

# Article

## Medically Assisted Procreation for Women Couples in French Law: Review of New Legislation

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### ABSTRACT

*French law regulates medically assisted procreation (AMP) within the framework of a more general law, known as the “bioethics law”. The first bioethics laws date from 1994. This law has the particularity of being revisable. In July 2019, a bill was tabled to carry out the third revision. The health crisis, a busy legislative schedule but also political opposition led to a considerable delay in the adoption of this reform<sup>1</sup>, which was finally adopted definitively on 29 June 2021<sup>2</sup>.*

*The first draft opened the benefit of medically assisted procreation to couples and single women. This proposal was adopted by both parliamentary chambers (National Assembly and Senate) during the preparatory work. But in February 2021, against all expectations, the Senate had finally refused this opening, in a climate of total confusion<sup>3</sup>. It was to be expected that in its final reading the National Assembly*

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1. This reform required 468 hours of parliamentary debate.

2. France has two parliamentary assemblies: the National Assembly and the Senate. On 29 June 2021, the National Assembly adopted the text in final reading, thus putting an end to the long parliamentary process : Draft law, adopted by the National Assembly, under the conditions provided for in Article 45, paragraph 4, of the Constitution, relating to bioethics on 29 June 2021, T.A. n° 640.

3. The first stages of the debate in the Senate showed that Art. 1 of the draft on access to AMP was favourably received. Then two amendments were adopted: one refusing access to AMP to single women, the other authorising post-mortem AMP. These two amendments were passed even though many senators were absent. Therefore, a second deliberation was organised. The senators, who disagreed with the text modified by these amendments, then voted against Article 1. It is thus possible to say that it was more the refusal of post-mortem AMP than the refusal of AMP for women's couples that led to this vote, under troubled conditions.

would reverse its position by allowing unmarried women and couples to have recourse to medically assisted reproduction.

A “moment in history”,<sup>4</sup> a “text which, above all else, places the will of men above the weight of destiny”,<sup>5</sup> these are the terms used by the bearers of this project on 29 June 2021. This is obviously an incredible step forward. However, the modalities chosen to allow the establishment of filiation with regard to the female couple in the event of recourse to a sperm donor reveal valuable lessons. These modalities shows that the legislator is incapable of going beyond a traditional model of filiation, based on carnal procreation, to grasp the specifics of AMP. This article proposes, after a historical overview, to analyse the choices that the legislature is preparing to make in 2021 and the paradoxes that lie behind them.

**Keywords:** *Medical Assistance for Procreation, Female Couple, Third Party Donor, Establishment of Filiation, Access to Origins*



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4. Remarks by Mr Adrien Taquet, Secretary of State for Children and Families.

5. Remarks by Mrs Coralie Dubost, rapporteur of the bioethics bill in the Assembly.

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French law on filiation has just undergone a revolution: a reform of the law on medically assisted procreation (AMP) has been adopted, which provides that unmarried women and lesbian couples may have recourse to this reproductive technique. This revision could have been a major turning point in the law of filiation, inviting a global reflection on the issues related to the use of AMP. However, this is not the case. We shall see, without denying the progress of the opening up itself, that a minimalist approach has been chosen by the legislator. The way in which French law deals with recourse to AMP by a female couple also reveals, despite profound changes, the resistance of a traditional model of filiation.

To understand this, it is easiest to start by explaining how French law governs AMP. The rules relating to AMP stem from the so-called “bioethics” laws, the first version of which dates from 1994<sup>6</sup>. From this first version, the periodically revisable nature of these laws is pronounced. A first revision took place in 2004<sup>7</sup>, a second in 2011<sup>8</sup> and the legislative process of the third is therefore coming to an end with this final reading of the National Assembly on 29 June. Very soon, a new law, including this adopted rule, will therefore be published and promulgated.

To facilitate understanding, here is the progression of the reforms of the bioethics laws.

<i>DATE</i>	<i>TEXT OF LAW</i>	<i>ACCESS TO THE AMP</i>
27 July 1994	Law relating to the donation and use of elements and products of the human body, medical assistance for procreation and prenatal diagnosis First bioethics law	<ul style="list-style-type: none"> <li>✓ Only to infertile heterosexual married or cohabiting couples</li> <li>✓ Anonymity and free donation in the case of third party donors</li> <li>✓ Codified in the article L. 152-1 of the Public Health Code</li> </ul>

6. Loi 94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal [Law 94-654 of July 29, 1994 relating to the donation and use of elements and products of the human body, medical assistance for procreation and prenatal diagnosis], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 1994, p. 11060; Loi 94-653 du 29 juillet 1994 relative au respect du corps humain [Law 94-653 of 29 July 1994 relating to respect for the human body], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 30, 1994, p. 11060.

7. Loi 2004-800 du 6 août 2004 relative à la bioéthique [Law 2004-800 of August 6 2004 relating to bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 7, 2004, p. 14040.

8. Loi 2011-814 du 7 juillet 2011 relative à la bioéthique [Law 2011-814 of July 7, 2011 relating to bioethics], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2011, p. 11826.

<i>DATE</i>	<i>TEXT OF LAW</i>	<i>ACCESS TO THE AMP</i>
6 August 2004	Law on bioethics [first revision]	<ul style="list-style-type: none"> <li>✓ Only to infertile heterosexual married or cohabiting couples</li> <li>✓ Anonymity and free donation in the case of third party donors</li> <li>✓ <i>Codified in the article L. 2141-2 of the Public Health Code</i></li> </ul>
7 July 2011	Law relating to bioethics [second revision]	<ul style="list-style-type: none"> <li>✓ Only to infertile heterosexual married or cohabiting couples</li> <li>✓ Anonymity and free donation in the case of third party donors</li> <li>✓ <i>Codified in the article L. 2141-2 of the Public Health Code</i></li> </ul>
<b>BILL IN THE PROCESS OF ADOPTION--THIRD REVISION</b>		
24 July 2019	Tabling of the draft law on bioethics--National Assembly	<ul style="list-style-type: none"> <li>✓ Offers the AMP to couples of women and single women (not married)</li> </ul>
15 October 2019	Text adopted on first reading by the National Assembly	<ul style="list-style-type: none"> <li>✓ Offers the AMP to couples of women and single women (not married)</li> <li>✓ Offers to allow self-preservation of gametes</li> <li>✓ Possible access for the person born of a donation to non-identifying data and donor identity with donor consent <u>at the time of donation</u></li> </ul>
4 February 2020	Text adopted on first reading by the Senate	<ul style="list-style-type: none"> <li>✓ Offers the AMP to couples of women and single women</li> <li>✓ Proposes an article in the Civil Code according to which “No one has the right to a child”.</li> <li>✓ Proposes possible access to non-identifying donor</li> </ul>

<i>DATE</i>	<i>TEXT OF LAW</i>	<i>ACCESS TO THE AMP</i>
		<p>data without donor consent</p> <p>✓Proposes possible access to the donor's identity when the child reaches the age of majority, subject to the donor's consent <u>at the time of application of access</u></p> <p>✓Offers to allow self-preservation of gametes</p>
31 July 2020	Text adopted on second reading by the National Assembly	<p>✓Deletion of the Senate's proposed article stating that "no one has the right to a child".</p> <p>✓Offers the AMP to couples of women and single women</p> <p>✓Possible access for the person born of a donation to non-identifying data and donor identity with donor consent <u>at the time of donation</u></p> <p>✓Offers to allow self-preservation of gametes</p>
3 February 2021	Text adopted on second reading by the Senate	<p>✓<u>Refuses the opening of the AMP to women couples and single women</u></p> <p>✓Proposes an article in the Civil Code according to which "No one has the right to a child".</p> <p>✓Proposes possible access to non-identifying donor data without donor consent</p> <p>✓Proposes possible access to the donor's identity when the child reaches the age of majority, subject to the donor's consent <u>at the time of</u></p>

<i>DATE</i>	<i>TEXT OF LAW</i>	<i>ACCESS TO THE AMP</i>
		<u>application of access</u> ✓Provides that in the case of sperm donation by a female couple, the parent-child relationship of the woman who does not give birth is established by filiation <sup>9</sup> ✓Deletes the proposal to allow self-preservation of gametes
17 February 2021	Joint Committee (seeking agreement between the two assemblies)	<i>No agreement found</i>
9 June 2021	Third reading by the national assembly (the text essentially reproduces the texts voted during the second reading)	✓Offers the AMP to couples of women and single women (not married) ✓Possible access for the person born of a donation to non-identifying data and donor identity with donor consent <u>at the time of donation</u> ✓Offers to allow self-preservation of gametes
24 June 2021	Third reading by the Senate	<i>Rejected text</i>
29 June 2021	<b>Final adoption of the text by the National Assembly<sup>10</sup></b>	✓Offers the AMP to couples of women and single women (not married) ✓Possible access for the person born of a donation to non-identifying data and donor identity with donor consent <u>at the time of donation</u> ✓Offers to allow self-preservation of gametes

9. Art. 342-11 of the draft.

10. The final adoption puts an end to the parliamentary phase and leads to the promulgation of the law. The final text is signed by the President of the Republic who promulgates the law within 15 days. The law is then published in the Official Journal of the French Republic. However, the promulgation of the law here has a very high chance of being delayed by an application for a constitutionality review before the Constitutional Council.

It is the first title of the adopted text that interests us most in this publication. Entitled “*Broadening access to available technologies without breaking with our ethical principles*”, it includes several articles relating to:

- access to third-party donor AMP for women in couples and single women;
- the modalities for realising the right of access to personal origins;
- the modalities for establishing filiation in this situation.

We will adopt a simple and chronological approach here to show how, despite a great deal of preparatory work, the French legislator's choice reveals his inability to go beyond a given model of filiation. The opening up of AMP to women's couples (I) could nevertheless have served to reconstruct a new logic of the law of filiation (II), regardless of the sexual orientation of those who wish to use this technique.

#### I. POSSIBLE ACCESS TO AMP FOR WOMEN COUPLES

The opening of the AMP to a female couple was unimaginable in 1994, the year of the first bioethics laws (A). Going back to that time allows us to better understand the factors that led to overcoming this initial unthought and that allowed us to understand the use of this technology in a different way (B).

##### A. *An Initial Unthought*

**1994. Mimicking biology**—Although AMP practice developed in France as early as 1970, a legal definition was not given until many years later.<sup>11</sup> The Public Health Code, amended by the law of July 29, 1994, thus provides that it refers to “clinical and biological practices allowing in vitro conception, embryo transfer and artificial insemination, as well as any technique of equivalent effect allowing procreation outside the natural process”.<sup>12</sup> Immediately, the beneficiaries of the device are strictly stated: a man and a woman, living, of childbearing age, married or able to provide proof of two years of life together,<sup>13</sup> consenting and, above all, whose pathological

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11. The doctrine, however, began to question itself long before. GÉNÉTIQUE, PROCRÉATION ET DROIT: ACTES DU COLLOQUE TENU À LA MAISON DE LA CHIMIE [GENETICS, PROCREATION AND LAW: PROCEEDINGS OF THE CONFERENCE HELD AT THE MAISON DE LA CHIMIE] (Actes Sud ed., 1985).

12. CODE DE LA SANTÉ PUBLIQUE [PUBLIC HEALTH CODE] Former art. L. 152-1 (Fr.).

13. This condition was, moreover, criticized in doctrine. For some authors, the assimilation of concubinage and marriage was criticized, see in this sense: Guy Raymond, *L'assistance médicale à la procréation (après la promulgation des lois “de bioéthique”)* [Medically Assisted Procreation (After the Promulgation of “bioethics” Laws)], 43 LA SEMAINE JURIDIQUE ÉDITION GÉNÉRALE [LEGAL WEEK



infertility had been medically diagnosed.

The practice of AMP with gamete donation is thus conceived in a singular way:

- It is necessarily subsidiary and can only be set up in the event of failure of an endogenous AMP, i.e. one carried out with the couple's gametes.<sup>14</sup>
- It can only involve a single donation. A child cannot be conceived through a double donation. At least one of the candidates for AMP must be a biological parent, unless the couple can benefit from embryo reception.<sup>15</sup>
- The principle is that of anonymous donation and neither the child nor the AMP candidates can access the identity of the donor, at the time of donation or later.<sup>16</sup>

It is therefore understandable that the legislator, inspired by the previous practices of AMP centers, wanted to incorporate the AMP model with third-party donors into the model of carnal procreation. The desire to “mimic the biological” was quite visible:<sup>17</sup> the technique is seen as a palliative for those who cannot procreate naturally, even though they would otherwise meet the “abstract” conditions, such as age or heterosexuality. Donated AMP is thus thought of as a means of responding to a public “health” problem, even though it does not treat the couple's infertility. And everything is done so that the recourse to donation, if it takes place, is concealed and concealable. A desire to pass off the sterile father as the progenitor is therefore the basis of this set of rules which preserve a certain image of virility.<sup>18</sup>

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GENERAL EDITION], DOCT. 3796, 1-6 (1994).

14. CODE DE LA SANTÉ PUBLIQUE [PUBLIC HEALTH CODE] Former art. L. 152-6 (Fr.).

15. A couple may decide, as early as 1994, to donate embryos already conceived with their gametes, but for which there is no longer a parental project, to another couple anonymously and free of charge.

16. CODE CIVIL [C.CIV.][CIVIL CODE] art. 16-8 (Fr.): «No information that could identify both the person who donated an element or product of his body and the person who received it may be disclosed. the donor may not know the identity of the recipient, nor the recipient the identity of the donor In case of therapeutic necessity, only the doctors of the donor and of the recipient may have access to information allowing the identification of the latter». Also CODE DE LA SANTÉ PUBLIQUE [PUBLIC HEALTH CODE] art. L. 665-14 (Fr.). Only the physician may, in case of therapeutic necessity, access certain data.

17. Some authors, approving this construction, evoke the existence of a legislative choice translating a “structuring fiction”, in this sense, Jean-René Binet, *Vers la procréation médicalement assistée pour toutes?* [Towards Medically Assisted Procreation for All?], 5 REVUE DROIT DE LA FAMILLE [FAMILY LAW JOURNAL] 1, 1 (2017). in relation to a bill tabled in the Senate on October 18, 2016 and amending Article L. 2141-2 of the Public Health Code relating to medically assisted procreation.

18. This is the model that Anne-Marie Leroyer and Irène Théry call the “neither seen nor known” model. ANNE-MARIE LEROYER & IRÈNE THÉRY, LA DOCUMENTATION FRANÇAISE [FRENCH

There was thus no question of considering lesbian couples as possible beneficiaries. At the time, these couples did not benefit from any legal recognition. Things changed in 1999 when France, following the example of certain European States, and particularly Northern European countries, adopted a registered partnership open to same-sex couples.<sup>19</sup> But the construction is slow: qualified as a couple, the link between two persons of the same sex has no legal vocation as a family and the interest of this recognition is above all patrimonial.

**2004.--The maintenance of an AMP with a “therapeutic purpose”.** It is therefore not surprising that in 2004, the first revision of the bioethics laws by a law of August 6 did not change the profound philosophy of the system of AMP with donation.<sup>20</sup> It is simply specified that certain situations hinder the process: insemination or embryo transfer cannot take place in the event of the death of one of the members of the couple, revocation of consent or rupture. Beyond that, French law remains in a system of medically assisted procreation with donation conceived as “therapeutic”.

#### B. *A Conceivable Model*

**2011.--The time of claims.** It is finally on the eve of the second revision of bioethics laws that some have tried to undermine this approach to AMP by proposing that it be opened up to single and infertile women and to couples of women.<sup>21</sup>

The opening of the AMP to single and infertile women was called for in the name of a certain conception of equality and the principle of non-discrimination: there should be no discrimination according to whether or not the woman was in a couple. In any case, women should have access to this technique in the event of sterility. The argument was all the more weighty since French law has allowed the adoption of a child by a single person since a law of July 11, 1966. On the other hand, the proposal to open the AMP to female couples was based on a real alternative logic: it was a question of going beyond the so-called therapeutic purpose, of ceasing to conceive of gamete

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DOCUMENTATION], FILIATION, ORIGINES, PARENTALITÉ: LE DROIT FACE AUX NOUVELLES VALEURS DE RESPONSABILITÉ GÉNÉRATIONNELLE [FILIATION, ORIGINS AND PARENTHOOD. THE LAW IN THE FACE OF THE NEW VALUES OF GENERATIONAL RESPONSIBILITY] (2014), <https://www.vie-publique.fr/rapport/33805-filiation-origines-parentalite>.

19. Loi 99-944 du 15 novembre 1999 relative au pacte civil de solidarité [Law 99-944 November 15, 1999 relating to the civil solidarity pact], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 15, 1999, p. 16959.

20. Only the numbering is modified, the AMP being then provided for in art. L. 2141-2 Public Health Code.

21. PARLIAMENTARY OFFICE FOR THE EVALUATION OF SCIENTIFIC AND TECHNOLOGICAL CHOICES, REPORT ON THE EVALUATION OF THE APPLICATION OF LAW 2004-800 OF AUGUST 6, 2004 ON BIOETHICS, SPEC. 125, 1-273 (2008).

donation as a therapy, but of seeing it as a means of creating a family, and in particular a homoparental family.

However, the Bioethics Law of July 7, 2011, which constitutes the second revision, did not take this step, notably because the project leaders considered that such a reform went beyond the boundaries of a bioethics law. However, the legal and social climate was considerably modified two years after this law.

**2013.--The time of hypocrisy.** The law of May 17, 2013 allows two men or two women to marry and adopt as spouses a child jointly or adopt the child of the spouse. While the text does not change the law on the AMP, its concrete application and the interpretation that has been made by judges has profoundly changed the use of this technique by lesbian couples. Indeed, many French women who wanted to have a child had recourse to the AMP with donation abroad (Belgium, Spain, the Netherlands, in particular) and then returned to France to follow up their pregnancy and childbirth. In this hypothesis, the woman who gave birth is recognized as the mother of the child by application of the common law of filiation.<sup>22</sup> From then on, his wife could then apply for the adoption of this child. Some judges have opposed this practice on the grounds that these women had recourse to a technique prohibited in France. However, the Cour de cassation, the highest court of the judiciary, admitted that there was no fraud against the law in this case: adoption was possible, as long as it was in the interest of the child.<sup>23</sup>

Some cases, submitted by determined litigants and lawyers, were able to show all the artifice of French law in the event of recourse to the AMP in a couple of women. It is noticeable that the law of May 17, 2013 had created a situation that was as lame as it was hypocritical, by authorizing the consequences--filiation--of an act--the AMP with gift--which was prohibited in principle.<sup>24</sup> It also amounted to ratifying a *de facto* inequality between female couples, depending on whether or not they had the means to travel abroad. It also led to the emergence of real health risks for these couples: recourse to so-called “wild” donations, homemade procreation, sperm

22. CODE CIVIL [C. CIV][CIVIL CODE] art. 311-25 (Fr.).

23. COUR DE CASSATION, [CASS] [SUPREME COURT FOR JUDICIAL MATTERS] Opinion of 22 Sept. 2014, No.15010 and No.15011 (Fr.): “*Is the use of medically assisted procreation, in the form of recourse to artificial insemination with an unknown donor abroad by a couple of women, insofar as this assistance is not available to them in France, in accordance with Article L.2141-2 of the Public Health Code, of such a nature as to constitute fraud against the law preventing the adoption of the child born of this procreation by the wife of the mother?*” On these opinions, Jean Hauser, *L’assistance médicale à la procréation: Libres propos* [Medical Assistance in Procreation: Free Speech], 57 LA SEMAINE JURIDIQUE [THE LEGAL WEEK] (2014); Anne-Marie Leroyer, *L’enfant d’un couple de femmes* [The Child of a Couple of Women], 35 RECUEIL DALLOZ [COLLECTION DALLOZ] 2031 (2014).

24. It also meant admitting, beyond that, the indirect use of assisted procreation in another form, using the gametes of a known donor.

purchased online, and lack of medical follow-up.

**2019.--The field of possibilities.** It is therefore in this context, which presented numerous disadvantages and serious legal uncertainties, that the draft reform of the bioethics laws was submitted on July 24, 2019<sup>25</sup>. The opening of the AMP to single women and female couples was at the head of the project.

The brand new article L. 2141-2 of the French public health code specifies in particular that AMP is “*intended to respond to a parental project. Any couple composed of a man and a woman or two women or any single woman have access to medically assisted procreation after an individual interview with the members of the multidisciplinary clinical and biological medical team ( . . . ) This access may not be subject to any difference in treatment, particularly with regard to the marital status or sexual orientation of the applicants*”. This article, which has crystallised the opposition between the two French parliamentary chambers<sup>26</sup>, leads to a real change of model.

AMP with donation is conceived as an innovative way of creating a

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25. This project has of course been preceded by a great deal of work and advice. See, among others, Comité Consultatif National d’Ethique [National Consultative Ethics Committee], *Contribution du comité consultatif national d’éthique à la révision de la loi de bioéthique* [Contribution of the National Consultative Ethics Advisory Committee to the Revision of the Bioethics Law], Opinion No. 129, Sep. 25, 2018; Comité Consultatif National d’Ethique [National Consultative Ethics Committee], *Opinion on Societal Requests for Recourse to the AMP*, Opinion No. 126, June 15, 2017; On this opinion, Anne-Marie Leroyer, *L’avis du Comité d’éthique sur les demandes sociétales de recours à l’AMP ou les présupposés idéologiques d’une pensée institutionnelle* [The Opinion of the Ethics Committee on Societal Requests for Recourse to the AMP or the Ideological Presuppositions of an Institutional Thought], 37 LA SEMAINE JURIDIQUE [LEGAL WEEK] 1583 (2017); CONSEIL D’ÉTAT [COUNCIL OF STATE], RÉVISION DE LA LOI DE BIOÉTHIQUE: QUELLES OPTIONS POUR DEMAIN? [REVISION OF THE LAW ON BIOETHICS: WHAT OPTIONS FOR TOMORROW?], <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes/revision-de-la-loi-de-bioethique-queelles-options-pour-demain> (2018). Study adopted on June 28, 2018 at the General Assembly; *Avis sur l’assistance médicale à la procréation* [Opinion on Medically Assisted Procreation], Commission nationale consultative des droits de l’homme [C.N.C.D.H.] [French National Consultative Commission on Human Rights], Nov. 20, 2018), <https://www.cncdh.fr/fr/publications/avis-sur-lassistance-medicale-la-procreation>; Défenseur des droits [Defender of rights], *Opinion No. 15-18* of July 3, 2015, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=15233](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=15233) and *No. 18-23* of Oct. 10, 2018, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=26197](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26197), on bioethical issues, *Opinion No. 19-13*, Dec. 20, 2019, [https://juridique.defenseurdesdroits.fr/index.php?lvl=notice\\_display&id=26197](https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26197).

26. Jean-René Binet, *Bioéthique et filiation: la guerre des chambres À propos de l’adoption du projet de loi relatif à la bioéthique en seconde lecture au Sénat* [Bioethics and Filiation: The War of the Chambers on the Adoption of the Bill on Bioethics at Second Reading in the Senate], 3 DROIT DE LA FAMILLE [FAMILY LAW JOURNAL] 41 (2021). Numerous oppositions were formulated by associations when the Senate went back on this opening and refused that AMP be opened to couples of women and to single women: Le Monde avec AFP, *PMA: les associations LGBT et de femmes seules furieuses du rejet de l’extension à toutes les femmes par le Sénat* [PMA: LGBT and single women associations furious at Senate rejection of extension to all women] (Le Monde, Feb. 4, 2021), [https://www.lemonde.fr/societe/article/2021/02/04/les-associations-furieuses-du-rejet-de-l-extension-de-la-pma-a-toutes-les-femmes-par-le-senat\\_6068796\\_3224.html](https://www.lemonde.fr/societe/article/2021/02/04/les-associations-furieuses-du-rejet-de-l-extension-de-la-pma-a-toutes-les-femmes-par-le-senat_6068796_3224.html).

family, at least within the lesbian couple, and not in a general way, as we shall see. The adoption of this article 1 will have aroused, until the final adoption of the text on 29 June, numerous oppositions<sup>27</sup>. While some see it as a major step forward for women's rights and the rights of same-sex couples, others consider that the legislator is responsible for bringing fatherless children into the world or for an inexorable decline in the protection of the individual. As such, the lawyer certainly has no legitimacy to welcome or criticise this extension. It is a political choice and no legal principle, as such, makes it possible to impose or refuse recourse to MAP to female couples and single women, whether it be the principles of equality, precaution or defence of the best interests of the child<sup>28</sup>.

On the other hand, once this choice has been made, the lawyer's task is to look at the technical consequences that it has for female couples. It is to this study of the effects that we must now devote ourselves.

## II. THE CONSEQUENCES OF RECOURSE TO AMP FOR WOMEN COUPLES

Article 1 of the adopted text --which specifies that the AMP is open to unmarried women<sup>29</sup> or in couples, as well as to couples of different sexes-- is

27. Doctrinal oppositions, first of all: Claire Neirinck, *Réforme de l'assistance médicale à la procréation Liberté procréatique, égalité arithmétique, parenté homosexuelle* [Reform of Medically Assisted Procreation Reproductive Freedom, Arithmetic Equality, Homosexual Kinship], 13 LA SEMAINE JURIDIQUE [LEGAL WEEK] 609 (2019); Clotilde Brunetti-Pons, *Les conséquences mal maîtrisées du projet bioéthique en matière de filiation* [The Poorly Understood Consequences of the Bioethics Project in Matters of Parentage], 5 DROIT DE LA FAMILLE [FAMILY LAW JOURNAL] 1, 5-14 (2021) which goes so far as to consider that «the institution of filiation is in the balance: the project calls into question the concept of filiation defined as the legal link between the child and his father (paternal filiation) and mother (maternal filiation). In order to allow the creation of a second maternity, the project declares paternal affiliation optional (in law by principle and no longer only in practice by accident). In the draft voted by the National Assembly, the father thus disappears from the--still intangible--structure of filiation. In this way, he is removed from the filial institution». Part of the doctrine also expresses fears about what tomorrow's AMP could be: «Won't it be more difficult, once this shift has been accepted, to resist the claims of other couples who, without suffering from pathological infertility, cannot or no longer have children (men or women who are no longer of childbearing age, who renounce married life . . . ) by advocating the exclusion of the carnal model? Or to refuse a multiparenthood of three, four . . . ?» DOMINIQUE FENOUILLET, CHARLOTTE GOLDIE-GENICON & FRANÇOIS TERRÉ, DROIT CIVIL. LA FAMILLE [CIVIL RIGHT. FAMILY] 878 (9th ed. 2018). Then there are more political oppositions. on the content and value of the arguments developed against this project: Anne-Marie Leroyer, *Debates on Same-Sex Parentage: Main Arguments in France*, 16 NATIONAL TAIWAN UNIVERSITY L. R. (forthcoming June 2021).

28. This has been highlighted by: CONSEIL D'ETAT [COUNCIL OF STATE], *supra* note 25. "Study adopted on 28 June 2018 at the General Assembly: "The law therefore does not a priori require any response to the question of modifying the criteria for access to the AMP; the choices in this area are a matter for the sovereign appreciation of the legislator"", p. 56. V. equals. In this sense, Rémy Libchaber, *L'ouverture de l'assistance médicale à la procréation à toutes les femmes* [The Opening of Medically Assisted Procreation to All Women], 34 RECUEIL DALLOZ [COLLECTION DALLOZ] 1875 (2018).

29. On the issue of opening up to single unmarried women: Marie Mesnil, *Ce que les femmes mariées nous apprennent du projet de loi bioéthique* [What Married Women Tell Us about the Bioethics

a matrix article. Indeed, it led the French legislator to inevitable questions: should recourse to this technique, which is therefore no longer considered as therapeutic, be covered by national solidarity, through social security? How can the parent-child relationship between the child born of this technique and the two mothers be established? Should the mother's wife continue to be obliged to adopt this child, even though a common parental project is at the origin of its conception? And then, should this child, to whom we can never hide the fact that he or she is the fruit of a donation, anonymous or not, have access to the identity of his or her parent? If so, should this right not be recognised for all children born from a donation, whether the parents are single, in a couple, of different sex or of the same sex?

#### A. *Financing the Use of AMP*

The cost of extending reproductive health care to female couples has been estimated at fifteen million euros per year, or five percent of the total cost of reproductive health care (three hundred million).<sup>30</sup> Some have defended the idea that this act should not be covered by national solidarity when it is requested by a lesbian couple, as the therapeutic purpose is absent. However, this is questionable. On the one hand, the therapeutic nature of AMP within a different sex couple can be debated--infertility does not disappear after AMP<sup>31</sup>--and, on the other hand, there is no doubt that the French social security system reimburses, as things stand, a large number of non-therapeutic acts (preventive acts, cosmetic surgery, etc.). Last but not least, it is essential to guarantee equal treatment between all persons receiving health protection, which is in line with the principle of equality before the social security system.<sup>32</sup> We are therefore pleased to see that the National Assembly has chosen this option<sup>33</sup>.

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*Bill*], 26 JOURNAL DU DROIT DE LA SANTÉ ET DE L'ASSURANCE MALADIE [HEALTH AND ILLNESS INSURANCE LAW JOURNAL] 66 (2019); Marc Pichard, «Toutes les femmes»? À propos de l'exclusion des femmes mariées de l'accès à la procréation médicalement assistée avec tiers donneur [All the Women? About the Exclusion of Married Women from Access to Medically Assisted Reproduction with a Third-Party Donor], 39 RECUEIL DALLOZ [COLLECTION DALLOZ] 2143 (2019).

30. Impact study, Bioethics Bill. On care within the different-sex couple, Décision du 11 mars 2005 de l'Union nationale des caisses d'assurance maladie relative à la liste des actes et prestations pris en charge ou remboursés par l'assurance maladie [Decision of 11 March 2005 of the National Union of Sickness Insurance Funds relating to the list of acts and services covered or reimbursed by health insurance], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 30, 2005, p. 5309.

31. Pierre Murat, *Enjeu de structures sociales ou logique de droits fondamentaux?* [Issue of Social Structures or Logic of Fundamental Rights?], 57 ARCHIVES DE PHILOSOPHIE DU DROIT [ARCHIVES OF PHILOSOPHY LAW] 285 (2014).

32. As stressed by the Council of State in its opinion on the reform of 13 June 2019.

33. Amendment of art. L. 160-14 Social Security Code, by sec. 1 of the final bill.



### B. *The Filiation of a Child Born of an AMP*

This is another, much more controversial, effect of the extension of the AMP system to female couples. How to establish dual maternal filiation with regard to a child born of a donation?

This question is, no more and no less, a question of probing legislative creativity in the face of a situation that shakes the very foundations of a centuries-old legal system. In fact, either the legislator decided to use methods of establishment already known to our law, which were therefore designed for couples uniting persons of different sexes, and tried to adapt them; or, conversely, the legislator was creative and went beyond the traditional tools of the system of filiation in order to grasp this new situation.<sup>34</sup> In concrete terms, three choices were possible in French law.

#### *Choice 1. Retain the system put in place by the law of 17 May 2013 opening marriage and adoption to same-sex couples.*

According to this first proposal, the woman who gave birth to the child conceived by donation would have been designated as the child's mother and her wife would have had to adopt the child of her spouse. This "solution"<sup>35</sup> has many disadvantages. First of all, it affects, even indirectly, the freedom of marriage by making the establishment of filiation conditional on the existence of a marriage.<sup>36</sup> Secondly, the adoption of the child of the spouse is necessarily subject to the agreement of the mother who gives birth and presupposes the passage of a period of time between the application for adoption and its pronouncement. In other words, great difficulties may arise in the event of a break-up, voluntary or by death, of the parental couple.<sup>37</sup> Last but not least, it would lead the authors of a common ante-conceptual parental project to apply for the adoption of the child, and thus to submit to a judicial review that would strangely only concern lesbian couples.

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34. There is of course a great deal written on this issue: HUGUES FULCHIRON & JEHANNE SOSSON, PARENTÉ, FILIATION, ORIGINES. LE DROIT ET L'ENGENDREMENT À PLUSIEURS [KINSHIP, FILIATION, ORIGINS. LAW AND BEGETTING TOGETHER] (2013); LEROYER & THÉRY, *supra* note 18; Hugues Fulchiron, *Incertitude, ô mes délices* [Uncertainty, Oh My Dlights], 7-8 REVUE DROIT DE LA FAMILLE [FAMILY LAW JOURNAL] 1-2 (2019).

35. See for such a view, Neirinck, *supra* note 27, at 609; doctr. 351, spec. No. 23: «*The only adequate institutional technique is that of full adoption of the spouse's child which positive law grants. Adoption is a fictitious filiation. Through fiction, the law imposes as true what it knows to be false--in this case the child was not born of that person--because it is the only way to achieve the desired result.*»

36. The Senate, on 3 February 2021, had opted for this route by considering that the mother who has not given birth must adopt the child, and by extending this possibility to unmarried couples.

37. The Netherlands, Sweden and Finland experience this transition through adoption, but in these countries adoption is not conditional on the existence of a marriage.

All these drawbacks led to the exploration of a second possibility.

*Choice 2. Extend the existing provisions to different-sex couples.*<sup>38</sup>

Currently, in the case of AMP, the different-sex couple must consent to the donation before a notary, “under conditions guaranteeing secrecy”<sup>39</sup>. On the day the child is born, the rules relating to carnal procreation apply. The filiation of the mother will therefore be established by the registration of her name in the birth certificate<sup>40</sup>. The filiation of the married father will be established by the presumption of paternity<sup>41</sup>. The filiation of the unmarried father will be established by an acknowledgement<sup>42</sup>.

Everything is therefore done to ensure that filiation is established as if the donation did not exist and therefore as if the child’s father were his father. In order to guarantee the stability of the system thus set up, the law declares filiation indisputable: the person who does not recognise the child engages his responsibility and his filiation is judicially declared. No link can be established with the donor. The donation is therefore invisible to the child, as it is to society.

Should these same procedures be used for female couples? The couple would consent before a notary to the AMP, and then an extension of the presumption of paternity--by imagining a presumption of co-maternity--or an extension of the recognition currently offered to the unmarried father would be made possible for the mother who has not given birth. This route, which has been followed in Belgium<sup>43</sup> and Austria to some extent, has its drawbacks: both the presumption of paternity and recognition are supposed to reflect biological reality in different-sex couples. They are challenged by proving that the father is not the progenitor. In other words, extending these two tools to same-sex couples would mean the coexistence, in the French legal system, of instruments that would be identical only in appearance, but whose real foundations would be quite distinct depending on the couple they concern.

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38. In favour of the use of common law by all couples: Groupe d’information et d’action sur les questions procréatives et sexuelles [G.I.A.P.S.] [Information and Action Group on Reproductive and Sexual Issues], *Les lesbiennes sont-elles des mères comme les autres?* [Lesbians are mothers like everyone else?] (Mediapart, Aug. 9, 2019), <https://blogs.mediapart.fr/association-giaps/blog/090819/les-lesbiennes-sont-elles-des-meres-comme-les-autres-1>.

39. CODE CIVIL [C.CIV.][CIVIL CODE] art. 311-20 (Fr.).

40. CODE CIVIL [C.CIV.][CIVIL CODE] art. 311-25 (Fr.).

41. CODE CIVIL [C.CIV.][CIVIL CODE] art. 312 (Fr.).

42. CODE CIVIL [C.CIV.][CIVIL CODE] art. 316 (Fr.).

43. Law of 6 July 2007 relating to medically assisted procreation and the use of supernumerary embryos and gametes: this law opens up medically assisted procreation for female couples and medically assisted post-mortem procreation and proceeds, with regard to filiation, by simple reference to the provisions of the Civil Code which, on this occasion, have been amended to allow same-sex filiation.



It would also, more broadly, call into question the foundations and procedures of tools that work relatively well for different-sex couples.

*Choice 3. Invent a new way of establishing filiation, detached from the model of carnal procreation and reflecting the existence of a true common parental project.*

This option was proposed in the preparatory work. The couple would have to go before a notary to consent to the donation of gametes and subscribe in advance to a joint declaration of intent, by which each of them undertakes to become the legal parent of the child to be born. This declaration enshrines the couple's parental project. The notary keeps this declaration. The submission of a copy of this declaration to the civil registrar when the child is declared born is then sufficient to establish filiation with regard to each of the authors of the declaration of will. This option would have made it possible to account for the female couple's parental project, without melting it into the mould of biological plausibility, which is false and technically delicate to handle.

Furthermore, this system could be considered suitable for all couples having recourse to third-party donor AMP, whether they are of different sexes or the same sex. The donation would no longer be hidden behind the appearance of carnal procreation in the different sex couple. All children born from a donor conception would have been treated in the same way, taking into account the use of the donation. They would all be informed of the circumstances of their conception. To follow this path was ultimately to use the situation of the lesbian couple--in which there can be no secrecy by definition--as a means of totally rethinking the act of donation and the AMP it uses, as a means of no longer legally instituting the lie<sup>44</sup>.

Of these three options, which is the one retained by French law? For a while, the option of an "advance declaration of will" was considered, first for all couples, but this option was ruled out by the Council of State<sup>45</sup>, then for

44. However, this possibility has been criticised in that it would stigmatise children from gamete donation, Groupe d'information et d'action sur les questions procréatives et sexuelles [Information and Action Group on Reproductive and Sexual Issues], *PMA: de futurs enfants stigmatisés par le droit?* [*PMA: future children stigmatized by the law*] (Libération, May 2, 2019), [https://www.liberation.fr/debats/2019/05/02/pma-de-futurs-enfants-stigmatises-par-le-droit\\_1724583/](https://www.liberation.fr/debats/2019/05/02/pma-de-futurs-enfants-stigmatises-par-le-droit_1724583/): «Creating a specific mode of filiation for children from gamete donation constitutes a double stigmatisation by law. On the one hand, parents who have used this method of conception are treated differently from other parents because of their infertility, their sexual orientation or their lack of marital ties. For heterosexual couples, this is even a radical step backwards in their rights: today their filiation is established by common law, tomorrow they will be subject to a derogatory right. On the other hand, this system stigmatises children by implying that they are not children like others».

45. In its opinion the Council of State considered that this system should not be offered to all couples. According to the councillors, this option removes the possibility for couples of different sexes

lesbian couples only. In the end, it was the use of a common law tool for filiation that was chosen, after amendment by the government: recognition<sup>46</sup>.

The text adopted stipulates that all couples having recourse to AMP, whether of different or the same sex, must give their consent before a notary<sup>47</sup>. However, as regards the establishment of filiation, a fundamental difference exists.

*If the members of the couple are of different sexes or if a single woman has recourse to medically assisted procreation with a third party donor*, the classic methods of establishment apply: the mother will be the one whose name appears in the birth certificate; the father will be the one presumed to be the father if he is married or the one who has recognised the child in the absence of marriage. And this filiation is perfectly locked since the reform provides that consent to medically assisted procreation prohibits any action aimed at establishing or contesting filiation (unless it is argued that the child was not born as a result of medically assisted procreation or that consent was deprived of its effect).

*For female couples*, on the other hand, and for them alone, a particular method of establishing filiation is provided for. Article 342-11 Civil Code specifies that at the time of the consent provided for before the birth, the female couple jointly recognises the child. The text then states that filiation is established, with regard to the woman who gives birth, in accordance with Article 311-25 of the French Civil Code, i.e. by registration of her name in the birth certificate. With regard to the other woman, filiation is established by the

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who have recourse to a third party donor to procreate to establish their filiation link in the traditional manner and imposes on them a new procedure for early declaration of will, whereas there is no legal justification for changing their situation, since existing law can regulate the filiation of children born by recourse to a third party donor in a couple consisting of a man and a woman. Furthermore, as the advance declaration of will appears on the birth certificate of all children born by AMP, the draft gives precedence to the right of children to know their origins, over the freedom of parents to choose whether or not to reveal the mode of conception and, if so, when. However, the principle of revealing this truth of an intimate and private nature and the choice of when and how to inform the child can be regarded as the responsibility of the parents as long as the child is a minor. This option also leads, for the child and throughout his or her life, to revealing to all third parties who will have to know about his or her birth certificate, an intimate truth which is currently not accessible to them.

46. Amendment No. 2266 presented by the government on 10 September 2019. See the explanatory memorandum to justify the change from an “advance declaration of will” offered to all couples using a donation to a “joint recognition” offered only to female couples using the AMP with a donation: The bill intends to draw the consequences in terms of establishing filiation of the new right open to female couples: access to the AMP. On the other hand, this text on bioethics does not aim to carry out a global reform of the law of filiation. (. . .)

It is therefore proposed to use a known legal concept--recognition--which will be made jointly by the two mothers committing themselves together to this project, before the notary who, at the same time, will collect the consent to the GPA. Recognition already exists for the unmarried father, who can thus recognise his child by authentic act before a notary. The child's birth certificate will simply state that the child has been recognised by both mothers

47. This competence has also been claimed by lawyers, National Council of Bars and Law Societies, 11 September 2019.

joint acknowledgement which is given by one of the two women or by the person responsible for declaring the birth to the civil registrar, who indicates this in the birth certificate.

This choice deserves to be criticized. Indeed, by referring to joint “recognition”, the parliamentarians have chosen to use a method of establishment known in couples of different sexes, but for purposes other than those assigned to it in the field of carnal procreation. This leads to an alteration of the notion of recognition. In principle, a recognition can be challenged as soon as it is shown that the child is not biologically the child of its author. However, in the case of donor AMP, such a challenge is impossible. It is impossible for heterosexual couples since filiation is locked, as we have said, and it will also be impossible for female couples. It will be necessary to demonstrate, in order to assert the false nature of the recognition, that the child is not the result of the AMP or that the consent of one of the women has been deprived of effect. In other words, it will have to be shown that the recognition does not correspond to the will of its author and no longer to the biological truth.

One difficulty is already apparent: art. 342-11 Civil Code states that the female couple “recognizes” the child at the time of consent to the donation before a notary. It should therefore be considered that filiation is established, even prenatally, since this is the meaning of the act of recognition. But the text then goes on to indicate that the filiation of the mother who gives birth is established by the registration of her name in the birth certificate. Should we then consider that joint recognition is not sufficient for the mother who gives birth, whereas it is for the mother who does not give birth? Or, conversely, should we consider that the registration of the name of the woman who gives birth in the birth certificate is not sufficient? But then, isn't there a discrimination here: only the woman in couple with another woman is imposed this double modality, while the single woman or the one who will be in couple with a man will only need to register her name in the birth certificate?

In the name of a desire for “simplicity” and rapprochement with heterosexual couples, French law would persist in a regrettable fiction instead of seizing the opportunity offered to rethink donor AMP. This artifice necessarily has an impact on the third and final consequence of this opening: access to origins.

### *C. Access to the Origins of the Child Born of an AMP*

By opening up donor AMP to women's couples, French law institutes a situation in which lying and secrecy are impossible: unlike a child born of donor AMP conceived within a couple of different sexes, a child born to a

lesbian couple knows and will necessarily know that he or she is the product of a donor's gametes. The question of access to origins must therefore be asked. Was it necessary to maintain an anonymous donation and an impossibility for the child to access the identity of the donor?

On this point, the two chambers were fiercely opposed. The Senate wanted to give children the right to access non-identifying data about the donor. Access to the donor's identity would have been possible only with the donor's consent, obtained at the time of the child's request. The National Assembly made a different choice in the final text, which will be codified in article L.2143-2 of the Public Health Code. From now on, gamete donation is only possible, under French law, if the donor consents, at the time of donation, to the communication of his data (age, physical characteristics, family situation, country of birth . . .) and of his identity. Without this consent, the donation cannot be made. These data, which can be updated by the donor, are communicated to the physician who transmits them to the Agence de la biomédecine, which is responsible for keeping them. However, the donation will remain anonymous: neither the candidates for AMP nor the child can have access to the non-identifying data and identity during the child's minority. On the other hand, art. [ . . . ] This means that there will always be a principle of anonymity of the donation, associated with a right of access to origins at the age of majority of the child.

There is no doubt that this reform is a major undertaking.

But it goes without saying that the child still needs to know that he or she is the product of a donation! However, if the child of a lesbian couple necessarily knows it, the model of filiation chosen by the French legislator for couples of different sex, unchanged since 1994, does not allow the child to reveal its mode of conception. In other words, the effectiveness of the right of access to personal origins is hindered by the silence that the child's father and mother may keep. The parliamentarians seem to be perfectly aware of this, since the bill provides for a guide to be given to future parents, encouraging them "to anticipate and create the conditions that will enable them to inform the child, before he or she reaches the age of majority, that he or she is the product of a donation". The intention is laudable, but there is no guarantee that it will be respected<sup>48</sup>.

There is thus, in this new French law, an unfortunate difference in the treatment of children depending on whether they are born to a couple of

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48. Contra. Libchaber, *supra* note 28. «Within these couples, this intervention is moreover far from being easy to confess by parents who struggle to recognise their inability to procreate the child they have produced: as close as possible to natural appearances, lying about origins is sometimes useful. This is the target of deconstructivists who denounce it as a scandal. Is it necessary to renounce all lies by opting for unnatural appearances? And, moreover, wouldn't this extension lead to a lifting of the anonymity of third party donors, which would in turn upset all situations, even that of the heterosexual couple? Opening insemination to all women would thus risk destabilising the current system».

women, to a couple of people of different sexes or to a single woman. But above all, by guaranteeing access to origins only for lesbian couples, the legislator ratifies a depreciatory vision of mono-sexual filiation. Everything leads us to believe that access to origins is guaranteed in this model in order to compensate for the absence of a “father”, as if the fact of guaranteeing access to personal origins within the lesbian couple made it possible to compensate for the mono-sexual character of filiation<sup>49</sup>. In other words, by offering this right of access to origins within the female couple only, the legislator reinforces a confusion between father and donor, between filiation and origins, which was thought to have been acquired long ago . . .



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49. See Dominique Fenouillet’s remarks in this regard, in the wake of the 2013 law, who wondered about the opening of the MAP to female couples, wrote: “And what should be decided with regard to the third party donor of gametes: should anonymity be maintained or should the child be allowed access to his or her personal origins, in order to compensate for the inadequacy of a mono-sexual filiation, deprived of its symbolic function of anchoring the subject genetically in the “long chain of the living and the dead”?”.

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## 法國法下女同性伴侶的醫學輔助 生育權利：對新立法的檢視

Maïté Saulier

法國法律以「生物倫理法」此一個規範範圍更廣的法律框架進行對醫學輔助生育（AMP）的管理。而第一部生物倫理學相關法律可以追溯到1994年，且此法相當特殊者為其直接在條文內規定，法律應適時修改。其中，於2019年7月，此部法律被提出相關草案，以進行第三次的修訂。但因疫情、繁忙的立法日程以及政治上反對的聲浪，導致這項改革的通過被大大遲延，但其終於於2021年6月29日獲得表決通過。

第一版的草案向伴侶和單身婦女開放了醫療輔助生育的好處。而在籌備工作期間，議會兩院（國民議會和參議院）皆對此項提案表達同意。但在2021年2月，與所有人的預期相反，參議院最終在完全混亂的氣氛中拒絕了這項開放。但可以預見的是，國民議會將在最後一讀中會改變其立場，並允許未婚婦女和伴侶得求助於醫學輔助生殖。

一個「歷史的時刻」，一個「將人的意志置於命運的重壓之上的文本」，這些是這個項目的承擔者在2021年6月29日使用的文字。這顯然是一個令人難以置信的進步。然而，立法選擇以「求助於精子捐贈者」的模式允許建立與女同性伴侶的親子關係所選擇的方式亦揭示了不少寶貴的經驗。此些模式表明，立法者沒有能力超越基於肉體生育的傳統親子關係模式，遑論把握醫學輔助生育的具體內容。本文在回顧歷史後，建議分析立法機構準備在2021年做出的選擇以及背後的悖論。

**關鍵詞：**醫學輔助生育、女同性伴侶、第三方捐贈者、建立血緣關係、接近起源之權利