Assisted Reproductive Technology for all women and equality. A question of right or of justice? Analysis of the French context

Técnicas de reproducción asistida para todas las mujeres e igualdad. ¿Cuestión de derecho o de justicia? Análisis del contexto francés

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Abstract

The New bioethics law in France, proposed in 2019 and approved by the National Assembly on June 29, 2021, makes in its first article, concerning the ART (Artificial Reproductive Technology), modifications to article L. 2141-2 and L.2141-3 of the law No. 2011-814 of July 7, 2011 relating to bioethics. It thus opens the way to "any couple formed by a man or a woman or by two women or any unmarried woman". As a result, the link between law and bioethics is disrupted. While the law must protect the individual interest, bioethics reminds the law that the common good must also be protected. Hence the following questions that arise following this new bioethics law: is ART a right for all? Is it

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legitimate to claim it in the name of equality? What about justice? In this article, I would like to approach the subject from a bio-legal point of view by situating the problem within the framework of the philosophy of law.

Keywords: bioethics, dignity, natural law, positive law, marriage.

Introduction

The new "bioethics law" in France (Law number 2021-1017 of August 2, 2021, relating to bioethics) was approved by the National Assembly on June 29, 2021, by 326 votes against 115 and 42 abstentions and promulgated on August 2, 2021. Such a result prompts us to reflect on the goal of the law and its application in the field of bioethics. Subsequently, many questions arise. How can we approach the law when it comes to issues that affect the human person and their dignity? In this case, is it possible that the law is ethically neutral? Between law and rights, the principle of "justice" is anchored. In the name of equality, we want justice; in the name of justice, we ask for a right; in the name of justice, we demand to apply the law to get a right. Thus, the first article of the new bioethics law, to give the possibility to all women in the name of equality, has abandoned the two criteria to access Artificial Reproductive Technology (ART): medically diagnosed infertility and heterosexual couple (L. 2141-2 of the Public Health Code, 2021). That is why already in 2002, Jean-François Mattei[1] wondered: *Is it legitimate to legislate in the field of reproductive medicine? Can having children fall under the law? […] It is not a business! […] The mere fact of saying that we are going to legislate bioethics could suggest that there is no ethics elsewhere. This is very dangerous!* (1). What Mattei said encourages us to ask the ethical question of the relationship between law, right and justice.

The analysis of "right" and "justice" by the legal philosopher Javier Hervada in his book *Critical Introduction to Natural Law* (2),

[1] Minister of Health, Family and Disabled Persons of France, 2002-2004.

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offers us the possibility to evaluate, ethically, the ART from philosophy of law's perspective. Nowadays, "law is a set of rules enforced by government authority". However, this definition is not enough. Referring to Aristotle (3), Hervada reminds us, because it seems that our society has forgotten this fact, that there are two types of law: Positive Law and Natural Law; the second must be included in the first. That is why Thomas Aquinas gave a fuller law's definition: *ordinance of reason for the common good, made by him who has care of the community, and promulgated*. We can identify three elements in this definition: 1) ordinance of reason as *Recta ratio,* "right reasoning in acting", 2) the legitimate authority and 3) the common good. In the light of these three elements, I will lead my reflection on ART for all women.

1. ART´s law and the right reasoning in acting

The bioethics questions cannot fail to pay attention to the "right reasoning in acting" since they are related to human beings and to ethics, which are based on fundamental values that cannot be demonstrated. However, two points of view contradict each other: iusnaturalism and positivism.[2]

1.1. ART from iusnaturalism's point of view

Among the partisans of iusnaturalism, Thomas Aquinas considers that law cannot be separated from human nature which is naturally (innately) inclined to its own ends. He refers to the "natural law"[3]

[2] Iusnaturalism is a theory of law that favors a dualistic vision. It recognizes the existence of natural law and positive law. The second must follow the first as a universal human knowledge. On the other hand, Positivism is a theory of law that favors a monistic vision. It believes that only the legitimate sources of law are those written rules, regulations and principles, written by a unique legal authority, the State.

[3] The term "natural" does not refer to biological nature but to human nature. Furthermore, it should be noted that the notion of "natural law" should not be reduced to legal or moral concepts alone. Thomas places it in the question of the perfection of

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that precedes any positive law. This natural law (4, q.94) has its own precepts which comes in the form of natural inclinations which are specific to man and which are inscribed in his being. There are five such inclinations (4, q.94a.2; 5, pp.410-414): to the good, to the preservation of the species, to the knowledge of the truth, to life in society, and to sexuality. ART can be approached from the natural inclination to sexuality and to the preservation of species.

According to Pope Benedict XVI, to avoid accusing this vision of natural law *as a specifically Catholic doctrine, not worth bringing into the discussion in a non-Catholic environment* (6), it is important to remember this fact. Thomas Aquinas essentially takes up *the Aristotelian views according to which man finds his end in responding to the fundamental requirements of his nature, therefore in seeking happiness in harmony with rules received and to take the right means to achieve it* (7, p.48). In this context of natural inclinations, procreation is considered, by Aristotle and by Thomas (8, VIII, lect.12, n.1719-1725), as an end of marriage. Aristotle includes marriage in his treatise on friendship. Here is how he presents his idea:

> As for conjugal affection, it seems to be a direct and immediate effect of human nature. For man is inclined by his nature to live with woman, even more than to live in political society; all the more so (I say) because the existence of the family is necessarily prior to that of the city, and the propagation of species is a law common to all living beings (3, VIII, c.12, 1162 a6-8).

This quote from Aristotle in the *Nicomachean Ethics* is important for us. In the light of the Aristotelian vision and Thomist thought, the law concerning ART must respect the natural order of things:

a) Marital affection is based on love, which is expressed in the natural inclination to reproduction. It is not a necessitating sexual impulse (instinctive and obligatory), but a free deci-

being, which constitutes the goal. Thus, the notion of law in Thomas is not a command of the will but rather an indication of the intelligence that makes it clear what is the purpose of man.

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sion that emanates from the love between a man and a woman. Therefore, opening the ART to people outside the framework of marriage consists in surpassing marital love, as a fundamental stone of reproduction. By deleting the two criteria of heterosexuality and medically diagnosed infertility, justice, as Hervada says, becomes an attack *on the most intimate part of the human being as a person*. It empties the human being of something which belongs to him by nature (2, p.39).

b) Quoting Étienne Bonnot de Condillac, Pinckaers affirms that the *natural is proper to signify all that is not hampered, forced, constrained, artificial, disguised* (5, p.409). ART techniques manipulates the nature or even replace it, especially when it comes to two people of the same sex. As for the fact of their applications in a heterosexual couple, Sgreccia (9, pp.534-537) affirms that we can help nature, in a married couple in particular, to have children, but this must remain within the limits of respect for the conjugal act[4] in its "natural" framework. In other words, ART, as a technique that helps and does not replace the conjugal act, is considered licit and does not separate the unitive and procreative aspects of human reproduction.

c) The conjugal community (marriage and family) is prior to political society, hence the need for the latter to respect and legally protect the former. The fact is that ART, as voted in the new bioethics law, shows the opposite: the political society pays no attention to the family structure and does not protect it in any way. It disregards the child's right to be raised by his/her biological mother and father and is not a commodity to produce.

It is distinctly clear that "natural law", as presented by Aristotle and Thomas, does not concern only the biological aspect in the field of sexuality, but also the human and the politic one. This is why the

[4] In this regard, it is important to remember that the Church has no problems with art when it comes to homologous artificial insemination (between male-female spouses) and when the technique comes to the aid of marital act. The condition of acceptance depends on how the sperm is harvested.

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authority that will legislate in this area is required to respect what nature dictates. Procreation, as an integral part of sexuality, finds its fulfillment in married life between a man and a woman.

1.2. ART from Positivism's point of view

In contrast, Positivism has another approach. For example, Hans Kelsen, the father of positivism known as the "pure theory" of law, asserts that the law finds its foundation in the separation (10, p.14) between "is" as fact/nature (s*ein, essere*) and "is-ought to" as norm (*sollen, dover essere*). Thus, he introduces a dichotomy in legal thinking. For the legal philosopher, one cannot speak of natural law in the legal field. *Law is always positive, and its positivity lies in the fact that it is created and annulled by the acts of human beings, and is therefore independent of morality* (11, p.115). In other words, the law is completely separated from the sphere of nature, morality, psychology, sociology, and religion. The only object of the law is the legal system and nothing else! In this legal positivism, the rule imposes itself quite simply because it is the rule and because it is voted according to a sovereign legal order, namely the state (12, pp.17 ss).

The approval of the first article of the new bioethics law is part of this vision. Neither nature nor ethics finds a place in positivism. In this regard, Deputy Emmanuelle Ménard expressed it in her own way during her speech at the National Assembly on June 9, 2021, addressing those who voted for this project, which she compares to a Pandora's box that must not be opened.

> After three readings and despite some 1539 amendments tabled but rarely defended […], this Pandora's box is open, wide. By whom? By yourselves, apprentice false gods who believe you are above everything, common sense, reality, our carnal nature and above all, and this is the most serious, the best interests of the child (13).

Separated from reality, from good reasoning, from the risks and abuses it can bring, this law —this positive law— constitutes an

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"ethical shipwreck", in the words of Madame Ménard, because of numerous transgressions that do not conform to the right reasoning in acting, to common sense. The content of this law is no longer determined by speculative and practical reason through their contact with reality, the true and the life. Its content is determined only by a speculative reason —a positive law— simply because it emanates from a sovereign authority. Procreation is emptied of its primary meaning as being an end of marriage; the interest of the child is suppressed to be replaced by the instrumentalization of the child; family, filiation and parenthood undergo a fundamental change in their natural identity to meet the wishes of a few adults. The moral order and the social order are excluded from all legislation.

This kind of law seems to be attached according to Hervada to a "modern justice" (2, p.34) that deprives heterosexual couples of the natural right to procreation by transforming this same right into a right accessible at any time by positive law. This constitutes a direct attack on the ontological dignity of the person, since the only measure of justice is human dignity (2, p.65) which must not be crossed. Therefore, Hervada wrote that:

> Positivism has forgotten the civilizing element par excellence of right, which is natural right. […] Man does not present himself before others as a being who can be treated according to whims, but as a dignified and demanding being, bearer of rights which are inherent in his own being (2, p.9).

Clearly, it seems that right reasoning in acting does not have a role in positive law regarding bioethics. In consequence, it appears that the bioethics law is just reducing the human being to an object.

1.3. ART and reductionism

Not basing the law on the *recta ratio* is simply deviating from reality; and the one that we treat in this law is human being, which is one of the most complex realities of the universe. Therefore, it can be

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reduced by a utilitarian perspective (a). It should be treated with an integral approach (b).

a) *Utilitarian interpretation*

The new bioethics law reduces the human being to a body and a desire: an aspect of pure biological and an aspect of pure psychological. The first is at the service of the second. The deputies who voted against this law did indeed present the sociological, psychological, and legal issues; they approached their points and arguments based on scientific studies, philosophy, metaphysics, ontology, and science.

In the debate on ART in the National Assembly, these different points of view were not considered. This can be interpreted as moving to a register of pure utilitarianism where the pragmatism of technique and personal desire are joined, and where the only thing that matters, according to Sgreccia, is *the calculation of the consequences of the action according to the cost/benefit ratio* and to pleasant/unpleasant perspective. Utilitarianism reduces the human being; and the law that legislates in the name of utilitarianism does not fulfill its function of seeking the common good; simply because it is applied "to subjects who cannot decide (embryos) or to the detriment of future humanity which should suffer the decisions made by others" (9, p.318).

b) *Integral interpretation*

Procreation is linked in its nature to the "sexual intercourse". To reduce procreation to a single "technical problem", that would need technical means to be solved, is to see in the human being only a child-making machine. Dominique Folscheid, a French philosopher, warns of this danger of reductionism by insisting on being wary of the way in which ART presents itself; for him, it is disguised by the *anthropologically and ethically neutral* (14, p.68). Hence, the importance of a fundamental return to an integral vision. On one hand, it is not necessary to approach the technique only from its applicability but

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also in its *radical insufficiency, in its teleological ambivalence and in its dynamic of knowledge-power* (9, p.823). Technology should not be separated from an integral anthropological vision for better human development. On the other hand, it is imperative to consider sexuality as an integral part of the human person as body and soul. Therefore, reducing sexuality to the sole meaning of procreation is to empty it of its meaning. In this perspective, Pope Benedict XVI and Pope Francis insisted on the fact that sexuality cannot be isolated from other aspects such as the environment, life, family and social relations (15,§51; 16,§6).

In this case, how can we understand why the bioethics law has been voted without taking care of all these aspects? It seems that the reason behind this fact lies in considering legitimate authority as supreme or even infallible.

2. ART´S law and the legitimate authority

In a democratic system like the one in France, legitimate authority can face two major risks, especially when it comes to bioethics law.

2.1. The power over the most weak

Who has legitimate authority, has power and responsibility comes with it. Power is linked to the success of a political movement, to the success of its representatives —which remains legitimate. However, power is also governance. It has the vocation to the search for justice, to the compliance with the *recta ratio*, to the search for the general interest and the common good especially the three fundamental goods: life, freedom, and health. Therefore Pope Benedict XVI, relying on Saint Augustine who —in *The City of God*— insists on the link between law and the State and expresses this situation of separation between power and right. He assures:

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> We have seen how power became divorced from right, how power opposed right and crushed it, so that the State became an instrument for destroying right […] capable of threatening the whole world and driving it to the edge of the abyss. To serve right and to fight against the dominion of wrong is and remains the fundamental task of the politician. […] Man can destroy the world. He can manipulate himself. He can, so to speak, make human beings and he can deny them their humanity. How do we recognize what is right? How can we discern between good and evil, between what is truly right and what may appear right? (6).

In this perspective, instead of defending the newborn's right to life, which in France is not a constitutional right, the new bioethics law defends the right to freedom detached from responsibility. The most fragile of human beings, the embryo/fetus,[5] is outright excluded from humanity. It is true that the legal status of the embryo/fetus is not defined in French law (17, 18), which does not place it in the category of "juridical person" as a "physical person",[6] or in that of "thing" as object of law. However, while this status is not officially settled in ethical-legal debates, the new bioethics law, forced by the political power, closes the door to any jurisprudence concerning the status of prenatal being. Nevertheless, the legislator makes a distinction, in the

[5] Commonly, the denomination "embryo" applies to the prenatal being in the first 3 months after which the denomination "fetus" is used.

[6] In French law, there are two categories of legal persons:
a. Natural persons: these are living human beings, without distinction of sex, race or religion.
b. Legal persons: this is a group of individuals who have the will to associate and the will to exist for the purpose of common interest.
The issue of the status of the embryo/fetus concerns the first category. French law indicates that to acquire legal personality, one must be born alive and viable (art. 318 and 725 of the Civil Code). However, the unborn child can benefit from certain rights (succession, gift, will) when it corresponds to his interest. The conceived child can acquire rights while he is not yet born and does not meet the two conditions of "living" and "viable". This acquisition of legal personality is done exceptionally with reference to the adage "Infans conceptus pro nato habetur quoties de commodis ejus agitur", which means "the conceived child is considered as born whenever he can derive an advantage from it". (art. 725 and 906 of the Civil Code).

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16th article of Civil Code,[7] between a person and a human being; and by "human being" he is referring to the embryo according to Dhonte-Isnard (17, p.177). In the first article of the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*[8] (1997), we can find the same distinction and the same use of the "human being" applied on the embryo/fetus but without deciding on its qualification (19).

2.2. The false democracy

Moreover, if the law was voted by a majority, this shows the effectiveness of a true democracy. But the criterion of majority is sufficient. Pope Benedict XVI recalls that:

> it is obvious that in fundamental questions of law, where the dignity of man and humanity is at stake, the majority principle is not enough: in the process of formation of law, each person who has a responsibility must seek itself the criteria of its own orientation (6).

Since the French legislation is based on the Bicameralism system (National Assembly as Lower House and Senate as Upper House), it appears that during the study of the new bioethics law's project,[9] there was no consensus between National Assembly and the Senate. Despite the thousands of amendments set forth by the deputies who voted against this law, it seems that there was not a real debate. In this regard, Mr. Deputy Patrick Hetzel[10] said in an interview on June 14, 2021:

[7] "The law ensures the primacy of the person, prohibits any attack on the dignity of the latter and guarantees respect for the human being from the beginning of his life".

[8] Known as Convention on Human Rights and Biomedicine or Convention of Oviedo.

[9] The legislative process goes through examinations/readings between the two chambers: the National Assembly and the Senate, which are invited to find an adequate consensus to approve such or such a law.

[10] The deputy also explains the reasons why there were many people absent both in the committee and in the hemicycle: the pandemic and its priority consequences, the calendar at the time of departmental and regional elections, the conduct of debates

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> Systematically the government and its majority have done everything to ensure that the contribution of the Senate is rejected, non-existent, swept away by dogmatism; […] that this majority in the Assembly understood nothing of what the very spirit of bioethics laws should be. They bear the heavy responsibility of moving towards a law that no longer creates the consensus necessary for its collective acceptability. […] Where is the respect for the living in all this? Where is the application of the precautionary principle? We really wonder. (20).

The same day, i.e., June 14, following this majority vote, the special Senate committee decided not to continue the third reading of the text *for lack of constructive dialogue between the two assemblies, on a bill, however, with high societal stakes. […] The rapporteurs of the special committee regret, in particular, that the deputies refused any discussion* (21). On this, Senator Bruno Retailleau declared that *the National Assembly does as it pleases, and always goes back to its initial position. We are at the end of the dialogue. The government is not listening to us* (21). Indeed, the report of the senators of June *15, 2021 clearly indicates that the National Assembly has chosen to restore, concerning the* ART*, in new reading a text almost identical to that which it had adopted at second reading* (22) while the Senate had deleted it in public session during the second reading of the text.

How can we speak of a democracy in this way when the purpose of the examination of this law between the National Assembly and the Senate is to find, through dialogue, a consensus which would respect the values and ethical principles, which would preserve society from excesses, and which would protect the dignity of the human person? Notwithstanding this complexity and without going into the details of the lobbying policy explained by Sarton (23), the business according to Folscheid (14) and compromises of this law, it seems that the lack of democracy is related to the 45th article of the Constitution. In this article, we can find the right of the "last word". The government, to speed up the legislative process without falling back into another "shuttle" between the two Houses, can ask the National Assem-

at the same time (that of the draft bioethics law and that of the draft law "Respect for the principles of the Republic").

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bly —since it is the result of direct universal suffrage— to definitively rule on the legislative texts without taking into consideration what the Senate has advanced. I think that, to give a right and to apply justice in bioethics field cannot be enforced by laws just because a majority said so. History is full of examples where the majority were the cause of some human disasters.

Therefore, to search for the common good, authority must understand what real justice means.

3. ART and common good between desire and equality

The Roman jurist Ulpian gave the famous definition of Justice: *Justitia est ius suum cuique tribuere*/justice is to give everyone that to which he is entitled. As Hervada translates it, J*ustice is to give each one his own right*. In a society where the phenomenon of individuation is increasingly established, the fact of having a child at all costs is considered a good, as a common good, in the sense "that to which he is entitled". Therefore, desire and equality are the two main reasons to allow ART for all women.

3.1. The desire as right and the justice as reparation

To claim the right to a child in the name of justice, the desire for a child is often presented with a self-victimizing attitude. Olivia Sarton makes an interesting analysis of this desire. She affirms that what moves the human being is the desire to have what the other has. When one does not have what he/she desires, he/she acts as a victim. As soon as one is a victim, this *one can claim and even demand rights. Moreover, the legislator continues to adopt this flagship prism in the development of the law. […] Anyone who opposes these rights immediately falls into the category of the persecuting executioner* (23, p.34). I can apply to ART the five steps of Sarton's analysis of desire (23, pp.35-40) in as self-victimization situation.

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a) The encouragement of a mimetic desire: celibate women/ couple of women want to a have a child and want to be parent like any women in a heterosexual couple.
b) The impossibility of its realization: celibate women or couple of women, who do not want to have sexual relation with men, cannot have a child. This fact causes a situation of suffering.
c) The creation of the status of victim: because they cannot have a child, they consider themselves discriminated.
d) The designation of the executioners: because they consider themselves in a discrimination's situation, they consider guilty heterosexual couples and nature.
e) The claiming redress for injustice: since there is a guilty part, they reclaim justice by legislation of new laws. Thus, personal desire become the first main reason to access to ART.

Thus, ART becomes a great solution to have a child based only on desire. On this point, the deputy Jean Leonetti —in a report on the law's project relating to bioethics in 2011 speaking on behalf of the special commission— affirms *ART is a procedure for repairing infertility, not a legal vector legitimizing unions or ways of life. It is not a solution to all desires for children or to social infertility* (24, p.14) and it cannot be accessed for personal convenience (24, p.84). Therefore, in Italy in 2019 for example, Francesca Piergentili, PhD in Law affirms that:

> Any desire or any need perceived by the individual as necessary does not come under the protection offered by the right to health: this right is not based exclusively on subjective perceptions, in particular in the field of artificial procreation (25).

Leonetti and Piergentili agree on the fact that the right to health —ART is one of them since it is accessible under medical conditions— is not always compatible with a personal desire. To base this right on desire is already diverting medicine from its primary vocation: to cure and prevent (sometimes to predict). Folscheid argues this idea

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by affirming that ART *fulfills a whole other mission: that of giving birth to a child, who is a third party, not a patient of medicine, and whose occurrence does not respond to any vital issue for its parents* (14, p.40).

3.2. Equality and the right to a child

Furthermore, not allowing ART to all women[11], based on sexual orientation and the claim of a "right to a child", is considered as discriminatory and against the constitutional principle of equality (26).

However,

a) In response to the issue of discrimination, the Council of State, in a decision on September 28, 2018 —that was not received very favorably by some jurists (27,28)— considers that

> the principle of equality is not opposed either to the legislator regulating differently different situations or to derogating from equality for reasons of general interest, provided that, in one and the In another case, the resulting difference in treatment is directly related to the object of the law which establishes it (29).

Different situations mean different ways of life such celibate person, heterosexual couple, or homosexual couple. In this case, justice does not lack its veracity or its vocation since it gives everyone their right in accordance with the situation in which they find themselves. The right belongs to those who are in the same situation and not in different situations.

According to Hervada, when it comes to equality, giving each one his own right, does not mean giving everyone the same thing and treating everyone in the same way (2, p.122); this does not mean

[11] In February 2018, a couple of women filed an appeal with the Toulouse administrative court after being refused pma at the Toulouse University Hospital. The court sent an order to the Council of State on July 2, 2018, to examine the request for annulment of the decision by which the center for medical assistance in procreation of the chu rejected the request of the two women in question.

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giving or legislating a right of access to ART for all so that justice can be applied.

Thus, in a case against France treated in 2015 before the European Court of Human Rights, we can read that:

> It is from the perspective of equal access to a medical technique for all women that the Defender of Rights now calls for consideration of the question of assisted reproduction: equality for all women in access to medically assisted procreation (30).

The assertion for which one would suffer an inequality by the prevention of access to the ART is erroneous (31, p.122) for two main reasons.

- Even if ART is reserved only for couples of different sexes, it does not constitute a right for them. Its access is limited by the medically diagnosed criterion. That said, heterosexual couples who do not suffer from infertility/sterility are not entitled to ART and therefore do not experience any inequality. In this case, couples of women or single women do not experience inequality either.
- The National Consultative Ethics Committee (CCNE) in its opinion no. 126, asserts that *The fact of reserving ART only for cases of pathological infertility can be considered as a breach of equality between applicants for access to procreation techniques. This difference in treatment can, on the contrary, be considered as justified by the differences in situation between the applicants* (32).

Indeed, this opinion is approved/reinstated by decision no. 421899 of the Council of State of 2018 cited above. Equality means treating in the same way only the people who are in the same or equivalent situations. When ART is prohibited if the criteria required by law are not met, justice does not lack its veracity or its vocation since it gives everyone their right in accordance with the situation in which they find themselves. The right belongs to those who are in the same situation and who bear naturally this right (2, p.36).

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b) As for the "right to a child", the Convention on the Rights of the Child adopted on 20 November 1989, doesn't approve such a right. The child is a subject of protection and not an object of desire. In the preamble, the Convention insists on the protection of the child even before their birth:

> The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth (33).

Protection means also not objectify the newborn on basis of desire. On this point, in its opinion of July 18, 2019, the Council of State specifies:

> Neither the fact that adoption is already open to female couples and single people, nor the right to respect for private life, nor the freedom to procreate, nor the prohibition of discrimination or the principle of equality do not require the opening of the ART. The Council of State specifies in this respect that the concept of 'right to the child' having no legal consistency, the child being a subject of law and not the object of the right of a third party, no infringement to the principle of equality cannot be invoked on this ground (34).

On this point, one might be surprised to see that even homosexual people adhere to it and refuse *to serve as moral guarantee for an archaic and regressive vision of the human* (35). They affirm that procreation is a natural given and "homosexual people cannot claim reparation from the State in order to alleviate discrimination since the latter does not exist". They consider that the right to be a parent fits at first glance in the natural framework since it emanates from this natural inclination outside of which the impossibility of procreating is an objective fact and not discriminatory. Positive law is bound, in theory, to respect this objectivity of which the natural family made up of a man and a woman is the place of its exercise.

Giving access to ART to all people who are neither infertile nor sterile, to homosexual couples *who refuse sexual relations with the other sex*

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(14, p.41), to single women who —in the name of equality— wish to free themselves from male domination (9, p.114; 14, p.67), transforms ART from an aid into a "procreatic" according to Folscheid's. The technique legalized by law, to respond to personal desires, replaces the natural act of procreation and the primary vocation of medicine, that of remedy.

4. Conclusions

Thinking of procreation as an individual right is a utilitarian attitude. What is a right, is getting married and performing acts (9, p.424) —sexual intercourse— which could be fruitful. Therefore, having a child could not never be a right; the child remains a subject and not an object, a fruit of procreation's act accomplished in marital love and a gift. Which is the reason why ART cannot be a question of right but a question of justice. By justice, I mean, according to Hervada, give to everyone his own right, the natural right that precedes the positive law. Justice is not intended to create a right (2, p.25) even if this latter is claimed. Hence the following four conclusions:

a) Since in matters of bioethics, where the primary issue concerns the human person, positive law has to find support in natural law by referring, as recommends Elio Sgreccia, to the unity and the totality of the person. By unity, he means the intrinsic bond between marriage and procreation, sexuality and procreation, sexuality and person. By totality, he underlines the three fundamental components of the human being: the body, the spirit and the soul (9, pp.107-133, 399-442, 582-585). Hence, the importance of taking in consideration the meta-ontological aspect of human being before promulgating any bioethics law. Otherwise, we risk an "ontological rupture" that demolishes all values on which society is built. Therefore, it is urgent to apply the constitutional principle of

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precaution[12] to safeguard these values to respond to societal and ethical questions.

b) In an opinion from 2015, the High Council for Equality between Women and Men insisted on the fact that the opening of the ART to all women constitutes an important step towards equality between all and all (36, p.23). However, this opening of access to ART, in the name of justice and equality, only for the "couple formed […] of two women or any unmarried woman", only digs the pit of inequality between men and women. Clearly, this law is within a feminist reach from which the male sex is absent. In the name of equality, we create more inequalities. Gender equality finds itself replaced by the power of excluding men that demands new legislation in the name of equality. What about single men who have the desire of having a child? What about gay male couples who would like to be parents? Would we then open up the possibility of accessing surrogacy despite all the ethical and legal problems? Where would it end? Legislation must serve the common good of each, including the well-being of the child born, and all for a better sustainable and integral development. The center of this kind of development is the human person.

c) Legal equality cannot be a mathematical and arithmetic equality reducing the human being to a quantitative mode of functioning, as explained by Alain Supiot (37, pp.9-13, 287-288, 304). Transforming itself into a system of quantitative distribution of "things", positive law causes law to disappear as protector of the common good. "It is not enough to proclaim equality for it to exist. […] Its consecration by Commu-

[12] Article v of the Environmental Charter incorporated into the Constitution in 2005. The text specifies "public authorities shall ensure, by application of the precautionary principle and within their areas of responsibility, the implementation of assessment procedures risks and the adoption of provisional and proportionate measures to prevent the occurrence of the damage". This principle applies in the fields of environmental ethics, scientific ethics, economic ethics, bioethics, etc.

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nity law has mainly served to justify the abolition of the rules which protected family life" (37, pp.315-316).

d) Basing the law only on technology and on biological and medical sciences, in the name of "everything is possible", risks a legal fundamentalism: the scientism. In the name of (a) Science, we eliminate human being as subject of law by falling into totalitarian system. In this regard, Alain Supiot does not hesitate to recall that *the political reference to so-called scientific laws implies the liquidation of the anthropological function of positive laws* (37, p.107). The law must humanize the technique by protecting the human being from the dangerousness that it creates. It seems that with the positive law in progress, we transpose the normative on the technique. However, everything that is technically possible must not become legally permitted.

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