countries undergone profound reforms that have radically altered family configurations. In this connection, Quebec, which the Mission visited, has been especially imaginative in putting in place a system of filiation that achieves an unrivalled complexity (see the table below). Laws that apply in other countries exert an undeniable attraction in the case of some couples that are unable to procreate and even in the case of single persons who want children.

### FILIACTION IN QUEBEC

	Spouses and persons in a civil union			De facto spouses			Single persons
	Man + woman	Man + man	Woman + woman	Man + man	Woman + woman	Man + woman	Man or woman
<b>Filiation by blood</b>	Paternal filiation bond	-	-	-	-	Paternal bond	1 paternal or
	Maternal filiation bond					Maternal bond	maternal bond
	Presumption of spouse's paternity	-	-	-	-	-	-
	Recognition of paternity or maternity	-	-	-	-	Recognition	Recognition
	Registration of birth by father and mother, or either on behalf of both	-	-	-	-	Registration by each	Registration by the parent
Rights and obligations for both parents <sup>47</sup>	-	-	-	-	Rights and obligations for both parents	Rights and obligations by the parent	
<b>Filiation by assisted conception</b>	Paternal filiation bond	-	1 maternal bond	-	1 maternal bond	1 maternal bond	1 maternal bond
	Maternal filiation bond	Surrogate mother against public order	1 other maternal bond with the spouse	Surrogate mother against public order	1 maternal bond with the spouse or civil liability	1 paternal bond or civil responsibility	(surrogate mother against public order)
	Presumption of paternity of spouse		Presumption of parenthood of the spouse	-	-	-	-
	If there has been a sexual relationship, possibility of establishing the father's biological bond in the year of birth		If sexual r'p, poss. of est. the father's biological bond in the year	-	If sexual r'p, poss. of est. the father's biological bond in the year	If sexual rel'p, poss. of est. the father's biological bond in the year	If sexual rel'p, poss. of est. the father's biological bond in the year
	Registration of the birth by the father and the mother, or either on behalf of both		Registration by the mother and co-mother, or either on behalf of both	-	Registration by the mother and co-mother	Registration by each	Registration for the parent
Rights and obligations for both parents		Rights and obligations for the mother and co-mother	-	Rights and obligations for the mother and co-mother	Rights and obligations for both parents	Rights and obligations for the parent	

<sup>47</sup> **Rights and obligations of parents:** parental authority, custody, upbringing, obligation to feed and care for, consent to care, obligation to provide support, recognition in law.

*Note: Principle: all children whose filiation is established have the same rights and obligations.*

<b>Filiation by adoption</b>	Single adoption: 1 bond of paternal or maternal filiation (minimum age difference between adopter and adoptee: 18 years/minor child other than person having had a parental role or court decision						
	Adoption of the child of one's spouse: 1 new bond of paternal or maternal filiation (without age difference between adopter and adoptee						-
	Joint adoption: Paternal filiation bond	Joint adoption: 2 paternal filiation bonds	Joint adoption: 2 maternal filiation bonds	Joint adoption: 2 paternal filiation bonds	Joint adoption: 2 maternal filiation bonds	Joint adoption: Paternal bond	Joint adoption: 2 paternal and/or maternal bonds
	Maternal filiation bond					Maternal bond	
	Registration of birth by the director of vital statistics on receipt of the adoption order						
Rights and obligations for the adoptive parent or parents							

**For homosexual couples:** In cases where the law assigns distinct rights and obligations to each parent, the one that has a biological bond to the child has the rights and obligations of the father, in the case of a male couple, or of the mother, in the case of a female couple, and the co-mother or adopter has the rights and obligations the law assigns to the other parent. When neither parent has a biological bond, the adoption order determines the rights and obligations of each.  
Source: Ministère de la justice du Québec [Québec ministry of justice]

When the desire for a child faces an impossibility, be it a pathological condition that legalized medically assisted conception cannot remedy or the lack of a sex difference within the couple, those who aspire to parenthood have an opportunity to resort to solutions available in other countries. Even single people can go abroad to satisfy their desire for a child. Thus, in recent years, a form of “procreational” tourism has developed.

For example, a number of French couples have taken advantage of surrogate motherhood overseas, most often in California, where the law in this area is very liberal and recognizes the intended mother as the mother of the child. The surrogate mother may be Belgian and may come to France, specifically to the Nord district, to give birth secretly, thus enabling the father to recognize the child while she herself retains her anonymity.

While it is very difficult to assess how many children have been conceived in this way, in recent years there has been a significant increase in artificial inseminations of homosexual women with a third-party donor. Apart from Belgium, where such inseminations have been performed for more than twenty years and where it is very easy to go to Thalys, the Netherlands and, more recently, Spain have been the main destinations for French women since the procedure requires a number of monthly inseminations on a date that is difficult to predict accurately, which means using a centre not too far from home. Fertility centres have procedures that vary slightly from one to another and involve consultation with a psychologist to verify that the woman has made a clear decision and the child will be raised in an environment offering some stability.

Belgian fertility centres are thus accustomed to providing service to numerous female couples from France: the demand is so great that there are waiting lists and the centres are short of sperm donors. The strong demand in France for ovocyte donations – a demand exceeding supply – is leading French women who qualify on medical grounds in France for third-party donor insemination to contact Spanish clinics, which do not face the same difficulties because they pay their donors.

The existence of these practices and optimization of legal differences between countries indicate a trend towards the commercialization of procreation. Like any other commercial practice, it faces the risk of an imbalance between supply and demand.

The imbalance is particularly pronounced with respect to adoption and has led to scandalous practices in international adoption that were denounced by witnesses appearing before the Mission. Despite procedures for approving candidates for adoption and the vigilance of authorities both in the countries where the future parents live and in those where the children were born, abuses are widespread.

Françoise Dekeuwer-Defossez reported some practices that equate adoption with the purchase of children: “*Others much better qualified than I am could also talk to you about the financial abuses associated with adoptions abroad, the adopters’ first move being to see their banker. In the meantime, other countries are not going to continue sending us children indefinitely under the current dubious conditions.*”<sup>48</sup> Obviously, the despair of some couples in wealthier countries that yearn for a child makes them easy prey for unscrupulous individuals who do not hesitate to sell children to Westerners.

Abuses are also seen in surrogate gestation practices, including in countries where they are not prohibited. For example, last spring, a Belgian surrogate mother turned over the baby she had just brought into the world to a Dutch couple she found over the Internet who offered her more money than the intended parents, who were the child’s genetic mother and father.

All these practices illustrate the consequences of globalization for the constitution of the family. The rights of the children are not in fact a central concern of those who engage in these practices and national laws designed to enhance respect for such rights are battling a trend that some say is irreversible.

To the extent that legislation is intended to set standards, rather than merely endorse existing practices, it is perfectly legitimate for it not to accept everything and to continue to prohibit those practices considered most deleterious for the child. This assessment may vary from country to country, so it is not surprising that family law also varies.

## **2. Family law: a national creation**

Because family law affects a foundation of society and must respect the values on which society is built, it remains a profoundly national area of law.

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<sup>48</sup> Hearing of October 5, 2005.

European Community law is essentially limited to resolving the difficulties that can arise given the freedom to travel within the Community and the development of “international” families, but family law lies outside the areas governed by Community standards. The European Convention on Human Rights guarantees rights and freedoms that the family law of each country must respect, but it does not define “family”. On the other hand, it does recognize and protect family relationships insofar as they involve individual rights and freedoms.<sup>49</sup>

The standards of the European Union and the Council of Europe do affirm some major shared principles: freedom to marry and start a family, freedom to live apart or outside marriage, equality of men and women and of children, equality of families and parents’ joint responsibility for their children. But these standards leave significant leeway for states in their application of these principles, which are not absolute in nature. The right to marry is exercised in accordance with the national laws that regulate it, so that states are free, for example, to allow or prohibit marriage between persons of the same sex. The right to start a family cannot be interpreted as a right to a family, so that states could not be required to make adoption and medically assisted conception techniques available to same-sex couples. Nor does anything require them to create special kinds of status for de facto spouses of the same sex or different sexes, and some social benefits can continue to be reserved for married couples without infringing upon any international standard.

It is true that, particularly as a result of the influence of such international standards, there are convergent trends underway. For example, the equality of families formed within and outside marriage is gaining ground everywhere as a result of changing customs and a constantly growing concern to avoid any measure that might be judged discriminatory. Similarly, the Community’s system of free circulation of persons and the assimilation of Community residents to national residents promotes the gradual transmission by contact, as it were, of the most liberal provisions in that other member states are led to grant the same rights as any one of them extends to its nationals.

However, this phenomenon is in no sense an abrupt legal revolution: it takes place gradually and is accompanied by changes in attitudes that facilitate its acceptance. The speed of dissemination of law from state to state depends mainly on the principles, traditions and political choices that make each country distinct. For example, thirty years after its accession to the European Union,

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<sup>49</sup> See Hugues Fulchiron, “Existe-t-il un modèle familial européen ?” [Does a European model of the family exist?], *Recueil Defrénois*, No. 19/05, pp. 1461-1478.

Ireland still does not allow deliberate interruption of pregnancy<sup>50</sup> and divorce is prohibited in Malta.

Thus, the pressure of practices elsewhere and of international law on the family law of a given country must be qualified. Above all, such pressure cannot constitute a valid argument for defending one kind of change or another. In this area, it is best to measure very carefully and objectively all the consequences of any contemplated change in legislation, particularly with respect to the rights of children, and not to be won over by the ease of imitating the choices made by other countries in circumstances that are necessarily different from those that each state has to deal with. This is what France did, moreover, when it passed legislation on bioethics and on accompanied termination of life.

Given the transformation of the family, what in fact should the role of the legislator be? At its hearings, the Mission was repeatedly questioned on this issue.

Archbishop of Paris André Vingt-Trois presented his concept of the formulation of laws: *“Can the law be content with regulating private contracts? Is legislation on the family merely an adjudication offered in order to prevent crises in the family from becoming too violent or harmful for individuals? I very gladly recognize that it is the legislator’s legitimate purpose to create conditions in which family crises will not turn into disasters. However, I would be concerned were legislation to be restricted to enshrining existing conditions. In a democratic society such as ours, the legislator’s duty is not just to record and legalize a multitude of special cases, necessarily impossible to develop into a general case, which is normally the only one written into law. The law strives for a measure of universality and must normally be intended to apply to the greatest number of a country’s citizens. The idea that legalizing special situations could be a way of extending recognition to them seems to me to be an abuse of legislation in the sense that the law would then be merely window-dressing for ethical advocacy. It seems to me that we should act with great caution in this field. It is clear that the purpose of some of the requests is official recognition for special status.”*<sup>51</sup>

Guy Dupuy, a member of the federal council of the Grand Lodge of France, defended the same concept of law: *“I believe that sufficient distinction is not*

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<sup>50</sup> Since 1983, interruption of pregnancy has been allowed when the mother’s life is in danger. Since November 2002, women in Ireland have had the right to seek an interruption of pregnancy abroad and to be informed of that possibility.

<sup>51</sup> Hearing of December 7, 2005.

*being made between what relates to the fundamental rights of the person in general and of children in particular, and what relates to the mores of the moment, to which ordinary law is trying to adapt. We cannot conceive the application of universal rules merely by following the evolution of specific mores.”*<sup>52</sup>

Olivier Abel, representing the Protestant Federation of France before the Mission, called on the legislator to show a measure of humility: *“To the Protestant way of thinking, an ethical tenet does not necessarily seek expression in the form of a written law. This is what Dean Jean Carbonnier was referring to in asking that the legislator legislate only with the utmost care. We must of course protect the weakest among us, which is the purpose of the law, but if the goal is to counter whatever society can imagine, crave or fear, then the law will remain powerless.”*<sup>53</sup>

Philippe Bas, Minister responsible for the social security of the elderly, the disabled and the family, enjoined the legislator to the utmost prudence: *“... In the area of civil law, we cannot seek at all costs to accommodate every possible kind of situation. The law has to remain a universal reference and cannot be adapted to every special case. Of course, there are individual freedoms and there are the realities of social life, but these are not enough to compel legislative intervention... In many cases the child is wanted; having the child is the parents’ dream. But the child is not properly understood as a person and we must do nothing to encourage this concept of the child as an accomplishment, as merely the token of the love of two adults for each other, excluding in a certain respect the child himself or herself from the relationship.”*<sup>54</sup>

The Mission is convinced that the legislator’s first duty is to ensure that as children face changing family structures, they are fully taken into consideration and do not suffer as a result of situations imposed on them by adults. The interests of the child must outweigh the exercise of freedom by adults. Thus, the legislator’s response should be made primarily in the area of affirming the rights of the child, whatever life choices are made by the parents.

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<sup>52</sup> Round table of December 7, 2005.

<sup>53</sup> *Idem.*

<sup>54</sup> Hearing of December 7, 2005.

## **II. AFFIRMATION OF THE RIGHTS OF THE CHILD**

Adopted by acclamation by the General Assembly of the United Nations on November 20, 1989 in New York, the Convention on the Rights of the Child was signed by every state in the world and has been ratified by 192 of them. Only the United States and Somalia, which signed the Convention in February 1995 and May 2002, respectively, have not yet ratified it, but both countries have announced their intention to do so. The Convention enshrines the accession of the child to the status of a person with rights.

France was among the first group of signatories, signing the Convention on January 26, 1990, and it came into force in France on September 6, 1990.

The Convention, which may fairly be called universal, has thus applied in France for almost fifteen years. The implementation of the principles it proclaims has gradually translated into developments in French legislation in numerous areas. Nevertheless, some situations remain subject to criticism in the light of what the Convention stipulates.

On January 25, 1996, the Council of Europe completed a procedure complementing the one that led to the adoption of the International Convention on the Rights of the Child. It prepared a European Convention on the Exercise of Children's Rights, which came into force on July 1, 2000 and was signed by twenty-four member states of the Council, as well as by four non-European states. France signed this Convention, but has yet to ratify it.

## PART 2: THE CHILD'S RIGHT TO A FAMILY

The Mission looked at how French legislation respects the child's right to a family. Three aspects of family law were examined from this point of view: the couple, filiation and parental authority.

### FIRST SUB-PART: WHAT CHANGES IN THE COUPLE MEAN TO THE CHILD

It may seem surprising to begin an analysis of the child's right to a family by addressing the question of the couple when a childless couple—particularly an unmarried one—is not generally regarded by society as forming a family.

In the great majority of cases, however, the couple exists before the birth or arrival of a child and the event does not always effect a change in its legal character. Yet the form of organization of the couple constituted by the parents is not in fact neutral in its consequences for the child, even though legislation has gradually effaced the differences that once existed as a result of the legal circumstances of the birth.

Every individual must be free to choose who is to share his or her life, how the couple's life together is to be structured and how long it is to last. The persistence of practices designed to restrict this freedom cannot be tolerated. Accordingly, the Mission wished to study means of assisting the effort against forced marriages – an effort that also contributes to the protection of children when the victims of such marriages are still minors.

#### I. THE ORGANIZATION OF THE COUPLE

Since Law No. 99-944 of November 15, 1999 concerning the civil union (*pacte civil de solidarité*, or PACS), the Civil Code has provided for three forms of organization for couples: marriage, the civil union created by the Law aforesaid – these two forms being matters of law – and cohabitation (*concubinage*), which is a matter of fact. The difference led Alain Bénabent to state that “*the real contrast is between, on the one hand, cohabitation, which is a de facto union that is merely taken note of, and on the other hand, marriage and the*

*PACS, two real forms of organization between which the essential difference relates to durability and thus to the level of commitment.”*<sup>55</sup>

These three forms of union entail different rights and duties. We find a certain proportionality, in fact, between the rights given to the members of the couple and the duties they agreed to assume in choosing one of these three forms for the organization of their life together. These duties, as Alain Bénabent notes, are related to the “durability” of the commitment (see the attached Table 3).

According to INSEE data, in 1990 only 1.5 million couples were not married: one tenth of all couples. The proportion had risen to one sixth by 1998, when the number of unmarried couples reached 2.4 million. Today, nearly 25 million French people are married, compared with nearly 5 million cohabiting and some 300,000 living in a PACS.<sup>56</sup>

Roughly 280,000 marriages are celebrated each year, compared with about 25,000 PACS unions a year on average between 2000 and 2003, and over 40,000 in 2004.<sup>57</sup> Lastly, the INSEE estimates that 500,000 cohabiting couples are formed annually.

Like France, most European countries offer several forms of couple relationships of varying degrees of formality.

#### **The various forms of couple relationships in the Netherlands**

In the Netherlands, those seeking official recognition of the ties that bind them have three possibilities open to them:

- A cohabitation contract, drawn up by the parties as they please;
- Registered partnership, established by the Law of July 5, 1997 and in force since January 1, 1998, giving homosexual couples a means of making their cohabitation official (the registered partnership is also available to heterosexual couples);
- Marriage, which since April 1, 2001, with the coming into force of the Law of December 21, 2000 providing for same-sex marriage, is no longer necessarily a union of two persons of different sexes.

<sup>55</sup> Round table of October 12, 2005. Except as noted, those who commented with respect to forms of organization of the couple did so at this round table.

<sup>56</sup> According to the Ministry of Justice, between the end of 1999 and the first quarter of 2005, 169,531 PACS unions were declared and 21,531 dissolved.

<sup>57</sup> Nearly 24,500 PACS unions were registered in the first quarter of 2005.

## **– Marriage**

The Netherlands was the first country to recognize same-sex marriage. The rules respecting the conditions and consequences of marriage, the mutual obligations of the spouses and dissolution of the union (divorce being decreed by a judge) are the same, regardless of the couple's sexual orientation.

Same-sex marriage does not have the same legal consequences with regard to children as heterosexual marriage. Thus, it does not establish a bond of filiation between a child and the homosexual spouse of the child's biological father or mother. On the other hand, the spouse does have a duty of care with respect to the child that lasts as long as the marriage.

On January 1, 2002, however, an amendment to the Civil Code came into effect that automatically assigns the exercise of joint parental authority to persons of the same sex who are married when a child is born during the marriage and has, for legal purposes, only one parent. Thus, two women who are married share parental authority if, as a result of artificial insemination, one of them gives birth to a child who, under the law, has no father. On the other hand, the rule does not apply if the birth is not a result of artificial insemination and if the father acknowledges the child at birth.

## **– Other forms of cohabitation**

Heterosexual and homosexual couples who do not wish to marry may choose either a free union under a cohabitation contract, which sets out the rights and obligations of the two partners and has no consequences for third parties, or registered partnership.

When the partners are of opposite sexes, marriage and registered partnership differ with respect to filiation: marriage creates a presumption of paternity, whereas in a registered partnership, the man must acknowledge the child in order to become the legal father.

When occurring between two persons of the same sex, marriage and a registered partnership have the same consequences: they both create a community of assets, and entail the same inheritance and fiscal rights. Similarly, the legal bond with the children is the same in both cases, since the law respecting adoption by two persons of the same sex applies regardless of the legal status of the couple, as do the provisions concerning parental authority, including the automatic sharing of such authority if a child is born during the cohabitation.

Whatever the sex of those involved, however, the main difference is symbolic: marriage is contracted when the two spouses have spoken the solemn "I do", whereas a registered partnership results from a declaration made freely before a registrar.

Moreover, unlike divorce, dissolution of a registered partnership does not require a judicial decision when the two parties agree. If they do, they need merely sign an agreement before a notary or a lawyer that sets out the consequences of the separation (disposition of the shared dwelling, sharing of common assets, pension rights, and so on)

and have it officially registered. Furthermore, judicial separation (*séparation de corps*) is authorized only in the case of marriage.

It is possible to switch from a partnership to a marriage, or the reverse, by means of a conversion agreement, which changes neither the contractual relationship between the spouses nor the bonds of filiation with the children. Thus, the drop in the number of homosexual partnerships beginning in 2001 is generally attributed to the conversion of some of them into marriages.

The Central Statistics Board of the Netherlands provided the following figures:

Year	Partnerships			Marriages		
	Between two men	Between two women	Between a man and a woman	Between two men	Between two women	Between a man and a woman
1998	1,686	1,324	1,626	–	–	86,956
1999	894	863	1,500	–	–	89,428
2000	815	785	1,322	–	–	88,074
2001	285	245	2,847	1,339 <sup>(1)</sup>	1,075 <sup>(1)</sup>	80,432
2002	358	382	7,581	935	903	83,970
2003	446	453	9,074	727	759	81,135

(1) Beginning in April

### A. THREE WAYS TO LIVE TOGETHER: MARRIAGE, CIVIL UNION AND COHABITATION

Alain Bénabent provided an excellent summation of the three ways of living together: *“From the point of view of mutual relations, there is a very obvious gradation. Between those who merely cohabit, there is nothing. The few legal consequences flowing from cohabitation affect only third parties – social agencies in particular – but there are no reciprocal rights or duties either during cohabitation or upon its termination. At the opposite extreme, in marriage we find all the mutual commitments. The PACS is at the mid-point: it entails some mutual commitments copied from those of marriage – the duty of solidarity, the duty of cohabitation – but it entails neither a duty of fidelity (hence no presumption of paternity in a PACS) nor a scheme of inheritance.”*

He noted the link between this gradation of rights and duties and the durability of the commitment: *“There is thus a gradation in the intensity or durability of the commitment, but also in the concept of commitment itself. Cohabitation exists only for as long as the union lasts, but there is no commitment. In a*

*PACS, there is a commitment and there are obligations, but their nature, while not ephemeral, since a PACS can last a long time, is highly precarious from a legal point of view – in other words, subject to interruption at any moment. In marriage, on the contrary, the commitment is durable – which does not mean permanent – in the sense that a procedure must be followed in order to obtain release from it.”*

He notes, however, that while the gradation is very clear regarding the couple’s relationship, it is less clear concerning the relationships between the couple and third parties and seems to vary depending on the aspect involved.

### **1. Conditions of access that are unequally demanding**

Marriage, PACS and cohabitation unite two persons and two persons only. While the Civil Code does not define marriage, article 147 prohibits bigamy and several articles mention “both spouses”. Nor has anyone yet disputed that marriage unites two persons. Article 515-1 defines PACS as a “*contract between two natural persons*”, while article 515-8 states that cohabitation is a de facto union “*between two people*”. The three forms of union are thus intended for couples, but cannot be chosen freely by all couples. The conditions of access to marriage are the most restrictive, while access to cohabitation is totally free and access to PACS lies between the two.

#### ***a) Age***

Under article 144 of the Civil Code, “*men not yet eighteen years of age, and women not yet fifteen years of age, may not contract marriage,*”<sup>58</sup> but article 145 provides for some exceptions to the rule: “*Nevertheless, the Attorney of the Republic where the marriage is celebrated has discretion to waive the age requirements for serious cause.*” Marriage is possible between minors, but requires the consent of those holding parental authority, dissension among them being tantamount to consent.

A PACS, on the other hand, may be contracted only by persons who are of age. This excludes minors, even those emancipated, and persons of age but under the authority of a guardian, although the latter may marry with the consent of a family council convened for the purpose.

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<sup>58</sup> After the Senate, the National Assembly passed first reading in December 15, 2005 of an amendment raising the marriage age for women to eighteen.

The definition of cohabitation in the Code does not mention an age requirement.

*b) The sex of the members of a couple*

While the fact that marriage unites only two persons is not disputed in our societies, the same is no longer true of the condition requiring a difference in sex between the two persons. A marriage said to unite two men was celebrated in Bègles on June 5, 2004. The French judiciary has already ruled against this marriage on three occasions: the superior court (*Tribunal de grande instance*) in Bordeaux came out against it on May 27, 2004, it subsequently declared the marriage null on July 27, 2004 and that decision was confirmed by the Court of Appeal of Bordeaux on April 19, 2005.

This declaration of nullity was based on arguments in French law and European law. The court found that while the Civil Code did not refer expressly to a sex difference between spouses, that was because it went without saying for the drafters of the Code; the court mentioned a number of articles in the Code that refer, in connection with marriage, to a man and a woman. It also recalled the intent of the legislators in 1999: “*Debates and legislative provisions respecting the PACS and cohabitation referred clearly to a difference in sex as a basic condition and a specific characteristic of marriage.*” Lastly, it felt that the European Convention on Human Rights was not violated, either in relation to article 12, which protects the right to marry, jurisprudence having confirmed that this concerned only people of different sexes, or in relation to article 8, concerning the right to respect for private and family life, the existence of a right for homosexual couples to live together being allowed in other circumstances, or in relation to article 14, which prohibits, among other things, “*discrimination on any ground such as sex... or other status*”, which includes sexual orientation. Making the essence of these arguments its own, the Court of Appeal went so far as to consider that “*a difference in sex is a condition for the very existence of marriage*” and that consequently, the celebration that was declared null “*cannot be considered a marriage*”.

The result of the unambiguous reasoning expressed by the Court of Appeal is that in the current state of the law, marriage in France can unite only a man and a woman. This is why the debate submitted to the Mission is not about the meaning of existing law, but about the wisdom of a possible change in the law.

The PACS, on the other hand, as a free union, indisputably can unite two persons of the same sex, as the legislators clearly decided. Article 515-8 of the Code states that two persons living in a de facto union may be “*of different sexes or the same sex*”;<sup>59</sup> the signatories of a PACS may similarly be “*of different sexes or the same sex*”, under article 515-1.

Thus, all three forms of union are available to a heterosexual couple, while a homosexual couple has a choice between the PAC and living in an informal union.

### *c) Impediments*

Just as “*a second marriage may not be contracted before the first is dissolved*” (article 147 of the Civil Code), there cannot be a PACS between two persons either of whom is already bound by a pact or between two persons either of whom is married (article 515-2). On the other hand, a member of a PACS may marry and by so doing dissolves the PACS (article 515-7). This type of impediment does not apply to cohabitation, which is merely a de facto union.<sup>60</sup> The same is true of impediments related to the degree of kinship by blood or marriage between the members of the couple, these applying only to the legal situations created by marriage or a PACS.

Related to the prohibition of incest, impediments consequent upon family bonds apply to marriage and a PACS, although they are not worded in the same way. Direct ascendants and descendants may neither marry nor enter a PACS; nor may relatives by marriage in a direct line or collaterals to the third degree, inclusive. These two forms of union are thus prohibited between a brother and a sister, or an uncle and a niece, for example. On the other hand, the rules for marriage distinguish between cases of absolute incest (between ascendants and descendants, or brother and sister), for which no dispensation can be obtained, and cases of relative incest (between those related by marriage, when the person who contracted the marriage has died, or between an uncle and a niece, or an aunt and a nephew), for which a dispensation is possible. Such dispensations may not be obtained in order to establish a PACS. There is no legal impediment, however, to cohabitation, a purely de facto union.

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<sup>59</sup> The legislators thus put an end to the jurisprudence created by the Third Chamber of the *Cour de cassation* of December 17, 1997 in deciding that persons cohabiting were necessarily of different sexes. However, they did adopt the definition in the jurisprudence of elements constituting cohabitation.

<sup>60</sup> Jurisprudence thus made good the harm suffered by a woman following the accidental death of her married de facto partner; it even indemnified both the spouse and the partner.

## 2. Strongly contrasting duties

Two articles in the Civil Code establish the duties of the spouses to each other: article 212 states that they owe each other “fidelity, succour and assistance” and article 215-1 requires them to “live in community”. The latter corresponds to the chief obligations of marriage, summarized by Loysel as “drinking, sleeping and eating together”. It includes both physical and material community, although the courts have allowed non-performance of the “conjugal duty” in certain cases and the divorce reform Law of July 11, 1975 allows the spouses to have two separate domiciles.<sup>61</sup>

The duty of fidelity forbids a spouse to have sexual relations with a person other than his or her spouse; the aforesaid Law of July 11, 1975 eliminated adultery as a criminal offence, but it remains a civil offence. This duty is the foundation of the presumption of paternity, which applies only in marriage. “Assistance” denotes a duty to provide help and support to a spouse, this duty varying with age, state of health and occupational situation. The duty of succour is directly related to the subsistence obligation between spouses and their contribution to the responsibilities of marriage, set out in article 214. The contribution to the responsibilities of marriage has to do with the upkeep of the household and the raising of children; the duty of succour arises when a spouse is in need, particularly after a separation. During divorce proceedings or after a legal separation, these duties may lead a judge to order one spouse to make support payments to the other. Generally, any failures to meet these obligations are sanctioned only when alleged as fault in a divorce.

Lastly, with regard to the financial consequences of marriage, under article 220, the spouses are jointly liable for debts incurred by either of them for the upkeep of the household or the raising of the children, except where expenses are manifestly excessive or involve time payments or loans contracted without the consent of both spouses.

The duties to each other contracted by the signatories to a PACS are substantially less onerous than those imposed on spouses, but they are also set out in the Civil Code and based on thinking that is fairly close to that regulating marriage. The existence of a life lived together is a condition for the signature of a PACS, which is intended to provide structure for a life together (article 515-1). As the Constitutional Council made clear in its decision on the law

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<sup>61</sup> However, they must choose their place of family residence “by mutual agreement” and there can be only one residence (article 215).

establishing the PACS arrangement,<sup>62</sup> the concept of a shared life is not limited to a community of interests or a requirement merely that two people live together: it presupposes not only a shared residence, but also a life as a couple. The obligation to live together accepted by the signatories to a PACS covers the same reality as the duty to live together imposed on the spouses by marriage. The duty to reside together, however, seems stricter than it is for spouses, since it is interpreted as prohibiting participation in a PACS by persons who are incarcerated.

The other duty resulting from a PACS is found in article 515-4: this is the “mutual material assistance”, the details of which are supposed to be set out in the PACS agreement: the pact. The Constitutional Council indicated in the decision mentioned above that any clause disregarding the mandatory nature of such assistance would be null and that if the pact did not spell out its terms, it would be for the judge of the contract, in the case of a dispute, to define them on the basis of the respective situations of the partners.

As for the shared financial responsibility of the partners in a PACS, it relates to debts contracted by either of them for everyday necessities and the expenses of the common dwelling (article 515-4). Paradoxically, this shared responsibility is absolute, with no provision for exceptions for manifestly excessive expenses or time payments or loans contracted by one partner alone.

Lastly, jurisprudence has added an obligation of loyalty, derived from the common law of contract. This is different from the fidelity demanded in marriage, but a bailiff may be designated to verify a failure to meet this obligation and such a failure may justify cancellation of a PACS, with the delinquent partner being found at fault.

Cohabitation (*concubinage*) entails no legal obligation beyond its essential elements. The Civil Code defines it as a “de facto union characterized by a life shared between two persons that shows stability and continuity”. An informal union thus entails legal consequences only when the situation of the cohabitants (*concubins*) is imbued with a stability resembling that of marriage.

Apart from that, the members of the couple have no legal duty to each other. Thus, for example, even if debts were contracted together, the obligations to creditors are not indivisible; expenses are not a shared responsibility,<sup>63</sup> even if

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<sup>62</sup> Constitutional Council, November 9, 1999, Decision No. 99-419 DC.

<sup>63</sup> There are cases, nevertheless, in which judges apply the theory of appearances: when third parties had legitimate grounds for believing that the cohabitants were married, debts incurred by

incurred for the upkeep of the household or the raising of the children, and each person bears the costs of everyday living he/she has incurred. This lack of a duty to each other means a lack of any right to a compensatory benefit in the event of a break-up of the cohabitation.

Note that while the differences in the duties to each other of the members of a couple are substantial, depending on the type of union chosen, they are non-existent with respect to the duties between each member of the couple and their children, as soon as these children are acknowledged. However, only marriage brings with it a presumption of paternity and exempts the husband from having to acknowledge the children to whom his wife gives birth. The institution of marriage entails consequences with respect to filiation that the other forms of union do not. As Dean Carbonnier has put it, “The heart of a marriage is not the couple, but the presumption of paternity.”

### 3. Partially different rights

It is precisely the gradation of duties entailed respectively by marriage, PACS and cohabitation that justifies the assignment of different duties to couples, depending on the type of union they choose.

#### *a) Social rights that are similar or closely related*

Jurisprudence and the law have produced a gradual convergence of the social rights granted to couples, whatever their legal status. Since a PACS is, at the very least, equated with a form of cohabitation, any right available to cohabitants is automatically available to the members of a PACS, even if its legal basis does not mention this explicitly.

**Family benefits** and **housing assistance** are identical, and **health insurance and maternity** benefits show very few differences. Since the end of the 1940s, a cohabitant is an assign of his or her companion as far as social security is concerned. The social security death benefit is paid to a spouse, a partner or a cohabitant. Article L 161-14 of the Social Security Code equates a cohabitant or a partner in a PACS with a married spouse for health insurance and maternity benefits in kind, but things are not quite the same for benefits in cash: the maternal rest allowance and the replacement indemnity are paid only to collaborating spouses of self-employed workers and not to their partners or

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one may be the responsibility of the other. Such outcomes are exceptions, however: article 220 of the Code is not applicable to cohabitants.

cohabitants; a disabled widow's or widower's pension is paid only to a disabled surviving spouse of a social insurance participant.

The status of collaborating spouse of a self-employed worker being available only to a married spouse, a collaborating partner or cohabitant cannot be affiliated to the **old age scheme** of the self-employed worker. The main difference with respect to old age benefits, however, concerns entitlement to a reverting pension, which is available only to a surviving spouse

A few differences persistent in **labour law**, which grants PACS partners rights that are still denied to de facto partners. Like spouses, but unlike cohabitants, partners enjoy the following rights: two days of leave on the death of a partner, simultaneous leave for partners working for the same employer, application of the Labour Code to the employed partner of a CEO who actually and habitually participates in the activities of the business and draws a salary. On the other hand, only spouses currently have the opportunity to have recourse to a term contract or a person employed by a temporary help agency to replace a spouse who participates in the activities of the business, the opportunity for the spouse to work with a home worker, or the possibility of taking into account the debtor's spouse in setting the quantum of pay subject to seizure.

Lastly, the rules respecting **workplace accidents** allow only the surviving spouse to receive a reverting permanent disability pension.

#### *b) Distinct fiscal rights*

One of the main purposes of the creation of the PACS was to offer people unable or unwilling to marry a status that would allow them to benefit from tax rules more favourable than those applicable to cohabitants, whom tax law treats as third parties with no legal ties (which they in fact are).

#### *• The income tax rules distinguish clearly between, on the one hand, cohabitants and, on the other, spouses and PACS partners*

The Law of November 15, 1999 creating the PACS civil union also created special rights for those concerned where a PACS lasted a minimum of three years. For tax on income in the year following the third anniversary of the registration of their PACS, the partners were entitled to joint taxation, in the same way as spouses, who are so entitled from the date of their marriage. The 2005 Financial Law<sup>64</sup> eliminated the time requirement and the conditions

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<sup>64</sup> Law No. 2004-1484 of December 30, 2004: the 2005 Financial Law.

applicable to tax on the income of PACS partners have since been identical to those for married persons.<sup>65</sup> Like married persons, PACS partners are jointly liable for the payment of tax, as they are for payment of wealth taxes, for which they are also subject to joint taxation.

Cohabitants, however, are taxed separately and, for income tax purposes, must divide between them the number of shares respecting any children in their care.

- ***Inheritance taxes follow the rules specific to each status***

Rights to transfer at no charge are determined by very different rules depending on the legal ties between the members of a couple.

Between spouses, there is an abatement of 76,000 euros over and above the abatement of 50,000 euros applicable to the estate as a whole.<sup>66</sup> There is also an abatement of 20% on the actual market value of the real property constituting the principal residence of the deceased and the spouse. The transfer charge rate brackets range from 5% to 40%.

Between the partners in a PACS, the abatement is 57,000 euros. A 40% rate is applicable to the first portion up to 15,000 and a 50% rate applies to the subsequent portion. As in the case of joint taxation of income, the two-year time requirement for these specific benefits imposed by the Law of November 15, 1999 was eliminated by the 2005 Financial Law, which also extended to a surviving PACS partner the benefit of the 20% abatement on the value of the couple's principal residence.

Between cohabitants, there are no special rules: as between third parties, a 60% levy applies to the value of the assets transferred, with an applicable abatement of only 1,500 euros.

These differences are attributable to the need to limit the risk of fraud. It was for this reason that time requirements for the existence of a PACS were initially imposed in order to benefit from the arrangements specific to such unions. The

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<sup>65</sup> The only remaining difference concerns consequences of separation of the partners (articles 6 and 8 of the General Tax Code): if the PACS is terminated in the calendar year of the separation order or the following year, each partner is taxed separately on the basis of the year of the separation order and the year of the break-up, as if the PACS had never existed; the benefit derived from joint taxation during the existence of the PACS must be repaid. A divorce decreed shortly after a marriage does not have this effect.

<sup>66</sup> This abatement, instituted by the 2005 Financial Law, applies to the net assets of the estate realized either by the children or the ascendants and, if applicable, the widow or widower, or by the latter only.

fact that the partners are jointly liable for the payment of tax made it possible to eliminate this condition shortly after. The lack of obligations between cohabitants explains why they are considered third parties for the purposes of tax law.

- ***Inheritance rules based on dissimilar thinking***

The differences in inheritance tax arrangements are accompanied by equally significant differences in the inheritance rules. The contrast between the various statuses was further accentuated by the Law of December 3, 2001,<sup>67</sup> which improved the rights of the surviving spouse.

Without going into the details of its provisions, we should recall the main principles of this legislation. If the spouse who dies first leaves issue of both spouses, the surviving spouse receives usufruct of all the assets or ownership of one quarter, at their option; if the descendants are not issue of the surviving spouse, the latter receives ownership of one quarter of the assets. If there are no descendants, the surviving spouse receives half the assets if both parents survive the deceased, three quarters if only one parent survives, and the entire estate if neither parent survives the deceased. In the latter case, half the assets in kind inherited by the deceased or received as a gift from his or her parents go to the brothers or sisters of the deceased. If there are no ascendants or descendants, the surviving spouse is even the birthright heir<sup>68</sup> of a quarter of the assets.

There are other benefits granted to the surviving spouse that complement these inheritance rights: a right to enjoyment at no charge of the couple's principal residence for a year, a right to live in the residence if it belonged to the spouses, or a right to use the furnishings, or both, until death, and a right to support if in need, provided application for support is made within one year.

While a spouse is the birthright heir in the absence of ascendants and descendants, neither a partner nor a cohabitant is. Since neither a PACS nor cohabitation entails inheritance rights, a partner or a cohabitant can inherit only as a result of a testamentary provision. After the death of a companion, PACS partner or cohabitant, the survivor may nevertheless secure a transfer of the lease on the shared dwelling, even if the survivor was not a participant when it was signed.

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<sup>67</sup> Law No. 2001-1135 of December 3, 2001 concerning the rights of the surviving spouse and adulterine children, and modernizing various provisions in the law of succession.

<sup>68</sup> Before his or her death, therefore, a spouse is not free to bequeath one quarter of the estate, which will revert to the survivor.

Gifts are irrevocable under common law between PACS partners and cohabitants, whereas gifts of future assets are always revocable between spouses. Since a decision of the *Cour de cassation* on February 3, 1999,<sup>69</sup> gifts between cohabitants are no longer cancelled on grounds of immorality in the case of adultery; the Court felt they were no longer contrary to correct behaviour.

#### **4. Modes of dissolution of varying formality**

While rights and obligations vary considerably with the form of shared living chosen by couples, the modes of dissolution of unions and the material consequences are even more different: depending on the situation, they range from divorce for cause with payment of damages to a mere de facto separation.

Since the late 1990s, about 120,000 divorces have been decreed annually; about 40% of marriages end in this way. While the Law of May 12, 2004<sup>70</sup> made divorce non-adversarial, promoted the search for a consensus between separated spouses and shortened the proceedings, divorce remains a serious step requiring judicial intervention.

There are now four forms of divorce: divorce by mutual consent, when the spouses agree on all the terms of their separation; divorce by acceptance of the principle of marriage breakdown, when the spouses agree to divorce but cannot agree on all the consequences of the separation; divorce through permanent breakdown of the conjugal bond, if one of the spouses does not wish to divorce when the couple has been physically separated for two years; and divorce for cause, when one of the spouses does not wish to divorce while the other accuses him or her of misdeeds that make maintenance of the conjugal bond intolerable. In all forms of divorce, the family court judge intervenes and may merely ratify the agreement between the spouses and issue a divorce decree where there is mutual consent; in other cases, where conciliation has failed, the judge may adopt temporary measures, before the contested stage of the proceedings, during which, if there is no agreement on a settlement, the judge may dissolve the matrimonial scheme and share the patrimony, assign the family dwelling, set any compensatory allowances designed to offset disparities in the living conditions of the spouses caused by the marriage breakdown, or award damages to a spouse who suffers consequences of unusual gravity as a result of the dissolution.

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<sup>69</sup> Cour de cassation, First Civil Chamber, February 3, 1999

<sup>70</sup> Law No. 2004-439 of May 26, 2004 respecting divorce

The Law of May 12, 2004 does, admittedly, stress conciliation and mediation, and the search for an agreed solution to the material problems created by the divorce, but in the absence of agreement between the spouses, the judge decides.

However, no family court judge is involved in the dissolution of a PACS or the termination of an informal union unless, for lack of agreement, a judge is called upon to assign the usual residence or rule on visitation and accommodation rights and support payments if the couple has children. A PACS is dissolved by mutual consent, unilateral break-up, or the marriage or death of a partner. In the first case, it is sufficient for the partners to make a joint declaration to the registrar in the district court where their shared dwelling is located. In the second, the declaration of break-up will be served by the bailiff on the partner, with a copy forwarded to the registrar in the local court where the initial pact was made; the PACS will terminate three months after service. The partner subjected to the break-up may seek reparation for harm, particularly in the case of fault related to the circumstances of the break-up. The same may occur in the case of an abrupt break-up of the PACS caused by the marriage of one partner. A judge will also intervene to resolve any disputes over the sharing of the patrimony and may thus be called upon to act to resolve the consequences of the dissolution of the pact, but does not decree the actual dissolution.

Since cohabitation is a de facto situation, the law does not specify the terms of the break-up. It is not subject to any formal rules and does not entail any compensatory benefits. It is not in itself a fault that can create entitlement to damages, but fairly limited reparation may be granted for an abusive break-up if the circumstances establish fault, through the application of liability for personal actions under common law (article 1382 of the Civil Code). In other circumstances, an indemnity may be obtained when the existence of a de facto community between the cohabitants is demonstrated or the unwarranted enrichment of one cohabitant at the expense of the other is established. These are exceptions, however: the informal nature of the union is revealed in its break-up, the comparison with marriage making the protective character of the latter very clear.

## **B. A BETTER HIERARCHY OF RIGHTS AND DUTIES**

### **3. Republican marriage must remain the basic institution of the family**

The Mission's deliberations have clearly shown the fragilization of republican marriage, with more and more couples making cohabitation a lasting life choice even after the arrival of children in the home. Nevertheless, a majority of the Mission believes that civil marriage has characteristics that, in the interests of the child, justify its retaining its full importance in family law.

*a) Civil marriage is not just a contract*

Marriage is not only the form of shared living that offers the best protection for those choosing it. It is also, and most importantly, the only form that “produces family consequences,” as the Minister of Justice put it in addressing the Mission.<sup>71</sup> Marriage is thus not only the contractual recognition of a couple's love. It is a demanding framework with rights and obligations designed to welcome the child and provide for his or her harmonious development.

Jurists recognize an institutional dimension of marriage, which Jean Hauser describes as follows: “*Marriage is the focus of a right and a fundamental freedom, but unlike many other individual rights that are exercised through actions guided only by the freedom of convention, marriage has another dimension. While it is a right to complete an individual act, it is also a right to choose a model that is defined and protected, at least in principle, by society. Marriage is not only a right or a freedom: it is also a social institution.*”

All the representatives of religious denominations appearing before the Mission<sup>72</sup> unanimously stressed the fundamental role of marriage as an institution on which the family is founded, while acknowledging the French peculiarity of mandatory civil marriage, which makes the institution a pillar of the secular Republic standing clear of the religious sacrament.

Archbishop of Paris André Vingt-Trois justified the role of the institution of marriage within society in these terms: “*Various legislative arrangements of recent decades give credence to the idea that marriage is merely a purely private contract between individuals, based solely on their emotional bond and a desire to be together, of which they themselves define the terms and which they terminate when they so choose. If we persist in this vision of legislative management of private contracts, we exhaust all possibility of expression of society's stake in marriage. Society deprives itself of its legitimate right to state how important marriage is for society's stability and renewal.*”<sup>73</sup>

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<sup>71</sup> Hearing of December 13, 2005.

<sup>72</sup> Hearings of December 7, 2005.

<sup>73</sup> Hearing of December 7, 2005.

Grand Rabbi Joseph Sitruk believes that the “*family* (which he calls) “*legitimate*”, *that is the result of marriage, is the only way of usefully conceiving of the future. Marriage is the basis of responsibility.*”<sup>74</sup>

Some of the Masonic lodges share this conviction, which Jean-Pierre Pilorge, Grand Secretary of the Grand Lodge of France, expressed as follows: “*The social value of marriage lies in its function as the cornerstone of the stability of the family, as the basic cell of society. Through the conjugal union, the heterosexual couple that founds the family provides a stable environment suited to the care of children and the raising of future generations. The family is the basis of the social bond that is created between successive generations through which they learn about love and differences between the sexes. Marriage is the institution on which Western society is founded.*”<sup>75</sup>

This specific dimension of marriage makes it the form of union that best protects the interests of the child. It is also a vital element to be considered in the debate on the possibility of making marriage accessible to persons of the same sex.

***b) Marriage is the form of union that best protects the interests of the child***

Despite the spread of informal unions and the conclusion of a significant number of PACS agreements, marriage still stands apart to the extent that since it is reserved for couples of different sexes, it is alone in entailing a presumption of paternity and continues to offer more significant benefits, particularly from the tax viewpoint.

**• *Children are central to marriage***

The central place that marriage holds for children is clear from the moment of its celebration. The registrar reads five articles from the Civil Code, two of which deal explicitly with the raising of children: article 213 makes the couple responsible for “together ensuring the moral and material direction of the family. They provide for the upbringing of the children and prepare a future for them.” Since passage of the Law of March 4, 2002, article 371-1 of the Code, defining parental authority, is also read. While this article applies to all parents, married or otherwise, reading it during the marriage ceremony emphasizes the family vocation of this union.

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<sup>74</sup> *Idem.*

<sup>75</sup> Round table of December 7, 2005.

As Alain Bénabent noted, in law, the conjugal situation of the parents no longer affects their children, except for the presumption of paternity and joint adoption, reserved for married couples, and a two-year cohabitation requirement imposed on cohabitants, but not on spouses, in order to have access to medically assisted conception. These exceptions may seem peripheral, but they are a good illustration of the family dimension of marriage, which is designed to accommodate children who have been conceived naturally or with medical assistance or adopted, but who will, in every case, have two parents.

Mr. Bénabent believes that the only difference between children of married, PACS or cohabiting parents is “purely psychological” in that children may think that unmarried parents will more readily separate. Edwige Antier, however, stresses the symbolic importance of marriage in the children’s eyes: *“Children like their parents to be married. This official recognition of the bond between them is always symbolically precious to the children, even though they know that married parents can divorce.”*<sup>76</sup>

According to Xavier Lacroix, *“Sources agree that cohabiting couples are on average six times more unstable than married couples and even when they have children, they are still twice as unstable.”* The greater stability of married parents is thus no mere child’s illusion.

He believes above all that *“marriage is the only institution that from the outset links, interconnects and unifies the three dimensions of filiation or parenthood: the biological, the legal and the social.”* In his view, the child’s interest lies in *“being able to rely on a stable, institutional bond between his or her two parents, in other words, on a commitment to be faithful”* and that acknowledgment of a child does not entail the same guarantees as the presumption of paternity: *“Acknowledging a child is indeed making a commitment to that child, but what is such a commitment worth in the absence of any commitment to be faithful to the other parent, that is, if the possibility that one of the parents may leave the family home is deliberately left open?”*

There is no denying that if the parents do separate, the children are better protected if their parents were married than if they were not, since a judge is necessarily involved in a divorce, among other reasons to see to the interests of the children.

Philippe Bas, the Minister responsible for social security, the elderly, persons with disabilities and the family, stated, *“One of the great strengths of marriage*

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<sup>76</sup> Round table of November 30, 2005.

*is, paradoxically, divorce. Why? Because it does not constitute repudiation. There are obligations upon both parents – towards the children, but also towards each other, where applicable – that survive divorce and from the viewpoint of the interests of the children, this is the basis of the superiority of marriage over other arrangements.”*<sup>77</sup>

Jean-Marie Bonnemayre, president of the National council of lay family associations, pointed to this weakness of the informal union compared with marriage: “*Couples who cohabit are, by definition, undeclared to the public authorities. Matters become complicated when they have children and they separate. Such separations, which are not always regulated by the courts and may be described as ‘uncontrolled’, sometimes cause considerable damage.*”<sup>78</sup>

François Édouard, Secretary General of the Trade union confederation of families, makes the same point: “*Cohabiting couples with children have the same obligations and rights as others. But since they are neither married nor PACS partners, their separation experience is especially difficult, which sometimes creates disastrous situations for the children.*”<sup>79</sup>

The Mission believes it is not possible to consider marriage and filiation separately, since the two entities are closely related, marriage being built around children. It is supported in its thinking by the foreign examples. Thus, the countries that have made marriage accessible to same-sex couples have all authorized adoption by such couples and developed systems of assisted conception – even surrogate gestation – to enable such couples to have children.

***c) The man-woman difference must remain the foundation of marriage***

In recent years, access to marriage for persons of the same sex has become a matter of international and national debate. The establishment of the PACS arrangement has made it possible to resolve some practical problems facing same-sex couples. The legal definition of cohabitation that includes heterosexual and homosexual couples has resolved the difficulty caused by the jurisprudence of the *Cour de cassation*, which recognized social rights only within informal couples formed of persons of different sexes.

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<sup>77</sup> Hearing of December 14, 2005.

<sup>78</sup> Round table of June 29, 2005.

<sup>79</sup> *Idem.*

The main practical everyday problems facing same-sex couples have thus been or still can be solved through a PACS or an informal union. The demand to make marriage accessible is thus the product of other thinking: through the affirmation of equality of rights for all couples, it seeks a form of social recognition. This move may seem paradoxical at a time when the institution of marriage is no longer a mandatory social norm either for couples or even for families.

- ***The international legal context***

The fact that same-sex marriage has recently been authorized in a few countries that are geographically or culturally close to France is used as an argument by French advocates of such marriages. Éric Fassin states that this development “*shows us clearly that making marriage available to homosexuals is not the end of the world, but only the end of a world.*” There is no denying, however, that it remains recent and public opinion in the countries concerned sometimes shows a measure of scepticism.

For example, in Canada, in April 2005, during debate on the federal bill designed to respond to decisions by provincial appeal courts in favour of making marriage available to same-sex couples, only 52% of the population approved this change, while 44% opposed it. The contrast between the position of the younger half of the population and that of the older half was significant. And residents of urban areas were more open to the change than persons in rural areas.

In June 2004, a year before Spain made marriage available to persons of the same sex, the Centre for sociological studies estimated that 66% of Spaniards favoured the move and only 26% were opposed. Despite the firm opposition of the churches, opinion thus seemed more broadly favourable to this change in Spain than it is in France.

- ***Same-sex marriage is allowed in some countries***

Two foreign supreme courts have recently ruled in favour of making marriage accessible to persons of the same sex as a means of prohibiting discrimination based on sexual orientation: the Supreme Court of Canada and the Constitutional Court of South Africa.

In Canada, the appeal courts of eight provinces or territories,<sup>80</sup> out of the thirteen jurisdictions that make up the federation, ruled that the right to equality without discrimination required equal access to civil marriage for spouses of the same sex, all of them finding that the prohibition against marriage between two persons of the same sex based on the common law definition of marriage<sup>81</sup> constituted a violation of section 15 of the Canadian Charter of Rights and Freedoms, which has constitutional force and prohibits all forms of discrimination. Asked by the federal government for its opinion on a bill defining “marriage for civil purposes” as “the union of two persons to the exclusion of all others”, the Supreme Court of Canada found not only that the bill was not unconstitutional but, on the contrary, that it reinforced and guaranteed constitutionally recognized rights. On the other hand, the Court declined to answer the question referred to it as to the consistency of the traditional definition of marriage with the Charter of Rights and Freedoms since, in particular, this might compromise the government’s goal of uniformity in the law respecting civil marriage throughout Canada and that could lead to legal confusion regarding previous decisions in lower jurisdictions. The new Civil Marriage Act was finally assented to on July 20, 2005.

The Supreme Court of Appeal of South Africa, in its decision of November 30, 2004 in *Fourie and Another versus Minister of Home Affairs and Another*, went further, holding that the definition of marriage as “a union of one man with one woman” was inconsistent with the Constitution of South Africa and that in order to be consistent with the Constitution, marriage must be defined as “a union of two persons”, without reference to sexual difference. The government appealed this decision to the Constitutional Court, which ruled on December 1, 2005 in favour of same-sex marriage and gave Parliament one year to change the legal definition of marriage, the existing definition in the Marriage Act having been found to be “*inconsistent with the Constitution and... invalid to the extent that it makes no provision for same-sex couples to enjoy the status and entitlements, as well as the responsibilities, which it accords to heterosexual couples.*”

Three American states allow same-sex marriage: Hawaii and Alaska, since 2001, following decisions by their respective courts, and Massachusetts, since a decision by its Supreme Court on February 4, 2004 that “*barring an individual*

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<sup>80</sup> In chronological order: Ontario (July 2002), Quebec (September 2002), British Columbia (May 2003), Yukon (July 2004), Manitoba (September 2004), Nova Scotia (September 2004), Saskatchewan (November 2004) and Newfoundland and Labrador (December 2004)

<sup>81</sup> A definition to be found in particular in the 1866 decision in *Hyde v. Hyde and Woodmansee*, wherein Lord Penzance defined marriage as “the voluntary union for life of one man and one woman, to the exclusion of all others”.

*from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”* The Court gave the Legislature 180 days to amend the marriage laws. When the deadline passed, same-sex marriage became possible in the Commonwealth. Some 4,000 same-sex marriages were also celebrated in San Francisco during February and March 2004 before being annulled by the California Supreme Court in August of that year on the grounds that California law did not allow them. On September 6, 2005, the state legislature narrowly passed a bill allowing same-sex marriage, which the governor vetoed.

Without being influenced by judicial decisions, three other countries—all in Europe—authorized same-sex marriage before the Canadian law was passed:<sup>82</sup> the Netherlands on April 1, 2001, Belgium on June 1, 2003 and Spain, which passed a law on June 30, 2005 removing the sex difference between spouses as a condition. In the Netherlands and Belgium, the consequences of same-sex marriage are similar to those of traditional marriage, except with respect to filiation, although in both countries, joint adoption of a child was finally authorized for all married couples.<sup>83</sup> In Spain as in Canada, the rights and obligations flowing from marriage, including questions of filiation, are the same whether the couple is homosexual or heterosexual.

The example of our neighbours thus corroborates the Mission’s legal analysis wherein the right to marriage and the right to filiation are closely connected. The ban on same-sex marriage cannot be lifted without also lifting the ban on adoption. There is no possible “middle path” for reforming marriage, even in states that, as a result of their culture and traditions, perceive marriage more as a contract than as an institution. We would add that demands for equal rights expressed by associations representing homosexuals cannot be limited merely to a demand for access to marriage without filiation.

**– *European law leaves each state free to choose***

We referred above to the arguments used by the French courts to annul the “marriage” of two men. The European Court of Human Rights has not ruled on

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<sup>82</sup> As a result of rulings by a number of provincial courts, in fact, civil marriages between persons of the same sex were already being celebrated before the new definition of marriage became law. Between 2003 and the summer of 2005, more than 1,500 same-sex couples, including 500 couples who travelled from the United States, were married in Ontario. The total is reportedly about 5,000 across Canada.

<sup>83</sup> The Belgian law was recently amended to this effect. However, there is no presumption of “parenthood” within same-sex couples either in Belgium or in the Netherlands.

the case. Its jurisprudence nevertheless clearly embodies a heterosexual concept of marriage.

Article 12 of the European Convention on Human Rights provides conventional protection only to marriage between a man and a woman, as its wording explicitly states: “*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*” The European Court of Human Rights has not yet opened the way to recognition of a right to marry between persons of the same sex. In *Rees v. the United Kingdom* of October 17, 1986, the Court held that the right to marry guaranteed by Article 12... refers to “*the traditional marriage*” between persons of opposite biological sex and in *Sheffield and Horsham v. the United Kingdom* of July 30, 1998, it was held that the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to constitute a substantial violation of the rights guaranteed by article 12. Its decision in *Christine Goodwin v. the United Kingdom* of July 11, 2002 offered the possibility of marriage to an English transsexual who wished to marry a person (a man) of the same sex as she with respect to civil status, inasmuch as she claimed to be of a different sex than her prospective spouse. The problem resulted from the fact that British law recognized the sex recorded at birth in allowing the marriage and in this respect ignored the result of a sex change. The possibility of marriage between persons effectively (and not just legally) of the same sex was not the subject of the suit.

The question also arose as to whether the condition requiring a sex difference in marriage constituted discrimination within the meaning of article 14 of the Convention. The Court’s jurisprudence allows for differential treatment “*where there is an objective and reasonable justification in pursuing a legitimate aim in a democratic society and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.*” It was on the basis of this jurisprudence in the *Bègles* case that the Tribunal de grande instance (superior court) in Bordeaux found that differential treatment was possible regarding “*the traditional function of marriage, commonly considered to be the founding of a family*”.<sup>84</sup> The Court of Appeal confirmed this interpretation, finding that its “*specific and non-discriminatory character was the result of the fact that nature had limited potential fertility to couples of different sexes... Clearly, same-sex couples whom nature had not made potentially fertile were consequently not concerned by the institution of*

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<sup>84</sup> Tribunal de grande instance de Bordeaux, July 26, 2004.

*marriage. This was differential legal treatment because their situation was not analogous*”.<sup>85</sup>

The Court of Justice of the European Communities also refuses to recognize the existence of a right to marriage for homosexuals, stating, “*It is not in question that, according to the definition generally accepted by the member states, the term ‘marriage’ means a union between two persons of the opposite sex.*”<sup>86</sup> Incorporation of the Charter of Fundamental Rights into the European Constitution, had the latter come into force, would not have changed the situation. First, the obligations it contains are binding on member states only when the states apply Union law. Civil law, however, is dependent only very partially on Community powers. Moreover, although the Charter requires respect for privacy and family life, and proclaims the right to marry and the right to found a family, the latter two rights are “*guaranteed in accordance with the national laws governing the exercise of these rights*”. Granted, there is no mention of the heterosexual nature of marriage that is thereby protected, but national laws can continue to require this without violating the Charter.

Nevertheless, the legalization of same-sex marriage in some countries could lead the Court of Justice of the European Communities to intervene. It will have to determine whether failure to treat two persons of the same sex who were married in their country of origin as spouses constitutes an impediment to freedom of circulation, if not the kind of unequal treatment prohibited within the borders of the Community.

- ***The terms of the debate***

The terms of the debate are based on two concepts of society and the norms on which it is founded. The dilemma is as follows: for some, it seems fair to make marriage accessible to persons of the same sex; for others, sexual difference constitutes an essential condition for marriage.

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<sup>85</sup> Court of Appeal, Bordeaux, April 19, 2005.

<sup>86</sup> Court of Justice of the European Communities, *D. and Kingdom of Sweden v. Council of Europe*, May 31, 2002, paragraph 34.

### **– The arguments for same-sex marriage**

Most associations for the defence of the rights of homosexuals<sup>87</sup> declare themselves in favour of making marriage accessible to persons of the same sex, citing the principle of equality for all citizens. The Association of gay and lesbian parents and future parents argues that as part of the change, the presumption of paternity should be replaced by a presumption of parental commitment.

The lay family associations<sup>88</sup> also want same-sex couples to be allowed access to the three structures for shared living, including marriage. This is particularly true of the National council of lay family associations.

The arguments advanced by those who advocate same-sex marriage relate mainly to resistance to discrimination and the absence of any obligation to procreate within marriage, whereas the impossibility of procreation for a same-sex couple constitutes an argument for those who defend the traditional concept of marriage.

For Éric Fassin, making marriage accessible to same-sex couples, as cohabitation and the PACS have been made accessible, is a question of equality. The establishment of the PACS validated “*a twofold development within society: first, a measure of recognition for the diversity of sexuality; second, a way of privatizing the way people structure their conjugality.*” The Law of November 15, 1999, which no one now seeks to abolish, thus afforded greater equality and freedom in “*the sexual order, in which the couple and the family are central figures.*” The progress already made must continue in our democratic society, whose laws and norms are humane, subject to change, and negotiable. The issue is the continuing “denaturalization” of our legal norms. In fact, “*in a democratic philosophy, the sexual order is no more natural than the economic system or the constitution. The laws that give it structure are the result of choices based on political values and not on truths that are removed from history.*”

Daniel Borrillo, who is sharply critical of the judicial decisions relating to the “Bègles marriage”, also stresses the principles of liberty, equality and

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<sup>87</sup> At the round table of July 13, 2005, the Interassociation for lesbians, gays, bis and trans, the Association of gay and lesbian parents and future parents, Homosexualities and socialism and Gay Lib declared themselves in favour of making marriage accessible to same-sex couples.

<sup>88</sup> Round table of June 29, 2005.

especially secularity in arguing for same-sex marriage. The “denaturalization” of norms is also a secularization process, one that began with the French Revolution. Marriage is increasingly perceived as a contract and no longer as a sacrament. Eliminating sexual difference as a condition would complete this process.

Mr. Borillo adds that the lack of fertility of same-sex couples cannot be a valid argument against same-sex marriage inasmuch as “*reproduction never was a condition of marriage*” and is now even less of a condition than ever.

Thus, there is no substantive reason for excluding persons of the same sex from marriage and doing so would constitute indefensible discrimination.

– ***The sex difference must remain an essential condition of marriage***

A number of arguments are advanced citing the sex difference as an essential condition of marriage.

Charles Melman and Xavier Lacroix distinguish between cohabitation and the PACS, on the one hand, and marriage on the other. Mr. Melman is “*led to distinguish marriage, which presupposes that in committing themselves to producing and bringing up children, the partners agree to limit the satisfactions they derive, from the couple structure - whether homosexual or heterosexual – that operates within the framework of a contract between the partners, the term of which is tied to the advantages they derive from its execution.*” For Mr. Lacroix, “*between the PACS and cohabitation, on the one hand, and marriage on the other, there is a qualitative leap. There are two reasons for this: first, we move from one concept of law to another, from a liberal law centred on individuals to a law that establishes an institution and protects a model; second, and above all, with marriage, it is not just a couple but a family that is being founded.*”

Thierry Damien, president of Rural families, believes we should distinguish between “*the couple that plans to found a family, which he considers to consist of a man and a woman and for which, out of a concern to protect each of its members, he recommends civil marriage, and the couple whose life plans consist merely of the desire to live together in solidarity. In the latter case, no account should be taken of the sex of the persons and such a union should not even be equated with a marriage.*” Like the National confederation of Catholic family associations and Families of France, Rural families is not in favour of making marriage accessible to persons of the same sex.

Xavier Lacroix is strongly opposed to the relativism that is often advocated by the defenders of same-sex marriage: *“Despite what some people say, there is an anthropological definition of marriage that is universally valid: it is the institution that articulates the alliance between men and women from generation to generation. If by chance the term ‘marriage’ were extended to unions between persons of the same sex, we would suffer the loss of a world of meaning: our vocabulary would no longer have a word to refer specifically to the socially instituted union of a man and a woman. Yet it is difficult to deny that this type of union and all the symbolism associated with it is an asset to society.”*

From this viewpoint, the *“vertical axis governed by the concern to ensure succeeding generations”* is an essential component of marriage and justifies reserving it for couples capable of contributing to the succession of generations, even if they are under no obligation to produce results in this regard. In this respect, same-sex couples are objectively not in the same situation as heterosexual couples. Daniel Borillo’s argument that *“after all, medically assisted conception techniques can offer help for the ‘phenomenological’ sterility of homosexual couples”* is not very strong, since children conceived in that way require a third party donor, if not a surrogate, who, in the case of an opposite-sex couple, is authorized only in special cases because of a specific medical problem.

Given the filiation aspects of marriage, the difference between the situations of homosexual and heterosexual couples may thus justify differential treatment that does not, in itself, constitute discrimination.

The link between marriage and filiation is so close that the question of making marriage accessible is inseparable from that of making adoption and medically assisted conception accessible. This link was acknowledged by almost all witnesses, whether they were in favour of or opposed to developments in this area. Xavier Lacroix, for example, asserts that *“claiming to promote the idea of homosexual marriage while ruling out adoption is hypocrisy: sooner or later, there will be allegations of discrimination.”* The Mission noted that in most cases, the advocates of same-sex marriage also want the possibility of joint adoption, while opponents of same-sex marriages are also against joint adoption within such marriages.

The Belgian example illustrates the difficulty of separating these two issues. The Law of February 13, 2003 enabled same-sex couples to marry while reserving for heterosexual married couples the right to jointly adopt. It did, however, allow one spouse to adopt the child of the other spouse of the same

sex. The balance this achieved satisfied no one, with the result that a bill was passed in the Chamber of Deputies on December 2, 2005 allowing joint adoption by same-sex couples.

Most members of the Mission accordingly feel that the sex-difference condition constitutes an essential component of marriage with regard to marriage's filiation aspects. The institution of Republican marriage is inconceivable absent the idea of filiation and the sex difference is central to filiation. It corresponds to a biological reality – the infertility of same-sex couples – and to the vital need to construct an identity for the child necessarily resulting from the union of a man and a woman, as indicated *infra* in the developments relating to filiation. Above all else, then, it is the interests of the child that lead a majority of the Mission to refuse to change the parameters of marriage.

*d) Defining marriage might weaken the institution*

As a way of improving protection for the interests of the child, a form of promotion of marriage may be desirable. It could be achieved through a legal definition of marriage that stresses its specific characteristics.

The National confederation of Catholic family associations<sup>89</sup> seeks in this way to renew the validity of marriage, emphasizing its institutional dimension and its contribution to social integration and cohesion. The organization accordingly wishes to see a legal definition of civil marriage in the Civil Code specifying that it is not merely contractual but also institutional in nature. The purpose is to restore to marriage its role as a model in the law of parental authority (without thereby reconsidering the status of the child and, especially, the equality of filiations) and to not facilitate divorce.

Marriage would thus be defined as follows: *“Marriage is a union freely consented to by one man and one woman based on their solemn public commitment undertaken before society. The family founded on marriage is afforded special protection under the law. Marriage is an institution. It enrolls the couple in a parental alliance and affords the child an indivisible filiation. This special nature of marriage is the basis for the existence of rules necessarily governing its conditions, its effects and its dissolution.”*

Xavier Lacroix believes that *“the public authorities must continue to show preference for the matrimonial arrangement, which is based on an explicit commitment to fidelity, and grant it specific rights, without which individuals*

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<sup>89</sup> Round table of September 28, 2005.

*would no longer understand the message”* and suggests reinforcing the roles of third parties before marriage and when it ends. Before marriage, he advocates offering the betrothed “*support in their deliberations and decisions*”, as is done before the celebration of a religious union. The same type of help should be provided before divorce, since today’s conciliation hearings are too short to be helpful.

While a majority of the Mission’s members fully embrace this concept of marriage as an institution protecting the child and founded on a sex difference, they are nevertheless not in favour of writing a formal definition into an article of the Civil Code.

The Mission believes it is primarily through information on its obligations and benefits that marriage can be defended in relation to other ways of living together. This is why (see *supra*) it proposes generalizing such information.

Above all, it believes that the Civil Code already contains all the elements of a definition of marriage, which are clearly and consistently applied by all jurisdictions, even though the Code does not provide a definition as such. This is why the Mission feels it is unwise to introduce a definition that would necessarily have a reducing effect and might make the institution more fragile by summing it up in a single article.

We would add that such a definition might reopen an unneeded controversy – as some witnesses rightly pointed out – by seeming to stigmatize children born outside marriage, whereas the Order of July 4, 2005 has eliminated the concepts of legitimate and natural filiation.

## **SECOND SUB-PART: THE CHILD AND THE DIVERSIFICATION OF FILIATION**

The movement towards filial equality through the progressive reduction of differences in treatment among children, according to whether they are born of married or unmarried parents, began with the Law of January 3, 1972<sup>90</sup>, which allowed for an adulterine child to be recognized by his or her father, and ended with the July 4, 2005 order, which concerns filiation reform and has removed from the civil code the concepts of legitimate filiation and natural filiation. While the conditions for establishing filiation remain different given that the presumption of paternity applies only to marriage, the succession rules are identical<sup>91</sup> and a “common law” with respect to parental authority applies, regardless of the filiation.

Promotion of the principle of equality has gone hand in hand with promotion of the principle of truth: ideally, a child’s legal filiation should correspond with his or her real filiation, preferably his or her biological filiation, if not, the child’s sociological filiation. In 1972, medical data did not allow for fully enshrining the principle of biological truth, whereas today a given man can be shown to be the father of a given child, with practically no risk of error. However, the provisions of the Law of 1972 have not been amended and the Laws of July 29, 1994<sup>92</sup> restrictively define the conditions permitting recourse to genetic fingerprinting. Jurisprudence has, nevertheless, turned towards emphasizing biological truth. The order of July 4, 2005 has unified the system of judicial actions related to filiation: first, it dispenses with the requirement for presumptions or very serious signs in order to initiate a filiation search procedure; second, it reduces the timeframe regarding the action. Furthermore, it prohibits any contesting of a filiation corroborated by a five-year possession of status. This order thus seeks to simplify the actions related to filiation while ensuring greater stability with regard to the child’s filial situation – stability that is unquestionably in his or her best interests.

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<sup>90</sup> Law no. 72-3 of January 3, 1972 concerning filiation.

<sup>91</sup> Law no. 2001-1135 of December 3, 2001 regarding the rights of the surviving spouse and the adulterine children and modernizing various provisions of succession law equated the succession rights of adulterine children with those of other children.

<sup>92</sup> Law no. 94-654 of July 29, 1994 regarding the gift and use of elements and products of the human body, medically assisted reproduction and prenatal diagnosis and Law no. 94-653 of July 29, 1994 regarding respect for the human body.

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**The principal provisions of order no. 2005-759  
of July 4, 2005 concerning filiation reform**

The order reorganizes the provisions of the civil code regarding filiation to make them clearer and more consistent. It is scheduled to take effect on July 1, 2006; however, certain provisions shall apply retroactively.

In essence, the order drops the concepts of legitimate filiation and natural filiation, provides for the automatic establishment of maternal filiation, amends the rules pertaining to possession of status and unifies the system of actions related to filiation.

**- Dropping of concepts of legitimate filiation and natural filiation**

With the elimination of the remaining advantages that only legitimate children benefited from, the terminological difference between legitimate filiation and natural filiation, at the origin of a judicial complexity that had become useless can be done away with. Dispensing with these concepts is essentially a symbolic gesture and does not prevent maintaining the specificity of the procedure for establishing filiation presently termed “natural” (the recognition and divisibility of the filiation applicable to children born outside of marriage as opposed to the presumption of the spouse’s paternity, a presumption that is nevertheless set aside if the father’s name is not entered on the birth certificate).

**- Automatic establishment of maternal filiation**

Entering the mother’s name on the birth certificate is now enough to establish filiation, with recognition by the mother no longer being necessary with regard to children born outside marriage. (However, pre-natal recognition – now codified – shall remain possible.) Entering the mother’s name is not mandatory, as it is still possible to give birth anonymously.

**- Possession of status**

The list of facts of possession of status is only completed by the parent’s participation in the support, upbringing and settlement of the child and it is now stipulated that this participation must be “ongoing, peaceable, public and unequivocal”. The order is more innovative with respect to proof of possession of status. Each of the parents or the child himself or herself may ask the judge

for issuance of an act of notoriety. However, such a request may be made only within a period of five years starting with the discontinuance of the alleged possession of status, this in order to better ensure the stability of the children's status and legal security in the settlement of estates. Moreover, a declaration of possession of status may be requested, by anyone having an interest in the matter, but only within a period of ten years.

### **- Unification of system of judicial actions regarding filiation**

Maternity and paternity searches comply with the same procedural system: the requirement of presumptions or very serious signs is eliminated and the prescriptive period extends through the child's minority and, subsequently, if the child requests the search, during the ten years following his or her reaching majority.

With the goal of strengthening the filiation link accompanied by an affective reality, actions with regard to contesting the filiation link follow a different system depending on whether or not the title is supported by the possession of status. In the event of possession of status of five years starting with establishment of the filiation, any contesting action is impossible. Before the five-year period has elapsed, the action is limited to the child, the parents or the person claiming to be the father or the mother. If the possession of status has ended before five years have elapsed, the applicant must act within the period of five years following the end of the possession of status. In the absence of possession of status, any interested person may contest the filiation within a period of ten years of the birth or recognition. Upon reaching the age of majority, only the child may still contest the link of filiation, for a period of ten years. Lastly, the possession of status may be contested within five years of issuance of the act of notoriety.

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If the parents' situation no longer has any consequences with regard to the children's situation, the cases in which the legal filiation does not correspond to the biological filiation remain relatively numerous and involve new scenarios. In fact, adoptive filiation, which results from an act of will and stems from a judicial decision, is becoming more commonplace, spurred by the development of international adoption. What is more, medical progress is facilitating cleavages between progenitors, the surrogate mother and persons raising the child. This is occurring thanks to the practice of medically assisted conception with a third party donor and even recourse to surrogate motherhood.

Use of these techniques leads to the appearance of new cases where children do not know who their progenitors are, while the decrease in the number of anonymous births and the prohibition on secretly abandoning a child have tended to limit these types of situations in the past and would likely continue to do so in the future.

Science now allows for filiation situations that were previously unheard of: donor insemination enabling a single woman or a female couple to have children; third party procreation that can get around the impossibility for a man to have a baby. While it is evident that the law does not have to authorize everything science makes possible, the issue of what limits should be respected is a delicate one and continues to evolve as society's values themselves change. The child's rights must always be taken into consideration first, especially, as far as is possible, his or her right to know his or her two (biological) parents and to be raised by them. Thus, it is important to find a balance between the child's interests and the adult rights, with the child's interests always having priority.

With the diverse methods now available to establish filiation, the desire to have a child is increasingly valued by society. Society can help meet this desire, but within the scope of previously specified ethical principles.

## **I. ADOPTION**

In France, 4500 adoptions were pronounced in 2003. Among these, 500 involved wards of the French state and the other 4000 involved children born abroad. France is the world's second-leading country regarding number of adoptions of foreign children, after the United States, where there are more than 20,000 a year. In relative terms, however, inter-country adoption is less developed in France than in certain northern European nations: Norway, Sweden and Denmark take in 10-12 children per 1000 births, compared with France's rate of 5 per 1000.

Section 21 of the international Convention on the Rights of the Child states, regarding adoption, that "*the best interests of the child shall be the paramount consideration*" and that "*inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.*" The Convention thus stresses that the primary aim of

adoption is to provide a child with a family and not a family with a child, and that inter-country adoption is to be considered only as a last resort.

The terms and conditions regarding adoption in France are stipulated by the Law of July 5, 1995 (the “Mattei Law”<sup>93</sup>), [and] a law that specifically concerns inter-country adoption adopted in 2001<sup>94</sup>. The more recent Law of July 5, 2005 dealing with adoption reform<sup>95</sup> seeks primarily to harmonize the conditions for the issuance of certificates by the general councils and to create the Agence française de l’adoption (French adoption agency).

## **B. GUARANTEEING ADOPTED CHILDREN LEGAL AND EMOTIONAL SECURITY**

The Mission’s attention was drawn to the need to provide adopted children with the greatest legal and emotional security. Most witnesses felt that this need justifies not amending the conditions that must be met in order to adopt.

### **1. Reserving joint adoption for married couples**

Joint adoption is currently reserved for spouses. Given the great increase in the number of families formed outside marriage, the question arises as to the possible extension of joint adoption to de facto spouses (*concubins*) of different sexes or even the same sex.

#### ***a) Access to joint adoption cannot be authorized for de facto spouses of different sexes***

Within the family movement, making joint adoption accessible to a man and a woman living in a de facto union is defended by lay family associations.<sup>96</sup> Nadine Pinget,<sup>97</sup> chair of the Movement for adoption without borders, also said she was in favour of adoption “without discrimination” and adapted to changes in society. Jean-Marie Muller, chair of the National federation of district mutual-aid associations of wards and former wards of the state, also sees no disadvantages in it.

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<sup>93</sup> Law no. 96-604 of July 5, 1996 regarding adoption

<sup>94</sup> Law no. 2001-111 of February 6, 2001 regarding inter-country adoption

<sup>95</sup> La no. 2005-744 of July 4, 2005 dealing with adoption reform

<sup>96</sup> Round table of June 29, 2005.

<sup>97</sup> Round table of November 2, 2005; except as noted, those who commented with respect to adoption did so at this round table.

Martine Gross noted that adoption by two persons who are not married is permitted in Quebec, British Columbia, Spain, Sweden, the Netherlands, Belgium, England and Wales.

Two arguments are advanced in support of this reform. First, it may appear inconsistent to allow medically assisted conception for de facto couples of different sexes who have been living together for two years but to deny them the possibility of jointly adopting a child. Second, since 2002, the rules for the exercise of parental authority have no longer depended on the status of the parents.

Nevertheless, children produced by medically assisted conception are not in the same situation as children who are abandoned and then entrusted to an adoptive family. The former are de facto in the same situation as children conceived naturally: they are the biological children of at least one of their parents and, in very many cases, of both. Adopted children, on the other hand, have no biological connection to their parents. They have been through the trauma of abandonment and, in many cases, have been uprooted; they must be afforded every protection, particularly if their parents separate, so as not to feel abandoned once again. Given its greater longevity and the involvement of judicial authorities, marriage offers children better legal security than a de facto union at the time of separation.

As all witnesses appearing before the Mission acknowledged, it is primarily because adoption concerns not the right of adults to have a child but, rather, the rights of a child to have a family that every precaution must be taken.

Frédérique Granet stated, *“When the child in question is not the child of either member of the couple, it seems to me it would be preferable to limit full adoption to spouses. Marriage does in fact offer certain guarantees, particularly should the couple separate, since a judge necessarily becomes involved to grant a divorce and one of the first consequences of the divorce to be examined by the judge – one that cannot be freely negotiated, as money issues can – is precisely how parental authority is to be exercised.”*

Added to this concern is the reality of international adoption. Janice Peyré, chair of Childhood and adoptive families, pointed out that states signatory to the Hague Convention<sup>98</sup> require the adopters to be married (and that the

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<sup>98</sup> Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption, dated at the Hague on May 29, 1993.

marriage be between a man and a woman) or single and that, increasingly, they verify this is so. Only a few countries that are not parties to the Convention allow adoption by unmarried couples.

Nor is the Minister of Justice of France favourable to the adoption of a child by two unmarried persons: *“We must be guided by the basic purpose of adoption, which is to give a child who has no family to a family itself unable to have one. While de facto spouses form a couple, they do not form a family. They may end their relationship at any time, without the exercise at any point of control by a judicial authority. This significant risk of family instability can prove especially harmful for an adopted child, who, given the nature of his or her personal history, in many cases expresses a greater need for emotional security.”*<sup>99</sup>

Most members of the Mission take the same view. They believe that given the original trauma he or she experienced, an adopted child requires the kind of legal and emotional security that only married parents can offer. They do not believe that marriage is such a restrictive commitment that a couple wishing to adopt cannot accept this commitment in order to give the child the greatest possible legal security.

***b) Access to joint adoption is all the more inappropriate for de facto spouses of the same sex***

While joint adoption by a man and a woman who are not married does not have unanimous support, giving such an opportunity to a same-sex couple seems an even more uncertain proposition. The arguments against the first type of adoption can also be made against the second type, but in the latter case the doubts involved are even stronger.

Bernard Teper, chair of the Union of lay families, sees a paradox in the *“1966 law authorizing adoption by a single person over 28, while adoption by homosexual couples is prohibited. In truth, only two positions are consistent: repeal the 1966 law or authorize adoption by homosexual couples under certain conditions. Today, several thousand children are being raised by homosexual couples. These couples thus have the right to raise children, but not to adopt them.”*<sup>100</sup> He therefore feels that the paradox must be resolved in favour of same-sex couples.

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<sup>99</sup> Hearing of December 13, 2005.

<sup>100</sup> Round table of June 29, 2005.

Martine Gross wants joint adoption to be possible for a same-sex couple just as it is for a heterosexual couple because *“it is best for the child to be adopted by two persons if two persons come forward to undertake to be the child’s parents. Adoption, as an institution, should not continue to imitate nature: it should show the way to a family law based on commitment. Why give only one parent to a child when two are prepared to make the commitment, solely on the grounds that two persons of the same sex cannot pretend to have procreated? It should be noted that providing a child with two parents prevents the child from being left an orphan should one of them die, allows a dual transfer of property, provides the child with four grandparents, and so on.”*

Thus, since a single person may adopt, it would be unjustified for the person’s companion – even one of the same sex – to be unable to adopt jointly with him or her if the companion were willing to make the same commitment to the child. Robert Neuburger thus feels that the sex of the parents is not a determinant in children’s development, particularly with regard to their sexual identity, which is said to be related mainly to the communicative structure between the parents and the influence of siblings.

However, strongly opposed views were expressed on this subject at the Mission’s hearings.

Janice Peyré again cites the reality of international adoption: *“According to the International social service, no source country knowingly entrusts children to homosexuals.”* In this regard, in the Netherlands, same-sex couples are authorized to adopt only children who have been abandoned in their own country, meaning, in practice, that none have yet been able to adopt a child since adoptable Dutch children are few in number and are entrusted by preference to heterosexual couples. Same-sex couples’ access to adoption thus remains theoretical.

But it is primarily in the interests of the child that Janice Peyré speaks for adopted children: *“As much as adoptive parents are open to the idea of extending adoption – legally and transparently – to homosexuals, adolescents or adults who have been adopted express genuine reservations. They attest to a private feeling of being different when they grew up – a feeling accompanied by a very deeply experienced desire for normalcy. In their view, having homosexual parents would simply add to the sense of difference and the curiosity that adoption already engenders. In certain cases and in certain communities, it might even lead to rejection.”* She therefore feels that *“bringing an adopted child into a society in which he or she will have the same rights and the same place as other children – as the Hague Convention provides –*

*requires that the child be received into pre-existing family structures, already recognized as such, and not serve as an instrument for obtaining recognition of new family structures.”*

Pierre Lévy-Soussan is of the same opinion: *“It is in the child’s best interests to join a nuclear family that is already socially accepted so that he or she does not have to take on the additional task, following a history of abandonment, of adapting to a family that is, for whatever reason, ‘non-standard’.”* He believes that in order to be successful, adoption must lead to a psychological filiation that *“allows for a nexus of the three elements that are basic to any society: the biological, the social and the subjective dimensions specific to human beings. The psychological strength of this construction exceeds the purely biological connection of filiation and provides it with security. The security and ‘truth’ of this filiation are based on childbirth, on a potential or actual procreative relationship between a man and a woman, allowing the fictional filiation through the encounter with the other sex, alive and of the same generation. The fictional filiation can then be experienced as true, consistent and reasonable.”* The difference in sex between the two members of the parental couple thus seems to him indispensable if the adoption “graft” is to take.

Inasmuch as almost 25,000 married couples in France have been approved but wait an average of five years to be able to adopt because fewer than 5,000 adoptions take place each year, it is possible to provide every adoptable child with a father and a mother who will offer him or her the best chance of integrating into a new family.

Xavier Lacroix believes *“it is preferable that the discontinuity inherent in adoption not be combined with a second discontinuity: the loss of similarity between the original couple and the adoptive couple that raises the child. The fact that a child is adopted gives him or her all the more need for a father and a mother.”*<sup>101</sup> Moreover, making joint adoption accessible to same-sex couples in the guise of resisting “alleged discrimination” would lead to the emergence of a *“far more real and serious”* kind of discrimination *“between children.”*

During the Mission’s deliberations, it was not formally demonstrated that approving legal filiation with two fathers or two mothers has no effect on the building of the child’s identity. Martine Gross gave the Mission a list of studies on children brought up by persons of the same sex. The conclusion, based on these studies, was that there were no negative effects on children. These

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<sup>101</sup> Round table of October 12, 2005.

studies' scientific basis and the representativeness of the population samples studied were widely criticized and disputed at the hearings. Few countries allow adoption of a child by two persons of the same sex, and legislation allowing this type of adoption is very recent and has, in fact, led to very few adoptions. The lack of objectivity in this area is blatant. The studies in question deal, rather, with children born of a heterosexual relationship and raised by a biological parent and his or her companion – a situation that is absolutely not comparable with the establishment of a dual same-sex filiation for a child from outside the couple.

Edwige Antier stresses the difference between such situations and feels that the *“psychological growth of the child will be difficult if society begins to say that there can be same-sex parents.”* She concludes, *“Much more detachment will be required before deciding that couples made up either of men or of women can become ‘parents’. Otherwise, we are taking a chance.”*<sup>102</sup>

Most members of the Mission echo this call for caution and share the opinion expressed by Janice Peyré: *“Ultimately, while there is absolutely no reason to doubt the emotional and childrearing qualities of homosexual parents, at the same time we do not yet know all the effects on the formation of the adopted child’s psychological identity. As long as doubt persists, however slight, is it not in the child’s best interests to apply the precautionary principle to adoption, as to other areas?”*

## **2. Maintaining the possibility of adoption by single persons**

In authorizing adoption by a single person since 1966, the law acknowledges the possibility that an adopted child may not be brought up by two parents. To some witnesses, this possibility seems contrary to the interests of the adopted child, who, it is argued, is entitled to a family made up of a father and a mother. Others also criticize application of this provision for not explicitly guaranteeing adoption to all single people, regardless of sexual orientation.

### ***a) Should we reconsider adoption by single persons?***

Elimination of adoption by single persons is urged by the National confederation of Catholic family associations. The other witnesses the Mission heard on this subject believe, on the contrary, that this possibility should be maintained.

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<sup>102</sup> Round table of November 30, 2005.

Reconsidering adoption by single persons is said to be warranted by the child's best interests, namely, to have two parents. Paul de Viguerie justifies this proposal as follows: *"Because we believe a child is entitled to a father and a mother, adoption by a single person has always seemed incongruous to us. In the current context, this provision presents increasing difficulty for us."*<sup>103</sup> Archbishop of Paris André Vingt-Trois shares this view: *"The question we must ask is what is best for the child: is it better for him or her to be adopted by a couple or by a single adult? The reason why the question of adoption by single adults arises is that single adults apply to adopt. But what is involved here is their desire for a child, rather than the good of the child. When we look at the length of the queue for couples waiting to adopt a child, it is reasonable to think that we should be concerned above all with giving adoptable children a home. The day that all the couples wishing to adopt have been able to do so, we can worry about deciding whether to provide children who are still orphans with a single parent."*<sup>104</sup>

We should nevertheless note the relative rarity of adoptions by single persons. According to an INED survey, in 2001-2002, only 10.6% of applications for approval to adopt were filed by women not a member of a couple and 0.3% by single men (only 5 applications out of 1,857 in the sample studied). Moreover, a successful outcome is far from assured: fewer than 7% of adopters are single women and not one man in the sample was chosen as an adopter.

Pierre Lévy-Soussan observed that, as with advanced age in an adopter, single status was often a risk factor. In his specialized consultations in matters of filiation, 20-30% of single people consult about difficulties with an adopted child. This figure demonstrates a strong overrepresentation of the category of children adopted by a single person. The classic case he cited was that of a single mother coping with an adopted child's teenage rebellion exacerbated by the initial trauma of the child's abandonment. He adds, however, *"It is important to point out that it is not only single status that is a determining factor, but the ability to psychologically exclude any third party, any 'other', between the parent and the child."*

However, the existence of a greater risk of failure does not justify the elimination of adoption by single persons, the primary goal of which was rightly recalled by Pierre Murat: *"It must be remembered that, initially, access to adoption by a single person avoided a situation where children had to stay in*

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<sup>103</sup> Round table of September 28, 2005.

<sup>104</sup> Hearing of December 7, 2005.

*an institution and were deprived of a family. However, that access did not mean that there was not an implied hierarchy in the law between adoption by a couple and adoption by a single person. Reconsidering that access would have the effect of eliminating a secondary channel that does have its uses.”*<sup>105</sup>

Adoption by a single person does not involve only unmarried persons, but also a spouse who adopts a child alone, a widow or widower, or a divorced person. It was instituted in order to give children, particularly those no longer young and those with a disability, an additional chance of being adopted, for example, by a caregiver who had taken care of them for years. It also allows for adoption by someone close to the child or related by marriage in the event of the death of the child’s parents or his or her abandonment. Frédérique Granet pointed out that adoption by a single person could be in the child’s interests and that a judge’s assessment of the desirability of adoption for the child offers an adequate guarantee.

Like almost all of those heard from, including the Minister of Justice and the Minister responsible for the family,<sup>106</sup> the Mission believes that the child’s interests justify maintaining this type of adoption.

***b) Should approval for homosexual single persons be explicitly authorized?***

Lay family associations and associations defending the rights of homosexuals request that the sexual orientation of the applicant cease to be grounds, even unspoken, for denying approval.

Jean-Marie Bonnemayre, chair of the National council of lay family associations, believes it is an anomaly that a homosexual single person can adopt by concealing his or her sexual orientation, whereas approval can be denied if he or she admits to it, even where neither morality nor the ability to raise a child is in question. To prevent this, he advocates “*including in the Civil Code a provision stating very clearly that denial of approval cannot be based on sexual orientation.*”<sup>107</sup> He disapproves of the jurisprudence of the European Court of Human Rights, which refers resolution of this problem to national legislation.

Martine Gross believes that a regulatory provision would suffice: “*We therefore want an executory order that prohibits citing sexual orientation for denying*

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<sup>105</sup> Round table of November 9, 2005.

<sup>106</sup> Hearings of December 13 and 14, 2005, respectively.

<sup>107</sup> Round table of June 29, 2005.

*approval.*”<sup>108</sup> She thus seeks extension of the logic that led, after the law of 1966, to a prohibition against citing marital status as a reason for denying approval. This demand is supported by all the associations for the defence of the rights of homosexuals that the Mission heard from.

The logic Ms Gross advocates is faulty: the marital status of persons is indisputably a public matter; the same is not true of their sexuality, which is an exclusively private matter. Thus, Frédérique Granet can argue that *“a person’s sexual orientation cannot be referred to in legislation, even in a positive way in order to grant a specific right, without prejudice to the principles of equality before the law and of the neutrality of the law and the principle of respect for privacy, of which sexual orientation is one element. This would flow both from specific positive treatment for single homosexuals, based on their sexual orientation, and from negative differentiation to the detriment both of non-homosexual single persons and of de facto partners of the same sex or of different sexes who, while able to adopt individually as single persons, could not do so jointly as a couple.”* Given that *“to differentiate on the basis of different circumstances or different situations is not to discriminate, but to distinguish and treat different situations distinctly,”* she favours simply maintaining the current law.

Approval to adopt is based on a comprehensive analysis of the applicant’s circumstances designed to assess the conditions in which he or she could take a child in. His or her sex life may affect those conditions, and cannot therefore be disregarded at the outset. It may be a factor in a decision to deny approval, in which case, as the European Court of Human Rights has pointed out, this is not discrimination but differential treatment justified by a different situation, which is subject to rigorous verification by the judge regarding any abuse of authority.

While it is appropriate to allow a single person to adopt, this possibility does not provide entitlement to approval or to an actual adoption any more than it does in the case of a married couple. Most members of the Mission find the present law satisfactory and believe there is no reason to reduce or more closely direct the authority of local general councils in granting approval since the legal remedies available are such as to prevent any abuse of authority or suspicion of unwarranted discrimination.

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<sup>108</sup> Round table of July 13, 2005.

## **II. FILIATIONS RESULTING FROM MEDICAL ASSISTANCE**

Some 11,000 children (1.5% of births) are born each year in France as a result of medically assisted conception; about 1,000 of them were conceived by means of a gamete donation.<sup>109</sup> Some 40,000 children have likely been born as a result of sperm donations over the last thirty years. These figures are for inseminations performed in France. The number performed abroad on women who subsequently give birth in France is difficult to determine.

Assessing the number of births following gestation on behalf of someone else, that is, through the use of a surrogate mother, is an even more sensitive question than assessing the number of illegal third-party donor inseminations. This practice is prohibited in France, but Belgian surrogate mothers come to this country and give birth anonymously, whereas French citizens use the services of foreign surrogate mothers in countries where the practice is legal.

### **A. THE FRAMEWORK ESTABLISHED BY BIOETHICS LEGISLATION**

The conditions for use of assisted conception techniques were set by Law No. 94-653 of July 29, 1994 on respect for the human body, amended by Law No. 2004-800 of August 6, 2004 on bioethics; they are incorporated into the Code of public health. The prohibition of surrogate motherhood is in the Civil Code, in the chapter devoted to “Respect for the human body”, introduced into Title 1 of Book 1 of the Code by the aforesaid Law of July 29, 1994.

#### **1. Medically assisted conception: strict supervision**

The concept of medically assisted conception applies to medical techniques designed originally to remedy a couple’s infertility. When donated gametes are not used, the only question is that of access to these techniques, because they have no effect on the reality of biological filiation; it is quite another question when a third-party donor is involved.

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<sup>109</sup> There were 1,500 a year before 1995. Since then, the appearance and development of such techniques as intracytoplasmic injection of sperm have led to a fall in the number of donor inseminations.

***a) Conditions for the use of medically assisted conception techniques***

Article L. 2141-1 of the Code of public health defines medically assisted conception as “*clinical and biological practices to enable in vitro conception, the transfer of embryos and artificial insemination, as well as any technique of equivalent effect enabling conception outside the natural process (...)*”

● ***Specific purposes***

“*Designed to respond to the parental wishes of a couple*”, medically assisted conception may have two purposes (article L. 2141-2 of the Code of public health):

- “*remedy infertility, the pathological nature of which has been medically diagnosed*”;
- or “*prevent transmission to the child or a member of the couple of a particularly serious disease.*”

The legislator sought thereby to avert possible abuses, such as selecting an embryo in order for the child to have some characteristic prized by the parents.

● ***The characteristics of a couple qualified to benefit from such techniques***

These techniques are reserved for couples, and exclusively for couples of different sexes, because there is a reference to “*the man and the woman forming the couple.*”

The same article L. 2141-2 states that the couple must be “*married or able to show evidence of having lived together for at least two years*”; this rule is justified by the interests of the child. It is more liberal than the rule that applies to adoption, which is possible only for married couples, either those who have been married for more than two years or those whose members are both over 28.

Since the said Law of July 8, 2004, insemination or the transfer of embryos has no longer been possible in the case of the death of a member of the couple (“*The man and the woman forming the couple must be living*”<sup>110</sup>), the filing of

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<sup>110</sup> This stipulation is designed to forbid *post mortem* conception, which, before the Law of 1994, had led to contradictory judgments.

a petition for divorce or separation, cessation of cohabitation, or written revocation of consent by the man or the woman.

The man and the woman forming the couple must also be of childbearing age; the legislator sought thereby to avoid applications from couples who are too old, but did not set an age limit, leaving that assessment to the doctors.

- ***Rules respecting consent***

Article L. 2141-10 of the Code of public health requires that before any medically assisted conception, the medical team have discussions with the applicant couple. In particular, the team must verify their motivation, inform them of the possibilities of success or failure, along with the short- and long-term risks and the technical difficulties and constraints, and remind them of the legal conditions. The couple's application can be confirmed in writing only after a period of reflection of at least one month following the final discussion.

These rules are common to all techniques and there are added special provisions applying to exogenous conception techniques. In the case of implantation with a third-party donor, the couple must give its consent in an official document in the presence of the presiding judge of the high court or a notary. The judge or notary must inform the applicants of the consequences of their undertaking and, in particular, of the prohibition against a subsequent challenge to filiation (see below). In the application of article L. 2141-6 of the Code of public health, the acceptance of an embryo<sup>111</sup> by a couple is subject to a decision by the judicial authority that has the prior written consent of the applicant couple. The judge must ensure that the couple meets all the legal conditions, and causes an inspection to be conducted to assess the conditions in which the child will be received from the family, psychological and child-raising points of view. The procedure is based on the inspection that precedes the issuance of approval to adopt; the couple, as it were, "adopts" the embryo.

The consent expressed according to these rules may be revoked in writing by either member of the couple and is voided by death, the filing of a petition for divorce or separation, or cessation of cohabitation.

Donations of embryos remain a rarity. Since June 2004, six children have been born from a donated embryo and some ten pregnancies are now under way.

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<sup>111</sup> The *in vitro* conception of an embryo may take place only with the gametes of at least one member of the couple.

***b) The consequences for filiation of medically assisted conception with a third-party donor***

Logically, medically assisted conception techniques are regulated by the Code of public health. The Civil Code addresses the issue only in the case of conception with a third-party donor, which creates a separation between biological filiation and legal filiation.

Article 311-19 of the Civil Code states that in such cases, “*no bond of filiation may be established between the author of the donation and the child whose birth results*” and that, consequently, “*no claim for liability may be made against the donor.*”

The Civil Code, however, goes further: it seeks to guarantee that the resulting child will have a legal filiation and that, while fictitious, it will be indisputable. Thus, article 311-20 gives to consent to medically assisted conception the effect of prohibiting any claim disputing filiation or asserting status. If the couple is married, the presumption of paternity applies; if they are de facto spouses, a “father” who refuses to recognize a child born of a process of assisted conception to which he consented is liable to the mother and the child. His paternity may be judicially declared.

**2. Surrogate gestation: a prohibited practice in France**

Techniques for medically assisted conception with a third-party donor make it possible to distinguish the persons who conceived the original gametes of the embryo from the child’s legal parents. However, the woman who brings the child into the world is also the one who will raise it. Nevertheless, when a woman is unable or unwilling to bear a child, it is “technically” possible to use the services of another woman, who accepts the responsibility for the gestation of an embryo conceived from an ovocyte of the first woman or with the aid of a third-party donor: this is a case of “gestation on behalf of another”. The woman responsible for gestation is sometimes also the one whose ovocyte is used, in which case we have “conception on behalf of another”. In either case, she may be described as a “surrogate mother”.

Maternity may also be divided between the genitrix, who provided the ovum, the gestatrix, who carried the child and gave birth to it, and the educatrix, referred to as the “intended mother”. This is what the law of California, for example, allows.

In France, it was the Court of appeal (*Cour de cassation*) that, in 1991,<sup>112</sup> condemned the recourse to “surrogate mothers” on the grounds that “*only things in trade can be the subject of an agreement*” within the meaning of article 1128 of the Civil Code. The Court’s prohibition was confirmed by legislation in 1994. It applies only within the borders of France, but also has consequences for the children of French “intended parents” born legally abroad through gestation for another.

***a) Violation of the principle of the unavailability of the human body and the status of persons***

All forms of surrogate motherhood are prohibited in France, under article 16-7 of the Civil Code, enacted by the said Law of July 29, 1994, which states that “*any agreement concerning conception or gestation on behalf of another is void.*” Even where money does not change hands, such a contract is prohibited because it violates the principle of public order whereby the human body and the status of person are unavailable, this principle flowing from article 1128 of the Civil Code.

Article 227-12 of the Penal Code provides for a year’s imprisonment and a fine of 15,000 euros for acting as an intermediary between a person or a couple wishing to give a home to a child and a woman agreeing to bear the child and turn him or her over to the person or couple. However, the Code imposes no penalty on either the person or couple seeking a child or on the surrogate mother.

Since the formal decision of the *Cour de cassation* plenary on May 31, 1991, which preceded the legislated ban, jurisprudence has regarded as a perversion of the institution of adoption the full adoption of a child that is but the final phase of an overall process designed to enable a couple to take into their home a child conceived under contract and abandoned at birth by his or her mother. It thus prevents adoption by a woman of a child her husband has acknowledged if the child was born of a surrogate mother.

***b) The difficulties encountered by children born of surrogate mothers***

A number of countries, including the United Kingdom, and some US states allow gestation on behalf of another. In Canada (but not in Quebec, where the

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<sup>112</sup> *Cour de cassation*, plenary session, May 31, 1991.

practice is forbidden in all cases), Belgium and the Netherlands, surrogate motherhood is allowed if the surrogate mother is not paid, such payment being prohibited.

It is thus perfectly legal for French nationals to engage in these practices in certain foreign countries, but they face significant problems when they return to France with children brought into the world in this manner.

According to some testimony, moreover, couples do make clandestine use of surrogacy in France. Anonymous childbirth enables the surrogate mother to give birth to a child without establishing a bond of filiation with the child; the father can then recognize the child, who will be raised in his home by him and his wife. The wife may apply to adopt her spouse's child without the judge being informed of the agreement between the father and the unknown mother. Given the legal conditions applicable to anonymous childbirth, the arrangements developed by couples and surrogate mothers are difficult to characterize and thus to penalize, particularly as they are difficult to detect.

In everyday life, the absence of maternal filiation recognized by French law and the transcription of the birth certificates of children born abroad do not appear to pose major problems, since children are in general linked to their father. The child thus qualifies for schooling, social security and family allowances. As long as the couple's relationship is amicable, even if the bond of maternal filiation has not been established or has been cancelled, there is no risk of the child being taken from the woman who is raising the child in the home of his or her father, whose paternity is legally established. Nevertheless, in the most common case – where only maternal filiation has not been established – the child cannot be considered a birthright heir of the woman who is in social terms his or her mother. At her death, therefore, the child can inherit from the woman who raised him or her only as a third party, which, as we know, is highly disadvantageous from a tax point of view.

The lack of maternal filiation can have serious consequences in the case of early death of the father or separation, since the intended mother has no legal claim to the child she is raising and, thus, no rights. In the case of divorce, there is a risk that the father will abscond with the child. The only recourse then open to his ex-spouse is to invoke article 371-4 of the Civil Code, which enables a judge, if the interests of the child so warrant, to set the terms for a relationship between the child and "a third party, whether a relative or not". If it is the intended mother who is raising the child and the father takes no interest in the

child, she will be unable to justify her authority over the child to a third party, for example, to have the child hospitalized or register him or her for school.

Two recent cases provide evidence of such difficulties. In both cases, surrogate childbirth took place in California.

The first concerns an unmarried couple. The woman was unable to carry a child to term and the couple used the services of an American woman for the gestation of the embryo. Twin girls were born. Their birth was declared in California and their parents, who were their biological parents, recognized them in France. The state prosecutor launched an action for nullity of the recognition on the basis of article 339 of the Civil Code.<sup>113</sup> The Court of appeal in Rennes<sup>114</sup> confirmed the decision at trial annulling the recognition of the girls by their genetic mother on the grounds that, under French law, “*the mother is the one who bears the child and gives it life by bringing it into the world.*”

This principle flows from article 341 of the Civil Code, whereby an action for maternity requires that the child prove it was him or her that the alleged mother gave birth to. The decision attaches no special weight to the genetic aspects of maternity, even though science offers near-certainty, and the *Cour de cassation* has recognized that expertise is authoritative in matters of filiation.<sup>115</sup>

The other high-profile case concerned a married couple who used the services of a third-party donor to provide ovocytes and those of an American woman to carry the pregnancy to term. According to the rules of the State of California, the birth certificates of the two little girls designate them as the children of the couple. The application to transcribe the birth certificates was denied by the Consulate General of France, which alerted the state prosecutor. The couple was then charged with acting as intermediaries in gestation on behalf of another and false pretences causing prejudice to the civil status of the children. The Superior court in Creteil declared a nonsuit on September 30, 2004. The offence of acting as an intermediary, which entails the involvement of a person outside the agreement, was not materially consummated. Moreover, French law applies only to offences committed on French soil, whereas all the actions concerned had been taken in the United States. Nor were there any false pretences inasmuch as the original filiation of the children could not be

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<sup>113</sup> (1) “Recognition may be disputed by any person with an interest, even by its author. The state may also take action if the indications in the actual documents render the declared filiation implausible. It may also take action where the recognition is in violation of the rules governing adoption(...)”

<sup>114</sup> Court of appeal, Rennes, July 4, 2002.

<sup>115</sup> *Cour de cassation*, first civil chamber, March 28, 2000.

established since American law does not accept any legal filiation between a woman who gives birth in order to execute a surrogate motherhood agreement and the child born thereof. Here again, everything that was done was done on American soil. Thus, the criminal trial did not produce any sanction against the couple, but the civil jurisdiction has yet to rule on the state's action to annul the transcription of the birth certificates registered in California. Given the aforesaid precedent set by the Court of appeal in Rennes and given, moreover, that in this case, the woman of the intended couple is not the genitrix, it would be surprising were annulment not granted.

Couples who use a surrogate mother have no alternative but to adopt delegation of parental authority, exercised jointly. In the case in Rennes, parental authority over the child is exercised jointly by his or her two legal parents, the surrogate mother and the ex-spouse, but the child retains his or her habitual residence with the intended mother, who is regarded as a third party to whom the interests of the child require that he or she be entrusted, in accordance with article 373-3 of the Civil Code. Although parental authority continues to be exercised by the father and mother, this arrangement has the advantage of allowing the woman the child lives with to perform all the customary actions related to his or her supervision and upbringing, under article 373-4 of the Civil Code. The child's legal mother has visitation and accommodation rights.

## **B. SUPPORT FOR THE FRENCH BIOETHICS MODEL**

While some of the rules derived from bioethics legislation are now being contested, most members of the Mission believe they form a whole and care must be taken not to disturb the whole edifice by reconsidering one element of it. The aforesaid Law of August 6, 2004 was passed following a long debate begun during the preceding legislature. Amendments were made without reconsidering the underlying principles affirmed by the Law of 1994. It seems inappropriate to revisit the law after just eighteen months of application.

### **1. Assisted reproduction must retain its medical justification based on the "father, mother, child" triptych**

The rules of access to medically assisted conception are designed to limit it strictly to cases in which it is medically prescribed, usually to remedy pathological sterility in a couple but also to avoid the transmission of a serious

disease. This very expensive<sup>116</sup> technique qualifies for state assistance because it is medically justified.

Broader access to medically assisted conception would directly challenge that rationale, opening the door to medically assisted conceptions “of convenience”. It would also allow for the birth of children without fathers, whereas the current law offers every guarantee to children born of donated gametes that they will have two parents and their filiation will be unassailable.

Guy Dupuy, a member of the federal council of the Grand Lodge of France, said that the current rules should be maintained: *“I do not think we should touch this legislation, not out of homophobia but in order to preserve its restrictiveness and avert any slippage towards inseminations of convenience performed without concern for the future trauma to the unborn child.”*<sup>117</sup>

Philippe Bas, Minister responsible for the social security of the elderly, the disabled and the family, followed suit: *“With respect to medically assisted conception, the legislature, having likely done more work on this subject than on any other over the last dozen years, imposed two essential conditions. First, it defined it as a medical procedure designed to remedy the sterility of a couple strictly within the necessary means: this is the rule Parliament adopted in 1994 and in 2004. Second, the two people involved must form a stable couple – a condition that is not perhaps adequately verified in every case – and they must be a man and a woman. It is not a question of recognizing people’s vocation to give birth to and raise children, but of authorizing medicine to assist a stable couple. There can thus be no question of medically assisted conception for convenience.”*<sup>118</sup>

#### ***a) Medically assisted conception cannot be authorized for single women***

Access to medically assisted conception (MAC) is already available to single women or members of same-sex couples in the United Kingdom, Belgium, the Netherlands, Spain and Canada. In Quebec, when a child is born by MAC with a donor to a female couple, both women may be named as mothers in the birth certificate. In Canada and Spain, the availability of same-sex marriage is accompanied by an extension of the presumption of parenthood to the spouse of the biological mother. In the Netherlands, when a child is born to a female

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<sup>116</sup> *In vitro* fertilization costs some 15,000 euros for the six authorized attempts.

<sup>117</sup> Round table of December 7, 2005.

<sup>118</sup> Hearing of December 14, 2005.

married couple or registered union, the mother's companion automatically shares parental authority if the father of the child has not recognized the child.

Citing this foreign legislation, a number of lay family associations and groups representing homosexuals are seeking, as part of the struggle against discrimination, to provide access to these techniques for any woman of childbearing age, regardless of her marital status.

Jean-Marie Bonnemayre believes that *“we must allow equal access to medically assisted conception techniques for any person or any couple able to demonstrate a coherent parental plan.”*<sup>119</sup>

Martine Gross, who wants access for all women, also gives more weight to the existence of a parental plan than to biological suitability: *“Allowing access to MAC techniques for heterosexual couples only while denying it to homosexual couples and single people constitutes discrimination. Why should the state involve itself in access to medical techniques and exclude a class of persons from the outset? We want MAC techniques to be made available forthwith to all persons of childbearing age, to lesbian couples and singles, on the basis of a plan of parental commitment. It is the existence of a coherent parental plan, one that commits one or more persons to the child and to society, that seems to us to constitute the determinant criterion for parenthood – not biological suitability.”*<sup>120</sup>

Ms Dekeuwer-Defossez favours access to MAC for all women: *“As for MAC, it is in essence a medical procedure. Given that France has not elected to reserve it for married couples, it is relatively logical eventually to authorize it for all women, whether they live alone or as a couple.”*<sup>121</sup> She finds it curious, in fact, that a woman's access to MAC should be subject to her partner's consent when he has no authority over her and there is no legal bond uniting them.

Claude Sureau expresses shock that a single woman should be denied access to MAC given that there are unquestionably many single women who raise their children quite satisfactorily. He declared himself in favour of a supervised expansion: *“In certain circumstances, I believe the French legislation should be relaxed and should allow supervised use of MAC for single persons.”*<sup>122</sup>

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<sup>119</sup> Round table of June 29, 2005.

<sup>120</sup> Round table of July 13, 2005.

<sup>121</sup> Hearing of October 5, 2005.

<sup>122</sup> Round table of November 9, 2005.

Access to medically assisted conception for all women, however, would have serious consequences.

First, as things stand, it is a medical solution for a pathological problem – in most cases, a couple’s infertility. If made accessible to all women, it would become a means of conception devoid of any medical consideration.

Such access would result in the proliferation of third-party donor inseminations since the woman inseminated would not need a partner, whereas today such inseminations are not numerous, accounting for some 9% of all MACs. There would likely be a problem involving a shortage of male gametes, with demand increasing sharply. Above all, science would thus be contributing to the birth of children denied a father and this is precisely what the current special filiation rules applicable to children born of an MAC with a third-party donor are designed to avoid.

Citing the Belgian example, Geneviève Delaisi de Parseval expresses reservations about authorizing such practices: the Belgians *“have almost stopped the insemination of single women: at age 7 or 8, the children tend to ‘form a couple’ with their parent. This is a criticism not of single women as such but of legislation that authorizes the creation ex nihilo of full filiation for a single person.”*<sup>123</sup> The doctors in the centres specializing in MAC who met with Mission members who travelled to Belgium indicated, in fact, that requests from single women were the ones they most often turned down.

Lastly, such a measure would reinforce the natural inequality between men and women and thus create discrimination between female homosexual couples and male homosexual couples, except where the latter were able to use a surrogate mother. Like Jacques Combret,<sup>124</sup> Pierre Murat drew attention to this problem: *“If we expand medically assisted conception by allowing, for example, inseminations of convenience, we run a risk of reinforcing the natural inequality between men and women, who alone can bear children, and thus between male couples and female couples.”*<sup>125</sup>

Most members of the Mission thus are not in favour of allowing single women access to medically assisted conception.

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<sup>123</sup> Round table of November 9, 2005.

<sup>124</sup> Hearing of October 5, 2005.

<sup>125</sup> Round table of November 9, 2005.

***b) Medically assisted conception cannot be made available to same-sex couples***

A number of witnesses asked that all couples be given access to medically assisted conception. Since such access is not necessary for heterosexual couples, except in pathological cases already covered by French legislation, this solution would in fact benefit female couples and even “co-parenting” undertakings by a homosexual female and a homosexual male.

Some lay family associations<sup>126</sup> and groups defending the rights of homosexuals,<sup>127</sup> which also defend the right of all women to MAC, also seek this possibility. The determinant criterion in this case would be the quality of the couple’s parental plan.

Emmanuelle Revolon, a member of the Association of gay and lesbian parents and parents-to-be, stated her group’s goals as follows: “*We want the determinant criterion no longer to be heterosexual cohabitation, that is, the biological suitability of the plan, but the commitment of persons – whether single, same-sex couples or heterosexual couples, or couples made up of a gay father and a lesbian mother.*”<sup>128</sup> The ability of a female couple to have access to MAC with donor in a neighbouring country, at a substantial cost,<sup>129</sup> is said to constitute discrimination against less well-to-do female couples, in addition to the discrimination of which Ms Revolon believes French lesbians are victims. Allowing these practices in our country would also offer a way of setting our own rules: “*Expanding access to MAC to include lesbian couples and co-parents would enable France to define its own legal framework, instead of leaving it to the countries to which lesbians are now going.*”

Being born to a couple, even a same-sex couple, would not pose the same psychological problems for a child as being born to a single woman inseminated with donor sperm. Again with respect to the experience of Belgian doctors, Geneviève Delaisi de Parseval noted, “*In hindsight, they believe that the cases that pose the fewest problems are those of couples, whether heterosexual or homosexual.*”<sup>130</sup> The risk of behaviour showing excessive closeness to an only parent is reportedly eliminated. In cases of co-parenting,

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<sup>126</sup> Round table of June 29, 2005.

<sup>127</sup> Round table of July 13, 2005.

<sup>128</sup> Round table of November 9, 2005.

<sup>129</sup> The cost was estimated by Ms Revolon at between 400 and 500 euros for each attempt, not including the costs of preliminary examinations, which, in theory, cannot be performed in France.

<sup>130</sup> Round table of November 9, 2005.

the problems caused by the use of donated gametes and the lack of a father do not arise, since both biological parents remain active in the life of their child.

However, making a couple's access to MAC conditional on their having a parental plan is not without risk. First, we need the means to assess such a plan and, to that end, we must develop a procedure whereby its solidity and earnestness can be gauged. This would mean making MAC – like adoption – subject to the applicant couple obtaining some form of approval. Olivier Abel, a member of the Church and society commission and of the Protestant federation of France, expressed his “*deep distrust of the ‘project child’: The technique exists, so we have the wherewithal to undertake ‘projects’. However, society grows less institutionalized day by day and a corollary of this is that everything increasingly takes the form of a ‘project’. This is wartime thinking, dangerous in itself and disastrous for children, who cannot be reduced to projects. A bewildering anthropological change is taking place, all the implications of which are not being assessed.*”<sup>131</sup>

We would then have to agree to establish a bond of filiation between the child and the members of the couple who requested his or her conception—that is, base filiation in part on wishes alone, the child in most cases being born of insemination by a third-party donor, and allow for a child to have two parents of the same sex.

All these consequences justify the reservations of some persons who appeared before the Mission. Pierre Murat<sup>132</sup> warned against the insidious nature of wishes that would constitute a risky basis for filiation: “*Is the answer to be provided in the matter of filiation? Personally, I am not sure, because that would make the balance of filiation incline towards wishes. Yet if filiation cannot be reduced to biological ties, basing it on wishes – the insidious nature of which is well known – poses just as much of a problem. The advantage of biological ties is that they are lasting.*”

As with adoption, others call for respecting the precautionary principle in the absence of sufficient objectivity to measure the effects on the child of a same-sex dual filiation.

Claude Sureau cites the Belgian experiences, which “*seem positive*”, but concludes that “*they are relatively recent*” and he “*willingly supports the*

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<sup>131</sup> Hearing of December 7, 2005.

<sup>132</sup> Round table of November 9, 2005.

*opinion of Mr. Murat – that it is prudent to wait until we can see things more clearly.*”<sup>133</sup>

Invoking discrimination in support of the request that MAC be made available to all couples is hardly justified, so obvious is the difference between the situation of a heterosexual couple and that of a same-sex couple with respect to procreation. As noted above, such availability could in any case benefit only female couples, shifting the problem from the difference between same-sex couples and heterosexual couples to that between female couples and male couples. The inevitable next step would have to be authorizing surrogate conception and gestation for male couples.

Most members of the Mission believe that a child needs legal and emotional security, which is best provided when the legal bond and the biological bond coincide. They thus do not wish to increase the frequency of situations in which biology and filiation deviate, and favour continuation of the conditions now required for access to medically assisted conception.

***.c) The post mortem transfer of an embryo could be authorized within a specific framework***

In France, under L. 2141-3 of the Code of public health, dual donation of gametes is prohibited. Thus, *in vitro* conception of a human embryo is possible only if at least one of the gametes comes from a member of the couple seeking to become parents and for whom they will be transferred.

When the embryos have been conceived, some are transferred to allow for a birth within the applicant couple, some are stored, some may be made available for research if the parents consent (article L. 2141-8 of the Code), and some are destroyed (article L. 2141-4 of the Code). The parents are consulted yearly as to what is to become of these “surplus” embryos.

Article L. 2141-5 of the Code of public health allows some of the stored embryos to be accepted by another couple “*in exceptional circumstances*”. This acceptance is subject to a judicial procedure designed to assess the conditions that await the child to be born. The article also states that “*in the event of the death of one member of the couple, the survivor is consulted in writing as to whether he or she consents to the stored embryos being accepted by another couple on the conditions set out in article L. 2141-6.*”

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<sup>133</sup> Round table of November 9, 2005.

Thus, a widow may agree to the acceptance by another couple of embryos produced from her gametes and/or those of her spouse. However, she cannot accept them herself, since article L. 2141-2 of the Code of public health states that the death of a member of the couple prevents the insemination or transfer of the embryos. If she does not agree to acceptance of the embryos by another couple, they will be destroyed.

Claude Sureau, who believes it is unfortunate that France does not allow a dual donation of gametes in the context of medically assisted conception, is strongly critical of the ban on *post mortem* transfer: “*Lastly, honourable members, if there is one thing in the 1994 legislation and the Law of 2004 with respect to filiation that is profoundly shocking, unacceptable in my eyes and tragic from a human point of view, it is the ban on the posthumous transfer of embryos!*” He believes that French law condemns “*a fatherless orphan to becoming a fatherless and motherless orphan*” and creates situations that are hard to justify: “*Imagine what you will say to the children if they are alive after transfer to another couple: you were wanted by your parents, especially your mother after your father died, your mother wanted to bear you and raise you, but by some strange concession to public order, it was decided that you would be raised by a foster couple!*”<sup>134</sup>

The argument that medically assisted conception must not allow for the birth of a fatherless child can in fact be qualified: the conception of a child for a single woman through a gamete donation is indisputably distinct from the implantation of an embryo conceived from the gametes of a couple parted by an untimely death who had a desire for children that was being realized. The child thus brought into the world will undeniably have a father, even if he is dead, and family on his or her father’s side.

Moreover, after the death of the male member of the applicant couple, the denial of insemination and the denial of embryo transfer do not raise the same ethical issue. In the first case, conception has not yet taken place and the child exists only in the parents’ plan; in the second, it has already taken place, although outside the mother’s womb, and the future child does henceforth have a form of existence, which, paradoxically, can develop only outside the couple to whom the child owes his or her conception.

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<sup>134</sup> Round table of November 9, 2005.

It would thus not be aberrant to treat the two situations differently and the possibility of embryo transfer after the death of the father-to-be could be considered. A legislative framework would be necessary to specify the period during which transfer would be possible, perhaps after time for reflection to enable the woman to grieve for her husband or companion. The number of authorized transfers should also be limited to what will allow a single pregnancy to be carried to term.

The Minister of Justice, however, does not favour consideration of such a possibility: *“I am also opposed to the post mortem transfer of the embryo to the mother. I know the National advisory committee on ethics has repeatedly expressed approval of the practice on humanitarian grounds. I believe those grounds, however worthy, cannot stand given the harmful consequences and upheavals in family law entailed in legal recognition. I would like first to point out that this issue was very thoroughly debated during the recent review of bioethics legislation. In the previous legislature, the National Assembly had planned to make post mortem embryo transfer permissible under supervision. The plan was abandoned, in particular because of its impact on the law of succession. Admittedly, this is an issue we do not know how to resolve. First and foremost, however, it is for reasons of family policy that I would have strong reservations about the prospect of such a reform if it resurfaced as an issue.”*<sup>135</sup>

There is no doubt that *post mortem* transfer could pose problems in the settlement of estates, but these could likely be lessened by supervising the time period involved in the embryo transfer and, thus, the birth of a child. Moreover, solutions are found when the existence of an illegitimate child comes to light after the settlement of an estate; they could all the more easily be applied if the possibility of a birth could be allowed for from the beginning of the process of settlement.

After prolonged discussion, the Mission believes that, given the strong symbolic presence of the deceased father, the mother should be permitted to undergo implantation of an embryo between the sixth and twelfth months following death.

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<sup>135</sup> Hearing of December 13, 2005.

Proposal

– *In the case of the death of the father, permit the mother to undergo implantation of an embryo between the sixth and twelfth months following death.*

## **2. The prohibition of gestation on behalf of another should be maintained**

The ban on any form of surrogate gestation appears unjustified to a number of witnesses heard by the Mission, particularly Claude Vaillant, Grand Orator of the Grand Orient of France.<sup>136</sup>

Emmanuelle Revolon<sup>137</sup> wants surrogate gestation to be allowed for all persons, single or member of a same-sex or heterosexual couple, provided they have a parental plan and a commitment to the child to be born. This demand is perfectly consistent with the other positions defended by the Association of gay and lesbian parents and parents-to-be with respect to adoption or access to medically assisted conception. Its particular purpose is to get around the inability of a man or a male couple to bear a child while respecting “*their fundamental desire to have a child that is flesh of their flesh.*”

Without going as far as this very liberal solution, other persons said they want authorization of surrogate gestation in certain cases, particularly as a remedy for forms of female infertility, and within a strictly defined framework.

*a) For ethical reasons, gestation on behalf of another cannot be legalized*

- **Arguments for the lifting of the ban**

All witnesses stressed the evolution of the practice of surrogate gestation between the 1980s and the present day – the condemnation by the *Cour de cassation* in 1991 having dealt with methods henceforth obsolete. For example, Laure Camborieux explained that in the 1980s, “*in general, the surrogate mother had no contact with the couple or, subsequently, with the child; there was no procedure to ensure either her informed consent or monitoring of her*

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<sup>136</sup> Round table of December 7, 2005.

<sup>137</sup> Round table of November 9, 2005; except as noted, those who commented with respect to surrogate gestation did so at this round table.

*medical or psychological well-being after the birth.*” The ban thus outlawed a practice she described as inhumane.

The situation is quite different in countries where surrogate gestation is now allowed: *“Gestation on behalf of another as now practised in countries other than France has very little to do with the earlier situation of surrogate mothers. It takes place within a protective legal framework that guarantees the informed consent of the birth mother and the intended parents.”* It is subject to a series of conditions that vary from country to country and apply to both the intended parents and the birth mother. Building a national legal framework would make it possible to avoid the clandestine practices which French couples turn to when they lack the means to go abroad. Ms Camborieux is in fact concerned about “amateur” inseminations performed without medical, psychological or legal supervision.

Martine Gross also sees such a national legal framework as a way of avoiding the abuses that may occur abroad: *“With regard to surrogate motherhood, I wish to point out that article 16-7 of the Civil Code voids any agreement for procreation or gestation on behalf of another. However, some countries provide a legal framework for this practice in order to guarantee respect and dignity for all concerned. We could cite Canada, Australia, New Zealand, some US states, Taiwan, Mauritius, Israel and, closer to home, the Netherlands, Denmark, Belgium, Hungary, Romania, Greece, Finland and Great Britain. Instead of being completely banned, which leads to dealings abroad, the practice should be legally sanctioned in France to prevent abuses.”*<sup>138</sup>

Another argument for the legalization of surrogate gestation is based on the fact that access to medically assisted conception does not provide a solution for every case of infertility: it makes it possible to treat some, particularly the absence of ovarian function, with an ovocyte donation, but not other pathologies, particularly of the uterus, for which surrogate gestation is the only solution. Geneviève Delaisi de Parseval thus explains that *“the invention of in vitro fertilization has constituted tremendous progress for many sterile couples and surrogate gestation is a very useful form of such fertilization, as it offers a remedy for an irreversible form of female sterility, the lack of a uterus or an accidental hysterectomy.”*

In addition, in France, acceptance of embryos is legal while surrogate gestation is prohibited, which Ms Delaisi de Parseval finds not only unjust but also

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<sup>138</sup> Round table of July 13, 2005.

illogical “because the donation of gametes, and more certainly of an embryo, may be a weightier consideration in the life of a child than having been carried by another mother, perhaps a friend of his or her mother’s.” After thirty years’ practice, she believes that “purely gestational surrogate gestation presents no more risk for the psychological well-being of the child than an ovocyte donation.” In the former case, in fact, the surrogate mother (Ms de Parseval uses the familiar term “nanny”) is content to bear a child who is a complete stranger to her and will be raised by his or her progenitors, while a woman pregnant as a result of a donated ovocyte feels like “the surrogate mother of her own child.”

The argument that surrogate gestation makes a woman’s body a mere instrument is criticized. In Emmanuelle Revolon’s view, “to advance that argument is to disregard the personal reasons that motivate some women to carry and bring into the world a child for someone else, considering their action as something positive, even in the absence of financial reward, I would point out that in those countries where the practice is permitted, surrogate mothers must already have borne a child. This is not making a woman’s body an instrument, but on the contrary, a form of freedom to control one’s body, like the right to contraception or to abortion. A woman must have the right to conceive a child for someone else if she sees fit.” In the same vein, Geneviève Delaisi de Parseval evokes the happiness derived from the gift thus made, the same happiness as that experienced by organ donors. Since organ donations *inter vivos* are allowed in France, “Why not allow a mother or a sister to bear a child for a woman who, for medical reasons, is not capable of gestation? It is admittedly not a way of saving a life, but it is a way of creating one and that is no less important. If there is a medical risk to the surrogate mother, it seems to me no greater than that taken by organ donors.”

Some associations that took part in the round table of November 9, 2005 suggested forms of supervision they felt would enable surrogate gestation to take place in France under conditions that would limit abuse:

- The consent of the intended parent couple and the surrogate mother should be verified, for example, in accordance with the rules in place for embryo transfer;
- At least one of the intended parents should be a genetic parent for consistency with the prohibition on dual donations of gametes;
- To limit cases in which the surrogate mother wishes to keep the baby, there should be mandatory separation between the genetic function (the ovum donation) and the gestational function (pregnancy);

- Responsibility for the child should be transferred to the intended parents at conception to avoid the risk of their rejecting a child who does not meet their expectations (a child with a disability, for example);
- Before birth, a bond should be established between the intended parents and the surrogate mother.

Furthermore, in line with recent European legislation, some suggest reserving surrogate gestation for couples who meet the conditions for medically assisted conception but who cannot make use of the technique (lack of a uterus, for example). This would prevent the use of surrogate gestation for “convenience” or by a same-sex couple.

- ***Ethical concerns are behind the refusal to lift the ban***

Pierre Murat strongly resists the idea of allowing surrogate gestation, even within a strict legal framework: *“In reality, this type of maternity undermines two essential values that protect human dignity: first, the unavailability of the human body, more specifically, the unavailability of a woman’s capacity for procreation; second, the unavailability of filiation. To accept such maternities is to place in trade, even at no charge, the gestational capacity of the mother. It means allowing the transfer of bonds of filiation outside what have hitherto been controlled processes – socially controlled in the case of adoption. It means introducing into the law of filiation, which is now granted by an outside authority, the possibility of contracted filiation. We would thus be moving away from institutional filiation and towards brokered filiation.”*

In this regard, he echoes the arguments used by the *Cour de cassation* in prohibiting the practice and preventing the adoption by the intended mother of a child produced in this way.

Chantal Lebatard is also strongly opposed: *“We cannot embrace the concept whereby medical science must respond to every wish for a child, particularly in the case of surrogate gestation – a practice that ignores the bonds created between a mother and her child during pregnancy and makes a woman’s body an instrument, which is not acceptable.”*<sup>139</sup>

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<sup>139</sup> Hearing of December 13, 2005.

France offers exemplary assistance to infertile couples who want children and whose treatment qualifies for government assistance. It should not, in order to satisfy the desire for children at any price – no matter how legitimate – authorize every practice available to medicine. It must set ethical limits.

True, in today's globalized world, we need only go online to be offered opportunities to deal for anything, including a human organ, a "womb for rent", or even a newborn, as happened last spring, when a Belgian surrogate mother tried to sell an infant to the highest bidder. However, the fact that a national law may be circumvented cannot obviate the legislator's duty to establish principles and set limits. Renouncing this duty would be to agree to systematically concur with the most permissive legislation.

The Mission believes that bioethics in France should include a continuing absolute ban on surrogate gestation. Without it, the door would be open to abuses of all sorts and even to situations like those that can arise in California, where the birth of a child can involve up to five people: a sperm donor, an ovocyte donor, a gestatrix and an intended parent couple.

***b) The situation of children produced by surrogate gestation cannot be resolved by the establishment of maternal filiation***

In the event the ban is not lifted, for the children already born, the defenders of surrogate gestation ask that the filiation of children born as a result of this practice may be established with the intended mother.

Two legal solutions can be considered: adoption and possession of status

A third solution is advanced by Emmanuelle Revolon, who suggests merely allowing surrogate gestations to go ahead in countries where they are allowed and abandoning all vigilance in this regard: *"In particular, we should forbid any directive preventing the transcribing onto French registration documents of the birth record of children born to surrogate mothers abroad, as well as withdraw all circulars sent out to French consulates for the purpose of tracking down cases of surrogate motherhood, as seems to be the practice in some administrative branches."* Unless the ban is reconsidered in France, this would mean closing our eyes to the use of the practice abroad, which would be rather hypocritical.

- **Adoption must remain impossible**

It is *Cour de cassation* jurisprudence, based on principles of public order, which excludes full adoption of a child born to a surrogate mother by the spouse of his or her father. The only way around this difficulty would be legislation stating explicitly that an application to adopt in such circumstances is not a perversion of the institution of adoption. However, the current inability of a de facto partner to fully adopt the child of his or her companion would make this solution applicable only to married couples. A de facto couple could gain approval for simple adoption, with sharing of parental authority by delegation.

The present situation is considered contrary to the interests of the child by a number of witnesses. According to Emmanuelle Revolon, *“The fact is that current legal provisions in France run counter to the interests of the child. Whatever opinion each of us may have about surrogate gestation, no one can deny that these children exist and were wanted. In enacting provisions against couples who use surrogate gestation abroad, the legislator weakens protection for the children since they can be deprived of their parents or have only one bond of filiation.”* A satisfactory way of respecting the interests of the child, therefore, would be to explicitly authorize the child’s adoption by the intended mother, with the judge responsible, as in any adoption, for assessing whether it is indeed in the child’s interests.

However, writing into law that a forbidden practice may nevertheless have legal effects is hardly satisfactory, particularly inasmuch as the practice may have been performed clandestinely in France. The Mission therefore believes that explicitly authorizing the adoption of child born of a surrogate gestation would encourage circumventing the ban on the practice.

- **Possession of status will not work**

Recourse to possession of status (“possession d’état”) would have the advantage of resolving concrete cases without making new law (such as giving the intended mother the right to adopt).

However, since the Order of July 4, 2005 referred to above, possession of status must be *“uncontested, public and unequivocal.”*<sup>140</sup> Yet maintaining the ban on

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<sup>140</sup> According to the wording of article 311-2 of the Civil Code, as it is to come into force on July 1, 2006.

surrogate gestation may vitiate the possession of status that the intended mother might invoke by making it equivocal and contested. The only solution would be to reconsider the qualification introduced by the Order.

Creating an exception to a principle enshrined in the Order of July 2005 to give security to filiations appears to be a delicate matter. Can we retreat from this principle in order to resolve the special problem of children born of surrogate gestation, whose numbers, though not known, are surely not very great?

Furthermore, while some object to the fact that the bond of filiation between a child and his or her biological mother cannot be established solely on a genetic basis, whereas that bond is commonly used to the benefit of fathers, not all children born of surrogate gestation are produced from the gametes of their intended mother.

Above all, the intended mother can benefit from a delegating or sharing of parental authority that at least allows her to perform the customary actions related to the supervision and upbringing of a child, provided such delegating or sharing has not been denied by the judge as a perversion of the institution, as is the fear of Laurence Brunet, a member of the Maia association. The father may also make a testamentary arrangement for the woman who raised the child to be designated the child's guardian, should he die while the child is a minor.

For the sake of consistency with its wish to maintain the ban on surrogate gestation in any form, the Mission believes it wise to continue to disallow the establishment of a bond of filiation between a child born as a result of this practice and the intended mother. The solution lies, rather, in the exercise of parental authority and here the Mission suggests a "delegation of parental responsibility", which could be used as required to resolve difficulties encountered by intended mothers (see discussion below of developments concerning the position of third parties in relation to the child).

### **3. The no-cost nature of gamete donations and assisted conception should be reaffirmed**

The Mission's attention was drawn to the scarcity of ovocyte donations in France, related mainly to the difficult surgery required.

The principle of no-cost organ, tissue and gamete donations allows for no exceptions and now does not permit even expenses to be paid to the donor.

According to Geneviève Delaisi de Parseval, the inflexibility of French law on this point is regrettable, given that other countries have found a more satisfactory solution. She offered the Spanish example: *“The Spanish law of 1999 respecting gamete donations, like French law, proscribes payments to donors, but in practice a sort of pretium doloris, or pain indemnity, is provided, and ovocyte donors receive from public and private hospitals financial compensation of about 1,000 euros per donation cycle – a sum the authorities and the donors regard as reasonable. As a result, two Catalan clinics are working full-time for French couples... How could it be otherwise? Who can want to make an ovocyte donation at no charge when the cost of the procedure is high in both psychological and physical terms?”*<sup>141</sup> Laure Camborieux confirmed the existence of such a situation, which leads some French couples who could legally obtain an ovocyte donation free of charge in this country to go to Spain, where the donation costs them 6,000 euros per attempt but does not require a three- to four-year wait. Government programs do not cover these costs and thus low-income couples do not have access to this solution. She noted that *“while the Spanish and Belgian clinics are well-run establishments under government supervision, clinics are opening up in Eastern countries about which we have the gravest reservations.”*<sup>142</sup> The risk of abuse seems very real.

Arnold Munnich, who said that he believes in the principle of unpaid donors *“if only for Kantian reasons”*, admitted that paying donors’ expenses would not bother him at all, while Claude Sureau said he was *“fully in favour of paying expenses that I think are perfectly legitimate.”*<sup>143</sup>

However, does the issue justify accepting any form of exception to the principle of free donations or at least making an exception only for donors of ovocytes when other kinds of donation can also involve suffering? Should we also compensate organ donors to relieve the scarcity of donations? There is also reason to fear that financial compensation may induce needy women to give up their ovocytes to earn money, as is done in some foreign countries, in particular the United States.<sup>144</sup>

In the view of the Minister of Justice, *“Any exception to a fundamental principle – in this case, the one whereby the human body is something excluded*

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<sup>141</sup> Round table of November 9, 2005.

<sup>142</sup> *Idem.*

<sup>143</sup> *Idem.*

<sup>144</sup> In the United States, ovocytes are sold, in particular by young women who use the proceeds to pay their tuition. The financial compensation is, however, substantially higher than the modest “pain indemnity” paid in Spain.

*from trade – carries with it the risk of diminishing the very credibility of that principle.”*<sup>145</sup> This assertion is as valid for unpaid donations of ovocytes as for the ban on surrogate gestation. The Mission shares this view and favours maintaining the total absence of financial compensation that is a feature of the French bioethics structure and that has a corollary in no-charge medically assisted conception in France.

### **III. CHILDREN’S ACCESS TO THEIR PERSONAL ORIGINS**

Article 7 of the International Convention on the Rights of the Child gives a child “*as far as possible, the right to know...his or her parents.*”

The Hague Convention of May 29, 1993 on the protection of children and co-operation in respect of intercountry adoption states, in article 30: “*The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved. They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State.*”

These two international conventions do not offer an imperative right of access to their origins that individuals can invoke, but they nevertheless set objectives for the legislation of states signatories.

It is true that in some situations, determining origins is materially impossible: records are non-existent or have been destroyed by war, country or region of origin is inaccessible, witnesses from early childhood days have all died, the mother’s way of life at the time of conception makes the father’s identification uncertain or impossible, and so on. Moreover, it may be considered legitimate not to record the identity of the father when conception was the result of incest or rape.

Apart from such special cases, however, a number of legal situations may deny a child knowledge of his or her parents: anonymous childbirth, abandonment with a request for secrecy, or medically assisted conception with a third-party donor.

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<sup>145</sup> Hearing of December 13, 2005.

While the number of anonymous births has decreased with developments in contraception and the voluntary termination of pregnancy, as well as in the social acceptance of single mothers (there were 10,000 a year until the 1970s, compared with about 780 in 1991; since 1999, there have been between 500 and 600 a year) and abandonment in secrecy is no longer possible, the use of medically assisted conception with a third-party donor (1,000 a year) is more frequent. In all, more than 400,000 living persons were born or abandoned in secrecy.

## **B. CHILDREN BORN OF MEDICALLY ASSISTED CONCEPTION WITH A THIRD-PARTY DONOR**

Whereas the number of anonymous births is declining, the development of medically assisted conception with a third-party donor is creating new cases in which a person does not know his or her biological origins. The question of the wisdom of making access to knowledge of one's origins available is closely tied to individual concepts of the importance of biological factors in relation to cultural factors in a person's formation.

### **1. The principle of anonymous donation**

Children born of medically assisted conception with a third-party donor (or an embryo transfer) have no possibility of obtaining information about the gamete donor.

Article 311-19 of the Civil Code states that in the case of medically assisted conception with a third-party donor, "*No bond of filiation can be established between the donor and the child that is conceived.*" This provision applies both when only one gamete is from a third-party donor and when the child is the result of an embryo donation.

The impossibility of establishing a bond of filiation does not entail the impossibility of knowing the identity of the donor or donors. This second impossibility results from the general principle of anonymous donation set out in article 16-8 of the Civil Code. The principle is restated in the Code of public health in relation to both gamete donations (article L. 1244-7) and embryo donations (article L. 2141-5: "*The couple accepting the embryo and the couple renouncing it may not know their respective identities*"). Even a doctor is allowed access only to "*non-identifying medical information, in case*

*of therapeutic necessity, concerning a child born of medically assisted conception with a third-party donor” (article L. 1244-6).*

Moreover, it is apparently common not to inform a child of the circumstances of his or her conception: Laure Camborieux<sup>146</sup> estimates that only 10-15% of children born of MAC with a third-party donor were so informed.

## **2. Offering freedom of choice to donors and future parents**

The situation of a person born of a gamete donation and that of a person born in secrecy are not identical, although both can encounter the same problem with respect to the anonymity of their progenitor.

A birth resulting from medically assisted conception with a third-party donor generally does not involve the great suffering surrounding anonymous childbirth. It is a response to a sterile couple’s desire for a child through a donation – now anonymous – of a person outside the couple; the donation is freely given, at no charge; the child was desired by his or her legal parents and carried by the woman who is raising him or her; he or she did not suffer the trauma that always follows abandonment, however early in life it occurs. When the a person learns the circumstances of his or her conception, he or she does not ask himself or herself the same anguished questions as a person born in secret. The difference in their situations was noted by Marie-Christine Le Boursicot: *“Being children born of medically assisted conception, the search for their origins does not seem to me to be an emotional experience: it is not a search for an account of their abandonment or its causes, but rather a search for their biological background. Thus, the problem that arises is not the same and the answer to it can be different.”*<sup>147</sup> Chantal Lebatard<sup>148</sup> is of the same view. She adds that few children and few donors enquire about the origin of gametes or what became of them. Only a few donors of ovocytes ask centre staff whether children were born of their donation.

Questions from a person born of a gamete donation are not improper and the answers the person might receive pose no risk of upheaval in the life of the progenitor, as is likely when the pain of a secret childbirth is rekindled.

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<sup>146</sup> Round table of November 9, 2005; except as noted, those who commented on access to their origins for children born of MAC with a third-party donor did so at this round table.

<sup>147</sup> Round table of November 16, 2005.

<sup>148</sup> Hearing of November 13, 2005.

Françoise Moneger,<sup>149</sup> who defends the right of persons born of donor insemination to learn the circumstances of their conception, nevertheless points out that while the law recognizes this right, the anonymity of persons who made donations under the current rules should be preserved.

Geneviève Delaisi de Parseval attested to the frequency of consultations by persons suffering after a donor insemination, be they parents or children. Children would just like to have information, even non-identifying information, about their progenitor: *“For the children concerned, it is not a matter of creating personal ties with gamete donors but of situating themselves within an intergenerational narrative, of knowing where they came from, whether their progenitor was fair-haired, whether he played the violin, whether their grandfather was a cabinetmaker...”*

Laure Camborieux believes it is extremely difficult to hide from children the fact that they were conceived from the gametes of a third party, if only because they inevitably have physical characteristics that no one can explain. But parents often keep their secret in order not to risk upsetting the child, who would otherwise be confronted with a void regarding one aspect of his or her origins: *“Many parents do not wish to maintain the secrecy concerning the way in which their child was conceived, but do so because they fear that without an explanation as to the motivation of the donor, the revelation of the child’s origins may be disturbing. In other words, it is sometimes the impossibility of breaching the anonymity of the donation that drives parents to keep their secret.”* However, whatever may favour the lifting of the veil of secrecy in relaxed circumstances, as is done for adopted children, is positive. The worst outcome is for the child to discover the truth about his or her conception during a family crisis or the parents’ less-than-amicable separation.

The anonymity of the donation is an absolute principle – donors and recipients remain ignorant of each other’s identity – but the donor is not truly anonymous, since the centre that collects the donation knows the donor’s identity. Françoise Dekeuwer-Defossez believes that since the information exists, it must one day become available to children conceived through a donation: *“Will it be possible to tell them indefinitely that the name of their biological father is written down somewhere but they will never know it? I am not sure about that.”*<sup>150</sup>

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<sup>149</sup> Round table of November 16, 2005.

<sup>150</sup> Hearing of October 5, 2005.

Opinion as to the wisdom of lifting the anonymity is not unanimous. Because of the possible psychological consequences, Claude Sureau has reservations both about revealing to the child the circumstances of his or her conception and revealing the donor's identity.

Particularly in light of experience abroad, many believe that removing anonymity would lead to a decrease in donations, when in France donations of ovocytes are already all too rare. Jacques Combret thus urges caution: *“Nor do we think it wise to change the rule respecting the anonymity of gamete donors in cases of MAC with a third-party donor. The Swedish experiment had a negative effect, with a substantial drop in donations. People are willing to help someone have a child, but without the risk of creating a legal bond.”*<sup>151</sup>

Arnold Munnich shares his concern and finds it especially unfortunate that the pressure for donors to be known reveals a tendency to reduce the subject to a biological product: *“In this search for filiation, disregarding everything that makes the subject who he or she is – the environment and the adoption process that accompanies every birth – in order to reduce the person to a biological product is a way of yielding to the fascination with science. Yet the subject is much more than a few molecules of DNA. That betrays a pretty poor image of a human being. If filiation and the search for origins is increasingly a burning issue, it is because everything that made up a human being in terms of culture, upbringing and religion has crumbled and only one reality remains: the biological reality. Amending the law in a way that sees in the subject merely a product of the fertility of the donor would be a step backwards. I hope that the legislator will not depart from the current provisions, which bestow full nobility on the act of donation and allow parenthood to fully bloom.”* Similarly, Sophie Marinopoulos notes that *“donating a gamete is not enough to build a filiation structure”*<sup>152</sup> and that the most important thing is for the parents who receive the donation to make it their own and act as if the gamete were no stranger to them.

It is true that an overemphasis on the biological aspects may enclose people in a kind of all-encompassing virtual destiny determined by the genes that characterize them. Olivier Abel pointed to this danger: *“What is serious in the search for personal origins is their ‘biologicalization’, which is merely a band-aid for the ‘crumbling of the experiential identity’ noted by Paul Ricoeur.”*<sup>153</sup>

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<sup>151</sup> Hearing of October 5, 2005.

<sup>152</sup> Round table of November 16, 2005.

<sup>153</sup> Hearing of December 7, 2005.

The Minister of Justice pointed out the consequences that the child's access to the identity of the third-party donor would have for the law of filiation: *"You have also asked me whether consideration could be given to introducing a form of access to origins in cases of gamete donation, in particular by introducing conditional or optional anonymity. I am opposed to both. Such a change would radically alter the conditions and the philosophy related to donations. First, the prospect of lifting the anonymity of the donor when the child reaches majority would likely concern and thus discourage many donors. They might fear the intrusion into their lives of an absolute stranger, a third party, which is what the child born of their donation would be for them or even be apprehensive about consequences in terms of liability. Above all, giving the child this possibility at majority would undoubtedly have a psychological impact on his or her relationship with the parents even before the age of majority was reached. Their position might be rendered fragile as a result. Such a change would thus lead, in my view, to a quite unnecessary weakening of filiation in the case of a third-party donation. In incorporating into articles 16-8 and 311-19 of the Civil Code the principle of anonymity in gamete donations – a principle that constitutes a public order provision – the legislator made a social choice. Gamete donation must remain a device to relieve infertility. We should not introduce into it, even in a partial way, a filiation dimension or any question at all of access to origins."*<sup>154</sup>

Nevertheless, there are a number of possibilities that can be considered in the search for a balance between a person's right to know his or her origins and the concern not to make gamete donations even more rare.

A number of witnesses suggested maintaining anonymity when the donation is made but giving the child the opportunity at majority to know his or her origins. This would mean establishing an agency (the National centre for access to personal origins (CNAOP) or something comparable) responsible for recording the identity of donors and processing applications for access to this identity.

Despite the risk of donations becoming more rare, witnesses before the Mission are inclined in this direction. They believe that *"one solution would be to put in place a system similar to anonymous childbirth."*<sup>155</sup> As with anonymous childbirth, access to information would have no legal consequence in such

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<sup>154</sup> Hearing of December 13, 2005.

<sup>155</sup> Round table of November 16.

areas as applications for support payments, visiting or accommodation rights, or birthright inheritance from an estate. Laure Camborieux favours such a system, already in place in Sweden, Canada and New Zealand, and recently adopted by Great Britain.

Another solution might be the future establishment of a “two-track system”, i.e. two different schemes for gamete donations: the first would guarantee anonymity and the second would make the donation a personal action. Receiving couples and donors would be able to choose between the two schemes. This approach is supported by Claude Sureau, who welcomes the freedom of choice individuals would have, but notes that this system was abandoned in the Netherlands.

The Mission believes that receiving couples and donors should be able to choose between an anonymous donation and a personal donation. Rather than a system being set up to research origins comparable to the one managed by the CNAOP (national council for access to personal origins), it prefers to invoke individual responsibility. It therefore favours the establishment, at least on a trial basis, of two donation schemes: one anonymous and the other not. Those choosing the anonymous scheme would continue to benefit from the current system. If the donor and the future parents opted for the non-anonymous scheme, the child would be entitled at majority to have access to the identity of his or her progenitor.

*Proposal*

*– Establish a “two-track system”: two schemes for gamete donations that provide the genetic heritage of the child, the first guaranteeing the donor’s anonymity and the second authorizing access to the donor’s identity.*

THIRD SUB-PART:  
PARENTS AND THE RESPONSIBILITY FOR RAISING THE CHILD

**II. THE ROLE OF THIRD PARTIES IN THE RAISING OF THE CHILD**

**B. GIVING LEGAL PARENTS AN OPPORTUNITY TO DESIGNATE A DELEGATE FOR ORDINARY ACTIONS IN THE EVERYDAY LIFE OF THE CHILD**

Witnesses before the Mission cited the proliferation of families in which children are not brought up by their legal parents alone. Didier Le Gall noted that such situations are particularly difficult to address in our societies, whereas they seem to pose no problem in other cultures, in which children have always been raised by a group consisting of more than just their parents: *“The question is thus unavoidable: What are we to do about these ‘extra’ parents? The question is not to be taken lightly because filiation in the West, and particularly in France, is based on the concept of exclusivity, which means that other parents can never be considered, either concomitantly or successively. Whatever case we consider, the law is at pains to assert the exclusive nature of filiation.”*<sup>156</sup>

Stéphane Ditchév, secretary general of the Federation of movements for the status of fathers, noted that from the child’s point of view, there is really no such thing as a “blended family”, in that for the child, there is always a clear difference between his or her parents, which means the biological parents in the overwhelming majority of cases, and the other people around him or her. Edwige Antier shares this view, noting that according to statistics, a child almost never knows his or her stepparent before age 4 and generally meets the person for the first time at about age 8. She observes, moreover, that *“it is very rare for a bond to persist between a child and the mother’s companion after a further separation, unless other children are born.”* We should thus be cautious in establishing legal bonds that could become meaningless.

While there are cases in which a very strong bond is formed between a child and his or her stepparent, the latter must respect the place of the parents, particularly that of the one he or she has replaced in the life of the other. The Mission thus believes a balance must be found between the preeminence of the

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<sup>156</sup> Round table of November 30, 2005; except as noted, those who commented on the place of the stepparent did so at this round table.

rights of the legal parents, and the need for security and continuity in the everyday life of the child.

### **1. Adoption is not an appropriate response to situations involving blended families**

Facilitating the adoption of a child by the companion of one of his or her parents would indisputably cause difficulties where the child already has two parents. In fact, the establishment of an adoptive filiation should not be favoured when a dual legal filiation exists, to the detriment of one of the child's parents, at the very time when the principle of father/mother co-parenting is strongly advocated. On the other hand, the situation may be perceived differently where the child has but one legal parent. The question then is no longer one of competition between a biological filiation and an adoptive one, but rather of stability in the emotional bonds that develop between the new companion and the parent, as well as between that companion and the child.

Within this context, the debate before the Mission also addressed the question of whether any set of rules facilitating the adoption of the companion's child could be extended to same-sex couples. The question is posed in different terms, depending on whether we are considering full adoption taking the place of the original filiation or simple adoption that maintains the original filiation.

#### ***a) Full adoption***

As we have seen, the possibility of full adoption of the child of one's spouse is reserved for married couples. A number of people appearing before the Mission want it to be authorized for de facto partners. Some advocate it only when the couple consists of a man and a woman; others defend it regardless of the composition of the couple.

Martine Gross recommends that when there is only one legal parent, full adoption by that parent's de facto partner be made possible. She believes that *“such a rule... makes it possible to offer the child the protection of his or her bonds with both parents in the case of death or separation, and two sources of support rather than just one.”*<sup>157</sup>

Laurent Cheno, secretary of the political commission of the Interassociation of lesbians, gays, bis and trans, supports her recommendation. Given how few adoptable children there are in France and aware of the difficulties of

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<sup>157</sup> Round table of July 13, 2005.

international adoption, he believes that allowing joint adoption by same-sex couples would have mainly a symbolic value, whereas “*giving a couple the opportunity to adopt the child of the spouse, partner or de facto companion would thus likely have more of an effect and would fit in with the situation of many blended families.*” This position is shared by Homosexualities and socialism.<sup>158</sup>

However, it would be inconsistent to allow full adoption (*adoption plénière*) of a person’s child by his or her same-sex companion while denying the full adoption of an abandoned child by a same-sex couple. In fact, the two cases have the same legal consequences and would have the same effects on the filiation of the child, since full adoption erases the previous bond of filiation. In the eyes of the law, therefore, the child would have two fathers or two mothers and not one father and one mother. The law would be contriving a fictitious parenthood with no biological plausibility, which is at odds with what the Mission advocates. The same precautionary principle must be adopted in both cases (adoption of a spouse’s child and adoption of an abandoned child) in the interests of the child.

Frédérique Granet does not want full adoption to be possible for a partner of the same sex as the parent, even where there is no other legal parent. On the other hand, she is in favour of it for a couple composed of partners of both sexes, believing it is more in the interests of the child than the recognition of convenience embraced by many unmarried couples: “*Should the couple happen to separate, [filiations] are generally contested at the request of their author or at the mother’s request. If action is taken within the legal time limit, recognition of convenience is retroactively cancelled and the bond of filiation is deemed never to have existed. When an unmarried heterosexual couple thus wishes to establish a bond of filiation between one of its two members and the child of the other member, as the expression of a shared parental plan, full adoption is certainly preferable a priori to the practice of recognitions of convenience.*”<sup>159</sup> Full adoption is in fact irrevocable.

It is precisely this irrevocability that leads other jurists to be hesitant about full adoption of the child of a de facto partner. Adeline Gouttenoire, for example, noted, “*It is necessary to take into consideration the combination of the relationship of the couple and the relationship with the child, and to ask what*

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<sup>158</sup> *Idem.*

<sup>159</sup> Round table of November 2, 2005.

*will become of the relation between the stepparent and the child if the couple breaks up. It would thus be wiser to retain the possibility of revocation of the adoption in order not to form bonds that cannot be broken and might subsequently hamper the child.”* Florence Millet shares this concern: *“It would be perilous to base filiation too systematically on the couple formed by one of the child’s parents and a ‘third party’ because the theoretically irrevocable filiation would survive any break-up of the couple. Moreover, it would continue to have full effect with respect to parental authority, inheritance rights and support obligations.”*

Most members of the Mission believe that, given its irrevocable nature, full adoption is not suited to de facto partnership, a form of union that is more precarious than marriage. We must avoid encumbering the child indefinitely with a filiation that would have been only fleeting and would subsequently become altogether meaningless. It is not therefore appropriate to allow one de facto partner to fully adopt the child of another. In the case of a same-sex couple, this would create the same difficulties as full adoption of an abandoned child; in the case of a heterosexual couple, marriage is possible and opens the way to full adoption of the spouse’s child. It is in fact difficult to imagine a person wishing to become forever the parent of a child not biologically his or hers, but rejecting at the outset a much less confining and permanent commitment to the child’s legal parent, whereas it is precisely the couple the person forms with the latter that would make adoption legally possible.

***b) Joint parental authority after simple adoption (adoption simple)***

Article 365 of the Civil Code allows a biological parent to exercise shared parental authority over his or her child with a spouse when the spouse has adopted the child under the terms of simple adoption. This provision is reserved for married couples. Simple adoption of a companion’s child is, however, possible in a couple who are de facto partners with the consent of the child’s legal parent(s), but it entails a transfer of parental authority to the adoptive parent that deprives adoption of its appeal for the couple. In all cases, the application to adopt is submitted to a judge, who verifies that it is in the interests of the child.

Beatrice Weiss-Gout<sup>160</sup> wants shared parental authority to be possible for unmarried couples in the case of simple adoption of the other partner’s child: *“If you are married and your child is adopted by your spouse, you do not lose*

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<sup>160</sup> Hearing of October 5, 2005.

*parental authority. On the other hand, if you live in a de facto union or a domestic partnership (PACS), you do lose parental authority and you can recover it only through a complicated delegation mechanism, which is absurd. We therefore suggest that the legislator extend the provision in article 365 of the Civil Code to de facto partners and domestic partners.”* In spirit, this suggestion, which seeks to simplify family life, likely concerns only heterosexual couples.

The proposal is supported by Adeline Gouttenoire, who prefers this approach to full adoption because simple adoption can be revoked on serious grounds. This would avoid a situation where permanent bonds would lose all meaning after the separation of the couple composed of the blood parent and the adoptive parent. However, she favours the establishment of a criterion for the duration of cohabitation (eight to ten years) before allowing such adoption by the stepparent and making adoption subject to the consent of the child.

Martine Gross makes the same request for shared parental authority for same-sex couples: *“The APGL also recommends making simple adoption by the social parent possible. In multi-parent families, simple adoption enables adoptive parents to be added to the birth parents, but full parental authority is currently transferred only to adoptive parents. A change in the rules to allow parental authority consensually shared between legal and social parents would enable the child to have a filiation consistent with his or her family environment.”*<sup>161</sup> This would involve writing into the Civil Code a possibility recognized by the high court (*Tribunal de grande instance*) of Paris in July 2004.

From a strictly legal point of view, to the extent that it builds bonds of filiation in addition to those that already exist, without taking their place, simple adoption by a stepparent of the same sex as the legal parent would not, in theory, present the same drawbacks as full adoption. If the child already had two legal parents, they would have to consent to the adoption, but adoption of the child by a second wife, for example, would not erase the existence of his or her father (though it would deprive him of parental authority). If the child had only one legal parent, the matter of consent would be more easily resolved and the stepparent would not be competing with anyone. However, as after full adoption, the child would ultimately have only two parents of the same sex. Moreover, this would be tantamount to encouraging same-sex couples to circumvent the prohibition in French law against medically assisted conception

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<sup>161</sup> Round table of July 13, 2005.

by guaranteeing they would be able to request the establishment of a dual bond of filiation through simple adoption.

It may be thought that promoting simple adoption of the child of a companion in this way runs contrary to recent developments in family law, as Florence Millet explains: *“After taking from the couple formed by the parents the exercise of parental authority over children they conceived, it is now a question of reintroducing a correlation between the level of the couple and that of the family, but in relation this time specifically to children who are not the offspring of the couple in question.”* She is particularly concerned about how difficult it would be to limit the number of bonds of filiation. Since any person whose simple adoption was revoked can be adopted once again, a child could have in succession, as a result of the various couples formed by the biological parent caring for the child, multiple adoptive parents. Furthermore, adoption would have to *“be available in the same way to any new de facto partner or spouse of each parent. Logically, the provisions against a child being adopted by a number of persons, other than two spouses, should be repealed.”* We would thus face an *“uncontrollable proliferation of bonds of filiation”* and practical difficulties in the exercise of parental authority by three or four parents at the same time. The possibility of using simple adoption to add social parents to the biological parents, who would be the latter’s companions and would have the same rights and responsibilities as they, is also advocated by certain associations representing homosexuals.

This prospect would challenge the foundations of filiation as it now exists and would provide confusing points of reference for the children. Even in countries that have been very innovative in this area, the number of legal parents has always been limited to two. In the Netherlands, for example, after the birth of a child to a married female couple, the woman who is not the child’s biological mother shares parental authority and may adopt the baby if the father has not recognized the child. Thus, when a child is the outcome of a “multi-parenting” plan shared in by a female couple and a male couple, the biological father must renounce recognition in order to permit the shared exercise of parental authority by the female couple, with the result that neither he nor his companion has a legal bond with the child. This example illustrates the difficulty of applying legislation that establishes a totally fictitious filiation when it is confronted by the realities of biological filiation.

The majority of the members of the Mission believe it is best not to open a breach in the law of simple adoption since this might lead to a proliferation of

bonds of filiation for the child and open the door to distortion and abuse, contrary to the principles it wishes to see respected in the law of filiation.

## **2. The performance of ordinary actions in the life of the child should be facilitated**

The sharing of parental authority between the parents and a third party makes it possible, if the parents agree, to establish a legal bond between children and a social parent. However, it requires a decision by a family court judge and it places a third party on the same level of responsibility as a legal parent. In the vast majority of blended families, neither the parents nor the children want to see a third party designated by law exercising parental authority. The same holds true when one legal parent is raising the child: a parent who needs help in day-to-day living will not necessarily be willing, for that very reason, to delegate his or her parental authority since it would be an implicit recognition of an inability to fully assume responsibility for the child.

It is in the interests of the child, however, for the role of the adults in the child's life to be fully recognized by society and by the child himself or herself. It is not desirable for the child to be able to dispute the position of the adult who is raising him or her. In the circumstances, approaches could be considered that are less cumbersome and easier to implement.

In her report mentioned above, Irène Théry proposes using the British *Children Act* of 1989 as a basis. This act empowers the stepparent to “*perform all the ordinary actions associated with the supervision and upbringing of the child.*” She recommends inserting in the Civil Code the following article: “*A third party having the usual charge of a minor child may perform ordinary actions in relation thereto without prejudice to the rights of the holders of parental authority.*”

The notaries heard by the Mission<sup>162</sup> suggested a more flexible contractual solution: “*The place of stepparents is in fact very important in everyday life, but we must be mindful of protecting the biological parents, more particularly the father, who is the most easily displaced. The search for an amicable agreement is possible within blended families, which are free of conflict in more cases than people think. Notaries had suggested in 1999 the possibility of amicable arrangements for partial delegations of parental authority for the ordinary actions of everyday life. This could also be considered in the case of a*

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<sup>162</sup> Hearing of October 5, 2005.

*domestic partner or a de facto partner... Such a contractual mandate would also have the advantage that it could be cancelled, limited or adapted.”*

The contractual mandate, drawn up in a formal document, would be executory forthwith without judicial validation and could be revoked unilaterally, the revocation taking effect when communicated to the person mandated. In fact, given that this solution would require the agreement of both parents holding parental authority and that the agreement would cover only the authority to perform ordinary actions in the everyday life of the child, it seems that the oversight of a judge is not indispensable, which simplifies the procedure considerably by comparison with that contemplated in article 377-1 of the Civil Code, which can, however, cover more than merely everyday ordinary actions. What is involved is not so much a partial delegation of parental authority as an amicable sharing of a portion of that authority.

By comparison with Ms Théry’s proposal, which is automatic and systematic, the notaries’ suggestion is better adapted to diverse situations, since not all stepparents take daily care of the children of their spouse or companion, and more respectful of the rights of each parent, including the non-custodial parent whose consent to the arrangement is indispensable. At the same time, however, the notaries’ suggestion has the disadvantage of being subject to that consent, whereas the child’s practical situation may require reinforcement by the assignment of rights to the person who usually cares for the child.

Those attending the round table arranged by the Mission on this subject had contrasting views on the question of authorizing a third party to perform ordinary actions in the life of the child through a contractual arrangement.

Opponents of this approach cite either the importance of a judge’s input to ensure that the solution chosen is in the child’s interests or the practical difficulties such a form of authorization might entail.

Adeline Gouttenoire believes that the implementation of article 377-1 of the Civil Code, which authorizes shared parental authority, should be possible even where no particular circumstance requires it, which some judges refuse. However, she does feel that the agreement of both parents and the oversight of a judge are both indispensable.

Florence Millet also attaches great importance to the judge’s input, which seems to her essential in that the child’s interests cannot be presumed but must be assessed in practical terms. She is also concerned about “*conflicts that are*

*bound to arise among the various adults once they are in a position to claim rights over the child. Thus, the disputes the legislator has sought to control in addressing the consequences of divorce would arise once again in relation to the stepparent. They would develop not only at the outset over the assignment of parental authority, but also subsequently and repeatedly in the distribution of portions of parental authority among the various holders.”*

This risk of conflict may seem apparent, but its magnitude should not be exaggerated. In any case, this agreed-upon arrangement of family life would be possible only if the legal parents felt the need for it in their daily lives. It presupposes an extremely harmonious state of affairs between the legal parents despite their separation. In particular, it would be possible, if a difficulty arose, for either parent to terminate the mandate immediately. In the case of conflict, the law would recognize the exclusive authority of the legal parents.

Edwige Antier believes that practical problems in daily life are not very frequent, but one could *“imagine the signing of a form or some sort of contract authorizing a stepparent to perform ordinary actions concerning the child, provided, however, that both parents agree to it.”* She noted the anguish of fathers who, sometimes even before their child is born, fear being distanced from the child one day if they separate from the mother. Also, *“giving a contractual mandate to the stepfather without the authorization of the birth father would be very dangerous since it would be a denial of the birth father’s role, whereas tremendous work has been done to involve him more and give him his place after a separation through the exercise of joint parental authority and alternating custody – arrangements that are beginning to pay dividends.”*

Didier Le Gall believes the daily life of families should be made easier, particularly when the children recognize the stepfather *“as a foster father with an emotional and socializing role in a supplementary capacity, since he is not competing with the biological father.”* In such a case, an agreed-upon solution would be perfectly suitable.

As soon as there is a single legal parent or an agreement between the legal parents, the simple organization of the child’s daily life must be considered a private matter that does not require society’s control. This is indeed how parents now organize things in practice, authorizing third parties on a case-by-case basis (authority to pick the child up from school, have him or her admitted to hospital, take the child on vacation, and so on). The Mission wants a consistent and protective legal framework for such authorizations. It is not a question of transferring parental authority: this must remain a judge’s

prerogative. The organization of the child's life could therefore be the subject of an agreement between the parents, who could thus entrust ordinary actions in the raising of the child to third parties whom they jointly select as a "delegate regarding ordinary actions in the child's daily life".

The Mission thus proposes giving legal parents who want it the possibility to grant a third party – a stepparent, grandparent or even another person who usually cares for the child – a "delegation of parental responsibility" regarding the ordinary actions in the child's life. This delegation could take the form of an authentic deed before a notary or a deed under private seal approved by a judge. This second form of delegation would avoid a situation where notary fees, however modest they may be, constituted an obstacle for certain families.

This "delegation of parental responsibility" would help meet, in a more flexible manner than current solutions available to judges, the upbringing requirements of the three million children who, in France, do not live with both their parents.

*Proposal:*

*- Offer parents the opportunity to give a third party a "delegation of parental responsibility" for the ordinary actions in the child's life, either by authentic deed before a notary, to be immediately enforceable, or by deed under private seal approved by a judge.*

## THE MISSION'S PROPOSALS

The mission proposes 100 measures requiring modification of existing legislative or regulatory measures.

### A. PROTECTING CHILDREN'S RIGHTS

#### 1. Expediting the Process of Bringing French Law into Compliance with the International Convention on the Rights of the Child

*1– Establish a transcription commission relating to the International Convention on the Rights of the Child, under the aegis of the ministries responsible for justice and the family, with the task of drawing up a list of amendments to be made to French law to bring it into compliance with the Convention*

*2– Incorporate paragraph 1 of article 3 of the International Convention on the Rights of the Child into French law through a statutory provision of general application, affirming the primacy of the best interests of the child*

#### 2. Better Monitoring of Violations of Children's Rights

*3– Make the opinion of the Defender of Children regarding bills relating to children or children's rights mandatory*

*4– Create parliamentary delegations for the rights of the child*

*5– Remind the Government of its obligation to submit a report annually to Parliament on the status of the rights of the child in France*

#### 3. Giving all Children the Right to be Heard by the Courts

*6– Give children the right to be heard, if they so wish, in all judicial proceedings that affect them, while also guaranteeing that they have the opportunity to decline a hearing when it is requested by the judicial authority*

*7– Require courts to explain to children the judicial decisions made to the extent that they affect them, including decisions to release accused persons and decisions not to act on complaints*

*8– Provide encouragement for minors to be assisted by counsel by expanding access to legal aid for child victims and providing appropriate training for lawyers*

*9– Review the terms under which ad hoc administrators are appointed to guarantee that they are independent and increase the fees paid*

## **B. CONSOLIDATING COUPLES**

### **1. Guaranteeing Informed Choice in Organizing Lives as Couples**

*10– To guarantee free and informed choice, inform couples, especially when they enter into a PACS, apply for a common-law relationship certificate, a marriage certificate or certificate of birth for a child, about the differences between the rights and duties associated with marriage, a PACS and a common-law relationship.*

### **2. Making the Civil Solidarity Pact a Coherent Contract for Couples**

#### **– Entering into and registering the PACS:**

*11– Specify that the written agreement that is a condition of entering into the pact may be a deed under private seal or an authentic deed entered into before a notary*

*12– Preserve registration by the clerk of the lower court, but incorporate a reference to the existence and, where applicable, the dissolution of the pact into the birth certificate of each of the partner by entering a simplified reference that does not disclose the identity or sex of the partner*

*13– Eliminate the prohibition on entering into a pact for persons of the age of majority under tutorship, provide that persons of the age of majority under curatorship must be assisted by their curator when they enter into and dissolve a civil pact, and grant persons who are incarcerated the right to enter into a PACS*

#### **– Rules governing property:**

*14– Replace the existing presumptions of undivided ownership with rules providing for separation as to property, with the partners being able at any time to opt, by agreement, for rules providing for organized undivided ownership*

#### **– Social rights:**

*15– Provide for authorization for a day's absence for entering into a PACS*

*16– Allow contracts with fixed terms to be used to replace a partner who actually participates in the professional activity of the business*

*17– Allow temporary employment agency employees to be used to replace a partner who actually participates in the activity of the business*

*18– Consider a person who works with his or her partner to be a home-based worker*

*19– Consider a partner to be a dependant for the purpose of calculating the portion of earnings subject to seizure and assignment*

20– *Extend cash benefits for disability insurance and maternity to partners*

21– *Extend rights in relation to workers' compensation to partners*

22– *Allow a partner who works in the business of a self-employed worker to participate in that partner's old age insurance scheme*

23– *Extend the right to a reversionary pension to partners who have been parties to a PACS for five years*

24– *Make entitlement to the social rights provided by the PACS subject to proof that the partners' incomes have been taxed jointly*

**– Estate taxes:**

25– *Extend to the surviving partner the supplementary abatement of 50,000 euros granted to the surviving spouse since 2005*

**– Succession rules applicable to the residence:**

26– *Give the surviving partner a temporary right of enjoyment of the residence free of charge for one year*

27– *Where the surviving partner is a legatee, give him or her a life interest for the purpose of residing in the residence*

28– *Where the surviving partner is a legatee, give him or her a preferential right to ownership of the residence*

**– Rights of foreign nationals:**

29– *Specify, by circular, the requirements relating to the length of cohabitation required in order for the foreign partner of a French citizen to obtain a "private and family life" temporary residence card*

**– Duties as between partners:**

30– *Balance mutual and material assistance between partners, having regard to their capacities to contribute*

31– *Limit the rules regarding joint and several liability to third parties for debts contracted by one partner for everyday needs, excluding excessive expenditures*

32– *Create a duty of support between partners*

### **3. Reaffirming the Freedom to Marry and Combating Forced Marriages**

33– *Set the minimum age for marriage at 18, while allowing the public prosecutor the discretion to grant exemptions from the age requirement for serious reasons*

34– *Make express provision regarding absence of consent in provisions relating to hearing the future spouses, staying the solemnization of the marriage and staying the registration of the marriage*

35– *Allow the officer of civil status with jurisdiction to request that the hearing be held at a French consulate in the future spouse's country of residence*

36– *Authorize officers of civil status and consular officers to delegate the holding of the initial hearing to an official in their department*

37– *Where the spouses refuse to be examined, make the failure to respond to the summons forwarded to the prosecutor's office by a consular officer grounds for non-registration of the marriage*

38– *Make it possible for the public prosecutor to challenge a marriage entered into without the freely given consent of one or both spouses*

39– *Increase the limitation on actions for annulment based on the absence of consent or defective consent of one or both spouses to two years, in the event that cohabitation was undertaken after the spouse or spouses were once again free*

40– *Increase the limitation on actions for annulment based on the absence of familial consent to the marriage of a minor to two years from the date of the marriage*

41– *Provide that the provisions of article 1114 of the Civil Code (reverential fear of parents) do not apply to marriage*

42– *Organize information sessions in the schools regarding free consent to marriage and the rights that derive from marriage*

43– *Raise awareness among people likely to know about plans for forced marriages (diplomatic and consular officials, magistrates, the police, social workers, teachers)*

44– *Develop places for people who are being threatened with or have been victims of forced marriages to talk, get assistance and advice, and take refuge, in particular at women's rights information centres*

45– *Develop housing solutions that are appropriate for people who are being threatened with or have been victims of a forced marriage*

46– *Provide that the existence of constraint to marry constitutes grounds for annulment of the marriage*

## **C. STRENGTHEN CHILDREN'S CONNECTION WITH THEIR PERSONAL ORIGINS**

*47– When a child who has been abandoned is a minor, give the child the exclusive opportunity to request access to his or her origins, provided that the child has reached the age of discernment and his or her representatives agree*

*48– Create a two-track system: two systems for donating the gametes that comprise a child's genetic heritage, the first guaranteeing the donor's anonymity and the second allowing for access to the donor's identity*

*49– Where the father is deceased, authorize the mother to have an embryo implanted between six and twelve months after the death*

## **D. HOLDING PARENTS ACCOUNTABLE**

### **1. Encouraging Co-parenting by the Father and Mother**

#### **a) Improve the setting up of alternating residence**

*50– Have the ministry of justice prepare a guide to best practices for alternating residence*

*51– Allow a child who has reached the age of discernment to apply to a judge to vary the terms on which parental authority is exercised*

*52– Adapt the family benefits scheme to alternating residence*

#### **b) Strengthening family mediation**

*53– In the event of disagreement between the parents regarding the exercise of parental authority, require that the judge propose that they engage in a mediation process and require them to meet with a family mediator, who will inform them about the purpose and conduct of that process*

*54– Establish a system of assistance for mediation comparable to legal aid prior to the judicial proceeding stage*

#### **c) Ensuring better compliance with parental obligations**

*55– Make a scale available to judges to assist them in determining the amount of support*

*56– Use a circular to strengthen the action taken by prosecutors against parents who do not comply with their support obligations*

*57– Authorize judges to order withdrawal of parental authority, in whole or in part, against a parent who fails to exercise his or her right of access and residence*

## **2. Giving Legal Parents the Opportunity to Appoint a Delegate for Matters Affecting Children’s Everyday Lives**

*58– Offer parents the opportunity to give a third party a “delegation of parental responsibility” for the ordinary actions in the child’s life, either by authentic deed before a notary, to be immediately enforceable, or by deed under private seal approved by a judge*

## **3. Strengthening the Role of Third Parties After the Death of the Parents**

*59– Authorize a third party who is rearing the child to apply to a judge to have the child placed with that party in the event of the death of a parent*

*60– Where the parents have not designated a tutor, provide for tutorship to be awarded to older relations unless the family council is of the view that designating the third party who is rearing the child is justified in the best interests of the child*

## **4. Improving the Manner in which Grandparents’ Rights are Exercised by Making them Subordinate to the Best Interests of the Child**

*61– Provide that only the best interests of the child may be used to deny exercise of the right to maintain relationships with his or her older relatives.*

# **E. GUARANTEEING THAT THE CHILD IS PROTECTED**

## **1. Strengthening Risk Prevention and Detection**

### **a) Moving Detection Efforts up to Include Pregnancy**

*62– Strengthen the prenatal oversight conducted at the interview in the 4th month of pregnancy by developing a guide for detecting problems in mother-child bonding*

*63– Promote “birth houses”, which monitor mother and child after delivery, and maternology (motherhood) services in hospital to prevent attachment disorders*

*64– Arrange for home visits by midwives and childcare specialists after delivery, as prescribed by the physician attending the birth, the midwife, the paediatrician or the family practitioner, or at the request of the parents*

### **b. Improving Detection Procedures**

*65– Extend the detection role of the general council to include all risk situations and identify a reporting unit in each department*

*66– Make training in detecting abuse mandatory in IUFM (university teacher-training institute) programs*

*67– Experiment in pilot departments with extending the authority of the PMI (maternal and child care) to include all children in primary school*

68– *Institute a mandatory medical examination for children at the age of three, which would be the basis for a health certificate*

69– *Provide for physicians, midwives and paramedical professions to have a module in their training programs on children at risk*

70– *Create a reference guide identifying indications that a child is at risk, to be developed after a process of transverse and multidisciplinary consultation*

71– *Create a training module on the risks children face that will be common to all training for social workers*

### **c. Sharing Information**

72– *Define a “shared social privilege” by law in order to:*

*-institute an obligation to share information between child protection professionals where there is an indication that the child is at risk, and specify the nature of the information that may be disclosed and the professions concerned*

*-authorize the sharing of information without the parents’ agreement, provided that parents are given prior notice that information relating to their children will be shared*

*-make the disclosure and processing of shared information subject to very stringent confidentiality rules overseen by the CNIL (Commission nationale de l’informatique et des libertés)*

### **d) Ensuring Oversight of Identified Families**

73– *Use information from the CAFs (family allowance funds) relating to changes in affiliation to monitor families that move and to provide for continuity in that monitoring, from one Department to another, under agreements entered into by the general council and funds*

74– *Require that CAFs report children to the PMI for whom the mandatory health certificates have not been submitted*

75– *Institute home visits by a social worker working for the CAF in response to non-compliance by people who fail to submit the mandatory health certificates, after a reminder is sent (for the 8th day, 9th and 24th month and 3-year medical examinations)*

76– *Make school principals and heads of educational institutions responsible for reporting school absenteeism to the CAF and the general council*

77– *Extend the obligation that now rests on the judicial authority (prosecutor’s office and judge) or the president of the general council to inform people who submit information*

*relating to a child at risk about what follow-up has been given to that information communication*

## **2. Improve the process of taking into care children and their families**

### **a) Clarifying the Criteria for Taking into Care**

*78– Clarify the concept of the best interests of the child by way of a guide to best practices, in particular identifying flaws that may be present in a minor’s upbringing*

*79– Clarify the missions of the ASE (children’s social aid) by reference to the four essential components of child development as laid down by the law (health, safety, morality and upbringing)*

*80– Give the general councils full jurisdiction over children at risk and reserve the intervention of a judge for situations in which it is impossible to assess the situation or the family has refused to cooperate; experiment with this new division of authority in interested Departments*

*81– Place an obligation on the president of the general council to take a matter before a judge where it is impossible to assess the situation or the family refuses to cooperate, and in particular to obtain access to the family’s residence*

### **b) Reviewing the Procedure for Taking into Care**

*82– Reserve the choice of keeping the child in his or her family for situations in which doing so is not likely to harm the child’s interests*

*83 – Introduce a provision for day placement into the social action and family code, which would be an intermediate measure between assistance in the home and taking into care*

*84– Give the ASE the opportunity to supplement the action of taking a child into care with social or medical/psychological oversight of the parents*

*85– Use family mediation to prevent abuse and prepare for the child’s return to the family*

*86– Have consultations by minors and their families with psychologists, on a physician’s prescription, covered by health insurance*

*87– Place an obligation on the ASE and the judge to ensure continuity in placements of children by stating the principle of a single placement, except in specific cases as justified by the child’s situation*

88– *Limit time spent in infant homes to a maximum of three months*

89– *Place an obligation on ASE services to produce an annual report on each child taken into care, which would be submitted to the parents and, where applicable, the judge*

90– *Strengthen cooperative action to organize the return of isolated foreign minors to their country of origin*

91– *On the decision of the prefect, give isolated foreign minors who arrive in France after the age of 16 and who continue to be in the care of the ASE under a “young adult” contract, access to paid vocational training*

92– *Issue a circular to specify the terms under which parental authority is to be exercised when a child is placed*

93– *Give children’s judges the power to make ad hoc decisions delegating parental authority so that rights relating to day-to-day life may be exercised*

### **3. Clarifying the organization of the child protection scheme**

#### **a) Strengthening Coherency in Actions Taken by Departments**

94– *Affirm in the eyes of the general public the central role of the president of the general council as child protection officer for the Department*

95– *Encourage the creation at the municipal level of a local child protection council, which would be under the joint authority of the mayor and the president of the general council and would be responsible for sharing information about families at risk*

#### **b) Modernizing the Operation of Children’s Courts**

96– *Provide for specific training for children’s judges before they take up office*

97– *Recognize the supervisory functions performed by the vice-president of the lower court responsible for presiding over the children’s court*

98– *Provide for each court with jurisdiction over children to publish its waiting times for judgments in cases of children at risk and to adopt the objective of reducing that time to three months*

**c) Strengthening Oversight and Harmonizing Practices in the Departments**

*99– Give the Defender of Children the power to bring a request for an investigation directly before the minister responsible for social affairs and to release the findings of the investigation publicly*

*100– Harmonize the actions taken by the different Departments by defining national minimum standards*

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Affidavit by certified translator

**AFFIDAVIT**

I, the undersigned, hereby certify that the above document is a true and accurate translation of the original French. And I have signed at Montréal, Québec, Canada this 16th day of April 2007.

Sworn to before me this 16th day of April 2007 at Montréal, Québec, Canada.

\_\_\_\_\_  
Peter Vranckx, Certified Translator (#3641)  
Ordre des traducteurs, terminologues et  
interprètes agréés du Québec (OTTIAQ)

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Aleksandar Kovalski  
Commissioner for Oaths for the District of  
Montréal