

I would like to thank the organisers of this conference for having invited me here today to talk with you about the implementation of strategic legal procedures aimed at securing equality of treatment for lesbians and gays in the context of civil marriages and partnerships entered into abroad.

Before I begin, I believe it is important to underline that, in France, it is not part of our culture to implement legal strategies no matter what may be their final objective.

Indeed, here in France, there exists a positive aversion to refer matters to a judge with the definite aim of pushing forward an agenda concerning such and such a right, or such and such a cause.

As a result, French associations defending LGBT rights have to recognise and deal with this attitude .

They typically have a problem in recognising that the implementation of legal strategies (that is to say the process of identifying suitable claimants or petitioners and finding lawyers to prepare and defend cases symbolic of various forms of inequality) is a means of action that, in my view, should and ought to accompany all other forms of claims or lobbying such as demonstrations, conferences, questioning of political parties etc.

All of this in order to say that, in France, it is not possible for there to be an overall legal strategy on LGBT issues aimed at achieving Equality.

We are therefore obliged to wait until there arrives, on the scene, an individual whose case is representative of a more general issue (such as adoption, marriage, the right to surrogacy etc) which primarily concerns him or her as an individual but which nonetheless poses a much broader issue that potentially concerns homosexuals as a whole.

Moreover, it is not enough to have the presence of such an individual. It is equally necessary, of course, to have him or her meet the appropriate lawyer but also to have his or her case presented before the appropriate judge you can readily see how difficult that is.

I will speak initially about the issue of the recognition of marriages and then, secondly, about that of registered partnerships.

I- The recognition in France of a marriage entered into abroad between two persons of the same sex.

Currently, almost 10 European countries offer the possibility to getting married to two people of the same sex (the Netherlands, Belgium, Spain, Portugal, Iceland, Sweden, Norway, the United Kingdom etc) to get

So what then is the situation in France in regard to the recognition of same sex couples who were married abroad ?

The answer is very simple : it is necessary to make a distinction based on the nationalities of the two people concerned in order to determine whether or not the marriage entered into abroad will be recognized in France.

1. First of all, let's take a look at the case of a married same sex couple of foreign nationals

On the basis of the replies given to two separate ministerial questions (Mariani, n41533, JO Lower House, dated 26th July 2005 page 7437 and Masson, JO Upper House 9th March 2006 page 722) it follows that a valid marriage entered into by two same-sex foreign nationals has an impact in France.

French authorities have recognised that such a civil marriage entered into by two foreign nationals can have a full impact in France.

In other words, the two persons should be entitled to divorce in France, and should be able to inherit from each other without having to draw up a will, provided that their national law enables this to happen (individual decision of the tax authorities dated 24th September 2009)

2. Let's now examine the case of two same sex people of whom one (or both) is (are) a French national.

If one of the partners to a marriage (or both) is a French national, the same-sex marriage entered into abroad is not recognised since France does not currently extend marriage to same-sex couples.

In order for such recognition to be possible, it would be necessary for « gay marriage » to exist in France.

In this case, the legal strategy will therefore consists of opening up the

possibility of entering into such marriages on French soil.

A. Legal strategy and marriage in France : direct means.

a) **The first marriage entered into between two men in France in June 2004**

This concerned Messrs Chapin and Charpentier, and was celebrated in June 2004 by Noël Mamère.

This was a case of a true strategic approach, that is to say an approach well thought out ahead of time and having a very precise objective : to advance the cause of marriage equality.

The validity of the marriage was subsequently contested through the French legal system but it nevertheless enabled the first debate to take place both in French society as a whole and through the law courts.

The lower court in Bordeaux, then the Bordeaux Court of Appeal and finally the Supreme Court all judged that the marriage should be annulled.

The Supreme Court (Cour de cassation) indicating that:

« (...) according to French law, marriage is the union between a man and a woman ; that this principle is not in contradiction with any of the provisions of the European Convention of Human Rights or with the European Union's Charter of Fundamental Rights which does not have an obligatory character in France. ».

« French Law ? » But what law are we talking about ? : The Criminal Code ? the Labour Code ? : it just isn't clear.

This way to open up marriage thus being closed, it became necessary to find alternative ways which in turn supposed waiting for a suitable case to arrive.

b) **Seizure of the Constitutional Council**

It was the introduction in March 2010 of the priority issue of constitutionality (the QPC) which provided a vehicle for the strategy. This newly-introduced procedure authorised challenging the

constitutionality of a law whose application was essential to the resolution of the point at issue.

But then it was necessary to wait for a suitable case : that of a dispute in which two women who wished to marry and were refused permission to do so. I initiated a determined and targeted intervention and I registered a QPC.

Pleading before the Constitutional Council, I asked for an end to the discrimination resulting from the law and for a pronouncement and a judgment that this law (specifically two articles of the Civil Code) were in contradiction with Article 1 of the Declaration of the Rights of Man which states that « *all men are born and remain equal before the law* »

I also suggested that the Constitutional Council should follow the example of the Supreme Court of Canada, which, in 2004 had judged that a law defining marriage as being solely the union of a man and a woman was in contradiction with the principle of constitutional equality.

However, the Constitutional Council threw out the QPC. It avoided the issue and passed on the hot potato to the law makers. In so doing, it took a decision which was eminently political rather than purely legal. It chose to gut the QPC whose object is to verify the constitutionality of a law and consequently cannot solely concern the competency of the law makers.

Had it handed down a legal decision, based on the new QPC procedure by simply stating that the marriage law was in violation of Article 1 of the 1789 Declaration (homosexual and heterosexual couples are in similar *de facto* situations and should be the subject of similar legal treatment such as it exists in the 9 European countries having adopted marriage equality), then it would have addressed to all of French society a message of unbelievable strength : all men are equal before the law including those who are homosexuals.

The way to address this issue through a direct question to the Constitutional Council is now closed.

There remains the European Court of Human Rights.

c) The European Court of Human Rights.

To advance the cause of equality requires pugnacity. This applies equally to the seizure of the European Court of Human Rights.

So in 2007 I seized the European Court of Human Rights in the matter of the annulled marriage of Chapin and Charpentier.

My petition was communicated to the French government who responded with its observations.

Consequently, I am now awaiting the Court's decision - one which will not be simple because of the implications it would have on the 47 member states of the Council of Europe if the decision were to prove positive. Whatever the outcome, this is a case that's worth keeping an eye on.

B - Legal strategy, marriage and other ways to get there.

As always, for there to be a good legal strategy there needs to be :

- the right moment,
- the right case,
- the right lawyer
- and the right judge.

Currently two cases are pending

a) Let's start by examining the first case.

It concerns two Frenchmen who were married in Canada in January 2010.

The couple asked for their marriage to be recorded in the French Civil Status register so that a French marriage certificate could be issued in due form.

The prosecutor, as was to be expected, threw out the application.

I was retained by the couple and I summoned the prosecutor before the lower court of Nantes in order that the marriage could be recorded in the Civil Status register.

Filed in this way, my appeal has no chance of succeeding given the decision of the Supreme Court (Cour de cassation) dated 13th March

2007 et that of the Constitutional Council dated 28th January 2011, but in total agreement with my clients I judged it opportune to submit a QPC concerning Article 3 of the Civil Code.

In point of fact, Article 3 of the Civil Code lays down, notably, that « *Laws concerning Personal Status and Capacity apply to all French citizens including those who are foreign residents* »

This is a genuine law and it has never before been the subject of a constitutionality check. And it applies to this dispute because :

- if the homosexual couple, married abroad, are foreign nationals, their marriage will be recognised on French soil
- if the homosexual couple, married abroad, are French nationals, their marriage will not be recognised on French soil

Incisively, the Court considered that, in reality, Article 3 was not applicable to the resolution of the dispute because marriages entered into abroad by foreign nationals did not have to be recorded on the French Civil Status Register and so it threw out my QPC. (TGI Nantes 13th October 2011 (RG 11/01324).

The case will now be judged only, narrowly, on its substance but I can already anticipate the result.

In order to keep going on in this direction, it will now be necessary to identify a couple of French nationals or a binational couple, having entered into a foreign same-sex marriage, one of the partners in which will have just died.

The surviving partner would apply to be treated in relation to inheritance and estate matters in the same way as would be the case for a surviving heterosexual partner, for example by the Tax Authorities.

A case brought before the competent legal jurisdiction and challenging the administrative decision rendered would then provide an opportunity to present an argument aimed at breaking down and eliminating the existing inequality of treatment between married homosexual couples according to their individual specific national laws. A secondary argument could also be presented, consisting of a petition that the marriage entered into abroad should be considered in France as equivalent to a PACS by virtue of the old saying « *He who can do more can*

do less »

It cannot be denied that a marriage confers more rights than a PACS so that when you are married, you are, at the very least, PACSedsince the rights and the duties attached to a PACS are less than those attached to a marriage.

b) Let's now examine the second case.

This time, we are dealing with a man who has married a woman.

The man underwent a sex change and applied to the lower court for permission to officially change his civil status records : that is to say that, after having undergone all the surgical operations necessary to become physiologically a woman, he asked the judge to accept that his new birth certificate should state that he was a woman.

But he continued to be married to his female partner.

This implied that, if the lower court were to accept his petition to change his civil status, he would legally be a woman and since he would not have divorced, he would remain married to his wife : in other words we would be in the presence of a married couple consisting of two women.

The judgment in this case is expected at the end of this year.

In passing, it should be noted that there have already been two judgments of this type and so there are already two married homosexual couples with legal recognition of their union.

You can readily judge for yourself in the light of everything I have said, just how difficult it is to make progress on issues concerning equality of rights but also just how much such legal cases help to change views on the question of marriage.

This is all the more true given that, between 2004, the year that was marked by the marriage of two men by Noël Mamère and 2011, all the political parties of the Left have committed in their electoral programmes for the Presidential elections in 2012 to marriage equality (opening up marriage to all couples regardless of their sexual orientation) If put into effect, such programmes obviously settle once and for all the question of the recognition of same-sex marriage.

I can even add that in the context of the agreements on the harmonisation of political programmes between the Socialist Party and Europe Ecologie ecologist Party a commitment has been made to introduce a bill in parliament by 31st December 2012 at latest.

II- The recognition on French soil of registered partnerships entered into abroad.

In this area, from the point of view of French law, the situation is completely clear following the passing of law number 2009-526 dated 12th May 2009, which added a new article, article 515-7-1, into the Civil Code.

This article provides that :

« The conditions governing the formation of a registered partnership, its material and legal consequences and the causes and consequences of its dissolution are subject to the substantive provisions of the State responsible for its registration »

Article 515-7-1 thus anticipates a rule of international private law according to which registered partnerships are subject to the laws of the registering them. This applies to all partnerships registered abroad whatever the nationalities of the partners.

Article 515-7-1 was to be applied with immediate effect and therefore it directly applied to legal cases in process at the moment it entered into force (Cass, 3rd civ., 13th November 1984, Bull. III, number 189).

Finally, it was this article which was applied in a case which I had introduced in February 2009 and which led to a judgment handed down by the lower court (Tribunal de Grande instance) of Bobbing on 8th June 2010.

The court judged that:

« It is not considered that the consequences, in France, of an English « civil partnership » are contrary to public order. It is clear from the documents provided to underpin our debate that Mr. X validly submitted to the Tax Authorities proof – duly translated into French – of his English « civil partnership » with Mr. Y and of its registration in January 2006, of the last will

and testament of Mr Y dated March 2006 duly registered with the High Court of Justice of Winchester in the United Kingdom and the Death Certificate of Mr. Y dated April 2008.

Given these facts, in application both of articles 796-O bis of the General Tax Code and article 515-7-1 of the Civil Code it is judged that the « civil partnership » entered into under English law by Mr X with the late Mr Y has full legal and fiscal consequences in France The Tax Authorities are therefore condemned to reimburse Mr. X for all the amounts already paid by him in respect of estate duty on Mr. Y's estate as well as interest, calculated at the legal rate, as from the date of this decision in application of article 1153-1 of the Civil Code.

To my knowledge, there has been no other legal decision since, from now on, article 515-7-1 is applicable.