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in the case

CHARRON AND MERLE-MONTET V. FRANCE (N° 22612/15)

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In French law, use of assisted reproductive technology (ART) is confined to couples

1) suffering from medically diagnosed infertility of pathological origin or a serious disease whose transmission should be avoided,
2) and who would be able to conceive naturally by themselves, that is to say formed by a man and a woman, alive and of reproductive age.[1]

This legal framework reflects the exclusive medical nature of ART, exclusive of any diversion consisting in conceiving a child deprived of his father. ART aims to *correct* the nature, not to *increase* it according to the transhumanist logic.

The idea of allowing non-medical use of ART by making this technique available to the desires of single women and female same-sex couples was widely discussed in France when the Act n°2013-404 of 17 May 2013 on same-sex marriage has been adopted. Facing very strong opposition from the population, the government of François Hollande decided not to modify the medical purpose of ART. Opposition did not target homosexuality *per se*, but the fact that a child is voluntarily deprived of his father.

I. THE ABSENCE OF ANY "RIGHT TO A CHILD WITHOUT FATHER"

There is no "right to a child", let alone a "right to a child without father".

Access to ART in a medical purpose stems from the right of access to health care. In this respect, the Court repeatedly held that the Convention does not guarantee any right to any specific level or type of medical care.[2]
Access to ART without pathological cause, as claimed by the applicants, comes under the "right to a child". But the Court often highlighted that there is no "right to a child", neither a right to adoption, nor, *a fortiori*, a right to use the techniques enabling to conceive a child artificially, using whether ART or surrogacy.

The "right to marry and to found a family" only places on the State the negative obligation not to stand in the way of a married couple formed by a man and a woman deciding to conceive. The Court thus affirmed the existence of a "*right to respect for both the decisions to become and not to become a parent*"[3] in the case of *Evans v. The United Kingdom*, and of a "*right to respect for (the) decision to become genetic parents*"[4] in the case of *Dickson v. The United Kingdom*.
We can underline that, in this case, the applicants are not materially prevented by the State from having recourse to ART, since they point out that they can go to Belgium to this end, getting around the French law, and then adopt the child in France.
The applicants thus ask the Court to rule that the State has the positive obligation to act by public means and finances, in order to achieve their desire to have a child on the French territory. So the question in this case is whether the State has such a positive obligation under the Convention. The answer is clearly no.

[1] Article L2141-2 of the French Public Health Code provides: "*The object of medically assisted procreation is to remedy the infertility of a couple or to avoid the transmission of a particularly severe disease to the child or a member of the couple. Pathological nature of the infertility must be medically diagnosed. The man and the woman forming the couple must be alive and of reproductive age and give prior consent to the transfer of the embryos or to the insemination (…)"* (Free translation from French).
[2] *Tysiąc v. Poland*, n° 5410/03, 20 March 2007; *Cyprus v. Turkey*, [GC], n° 25781/94; *Nikky Sentges v. The Netherlands*, n° 27677/02, dec.
[3] *Evans v. The United Kingdom* [GC], n°6339/05, 10 April 2007, § 71; *S.H. v. Austria*, n° 57813/00, 1st April 2010, §58.
[4] *Dickson v. The United Kingdom* [GC], n° 44362/04, 4 December 2007, § 66.

Article 12 of the Convention does not impose on the State any positive obligation to help individuals to conceive or obtain a child, whether by adoption, ART or surrogacy.
In that, the Court highlighted that "*the right to procreation is not covered by Article 12 or any other Article of the Convention*".[5] The Court recalled it in its decision as to the admissibility in the case of *S.H. and Others v. Austria*: "*Article 12 of the Convention does not guarantee a right to procreation*".[6]
As Judge De Gaetano mentioned in its separate opinion in the case of *S.H. and Others v. Austria*, "*neither Article 8 nor Article 12 can be construed as granting a right to conceive a child at any cost. The "desire" for a child cannot, to my mind, become an absolute goal which overrides the dignity of every human life*."[7]
As regards Article 8, the Grand Chamber recently recalled in the case of *Paradiso and Campanelli v. Italy* that the right to respect for private and family life does not protect the mere desire to found a family.[8]

***A fortiori*, there is no right to medically assisted procreation**. Establishing a subjective right to ART would imply imposing on the State a positive obligation regarding procreation, separating the use of ART from its medical purpose and materially creating a right to a child.
Since a right to a child does not exist, there can be consequently no right to ART, irrespective of the situation of the persons wishing to have access to it. The Court concluded in the case of *Dickson v. The United Kingdom* that refusing access to artificial insemination to a heterosexual married couple in which the man was in jail violated the Convention. However, this decision cannot be interpreted as providing a right to artificial insemination but solely, as said before, a right to respect for the decision to become genetic parents because the applicants' parental project was impeded by the administration refusing them access to artificial insemination to which they were legally entitled. The Court, especially in *S.H. and Others v. Austria* and *Costa and Pavan v. Italy*, ruled that "*there is no obligation on a State to enact legislation of the kind and to allow artificial procreation*"[9]: States do not have any obligation to legalize ART.
The French *Haut Conseil à l'égalité entre les femmes et les hommes* also acknowledged that "*international law does not enshrine any right to access to assisted reproductive technology*."[10]

II. RECOURSE TO ASSISTED REPRODUCTIVE TECHNOLOGY EXCEEDS THE SCOPE OF PRIVATE LIFE

The desire to become a parent is an aspect of private and family life and deserves protection against impediments that State could unduly impose to the fulfilment of this natural desire. The Court repeatedly stated that "*the right of a couple to conceive a child and to make use of medically assisted reproduction for that purpose is also protected by Article 8, as such a choice is an expression of private and family life*."[11]
Nonetheless, using ART exceeds the strict scope of private and family life because it is realized outside the family setting, requires involvement of third parties and implicates the interests of children. As any medical technology, ART requires regulation as regards the protection of children, family and society which is of public interest. The same applies to adoption. The State is thus responsible for determining, in respect with the best interests of the child, if and to what extent an aid can be provided in the realization of a desire to have a child.

[5] *Šijakova and others v. « the former Yugoslav Republic of Macedonia »* (Dec), n° 67914/01, 6 March 2003, § 3.
[6] *S.H. v. Austria*, n° 57813/00, decision as to the admissibility, 15 November 2007, § 4.
[7] *S.H. v. Austria* [GC], n° 57813/00, 3 November 2011, Separate opinion of Judge De Gaetano, § 3.
[8] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017, § 141.
[9] *S.H. c. Autriche*, n° 57813/00, 1st April 2010, § 74.
[10] Haut conseil à l'égalité entre les femmes et les hommes, *Contribution au débat sur l'accès à la PMA*, Avis n° 2015-07-01-SAN-17 adopted on 26 May 2015, p. 11 (Free translation from French).
[11] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017, §§ 159-160.

III. THE QUESTION OF THE CONSISTENCY OF FRENCH LAW

In the case of *S.H. and Others v. Austria,* the Chamber ruled that "*once the decision has been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention*."[12]
It must be assumed that French legislation would not be coherent if men could use surrogacy and/or single women assisted reproductive technology; but this is not the case. The strictly medical nature of ART provides coherence of its legal framework. This strictly medical nature also excludes any discrimination against persons on grounds of sexual orientation.

In respect of access to adoption, the legal framework of ART is no more inconsistent. French law allows singles and same-sex married couples to apply to adopt a child. Doing so, the legislator implicitly considered that being adopted and brought up by such persons can be in the interest of the child. The legislator confirmed its long-standing position whereby the faculty to raise a child is not conditioned by sexual alterity, even if it is preferable. Note that adoption does not require to be infertile, but to be recognized as able to raise a child. Sexual alterity is however a legitimate condition to ART, since this medical technology is aimed at procreating, not raising a child.
This distinction between the regimes of access to adoption and ART is logical and justified: although they enable to have a child, these means are not analogical answers to the same parental project. Indeed, it is worth asking who should benefit from one or another means. As regards adoption, the adopted child already exists and is more entitled than the adopter to have a right to adoption by a couple or a person considered capable of raising them. Adoption should firstly take into account the well-being of the adopted child rather than the adopter's aspirations. Adoption sees itself as a means for restoring a kind of justice by providing the adopted child with the family, or at least the adult who they have been deprived of. Adoption by single persons or same-sex couples has often been presented as good for the child, or as a lesser evil than remaining an orphan.
Indeed, adoption consists in "*providing a child with a family, not a family with a child*"[13] which is the case of ART. In other words, it is one thing to provide a child with the family they have been deprived of, but another to "produce" a child deliberately deprived of at least one of their biological parentage in order to fulfil the adults' desire to have a child. Heterologous ART with anonymous sperm donor voluntarily conceives fatherless children. The injustice suffered by the child conceived is greater when the couple does not provide for any surrogate father.
Besides, note that heterologous ART with anonymous donor totally erases paternal filiation, which is not the case of simple adoption.

Adoption and ART not being alike, differences in French law concerning access to one and another are justified and coherent. French law on ART is consistent with Principle 1-1 of the 1989 report of the *ad hoc* committee of experts on progress in the biomedical sciences (CAHBI) stating: "*The techniques of human artificial procreation may (…) be used for the benefit of a heterosexual couple when appropriate conditions exist for ensuring the well-being of the future child (…).*"
The applicants also argue that there is inconsistency between French legislation on ART and the opinions delivered by the French *Cour de cassation* on 22 September 2014 accepting the possibility for the mother's wife to adopt the child conceived abroad through ART. Yet such a situation of *fait accompli* is similar to the one of surrogacy: prohibited in France, it has some effects, especially as a

[12] *S.H. v. Austria*, n° 57813/00, 1st April 2010, § 74.
[13] *Fretté v. France*, n° 36515/97, 26 February 2002, § 42.

result of the condemnation of France by the Court[14], without it imposing the legalization of this practice in principle. Imposing the removal of a principle by means of an act carried out by a circumvention of the law is called subversion.
French law on ART is consistent with the ban on surrogacy. Indeed, if ART is the only way for single women or female same-sex couples to be partially genetically related with a child, single men or male same-sex couples can only use surrogacy for the same result, which raises as serious ethical issues. If the Court rules in the case in favour of the applicants and acknowledges in substance a "right to a child without father", it will also have to recognise sooner or later a "right to a child without mother", that is to say surrogacy.

IV. A MEASURE PURSUING LEGITIMATE AIMS

A measure protecting family

The 1966 International Covenant on Civil and Political Rights (Article 23-1) and International Covenant on Economic, Social and Cultural Rights (Article 10-1) sets out that family "*is entitled to protection by society and the State.*" The Court repeatedly stated that the protection of traditional family can constitute a legitimate aim justifying a difference in treatment: in the case of *Karner v. Austria*, the Court expressed its readiness to "*accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment.*"[15]
In the case of *X. and Others v. Austria*, it "*accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment*."[16]
As expressed by judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov in their joint concurring opinion in the case of *Paradiso and Campanelli v. Italy*, "*a family is to be understood a natural and fundamental group unit of society, founded primarily by the marriage between a man and a woman*" and it "*is based primarily on interpersonal relationships formalised in law as well as relationships of biological kinship.*"[17] Reserving the use of ART to heterosexual couples thus stems from this consideration of protection of the natural family.

A measure protecting the interests of children, thus morality

In the case of *S.H and Others v. Austria* which dealt with heterologous ART, the Grand Chamber underlined that "*concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation*."[18]
Morality is not a set of standards stupidly inherited from the past. It can be defined as the way towards good. In the present case, it corresponds to what is good for children, that is to say their best interest. Morality is different from justice which aims for what is fair, equitable. Justice involves interpersonal relationship, which is not the case for morality. Appreciating what is "good" is done in a general way and is true for the whole society. This distinction between "good" and "fair", between morality and justice is very helpful to understand the present case. Indeed, the applicants only take the viewpoint of justice, by comparing their situation with the one of other couples and by alleging unequal treatment. This viewpoint in terms of justice between adults ignores the good of the children, and further the good of society, that is to say morality.
In the present case, appreciation differs whether the question is considered from the viewpoint of adults (in terms of justice/equality) or from the viewpoint of the good of children (in terms of morality). However, assuming that there cannot be any right on the child, it is excluded that access to ART could be subject to a claim for equality, and thus for a right. Besides, protection of the most

[14] *Mennesson v. France* (n° 65192/11) and *Labassée v. France* (n° 65941/11), 26 June 2014.
[15] *Karner v. Austria*, n° 40016/98, 24 July 2003, § 40.
[16] *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013, § 138.
[17] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017, Joint concurring opinion of Judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov, § 3.
[18] *S.H. v. Austria [GC]*, 3 November 2011, § 100.

vulnerable should always be given priority. So the present case should be examined from the viewpoint of the good of the child, that is to say morality, and not only in terms of adults' "right".

A measure protecting children

In the case of *X. and Others v. Austria*[19], the Court "*(reasoned) solely by referrals to the principle of equality between couples (…) (and) did not rule regarding the best interests of the child but from the viewpoint of the interests of the couple formed by the applicants.*"[20] In their joint partly dissenting opinion, seven judges said the child's best interests to be "*the major factor overlooked in this case*."[21] Indeed, some possibilities offered by ART often make the child the object of the parental project, desire, or non-desire. It is the case of the present application which is only based on the adults' desire to "have" a child and on their equality (including pecuniary equality) with other adults in access to ART. It would be a flawed logic to consider equality between couples regarding access to a technique, a "means" to procreate, without considering its end. Equality must not be appreciated by reference to access to the technique, but by reference to the procreation of a child. A child can never be subject of a right, albeit a right to equality, and should always be an end in itself. The real issue at stake is not equality in access to a technique but the protection of the childhood in general, increasingly reduced to object of the adults' desire, almost consumer goods. The protection of the existing children as well as future generations is at stake. Indeed, the Preamble of the Oviedo Convention states that "*progress in biology and medicine should be used for the benefit of present and future generations.*" The good and best interests of children require that children are wanted for themselves and raised by their parents: deliberately depriving children of such a good is unfair.

A measure protecting the best interests of the child under the protection of the rights and freedoms of others (Article 8.2)

Reserving ART for couples formed by a man and a woman, alive and of reproductive age is justified in the light of the child's best interests. In accordance with Article 3-1 of the 1989 Convention on the Rights of the Child and Principle 2 of the 1959 Declaration of the Rights of the Child, the Court consistently held that the protection of the interests of the child has to be taken into account and is a legitimate aim.[22] In this context, it is worth recalling that ART are not free of risks for the future child, as explained in a recent report commissioned by the Committee on Bioethics for the Council of Europe.[23] In any case, the child's best interests includes *inter alia* the "*right to know and be cared for by his or her parents*" (Convention on the Rights of the Child, Article 7-1) which are denied in case of ART used by single women or women same-sex couples.

The ECLJ incidentally draws the Court's attention on the fact that fathers are more and more excluded and made less responsible in the field of procreation and education, relegated to the status of begetter and second-class parent as a result of the generalization of the exclusively female control of births and divorces. Claiming for a "right to a child without father" would just increase this phenomenon.

Concerning the child's right to be cared for by his or her parents, law is structured by realistic norms taking into account sexual complementarity necessary to procreation. It is in this way that the term "parents" in Article 7 of the Convention on the Rights of the Child is to be interpreted as meaning

[19] *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013.
[20] Clotilde Brunetti-Pons, « Après la loi du 17 mai 2013, quel état des lieux et quelles perspectives pour le droit de la famille ? », in Institut famille et République, *Le mariage et la loi, protéger l'enfant*, p. 36 (Free translation from French).
[21] *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013, Joint partly dissenting opinion to Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, De Gaetano et Sicilianos, § 8.
[22] See *Neulinger and Shuruk v. Switzerland* [GC], n° 41615/07, 6 July 2010, § 134-135; *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013, § 138; *X. v. Latvia* [GC], n° 27853/09, 26 November 2013, § 95-96.
[23] Kavot Zillén, Jameson Garland, Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties*, submitted 11 January 2017 (Commissioned by the Committee on Bioethics for the Council of Europe), p. 22-25.

the child's father and mother.[24] Likewise, the Court recognized in the case of *Christine Goodwin v. the United Kingdom* that "*Article 12 secures the fundamental right of a man and woman to marry and to found a family*".[25] This children's right to be raised by their father and mother comes under the principle but, as explained by an author, "*in this field, what comes under the principle –the child needs a father and a mother- is required to be proven. On the contrary, it should be established that it is not the case to be in accordance with the child's best interests*".[26] Yet some studies show that the child's development requires a father and a mother because each of them specifically contributes to it[27] and that being raised by a father and a mother or by two persons of the same sex is not the same thing.[28] Besides, the Parliamentary Assembly of the Council of Europe affirmed that "*as far as granting homosexuals the same rights as married couples was concerned, the majority of the committee felt that the child's interests should override all other concerns and that homosexual couples were not in the best position to satisfy these interests. Consequently, it would seem premature to make recommendations in this area, even if some member states have already recognised the right of homosexual couples to adoption and medically assisted procreation in their legislation and case-law.*"[29] The optimal situation to which each child who is born has a natural right is to be raised by his biological father and mother. The State can legitimately consider that any deprivation of this natural right is constitutive of suffering, and even an injustice when this deprivation is intentional, whatever the conjugal status of the person originating it: these persons may have sacrificed the child's interests and natural rights for their own desire to have a child.

Concerning the child's right to know his or her parents, children born from heterologous ART are deprived of at least one of their biological parentage: ART for couples of women is "producing" a child deliberately deprived of the father and of paternal filiation. This is not consistent with the child's interest and can also be a cause of long sufferings,[30] as well as in health terms to get appropriate medical care.[31] The Court stated that "*respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement*

[24] See the demonstration in « Existe-t-il un droit à connaitre ses origines », *Le don de Gamètes*, Colloque Evry 2013 (Aude Mirkovic dir.), Bruylant, 2014.
[25] *Christine Goodwin v. The United Kingdom* [GC], n° 28957/95, 11 July 2002, § 98.
[26] Clotilde Brunetti-Pons, « Après la loi du 17 mai 2013 », op. cit., p. 36.
[27] Raphaële Miljkovitch and Blaise Pierrehumbert, « Le père est-il l'égal de la mère? Considérations sur l'attachement père-enfant », *Cahiers critiques de thérapie familiale et de pratiques de réseaux*, 2005/2 (n° 35), p. 115-129, in particular § 19, 29 et 30: https://www.cairn.info/revue-cahiers-critiques-de-therapie-familiale-2005-2-page-115.html;
Raphaële Miljkovitch, Blaise Pierrehumbert, Giovanna Turganti, Olivier Halfon, « La contribution distincte du père et de la mère dans la construction des représentations d'attachement du jeune enfant », *Enfance*, tome 51, n° 3, 1998, L'attachement, p. 103-116, in particular p. 103 and 114: http://www.persee.fr/doc/enfan_0013-7545_1998_num_51_3_31197
[28] See in particular Brief of Amici Curiae American College of Pediatricians, Family Watch International, Loren D. Marks, Mark D. Regnerus and Donald Paul Sullins in support of Respondents, in the Supreme Court of the United States *Obergefell v. Hodges (26 June2015)*, 3 April 2015: https://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/14-556_American_College_of_Pediatricians.pdf; *No Differences? How Children in Same-Sex Households Fare*, Studies from Social Science, Witherspoon Institute, 2014; Monica Fontana et Patricia Martinez, *Ce n'est pas pareil : rapport sur le développement des enfants élevés par des couples de personnes de même sexe*, May 2005:
http://www.actiegezin-actionfamille.be/Doc/FR/Hazteoir.pdf; Paul Cameron, "Homosexual parents testing 'common sense' – A literature review emphasizing the Golombok and Tasker longitudinal study of lesbians' children", *Psychological Reports*, 85, 1999, p. 282; Sotirios Sarantakos, "Children in Three Contexts", *Children Australia*, vol. 21, no. 3, 1996, pp. 23-31.
[29] PACE, Doc. 8755, 6 June 2000, *Situation of lesbians and gays in Council of Europe member states*, Report, Committee on Legal Affairs and Human Rights, Rapporteur: M. Csaba Tabajdi, § 72.
[30] See some stories on the website of the association Procréation Médicalement Anonyme: http://pmanonyme.asso.fr/; Marie-Laure Makouke, « PMA, GPA : l'épineux débat en cinq questions », 21 mars 2013: http://www.terrafemina.com/vie-privee/famille/articles/23882-pma-gpa-lepineux-debat-en-cinq-questions.html
[31] Kavot Zillén, Jameson Garland, Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties*, op. cit., p. 24-25.

to such information is of importance because of its formative implications for his or her personality (...). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents."[32] In the case of *Odièvre v. France*, the Court had enunciated that "*matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Mikulić v. Croatia, no. 53176/99, §§ 54 and 64, ECHR 2002-I). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention.*"[33] The Court also considered in the case of *Jäggi v. Switzerland* that "*the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life*."[34] The importance of the biological filiation, of the biological link is yet underlined by the Court in cases dealing with surrogacy, either to condemn a State on the ground that it did not take into account this existing link[35] or to conclude that there is no violation of the applicants' rights in the absence of any biological link with the child. [36]

V. THE MARGIN OF APPRECIATION

The Court ruled in the case of *Dickson v. The United Kingdom* that "*where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted. Where, however, there is no consensus within the member States of the Council of Europe either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider. This is particularly so where the case raises complex issues and choices of social strategy: the authorities' direct knowledge of their society and its needs means that they are in principle better placed than the international judge to appreciate what is in the public interest. In such a case, the Court would generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation". There will also usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights.*"[37] Then the Court also recognized in the case of *X. and Others v. Austria* that "*where (...) there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.*"[38]

In France, reflection on the legal regime of access to ART is part of a bioethical process in which regular legislative reviews are undertaken, in accordance with the Court's requirements.[39] Indeed, French current legislation on ART stems from Law n° 94-654 of 29 July 1994 on donation and use of elements and products of the human body, medically assisted procreation and prenatal diagnosis, Law n° 2004-800 of 6 August 2004 on bioethics and Law n° 2011-814 of 7 July 2011 on bioethics. The Court regularly recalls that "*since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since*

[32] *Phinikaridou v. Cyprus*, n° 23890/02, 20 December 2007, § 45.
[33] *Odièvre v. France* [GC], n° 42326/98, 13 February 2003, § 29.
[34] *Jäggi v. Suisse*, n° 58757/00, 13 July 2006, § 37.
[35] *Mennesson v. France*, n° 65192/11, 26 June 2014.
[36] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017.
[37] *Dickson v. The United Kingdom* [GC], n° 44362/04, 4 December 2007, § 78. See also *Evans v. The United Kingdom* [GC], n° 6339/05, 10 April 2007, § 77.
[38] *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013, § 148.
[39] *S.H. v. Austria* [GC], n° 57813/00, 3 November 2011, § 118; *Christine Goodwin v. The United Kingdom* [GC], n° 28957/95, 11 July 2002, § 98; *Stafford v. The United Kingdom* [GC], n° 46295/99, 28 May 2002, § 68.

the questions raised by the case touch on areas where there is no clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one."[40] Recently, the case of *Paradiso and Campanelli v. Italy* on surrogacy gave the Court an opportunity to recognize that medically assisted reproduction is among "*ethically sensitive issues (...) in which member States enjoy a wide margin of appreciation.*"[41] Generally speaking, as the Judge Costa expressed in its concurring opinion in the case of *Gas and Dubois v. France*, "*there are areas in which the national legislature is better placed than the European Court to bring about change in institutions concerning the family*", "*in a matter such as this, which concerns real societal issues, it is the Court's place not to censure the legislature in so drastic a manner*."[42]
The ECLJ does not dispute that the margin of appreciation could legitimately be wide if only the adults' interests were at stake, but it is not the case as concerns ART. On the contrary, the ECLJ believes that the margin of appreciation of the States should be a restricted one because ART questions the best interests of children and their natural rights. For the ECLJ, States should not be granted by the Court a wide margin of appreciation enabling them to deliberately deprive a child from his or her father, which is a serious injustice contrary to the dignity and best interests of children and future generations. Granting such a margin would amount to permitting violations of the rights guaranteed by Articles 3 and 8 of the Convention.

It is worth noting that, as the Court recalled in the case of *Paradiso and Campanelli v. Italy*, the aim of protecting children from surrogacy techniques is "*not merely the child in the present case but also children more generally.*"[43] Thus, when the State protects the child's interest, it is also those of children in general, that is to say future generations.

The absence of any consensus on access to ART for couples of women
The document "ILGA-Europe Rainbow Map (Index)"[44] published in May 2016 indicates that only 13 out of the 47 Member States of the Council of Europe allow couples of women to conceive a child through ART (Austria, Belgium, Croatia, Denmark, Finland, Iceland, Ireland, Luxembourg, The Netherlands, Portugal, Spain, Sweden and The United Kingdom). A clear majority of Member States oppose the use of ART without medical prescription. This position is confirmed by the fact that the majority of Member States also refuse surrogacy for couples of men. According to the Court's usual approach, once there is no consensus, States should be granted a wide margin of appreciation.
Here again, the ECLJ is not convinced by this sociological and relativistic approach of fundamental rights, once it is clear that the very object of the application at stake constitutes a violation of the children's rights. It is not because a minority of States accepts such a violation that the Court should refrain from ruling on the underlying practice. It is the same for surrogacy and all heterologous reproductive technologies, regardless of the adult benefitting from it.

VI. THE ABSENCE OF ANY DISCRIMINATION

Article 14 of the Convention prohibits any difference of treatment of persons in similar situations, without an objective and reasonable justification.[45] If the Court admitted that homosexual and

[40] *Evans v. The United Kingdom* [GC], n° 6339/05, 10 April 2007, § 81. See also *S.H. v. Austria* [GC], n° 57813/00, 3 November 2011, § 20 and 97; *X, Y and Z v. The United Kingdom* [GC], n° 21830/93, 22 April 1997, § 44.
[41] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017, § 194.
[42] *Gas and Dubois v. France*, n° 25951/07, 15 March 2012, Concurring opinion of Judge Costa.
[43] *Paradiso and Campanelli v. Italy* [GC], n° 25358/12, 24 January 2017, § 197.
[44] ILGA, « *ILGA-Europe Rainbow Map (Index)* », May 2016:
http://www.ilga-europe.org/sites/default/files/Attachments/side_b-rainbow_europe_index_may_2016_small.pdf
[45] *Salgueiro Da Silva Mouta v. Portugal*, n° 33290/96, 21 December 1999, § 26.

heterosexual couples are in a comparable factual situation regarding adoptive filiation,[46] it must be highlighted that the present case is not dealing with filiation but procreation.

Regarding procreation, two persons of the same sex and a heterosexual couple are not in a comparable situation. Heterosexuality is not legally defined as an emotional and subjective relationship, equivalent to homosexuality, but it is realistically considered as the sexual complementarity specific to procreation. Claiming that heterosexuality would be equivalent to homosexuality regarding procreation would imply ignoring the body and reducing persons to their affectivity.

In the present case, the applicants complain about a discriminatory treatment on the ground of their sexual orientation because ART is reserved by French law to couples suffering from infertility of pathological origin. They claim that the situation of two married women is comparable to the one of an infertile couple formed by a man and a woman. In the case of *Gas and Dubois v. France*, the Court accepted that French legislation on conditions of access to ART is not discriminatory, ruling that "*anonymous donor insemination in France is confined to infertile heterosexual couples, a situation which is not comparable to that of the applicants. In the Court's view, therefore, the applicants cannot be said to be the victims of a difference in treatment arising out of the French legislation in this regard.*"[47] This situation having remained unchanged since this decision and although same-sex couples can get married since the Law of 17 May 2013, such a conclusion should apply *mutatis mutandis* in the present case, once access to ART in France does not depend on the marital status of the persons wishing to benefit from it.

Like the Court, the French Constitutional Council ruled in its decision n° 2013-669 DC of 17 May 2013 on the Act opening up marriage to same-sex couples that "*regarding procreation, couples formed by a man and a woman and same-sex couples are in different situations; the principle of equality does not prevent the legislature from dealing differently with different situations, once the resulting difference of treatment is directly linked with the object of the Act establishing it.*"[48]

The origin of the infertility, comparability criterion of the situations

Objectively, two persons of the same sex cannot claim to be in a situation comparable to that of a couple formed by a man and a woman suffering from infertility. In the case of *Gas and Dubois v. France*, to explain the difference in situations, the Court noted that "*while French law provides that anonymous donor insemination is available only to heterosexual couples it also states that it is to be made available for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease.*"[49] So it is not the heterosexual or homosexual nature of the relationship which is taken into account when appreciating the comparability of the situations but the origin of the infertility, because the aim of ART is to help couples suffering from clinically diagnosed pathology. Although the infertility of a couple man-woman may sometimes remain unexplained, the sterility of a single person or a same-sex couple is not pathological at all, even if one of the two persons in the couple has fertility problems: such a couple is not prevented by law from procreating, but by nature and their way of life. And the State has no positive obligation under the Convention to help people to act against nature.

As regards the limits of medicine, the French *Comité Consultatif National d'Ethique* expressed that "*we must abstain from asserting the idea that any injustice, including physiological, questions equality before the law. Even if infertile women's distress provokes feelings of emotion or rebellion, the society should not be imposed to organize equalization by correcting conditions undermined by nature. Such a vision would lead to force the collectivity to intervene without limit to restore justice*

[46] *X. and Others v. Austria* [GC], n° 19010/07, 19 February 2013, § 112.
[47] *Gas and Dubois v. France*, n° 25951/07, 15 March 2012, § 63.
[48] Constitutional Council, Decision n° 2013-669 DC of 17 May 2013, considering 44 (Free translation from French).
[49] *Gas and Dubois v. France*, n° 25951/07, 15 March 2012, § 63.

in the name of equality and corresponds to the affirmation of a right to a child – while the desire or need for a child cannot lead to acknowledge such a right."[50]

Conclusion

In the present case, the decision will not be juridical only, but also anthropological and political, because it corresponds to the claim to a "right to a child without father". Like Judge De Gaetano, the ECLJ recalls that "*neither Article 8 nor Article 12 can be construed as granting a right to conceive a child* at any cost" and that "*the "desire" for a child cannot, to my mind, become an absolute goal which overrides the dignity of every human life.*"[51]

The present case also raises the question of the link between law, science and nature. If the International Covenant on Economic, Social and Cultural Rights acknowledges the right of everyone "*to enjoy the benefits of scientific progress and its applications*" (article 15 § 1 b), it only concerns real progress which are not achieved at the expense of human dignity and rights of others.
The European Court of Human Rights was created after the Second World War to protect humans from dehumanisation caused by materialistic and Scientist ideologies. This scientism of the 1930s, which had already dreamt of ectogenesis and artificial insemination,[52] is currently prolonged not in a collectivistic but individualistic light, yet it is the same materialistic scientism. With unlimited desires and techniques, can human rights still protect our humanity? If Human Rights only "*(play) second fiddle to advances in medical science*",[53] they will be condemned to be "moral alibi" for a new form of dehumanisation of which voluntary violation of the rights and interests of children –claimed in this case– is symptomatic. Human Rights would no longer protect humans, but would be limited to symbolically adapting society to this progress. On the contrary, the ECLJ believes that the role of Human Rights is to protect humans from all ideologies, nowadays particularly from voluntarism and scientism.
To this end, difference between justice and morality should be rediscovered and Human Rights should not be limited to equality. Justice protects relations between persons; morality protects the human's good itself. Facing science and individuals' unlimited desires, the direction of human's good should be rediscovered, and thus the positive value of morality which is the cornerstone of human rights.

[50] Comité Consultatif National d'Éthique pour les Sciences de la Vie et de la Santé, Avis n° 110, *Problèmes éthiques soulevés par la gestation pour autrui (GPA)*, p. 16 (Free translation from French).
[51] *S.H. v. Austria* [GC], n° 57813/00, 3 November 2011, Separate opinion of Judge De Gaetano, § 2.
[52] See Aldous Huxley, *Brave New World*, 1932.
[53] *S.H. v. Austria* [GC], n° 57813/00, 3 November 2011, Separate opinion of Judge De Gaetano, § 3.