

DONUM VITAE: CIVIL LAW AND MORAL VALUES

ABSTRACT. The *Instruction* reminds us that reproductive medicine has become part of our social reality and as such justifies the intervention of public authorities. The *Instruction* suggests relevant principles which should guide appropriate legislation. This essay analyzes how far the French government has taken these fundamental principles into account.

Key Words: IVF-ET, *Donum Vitae*, civil law, France

INTRODUCTION

Human artificial reproduction is not only a matter of science and technology. Because these new techniques have primarily been developed to assist infertile couples in their strong desire to become parents, they have also become part of our social reality, and as such, they should be evaluated on the basis of common social values. Today neither private citizens nor scientists tend to contest the right of public authorities to intervene in the field of biomedicine when public interest so requires. Nevertheless, two questions can be raised: When should this intervention occur? On what principles should such interventions be based?

According to the *Instruction*, "the new technological possibilities which have opened up in the field of biomedicine require the intervention of the political authorities and of the legislator, since an uncontrolled application of such techniques could lead to unforeseeable and damaging consequences for civil society" (p. 35). The Congregation suggests relevant principles which must guide appropriate legislation and regulations. These are: "a) every human being's right to life and physical integrity from the moment of conception until death; b) the rights of the family and of marriage as an institution and, in this area, the child's right to be

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conceived, brought into the world and brought up by his parents" (p. 36). To put it bluntly, the document urges that moral values, especially religious ones, should influence future legislation. It thereby invites lawyers and legislators to provide a clear definition of the relationship between morality, religion, and the law.

This essay analyzes how, concerning *in vitro* fertilization and embryo transfer (IVF-ET), France has perceived the *Instruction's* assertion that its notions of moral law ought to shape France's civil law.

THE EXHORTATION TO INTERVENE

It is clear that the *Instruction* is not intended as an internal document for Catholic priests and the faithful alone. Although elaborated by The Congregation for the Doctrine of the Faith, "[which] has been approached by various Episcopal Conferences or individual Bishops, by theologians, doctors and scientists..." (p. 3), it is also a reply to the "requests for clarification and guidance...from those who recognize the Church as 'an expert in humanity' with a mission to serve the 'civilization of love' and of life" (p. 5). As stated in its conclusion, the *Instruction* "addresses a new and heartfelt invitation to all those who, by reason of their role and their commitment, can exercise a positive influence...to those responsible for the formation of conscience and of public opinion, to scientists and medical professionals, to jurists and politicians" (p. 39). There is no doubt that this sentence is intended as an appeal to those involved in the various aspects of human artificial reproduction to use their influence in a way prescribed by the moral principles of the Church.

Moreover, apart from this general address to political, scientific, and moral authorities, the *Instruction* points out the important role that political institutions should play in this field. It also suggests ways for each individual to promote better practices when employing reproductive technologies.

THE DUTY OF PUBLIC AUTHORITIES

"Thanks to the progress of the biological and medical sciences, man has at his disposal ever more effective therapeutic resources; but he can also acquire new powers, with unforeseeable consequences, over human life at its very beginning and in its first

stages" (p. 5). In making this observation, the Church is perfectly right when it considers reproductive technologies as raising questions concerning the rights and the material condition of the human person, and also questions concerning important constitutive elements of civil society and public order. Moreover, who could disagree with the *Instruction's* conclusion that, "For this reason the new technological possibilities which have opened up in the field of biomedicine require the intervention of the political authorities and of the legislator" (p. 35)? Many nations are satisfied with this condition. This implies that these governments have become aware of the problems posed by human artificial reproduction and are presently attempting to analyze the consequences of these new procedures. The *Instruction* goes on, however, to express the opinion of the Roman Catholic Church that these new techniques may be so damaging to society that "Recourse to the conscience of each individual and to the self-regulation of researchers cannot be sufficient for ensuring respect for personal rights and public order" (p. 35). Whatever we think of this statement, we should realize that some nations do not share in this opinion. In what follows I hope to outline the reasons which led the French government to initiate debate about this opinion.

(a) First, if evidence is required to demonstrate that the French government is aware of the necessity to consider what policies should be applied to IVF-ET, one need only point to the different studies conducted in this field.

Four of the thirteen opinions [*avis*] given by the National Ethics Committee, established in 1983, concerned reproductive medicine or embryo research, viz., those concerning reproductive technologies (1984), use of fetal tissues (1984), prenatal diagnosis (1985), and research on embryos (1986). Moreover, in 1985, the government organized a national multidisciplinary symposium whose theme was 'Genetics, Procreation and Law', while the Prime Minister commissioned a position paper on human artificial reproduction. Following this study, a new report issued in 1988 discussed the following question: Should we go "from Ethics to Law"? The French government is actually considering translating the proposals in this report into legislation.

Two major reasons made the opportunity for such national studies timely: first, technological advances have seriously affected the configuration of matters – such as parenthood and family law – and neither the *code civil* nor the Courts (when they

had to apply the principles of French law) have been able to accommodate these changes adequately. Second, these new procedures intrude into the most intimate and profound aspects of human existence: reproduction and family life, about which most persons hold deep convictions based upon moral values. The possibility to intervene in the earliest stages of human development could create grave anxieties. In fact, the intervention of public authorities to initiate debate in this field was more a response to the desire of some physicians (who urged the authorities not to leave the advancement of science unregulated) than to the demand of the public, which is generally confident and adulatory vis-à-vis the community of scientists.

(b) In comparison with the important work that helped clarify the impact of these discoveries on society, this national effort led, albeit slowly, to some modest policy measures such as the ban on surrogacy by Courts¹ and the establishment of a licensing procedure for IVF centers in 1988.² But today it is generally presumed that biomedicine and reproductive technologies to overcome infertility require permanent review by society, review that is based upon human values and grounded in specific moral principles. Thus, scientists and politicians are no longer regarded as the only appropriate persons to promulgate a philosophy for all citizens. Consequently, ethical review of scientific developments, which led to the creation of the French National Consultative Committee on Ethics, has acquired a wider importance. Furthermore, the necessity to review public policies on the ground of the principles expressed by the opinions of the National Committee on Ethics justified the commissioning of a report which discussed the opportunity to legislate in this matter. As in other countries, the report 'From Ethics to Law' certainly made French citizens aware of the existence of potential legal action in the field of reproductive medicine, and suggested that statutory law is probably the commonest way to enforce these new legal rules. "Concerning the practice of reproductive medicine, it is often said that it is too early to legislate. State law should not interfere, but the responsibility to make decisions should be left to the professional ethics of physicians and scientists, and the freedom of choice to each individual's conscience. This way of thinking does not take into account that many scientists require legislation for those issues that are not simply professional matters. It ignores the fact that the National Committee on Ethics suggested that some

regulations should be promulgated..." (*De l'Étique au Droit*, p. 13). The report came to the following conclusion: "How can we not legislate when human artificial procreation places filiation law in question, challenges the idea we have about family and child interest, or when the existence of some fundamental social principles are at risk?" (p. 14).

From the French perspective, the *Instruction* of the Roman Catholic Church has had no direct effect inasmuch as it incites all citizens to disregard current law, particularly abortion law, and to resist "practices contrary to human life and dignity" (p. 39), except in the case of a private Catholic hospital where the board of directors decided to terminate the IVF program. At the Catholic University hospital in Lille, the local ethics committee refused to endorse the *Instruction*. The action of individuals and lobbies to change current law and practice in the field of reproductive medicine – which has probably been one of the most important struggles concerning moral issues since the controversy concerning the morality of abortion – is not significant in France.

It is only when the *Instruction* asserts that recourse to the self-regulation of researchers can at times not be sufficient that this position is reflected in French opinion. The well-known French biologist Jacques Testart,³ a Trotskyite in the 1960's and a declared atheist, publicly announced that he will not continue his IVF-ET research because he judges some things too sacred to be intervened upon by scientists. A similar idea is expressed in the *Instruction* when it asserts that, "If the legislator responsible for the common good were not watchful, he could be deprived of his prerogatives by researchers claiming to govern humanity in the name of the biological discoveries and the alleged 'improvement' processes which they would draw from those discoveries" (p. 35).

Whatever we may think of it, we should be aware that a major aim of the *Instruction* is to advocate as much as possible the inclusion of its moral views in all nations' civil law. The subtitle of Chapter III is very clear when it speaks of "The Values and Moral Obligations That Civil Legislation Must Respect and Sanction in This Matter" (p. 35). To do so, the Catholic Church needed to underscore the importance of governmental responsibilities in this field. But to be effective, "The intervention of the public authority must be inspired by the rational principles which regulate the relationships between civil law and moral law" (p. 35). Before coming to any conclusion concerning the influence of the

Instruction, we should consider what these principles are and how they have been developed for inclusion in future legislation.

FUNDAMENTAL PRINCIPLES: FROM MORALITY TO LAW

At the outset the *Instruction* reminds us of the traditional end which according to the Church should be aimed at by law: to promote peace and public morality. If "It must sometimes tolerate, for the sake of public order, things which it cannot forbid without a greater evil resulting,...the inalienable rights of the person must be recognized and respected by civil society and the political authority" (p. 36). "These human rights...are inherent in the person by virtue of the creative act..." (p. 36). They are the right to life and the right of the family (and of marriage) as an institution. It is necessary to give further consideration to each of these two themes because, according to the Church, "The moral judgments on such methods of artificial procreation must...be formulated in reference to these values" (p. 10).

THE RIGHT TO LIFE

The recognition of a right to privacy and the development, especially in common law, of individual rights founded on the principle of autonomy led to an evolution of the "right to life". For many people, the right to life is now associated with the freedom to use one's own body, with the consequence that in many countries the refusal of treatment and the abortion of an embryo are permitted.

The teaching of the Magisterium throws light on this problem when it asserts that, "from the moment of conception, the life of every human being is to be respected in an absolute way..." (p. 11). Careful reflection on this teaching enables the Church to respond to the question of respect due to embryos and to the morality of various reproductive techniques, so that it is now possible to see the balance, even the influence, which exists between these responses and the law which regulates the questions.

(a) *The Church Opinion and the Respect Due the Human Embryo: The Human Being Must Be Respected As a Person From the very first Instant of his Existence.*

The French perspective clearly recognized, the special nature of the human embryo. It refuses to consider the human conceptus as material or commercial property.

The opinions expressed both by the National Committee on Ethics and by the writers of 'From Ethics to Law' are undoubtedly inspired by a humanistic philosophy, but not a Catholic point of view. According to this philosophy the embryo should be regarded as a potential human being. In regard to its human origin, some respect is due the embryo *in vitro*. 'From Ethics to Law' proposes that (1) the creation of embryos for the sole purpose of research should be forbidden; and (2) research that involves the alteration of the human genome or is not scientifically justified (chimerism, ectogenesis, parthenogenesis) should not be carried out. But this respect should not have the consequence of preventing research authorized by the National Committee on Ethics, if the preservation of the embryo is limited to fourteen days. The *Instruction*, which states that the embryo is a human person is, therefore, not adopted. However, forthcoming legislation will recognize that the human nature of the embryo requires some form of respect, and the consequences of this respect largely imply the need to restrict as much as possible the use of human embryos for research purposes.

In the opinion of the Church, the absolute respect due human life governs the morality of the reproductive technologies. On this point, the gap between the judgment of the Church and the civil law seems broader than in the field of research.

(b) *The Instruction and the Morality of IVF*

Can we consider that, with the exception of embryo research, IVF is not a procedure which is contrary to the right of life?

In permitting this technique to be developed in their countries, many governments view it as one possible way to treat infertility. The Roman Catholic Church, however, has chosen to view it *a priori* as a negative procedure.

A preliminary point for moral evaluation is, according to the Church, the consideration of the circumstances and consequences which those procedures involve in relation to the respect due the human embryo. The *Instruction* remarks:

Development of the practice of *in vitro* fertilization has required innumerable fertilizations and destructions of human embryos. Even today,...a number of ova

are withdrawn, fertilized, and then cultivated *in vitro* for some days... Some embryos...are destroyed or frozen. On occasion, some of the implanted embryos are sacrificed for various eugenic, economic, or psychological reasons... The abortion mentality which has made this procedure possible leads to man's domination over the life and death of his fellow human beings and can lead to a system of radical eugenics (pp. 21–22).

The ethical study of the technique of IVF in itself, abstracting as far as possible from the destruction of embryos produced *in vitro*, also reveals many problems. According to the *Instruction*, "the so-called 'simple case', i.e. a homologous IVF and ET procedure that is free of any compromise with the abortive practice of destroying embryos and with masturbation, remains a technique which is morally illicit..." (p. 30). Such a statement has had no direct effect on French regulations. Homologous and heterologous IVF are recognized practices in France. More than 70 hospitals have been licensed to carry out these procedures, the cost of which is largely paid by the National Health Service.⁴ However, it has had, surprisingly, a wider influence in Anglo-Saxon and Protestant states, where the doctrine of the Church is considerably closer to the opinion of pro-life lobbies.⁵

(c) *The Right of the Family as an Institution*

The doctrine concerning man teaches that "the gift of human life must be actualized in marriage through the specific and exclusive acts of husband and wife..." (p. 11). "*From the moral point of view, a truly responsible procreation vis-à-vis the unborn child must be the fruit of marriage*" p. 23). The eligibility for IVF and the status of the child which results are partly influenced by this point of view.

(d) *Eligibility for IVF*

Once more the Church appeals to science to affirm that marriage and its indissoluble unity is the only context worthy of truly responsible procreation. Three major reasons justify this statement: it is through the secure and recognized relationship to his own parents that a child can discover his own identity; the parents find in their child a completion of their reciprocal self-giving; and the vitality and stability of society require that children come into the world within a family and that the family be firmly based on marriage.

There is no doubt that the interest of the child born through IVF should be a major consideration when proposing the use of such a

technique to infertile couples. No report or proposed legislation suggests any absolute right to procreate. The French report proposes to limit the eligibility to reproductive technologies to infertile couples, whether married or not, but a Court did declare legal a posthumous insemination.⁶

(e) *The Status of Children Born through IVF*

A serious consequence of the statement of the Church that "*a truly responsible procreation vis-à-vis the unborn child must be the fruit of marriage*" (p. 23), is the exclusion of the use of donors and the refusal to consider the consenting husband as the father of a child born through procedures using donated gametes. "*The fidelity of the spouses in the unity of marriage involves reciprocal respect of their right to become a father and a mother only through each other*" (p. 23). Therefore, the use of external gametes is contrary to the dignity of the spouses, to the vocation proper to parents, and to the child's right to be conceived and brought into the world in marriage and from marriage. Furthermore, such damage to the personal relationships within the family has repercussions on civil society, because what threatens the unity and stability of the family is a source of dissension, disorder, and injustice in the whole of social life.

Some states still refuse to recognize the husband as the legal father of a child when donated sperm have been used in conjunction with IVF. A number of states changed their laws and now consider the consenting man as the legal father of the child, but a number of these laws only apply when the man is married.⁷ It is the case in the United States (except in Oregon), in Australia, Canada (Québec, Yukon) and in the United Kingdom.

In the forthcoming French legislation, the consent given by a man to the insemination of his spouse will have the following consequences: if the man is married and is the presumed father of the child, he cannot deny his paternity on the ground that the sperm used for insemination is not his sperm; moreover, if he is unmarried, he will still be considered the father of the child.

Although IVF is regarded in some countries, e.g., Scandinavia and Germany, as a technique which involves excessive manipulation, it will probably be very difficult to limit the eligibility of IVF to married couples without creating illegal discriminatory measures against cohabiting couples. Thus, it appears quite easy for those states that want to have greater control over the use of IVF to restrict the way this procedure may be practiced by, e.g.,

prohibiting the donation of gametes or keeping uncertain the status of the child. Clearly, France will not adopt such a position, even though it is acceptable to the Catholic Church.

In fact, according to the *Instruction*, it is the very nature of IVF which should be questioned. The process of IVF and ET “dissociates from the conjugal act the actions which are directed to human fertilization” (pp. 29–30). This statement has two consequences: First, such fertilization appears to entrust the life and identity of the embryo to the power of physicians and biologists, and establishes their domination through control of the technology over the origin and destiny of the human person. Second, such fertilization is not regarded as the expression of a specific act of the conjugal union, because the generation of the human person is deprived of its proper perfection, of being the result of a conjugal act.

(f) *The Domination of Technology over IVF is Largely a Reality*

One should now recognize that existing and forthcoming legislation will largely contribute to reinforcing medical power. After all, no report or legislation has contested the role played by physicians in utilizing reproductive technologies. In fact, these documents reinforce the fundamental role of the physician in carrying out these procedures. The physician is responsible for selecting couples and donors, acts as an intermediary in legal surrogate arrangements, and maintains the confidentiality and files of his patients. The physician maintains sperm banks and frozen embryos. These various functions, which are not always expressly stated, are nevertheless the normal outcome of the fact that most countries consider reproductive technologies – called “reproductive medicine” – as involving medical acts. This is particularly the case in France where the regulation of 1988 specifies that such techniques can only be utilized by licensed physicians. The lack of any challenge to medical power, with the exception of a few feminist groups, may lead to a situation where biomedical science could appropriate to itself the reproductive technologies and thereby prejudice the respect due individual autonomy and compromise the state interest to protect society.

The fundamental reason why the Church considers homologous *in vitro* fertilization illicit (even when it is free of any compromise with abortive practices and masturbation) is obviously the absence of the conjugal act and the presence of conception and

procreation. No exception to this doctrine is tolerated, although the *Instruction* states that "Certainly homologous IVF and ET fertilization is not marked by all that ethical negativity found in extra-conjugal procreation" (p. 30). It also remarks that, "every child which comes into the world must in any case be accepted as a living gift of the divine Goodness and must be brought up with love" (p. 31).

Is this attitude reflected in some governmental policies concerning IVF? It seems obvious that Germany and Sweden did not favor the development of IVF and have attempted to restrict it. But it is also a reality that these nations have also taken into account the *social context* and *democratic tradition* that prevent them from proscribing IVF. As noted earlier, the *Instruction* itself states that civil law "must sometimes tolerate, for the sake of public order, things which it cannot forbid without a greater evil resulting" (p. 36).

CONCLUSION

Two major functions were assigned to the *Instruction*. First of all, it is a symbolic way for the Roman Catholic Church to reaffirm the principles of morality which it believes should guide all human life. It is often said that French society is always in search of moral values; it is certainly a good opportunity for the Church to remind the world of its strong commitment to remain a leading authority in morality. This aim has not been fulfilled in France for the following reasons:

- (1) public opinion generally provides very strong support for medical and scientific progress, and French biologists and physicians who developed these reproductive technologies are very popular;⁸
- (2) for many years, irrespective of which party governed, public authorities have always encouraged French demography;
- (3) a social consensus does exist in support of abortion, and virtually no one wants to reopen this debate in relation to IVF-ET procedures; and
- (4) the history of the relationship between French public authorities and the Roman Catholic Church makes it

difficult for the Church to intervene directly in the world of politics.

Second, the *Instruction* was designed to affect forthcoming legislation. As a consequence of the limited influence of the doctrine expressed in the *Instruction*, French legislation and the regulations adopted or on their way to being adopted are not strongly inspired by this document. Nevertheless, the philosophy behind French legislation clearly reflects the force of fundamental humanistic principles which can be shared both by the faithful and the atheists. These principles are: (1) reproductive technologies, and particularly IVF-ET, should be considered as medical means to assist infertile couples to bear children; (2) the interest of the child, who should be regarded as the *legal* child of the infertile couple, should always prevail; (3) the human body should not be treated commercially, and the donation of gametes is only licit when no financial transaction is involved; and (4) the embryo *in vitro* is a potential human being, and research on it should be strictly regulated, controlled, and in some cases even proscribed.

In conclusion, the principles suggested in the *Instruction* have not been legally enforced in France, but some legal limits have been imposed on the use of reproductive technologies. Just a few years ago, lawyers were looking at these procedures, and searching for violations of human rights, but thought it was too early to regulate these new procedures. Now it is the other way about: things are moving rapidly to create legislation on virtually all aspects of the new reproductive technologies. In this context, France hopes to achieve a balanced position that both protects each individual from unreasonable legislative interference and provides legal sanctions for the abuse of reproductive technologies; this dual objective would eventually reinforce confidence in the progress of science and the wisdom of humanity.

NOTES

¹ Tribunal de Grande Instance de Paris, association nationale pour l'insémination artificielle par substitution, 20 janvier 1988; Conseil d'État, association les Cigognes, 22 janvier 1988; Tribunal de Grande Instance de Créteil, association Sainte Sarah, 23 mars 1988; Cour d'Appel d'Aix en Provence, association Alma Mater, 29 avril 1988.

² 'Décret 88-327 du 28 avril 1988 relatif aux activités de procréation médicalement assistée', *Journal Officiel* (lois et décrets), 9 avril 1988, p. 4707.

³ J. Testart succeeded with René Frydman in creating the first French test-tube baby, in 1984.

⁴ Cf. *Code de la santé Publique*, article L 286-1.

⁵ The support given in an article published in *The Times* (London), June 6, 1985, by the Archbishop of Westminster, the Roman Catholic Primate of England, to the Enoch Powell Unborn Children [Protection] Bill (1985), is a good illustration of this paradoxical attitude.

⁶ Mrs. C. Parpalaix V. C.E.C.O.S., Tribunal de Grande Instance de Créteil', 1 Aug. 1984, *Revue Trimestrielle de Droit Civil*, 1984, Paris, p. 703.

⁷ For a comparative legal study, see C. Byk, *État Comparatif des règles éthiques et juridiques relatives à la procréation artificielle*, 1986 and 1988, Ministère de la Justice, Paris.

⁸ For a more detailed articulation of the French opinion, see M.O. Alnot, *Les Procréations Artificielles: rapport au Premier Ministre*, La Documentation Française, 1986.

REFERENCES

- Actes de colloque Génétique, *Procréation et Droit*, 1985, Actes Sud, Arles, France.
Bund-Länder Arbeitsgruppe, 1987, *Zwischenbericht: Fortplantungs-medizin*, Bonn, F.R.G.
Comité consultatif national d'éthique pour les sciences de la vie et de la santé, 1984-1988, *Rapports*, La Documentation Française, Paris.
Conseil d'Etat, *De l'Étique au Droit*, La Documentation Française, Paris.