Anonymous childbirth and respect of the anonymity of the mother: A right in compliance with the Constitution

Seized on 16th March with a Priority Question of Constitutionality (PQC), the Constitutional Council declared in compliance with the Constitution the law into force related to anonymous childbirth. In France, between 600 and 700 women would be concerned each year. Despite this decision of compliance, however the debate is far from being relieved: anonymous children claim the right to know their origins. The difficulty consists in finding the balance point between the right of the mother and that of the child.

Anonymous childbirth: the law in force

- Anonymous childbirth in France

Anonymous childbirth is the “faculty for a woman to abandon its newborn baby to State services and the right to be anonymous for the society.” This possibility is “generally considered as a warranty against clandestine childbirth, savage child abandonment and infanticide.” (1) The law of 8th January 1993 (2) introduced this scheme in the Civil Code, inserting an article 341-1, according which: “during her delivery, the mother can ask that the secret of her admission and her identity are preserved.”

- The access to personal origins: A necessary conciliation between the mother’s right and the child’s desire

The law of 22nd January 2002 (3) intended to conciliate the “absolute character of the mother’s right to give birth (...) without revealing her identity and the child’s desire to know her/his origins.” (4) The articles L. 222-6 and L. 147-6 of the code of social action and families, coming from this law, relate, respectively, to the right of any woman to give birth secretly and the procedure allowing a possible reversibility of this secret upon child request. Indeed, subject to her express agreement, information related to the identity of the biological mother can be communicated to the child, if she/he asks for it to the National Council for access to personal origins (Onaop). However, the mother has also the possibility to deny explicitly the secret of her identity is unveiled. In this case, the child will not be able to access to this information, even after the death of her/his mother.

- A balance conform to the European Convention on Human Rights (ECHR)

This possibility, which allows the mother to preserve the secret of her identity, including after her death, has been contested in front of the European Court of Human Rights, which ruled with Odièvre judgment (5) on 13th February 2003. But, after having observed that the applicant had nonetheless accessed "identifying information about her mother (...) enabling her/him to establish any root of her/his history", the Court concluded that the balance searched by the French legislation between the respect of the mother’s right and the child’s desire was not contrary to the article 8 of the CEDH, according which anyone has the right to the respect of her/his private life.

The preservation of the mother’s identity considered in compliance with the Constitution

Mathieu Evers, born anonymously, challenged the articles L. 222-6 and L. 147-6 of the Social Action and Family code, about what they authorizes a woman to give birth without revealing her identity, and only allow lifting the secret with her agreement, or, in case of death, only if she did not express an intention to the contrary. According to him, these provisions breached her right to the respect of private life and to have a normal family life.

Following this request and by decision of the 16th March 2012, the Constitutional Council considered that the conciliation made by the French law between from one hand, “the respect effectively (...) of the will expressed by [the mother] of preserving the secret (...) of her identity”, and from another hand the objective consisting in "facilitating the knowledge by the child of her/his personal origins" was in compliance with the Constitution (6).

- The preservation of the anonymity of the mother, a need?

This decision is part of the debate related to the necessity of preserving the anonymity of the mother, during an anonymous childbirth. In December 2011, MP Brigitte Barèges (UMP) introduced a bill to constraint women giving birth anonymously to disclose their identity in sealed envelope. The possibility was foreseen to reveal to the child the identity of her/his mother if she/he wanted it, at the time she/he reaches the age of majority. If it is possible to understand the distress of an
an anonymous child, seeking her/his origins, it is also necessary to consider that the preservation of the law as it is “is fundamental on sanitary level.” Indeed, the warranty of the anonymity enables women “to give birth securely”, and avoiding to endanger “both their life, and that of the baby” (7), while limiting infanticides, abortions and child abandonments. Also the legislation in force allows women to leave information related to their health, that of the father, to the origins of the child and the conditions of the birth (8). In practice, women taking the decision to give birth anonymously do it “in the best interest of the child”, and then “agree to leave non identifying information (9)”.

In France, the legislation establishes a prohibition principle of the research on the human embryo and the embryonic stem cells. It is only for this derogation that the Agency of Biomedicine (ABM) can authorize this type of research. But, on 10th May 2012, at the request of Jérôme Lejeune Foundation, the administrative court of appeal (ACA) of Paris cancelled, due to the illegality, a decision made by the ABM, on the 20th June 2008, authorizing a research protocol from human embryonic stem cells. This legal decision, recognizing the importance of the protection of the human embryo, contrasts in the new political spectrum which announces new future threats.

The judgment of the 10th May: a victory on legal level

The major scope of the judgment delivered by the ACA deserves to be underlined since the judges have based their decision on an argumentation for content, a scientific argumentation (1). The law of bioethics 2004, in force in 2008, prohibits by principle the research on embryonic stem cells except derogation, provided particularly that it is impossible to reach the desired result through a method which does not use human embryos, embryonic stem cells or stem cell lines; in other words, provided that it does not exist alternative method of comparable effectiveness.

The purpose of the research protocol, authorized by the ABM, was the modeling of a form of myopathy, the facioscapulohumeral muscular dystrophy (FMD), by using human embryonic stem cells carrying the mutation responsible for pathology. But the ABM which had the obligation to give reason for its decision (Article L. 2151-5 IV, of the Public Health Code, coming from the law of bioethics of 6th August 2004), did not prove that these researches cannot be carried out according to an alternative method of comparable effectiveness. And for a very good reason: these could also be performed using reprogrammed adult stem cells (iPS cells).

Furthermore, the article L. 2151-5, coming from the law of bioethics of 2004, states that the research on embryonic stem cells can only be authorized if this is likely to allow major therapeutic advances. But, the ACA notes that, on the two experts designed by the director of the ABM, one emitted serious reservations concerning such advances. In consequence, the court of appeal concluded the cancelation of the authorization decision of the ABM due to its illegality.

The new political spectrum: a threat for the human embryo

During the presidential campaign, François Hollande, announced he will modify the law of bioethics of 2011 to authorize the research on embryonic stem cells. Shortly after his election, a socialist senator concretized the promise of the President of the French Republic by filing a bill, on 1st June 2012. For François Hollande, "no serious reason" opposes this authorization of principle. But, it is a fundamental principle which is flouted: that of the respect of the human being. Indeed, the article 16 of the Civil Code states that "the law ensures the primacy of the person, prohibits any offend to her/his dignity and guarantees the respect of the human being from the beginning of her/his life". By authorizing the research on the human embryo, the President of French Republic wishes to compensate the delay France would have regarding other countries. But, no country which has authorized the research on the embryo for several tens of years (for instance Great Britain) is in advance regarding France, which then, cannot be late. Some consider even that to have made the political choice in 2004 to develop the embryonic research led France to fall behind in matter of research on non-embryonic stem cells (iPS, adult stem cells, cord blood stem cells), some of which have already proved their therapeutic potential. François Hollande also stated that limiting the embryonic research leads to "offend the freedom of the research without real justifications". Nevertheless, the freedom of the research cannot be absolute and consequently must be supervised, as it is the case for any human activity. Granting an absolute freedom to the research would inevitably lead to favor economic and financial interest to the disadvantage of the protection of the embryo: The reality is that the human embryo is an important economic challenge for the pharmaceutical industry. But on which foundation could the scientific activity escape from the principle ensuring the respect of any human being from the beginning of her/his life?

For François Hollande, "limits are necessary” to avoid the drifts to which can lead the research on the human embryo. But, the judgment delivered by the Court of Appeal of Paris on 10th May 2012 proves that, even under a prohibition scheme with derogations, the research on the embryo has already generated drifts. Then how to believe that the absence of drifts could be guaranteed with the establishment of an authorization scheme in principle, even strictly supervised?
“Considering [...] that the researches [...] could also be carried out using, from epidermal cells collected on patients carrying the pathology, reprogrammed adults stem cells (iPS) presenting the same characteristics in terms of morphology, proliferation and pluripotence than the human embryonic stem cells (hESC). [...] That after [...] the decision attacked was made disregarding the article L2151-5 of French Public Health Code”.

(1)