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Daniel Borrillo

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# Divorcing Gays and Gay Divorce

**Daniel Borrillo**

**Professor at the University of Paris X and Researcher at the University of Paris II**

<http://www.cersa.org/BORRILLO-Daniel>

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## **Introduction**

The problematic of the symposium brings us to a double reflection: on the one hand, we may wonder about the breaches of marriage because of the homosexuality of one partner, we thus may come back on this case law, and notice that long before gay marriage, there existed an abundant case law on the issue of divorce of gays. On the other hand, the formality of a breach implies that the union has a character so important that its end also needs to take a public aspect. This is why divorce, as marriage, overflows the private sphere.

In France we have a paradoxical situation : homosexuals keep being forced to divorce if they are married to a person of the opposite sex as long as the heterosexual spouse decides to break the marital life; if the same homosexuals are committed to a person of their own sex ( through Pacs : Civil union), they cannot divorce, as the three months notice of one member of the couple is enough to automatically break the relationship. I propose to think about the theme of the symposium from a different perspective by considering this tension.

## **Divorcing Gays**

Case law on the subject of divorce shows that the homosexuality of one of the spouses constitutes serious grounds for the breakup of the conjugal bond. However, in contrast with case law on (heterosexual) adultery, the spouse’s homosexuality does not refer to the sexual infidelity of the wrongdoing spouse but rather to something else. The simple sexual orientation of the spouse (whether or not it was acted upon) constitutes an insult and a wrong inflicted upon the heterosexual spouse. Between 1942 and 1975 all of the published decisions concerning the

homosexuality of one of the spouses maintained the existence of serious injury, independently of any sexual relations. An isolated case confirms this rule: A ruling by the Aix-en-Provence Tribunal de Grande Instance (District Court (US), High Court of Justice (UK)) stated that: “adultery being a peremptory cause of divorce a fortiori, once the existence of intimate relations between the husband and a young man has been established, the facts which can be imputed to the husband are sufficient justification of the merits of the case, thus leading to the decree of the divorce against the husband.”<sup>1</sup>

The Bordeaux Appeals court ruled on April 10th 1996 that mere “sentimental relations with another man (...) interfere with the loyalty and fidelity which are due in a marriage.” The spouse’s homosexuality is sufficient grounds for a divorce decree against him for transgressing, whether the homosexuality pertains to behavior, an attribute, or a well known identity. According to the law, a transgression is a “serious or repeated violation of the duties and obligations of marriage from which continuing to live together becomes intolerable.” The transgressing (homosexual) spouse can be sentenced to pay damages.

A third of case law on divorce on grounds of homosexuality of one of the spouses gives as sole grounds the sexual orientation of one of the spouses, regardless of whether there was a transgression of matrimonial obligations. Thus, homosexuality in French family law appears as a prejudice inflicted on the spouse, one for which financial compensation can be imposed.

Since only heterosexual relations are recognized in the context of a marriage, only heterosexual adultery is recognized as adultery when trying to determine the existence of a transgression to conjugal obligations. Sexual relations with a person of the same gender can therefore not be termed adulterous, since this would indirectly grant them a similar status to heterosexual relations.

On the other hand, an excessively close relationship between a spouse and another person of the same gender can be used to establish “intellectual adultery” or “unconsummated adultery”, to use the terms from an old ruling from 1909 by the *Cour de Cassation* (House of Lords and Supreme Court of Judicature(UK)) or from the doctrinal comments on a 1986 ruling by the Paris Court of Appeals. Note that the same type of spiritual intimacy between individuals of the opposite sex does not have the same effect.

Abandoning the conjugal home or abandoning the family constitute grounds for divorce. Yet whenever this abandonment is in order to go live with another person of the opposite sex, judges never remark upon it (for that matter, adultery is another factor which does not contribute to the

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<sup>1</sup> TGI Aix-En-Provence, November 9th 1972, Mrs. Fabre vs. her husband, quote translated from the French

case for abandonment). But where it is to live with another person of the same sex, these same judges hit upon it systematically. For instance, in a January 26<sup>th</sup> 1998 judgment, the Rennes Appeals Court ruled that all fault lay with the husband, accusing him, among other things, of having “left his family to engage in a homosexual affair”.

Although insult ceased to officially constitute grounds for divorce in 1975, in matters relating to the homosexuality of a spouse this formulation reappears in numerous rulings. Homosexual adultery is very rarely used as grounds; even when it is, the divorce is granted on grounds of serious moral injury. In a November 10<sup>th</sup> 1989 ruling, the Colmar appeals court ruled that “the husband’s homosexuality, and what is more, with his brothers-in-law, constitutes a particularly serious moral insult.”

Case law shows that the focus is on condemning a spouse’s homosexuality rather than any failing in matrimonial obligations. Summaries of leading cases and decisions also show this ideology. While nothing can be found under the index heading “adultery”, we can find key words like “slur cast upon a spouse’s dignity and honour” or “shameful habits” or even “habits which are contrary to sexual morality” pertaining to homosexuality.

From a parental perspective, the divorce can lead to pecuniary compensation, which can take the form of damages. However, it is still necessary to show the exact wrong inflicted upon the spouse not at fault. On the subject of homosexuality, an abundant case law considers that the “well known homosexuality” of a spouse causes moral injury to the other for which there can be compensation. Thus, the Paris Court of appeals stated in a September 15<sup>th</sup> 1992 decision that a wife “has the right to claim damages when she has suffered moral injury due to the well known homosexuality of her husband”. This same court found, on May 12<sup>th</sup> 1998, that homosexuality was a “moral insult” inflicted upon the wife by the “husband’s behavior”.

Case law deems the homosexuality of one of the spouses a specific fault which can be grounds for divorce. Contrary to faults committed by heterosexuals, faults committed by homosexuals not only constitute a moral insult but raise the question of legal liability and in such cases result systematically in compensation. Although the spouses’ sexual orientation is never mentioned in the law, the judge has full discretion in evaluating the injury. In the case of homosexuality, in the absence of a legal basis, the insult stems from a moral evaluation.

Analysis of French case law clearly shows that homosexuality is an independent factor which can by itself be sufficient grounds for divorce. Even if the homosexual spouse scrupulously respects all conjugal obligations, his sexual orientation alone is sufficient not only to break conjugal ties but also to impose the payment of damages to the other spouse. Gays and lesbians can thus find themselves divorced by force and indebted without having committed any objective fault.

While sodomy is not a crime since the French Revolution, in contemporary case law on divorce, the homosexuality of the spouse is compared with alcoholism, violence, the abandonment of a person in need, betrayal of confidence and lack of respect for the spouse. By itself, homosexuality represents for judges a prejudice which undermines the honor, the reputation and consideration of the heterosexual husband or wife. For this reason "the wife can have a right to damages when having suffered a moral wrong resulting from the well known homosexuality of the husband" (*Cour of Appeal of Paris* 12 may 1998, 24 Ch. Sect. A)

Since the Civil pact of solidarity (PACS – civil union) law was passed, there have been fewer divorces with fault grounded solely in the homosexuality of a spouse. On the other hand, homosexuality is still a determining factor in evaluating parent-child relationships. For example, the Poitiers Court of appeals stated in a November 29<sup>th</sup> 2001 judgment that there is “moral abandonment of the child” from the moment that a father shows his children “his homosexuality by kissing his boyfriend in front of them”. Though the determining factor in the condemnation was more likely the act of leaving pictures of naked men in the children’s sight, the father’s homosexuality played a decisive role when the time came to end his visiting rights. Four years the adoption of the law of PACS, the Court of Appeal of Metz, after having granted the divorce for fault considers, in a judgment of May 6, 2003, that “its is advisable to accept the request for removal of custody, not due to the father’s homosexuality but due to his homosexual cohabitation. This can lead to problems with respect to the children to mental wellbeing of the children”.

In another judgment by the Court of Appeal of Besançon from April 6 2005, it was stated that “although the homosexuality of the mother cannot by itself justify giving custody to the father, it is nevertheless appropriate to consider the fact that the he has recreated a family environment, he is as available as the mother and that is therefore more capable of providing the climate of stability and serenity that the child requires”

## **Gay Divorce**

While gays and lesbians are forced to divorce in a regular marriage if the heterosexual spouse wishes it, these same gays or lesbians cannot divorce if joined to a person of the same sex. Divorce is an act reserved exclusively to matrimonial unions. Same sex couples cannot get married.

In the absence of a legal definition, French case law has considered the difference in sexes to be a fundamental condition of marriage.

Marriage is a formal act, public in nature. Indeed, contrary to the Civil pact of solidarity (PACS) which remains private in nature, marriage requires a preliminary step (public proclamation of the banns of marriage) and the participation of a public official is required both for its creation and its dissolution. We can call the PACS a sort of private marriage, a closet union. Indeed, the partner remains anonymous and only a few creditors, authorized by a judge, can learn the partner's identity.

Divorce is the dissolution of the marriage following a legal decision. Even in the case of a divorce by mutual consent of the spouses, the judge is the one who grants the divorce. This judicial character is the essence of divorce in French law.

Breaking a PACS requires no formal act; it can be done with a simple three month notice given by one partner to the other. It takes effect once the time has expired.

This can present an advantage the PACS has over marriage. However we can also see a hierarchy between couples. A heterosexual marriage's public aspect makes its social value evident. Marriage always implies some public interest, which is why it must be proclaimed and must have the participation of a public official. The PACS is a private contract with no advertising. It need only be registered. The institutional character of marriage shows its social superiority. Dissolving the tie requires either the will of both spouses or grounds established by law. For the PACS, the will of one partner is sufficient. Furthermore, when a PACSed partner gets married, the PACS ends automatically on the date of the marriage.

While marriage creates a couple in the eyes of society, the PACS only does so privately. Publicly, each PACSed individual continues to be considered as single since the PACS does not change a person's civil status. All disputes relating to a PACS come before a contract judge. Family judges deal with marriage-related disputes. This clearly shows that the PACS is categorized under private life while marriage is under family life. Since the State attaches a

particular significance to the family, its dissolution can only come from judicial proceedings. The absence of official public involvement in homosexual unions explains why its dissolution bears no formality.

### **Divorce as a reflection of marriage**

Divorce is inseparable from marriage. It is the other side of the same reality. In order not to upset a portion of conservative public opinion, the (socialist) parliamentary majority of the time distanced the PACS from marriage. While the latter is held at city hall, the PACS is registered at the tribunal. While marriage gives the right to a widow's pension, the PACS leaves the surviving partner without any rights. While marriage has an effect on parental rights, the PACS has no effect on the rules governing them.... While marriage gives the right to divorce, the PACS can be broken by a mere unilateral decision. This "dematrimonialisation" of the PACS is a concession by political forces to help pass a controversial law. The state of inequality that same sex couples find themselves in both in the face of marriage and of divorce creates instability in the union and a lack of clarity in the case of separation.

Divorce serves above all to clearly mark the end of a relationship. The intervention of a third party (the judge) gives the benefit of an objective look at the causes and consequences of this end. In the case of homosexual unions, neither the causes nor the consequences of a break-up can be overlooked by a judge. The parties (including the weaker party) must resolve the separation by themselves. If there is a disagreement about the specifics of the break-up and a dispute arises between the couple, its members cannot act as such. They must see a contract judge as would any other creditor about a debtor.

This reduction of the life of a gay couple to privacy truly shows we still need to come up with the way for the French gay couple to make their coming out.

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