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Redefining the identity of medically assisted reproduction in view of its opening up to same-sex couples

“The best recognition of homosexual parenthood can, under conditions, respond to the interest of the children being raised by two same-sex adults, whose relationship is characterized by stability while forming a family with the children”¹. This exceptionally important statement for the demands of same-sex couples belongs to the French Council of State, which adopted, however, a position against opening up medically assisted reproduction to same-sex couples in 2009².

The basic principle governing medically assisted reproduction in France, as already established by the very first *Bioethics Laws* and embraced in every review thereof, is that medical assistance in reproduction represents a medical solution to a medical problem. Therefore, it is, as such, solely provided to living, heterosexual couples of childbearing age (I). The legislator’s reluctance, nonetheless, to broaden the terms of access to medically assisted reproduction seems to be gradually declining, marking, thus, an important change in the way it is perceived by society (II).

I. Medically assisted reproduction as a medical solution to a medical problem

The French legislator remains committed to the principle that medically assisted reproduction constitutes a medical solution to a medical problem³. According to this approach, as adopted by the 1994 legislation (A) and embraced by the

¹ See Conseil d’État, La Révision des Lois de Bioéthique, Étude adoptée par l’Assemblée Générale Plénière, le 9 avril 2009, La Documentation Française, p. 49-50.

² See *O. Roy*, “Procréation Médicalement assistée et révision des lois bioéthiques françaises. Le montagne a accouché d’une souris”, in N. Gallus (dir.), *Droit des familles: Genre et sexualité*, Éd. Anthémis, 2012, p. 144.

³ *Ibidem*. See also *H. Oberdorff*, *Droits de l’homme et libertés fondamentales*, Éd. Lextenso, LGDJ, 2013, p. 433

following 2004⁴ and 2011⁵ reviews (B), the same-sex couple, whose “infertility” is not due to some pathological condition, has no right to access medically assisted reproduction⁶.

A. The exclusion of same-sex couples from access to medically assisted reproduction

According to the provisions of Article L. 2141-2(1) of the Code of Public Health (hereinafter the CPH), “*medically assisted reproduction aims at relieving a couple’s state of infertility [...]*”, while the conditions laid down by the legislator, in the very next paragraph, regarding the transfer of embryos or the insemination, as well as in any other provision regarding medically assisted reproduction only concern “*the man and the woman forming the couple*”(Article L. 2141-2(2) CPH).

This special legislation categorically excludes, as was made clear, same-sex couples from accessing medically assisted reproduction. This, of course, has not even changed with the recent legislative recognition of same-sex couple’s right to the institution of marriage under Law 2013-404 of 17 May 2013⁷. Therefore, the same-sex couples’ possibility to enter into marriage does not provide them with any right to access medically assisted reproduction⁸.

The choice made by the legislator is particularly founded on two arguments:

The first argument in favour of maintaining exclusive access to medically assisted reproduction for heterosexual couples revolves around the necessary, according to the French legislator, faithful reproduction of the conditions of medically assisted procreation modeled on natural reproduction and conditions of blood kinship. One would agree, however, that this argument lacks legal foundations, since medically assisted reproduction is traditionally defined as the method which enables reproduction beyond the context of natural conception⁹.

According to the second argument, it is in the child’s best interests to be born to a heterosexual couple in order to be raised by a father and a mother. This argument, more convincing than the first one according to a great part of the French doctrine, served as a sufficient ground for prohibiting access to medically assisted reproduction to a single woman or a same-sex couple. We cannot oversee, however, that the above

⁴ Loi n° 2004-800 du 6 août 2004 relative à la bioéthique.

⁵ Loi n° 2011-814 du 7 juillet 2011 relative à la bioéthique.

⁶ A. *Bertrand-Mirkovic*, *Droit civil: Personnes, Famille, Studyrama*, 2007, p. 416.

⁷ Loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe.

⁸ See also L. *Brunet*, “La Cour de cassation valide l’adoption, par la conjointe de la mère biologique, de l’enfant né d’un don de sperme à l’étranger. Note sous Cour de cassation (avis), 22 septembre 2014, n° 15010 et n° 15011”, *RDSS* 2014, p. 1145 ff.

⁹ It is reminded that pursuant to Article L. 2141-1(1) of the CPH, “medically assisted reproduction involves the clinical and biological practices allowing for in vitro conception, conservation of gametes, stem cells tissues and embryos, transfer of embryos and artificial insemination”.

statement collides with the general principle of equal treatment and non-discrimination, as guaranteed by the international and European human rights law¹⁰.

B. Maintaining same-sex couples' exclusion from access to medically assisted reproduction

Restricting access to methods of medically assisted reproduction to couples on grounds of their sexual orientation, nevertheless, seems to be more and more contested. During the last review of *Bioethics Laws*, in 2011, the possibility of expanding these constraints was considered, upon the exercise of strong pressure by the civil society.

More specifically, the French Senate adopted, during the first reading of the draft law in question, the principle of accessing medically assisted reproduction regardless of sexual orientation, amending the text voted by the National Assembly in two crucial points:

a/ Any mention of the medical purpose of the medically assisted reproduction was eliminated, while discharging, at the same time, the obligation to medically diagnose the pathological nature of infertility.

b/ Special emphasis was attached to the “*persons forming the couple*”, who are supposed to be living and of childbearing age¹¹, without specifying their sex.

This provision was ephemeral and, during the second reading of the draft law by the National Assembly, the approach which prevailed was the one of medically assisted reproduction as a “process expected to remedy infertility and not as a legal vehicle towards legalizing unions or lifestyles”¹². The deletion of the provision, however, was not without consequences. Many were the assembly members to claim that “the exclusion from access to medically assisted reproduction on grounds of sex, gender identity or sexual orientation, either directly or by means of the marital status of the persons interested, constitutes [...] discrimination, which must be lifted as it is contrary to the (French) republican tradition”¹³. Others, in fact, taking a step further, claimed that “granting same-sex couples access to medically assisted reproduction, for as long as it co-exists with the simultaneous prohibition of surrogacy, constitutes serious discrimination against gay couples”¹⁴.

The legislature, considering finally that the child's interests have high priority, made a conscious choice to maintain the *status quo* and insist on the granting of the

¹⁰ By way of illustration, we will refer to the Universal Declaration of Human Rights (Article 7), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14), the International Covenant on Civil and Political Rights (Article 26) and the Charter of Fundamental Rights of the EU (Article 21(1)).

¹¹ Doc. AN, n° 3324, Projet de loi adopté par le Sénat, 8 avril 2011, Article 20.

¹² J. Leonnetti, Rapport AN, n° 3403, 11 mai 2011, p. 97.

¹³ R. Muzeau, AN, 1^{re} Séance, 25 mai 2011, JOAN CR, 26 mai 2011, p. 3473.

¹⁴ A. Claeys, *idem*, p. 3474.

right to access medically assisted reproduction to heterosexual couples of childbearing age, exclusively for medical purposes. The medical aspect of assisted reproduction, as an answer to demands of “biological” infertility, has been confirmed, thus, leaving once more “social” infertility aside¹⁵.

The pressure, nevertheless, exercised on the Parliament for reviewing the restrictive regulatory framework, especially after Law 2013-404 of 17 May 2013 on same-sex couples marriage, is considerable and is being fueled by the constantly increasing reproductive tourism of French citizens towards either other EU member states or third countries. For how long, however, will the legislator be able to turn a blind eye to the growing number of families created *de novo* upon recourse – outside the legal framework of course – either to assisted reproduction using donor sperm for homosexual women or surrogacy for homosexual men¹⁶?

II. Redefining the identity of medically assisted reproduction in view of the extension of its terms of access

Despite the legislator’s reluctance to accept the extension of the terms of access to medically assisted reproduction, the need for relativizing the idea according to which medically assisted reproduction constitutes a medical solution to a purely medical problem seems more and more imperative. However, this opening up of medically assisted reproduction to same-sex couples, apart from its undoubtable value (A), shall mark an important change in the way the legislator and society perceive its nature: medically assisted reproduction shall not be any longer addressed as a therapeutic method, but as a wider social issue (B).

A. The perspective of opening up medically assisted reproduction to same-sex couples

Studying the case-law¹⁷ leads to the logical conclusion that same-sex couples wishing to have a child do not finally hesitate to resort to medically assisted reproduction despite the legal prohibition¹⁸. This can be easier for women, who only

¹⁵ The legislator has founded this position *inter alia* in the Council of State Report of 9 April 2009 on the review of Bioethics Law, in which despite the recognition of the increase in the demands for access to medically assisted reproduction for homosexual couples, it finally became acknowledged that demands regarding alternative family schemes are too serious to be incidentally and indirectly addressed at the occasion of the Bioethics Law review. See Conseil d’État, La Révision des Lois de Bioéthique, *op.cit.*, p. 49-50.

¹⁶ For more information on homosexual parenting see *M. Gross, J. Courduriès, A. de Federico*, “Le recours à l’AMP dans les familles homoparentales: état des lieux. Résultats d’une enquête menée en 2012”, *Socio-logos. Revue de l’association française de sociologie*, 2014, n° 9, available at: <http://socio-logos.revues.org/2870>

¹⁷ See *inter alia* CCass, 1^{er} Civile, 9 March 1994 [application n° 92-16774], CCass, 1^{er} Civile, 20 February 2007 [application n° 04-15676], CCass, Avis n° 15010 et 15011 du 22 septembre 2014 [application n° 1470006 and 1470007], TGI de Paris, 28 June 2005 [application n° 03/10641], partially reproduced in *F. Granet-Lambrechts*, “Droit de la filiation”, *Recueil Dalloz Sirey*, 27.4.2006, n° 17, p. 1139-1148.

¹⁸ A conviction which is strengthened by the findings of sociological researches. According to the research *Family and housing* by the French National Institute of Statistics and Economic Studies

need to look for sperm by a third donor. However, it is definitely more complicated for men, since in order to carry out their “parenting plan” (*projet parental*) they need to look not only for eggs, but also for a surrogate mother. More specifically, given that in France assisted reproduction methods are only available to heterosexual couples, same-sex couples resort to countries where the legislation allows them to access medically assisted reproduction, such as Belgium, Denmark, Spain, the Netherlands or the United Kingdom¹⁹.

In this context, the opinion issued by the French Court of Cassation on 22 September 2014²⁰ can only be received as a positive development towards opening up medically assisted reproduction to same-sex couples. This opinion paves the way of same-sex couples towards adopting children born through medically assisted reproduction technologies abroad. Indeed, before the adoption of the 2013 “marriage for all” law, there were many same-sex couples who, once returning from abroad where they had fled in order to realize their parenting plan, were confronted with the refusal of certain courts of first instance to recognise the adoptive rights to the mother’s female partner²¹. According to these courts, the application for adoption constituted the last stage of a broader process aiming at violating, by means of circumventing it, the French legislation. It is worth mentioning, as the rapporteur of the abovementioned opinion has pointed out, that from a total of 290 decisions upon adoption applications filed by same-sex couples, only 9 were rejected²². This statistical data constitutes the biggest proof that the issue of adoption, following the passing of the “marriage for all” law, had been largely settled by the French judges.

In order to totally remove any doubt, the country’s Supreme Civil Court, three months after the ECtHR judgment condemning France for its refusal to recognise children born abroad by a surrogate mother²³, was asked to issue an opinion on whether artificial insemination using donor sperm, when taking place abroad by a

(INSEE), 200,000 people have declared living with their male or female partner who shares the same sex with them. 10% of these people, in fact, have declared having at least one child. See INSEE, “Le couple dans tous ses états”, février 2013, available at: http://www.insee.fr/fr/themes/document.asp?ref_id=ip1435. Also, the French National Institute of Demographic Studies (Institut national d’études démographiques, INED) estimated, in 2006, the number of children being raised by a same-sex couple from 24,000 to 40,000. See *P. Festy*, “Le recensement des familles homoparentales”, in A. Cadoret, M. Gross, C. Méary, B. Perreau (Eds.), *Homoparentalités. Approches scientifiques et politiques*, PUF, 2006, p. 109-116. For more information on relevant sociological research see *M. Gross*, *Choisir la paternité gay*, 2012, Ed. Erès; F. L. Tarnovski, “Devenir père homosexuel en France: la construction sociale du désir d’enfant”, *Etnográfica*, 2012, vol. 6 (2), available at: <http://etnografica.revues.org/1487>; *V. Descoutures*, *Les mères lesbiennes*, 2010, PUF.

¹⁹ Spain was characteristically named the El Dorado of in vitro fertilisation by a French newspaper’s article. See *L. Mentzel*, “L’Espagne, eldorado de la fécondation in vitro”, *Le Monde*, 11.1.2013.

²⁰ CCass, Avis n° 15010 et 15011 du 22 septembre 2014 [application n° 1470006 and 1470007].

²¹ Due to the explicit legal prohibition of surrogacy, we inevitably only refer to female same-sex couples.

²² CCass, Avis n° 15010 et 15011 du 22 septembre 2014 [n° 1470006 and 1470007], Rapport, *Rachel Le Cotty*, p. 15.

²³ ECtHR, *Mennesson v. France*, 26.9.2014 [application n° 65192/11] and *Labassée v. France*, 26.9.2014 [application n° 65941/11].

same-sex couple, constitutes violation of the French law and whether it subsequently excludes, as such, the adoption of a child born to this process²⁴. In both cases, the French Court of Cassation rejected the claim of “law violation”²⁵, on the grounds that, in France, the medical method in question is allowed under conditions. Consequently, the fact that there are women fleeing their country in order to access this method does not violate any fundamental principle of the French law. The opinion of the Supreme Civil Court may not be binding, since it does not have the force of *res judicata*, but it is considered a guide for future court decisions.

Despite this most important step and although the extension of the terms of access to medically assisted reproduction was among Hollande’s programmatic statements, as a candidate for the socialist presidential nomination in view of the 2012 presidential elections, the issue of opening up assisted reproduction to same-sex couples is not included among the current government’s priorities. Any discussion was postponed *sine die*; at least until the competent National Consultative Ethics Committee (CCNE)²⁶ expresses a view on the matter. Thus, we cannot but wait with great interest CCNE’s new opinion, which, as announced by its President, Jean-Claude Ameisen, is expected to be published in Spring 2015²⁷.

B. Redefining the identity of medically assisted reproduction

“The extension of medically assisted reproduction to same-sex couples [...] is bound to contribute to the redefinition of its own identity”, as aptly mentioned by Professor Hennette-Vauchez, “since medical assistance in reproduction is nowadays perceived as a wider social issue, constantly doubting the structure of kinship, origins and equality and not as an issue of regulating the therapeutic techniques of biomedical technology”²⁸.

²⁴ CCass, Avis n° 15010 et 15011 du 22 septembre 2014, *op.cit.* See also the Press Release issued in this regard, Communiqué relatif aux Avis n° 15010 et 15011 du 22 septembre 2014, available at: https://www.courdecassation.fr/jurisprudence_2/communiqués_publicés_cour_cassation_4309/avis_n_30160.html

²⁵ On the contrary, according to its well-established case-law, the French Court of Cassation, refuses to transcribe birth certificates belonging to children who have been born abroad via surrogacy, on the grounds that it constitutes blatant violation of the French law (*fraude à la loi*). See CCass, 1^e Civile, 6 April 2011 [application n° 09-66.486], [application n° 10-19.053] and [application n° 09-17.130], 1^e Civile, 13 September 2013 [application n° 12-30.138] and [application n° 12-18.315], 1^e Civile, 19 March 2014 [application no: 13-50.005].

²⁶ Once asked regarding the extension of the scope of the legislation on medically assisted reproduction, the French Prime Minister, *Manuel Valls*, assured that the Government’s position is clear: nothing is going to change in the current legislation before the National Consultative Ethics Committee (CCNE) issues its opinion on the matter. The same position was also adopted by the French Rights Defender (Défenseur des droits), *Jacques Toubon*, who recommended we wait for CCNE’s opinion, stressing that “the extension of medically assisted reproduction to all couples is an issue which needs to be broadly debated”. See “Jacques Toubon plaide pour la reconnaissance des enfants nés par GPA”, *Le Figaro*, 13 October 2014.

²⁷ “Jean-Claude Ameisen annonce un avis sur la PMA au printemps”, *Libération*, 24 October 2014.

²⁸ *St. Hennette-Vauchez, D. Roman, Droits de l’Homme et libertés fondamentales*, Éd. Dalloz, 2013, p. 530.

In fact, it is true that opening up medically assisted reproduction to same-sex couples involves a radical change of the way we address it. The recognition of the right to resort to medically assisted reproduction to single individuals or same-sex couples entails the automatic acceptance of assisted reproduction not only as a biomedical issue preconditioning the existence of medical indications, but as a social phenomenon guarantying everyone's right to unimpeded access to methods of assisted reproduction, regardless of marital status or sexual orientation²⁹. Besides, it has been claimed that "assisted reproduction is not a therapeutic method in the narrow sense of the term, but rather an alternative way of reproduction"³⁰.

The opening up of medically assisted reproduction to couples regardless of sexual orientation seems to be promoted in France only for female couples, while male couples in order to realize their parenting plan, apart from finding eggs, are forced to resort to surrogacy, a method explicitly prohibited in the French legal order. As a result, the elimination of discrimination on grounds of sexual orientation will be replaced by another discrimination on grounds this time of sex. This observation, in fact, constituted one of the arguments for voting against the amendment put forward by the Senate in 2011 in order to bring forward the principle of access to assisted reproduction regardless of sexual orientation. Indeed, as appears from the respective preparatory work, despite the neutrality of the terminology of the proposed provisions and given the explicit legislative prohibition of surrogacy, which renders alternative reproduction impossible for male couples, only female couples would actually have access to medically assisted reproduction.

Many are those thus who speak of the inaction of institutional reflexes to take measures allowing same-sex couples to start a family, particularly after the recognition of "marriage for all", wishing at the same time that the legislator soon intervenes in order to explicitly guarantee all couples' right, regardless of sexual orientation or sex, to assisted reproduction. It remains to be seen which will be the framework within which this intervention shall take place, since it is obvious that, in the light of the aforementioned observations, the French legislator's obsession with prohibiting surrogacy may trigger new reactions.

²⁹ Of course, the issue of insurance coverage of medical assistance in reproduction is an entirely different matter. Indeed, by abandoning the therapeutic purpose of medically assisted reproduction and, consequently, the exclusively medical model, it is made clear that it will not be possible to maintain the French practice of the almost 100% state funded assisted reproduction.

³⁰ See in this regard *Simone Bateman*, Professor of sociology and Director of research at CNRS, France, interview, 23 June 2014.

