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ORIGINAL ARTICLE

Inclusion, exclusion: Comparative public policy (France/USA) in access to assisted reproductive technology

Jennifer Merchant

Universite Paris 2 Pantheon-Assas, France

Jennifer Merchant obtained her PhD in political sciences from Sciences po Paris, and now teaches at the Université de Paris II (France). Her research privileges a pluridisciplinary approach at the crossroads of political science, law, gender studies and bioethics in Anglo-American and European countries. She is currently working on two projects: (i) analysing, from a comparative perspective (France/USA), policies relative to gender and health care and research, and (ii) comparative public policy analyses of the framing of human genome editing and their impact on the future of human reproduction. She is a member of the INSERM Ethics Committee and of the Institut universitaire de France, and was a member of the US National Academy of Sciences Committee on Human Genome Editing.

Abstract This article examines what French and American societies mean by the principle of personal autonomy/'right to privacy' and the concept of solidarity/'the best interest of the society at large'. It will attempt to show how these two countries translate these concepts into different public policies, more specifically in the field of access to sexual and reproductive rights of women and men. In order to better highlight these differences, I observe what citizens actually experience on the ground, and in so doing, it becomes clear that each country does not fully meet the principles they purport to defend.

KEYWORDS: concept of solidarity, personal autonomy, public policy, right to privacy, sexual and reproductive rights

Introduction

This article examines what French and American societies mean by the principle of personal autonomy (interpreted by US constitutional law as exercising one's 'right to privacy') and the concept of solidarity (sometimes, but not always, taken to mean 'the best interest of the society at large'). For the purposes of this article, I use the continental understanding of 'solidarity' as being the collective contribution, usually in the form of taxes, towards providing all citizens with access to health care, education, unemployment insurance etc. This across-the-board form of 'solidarity' does not exist nationwide in the USA, except for elderly people (Medicare) and the poor (Medicaid). It will attempt to show how these two countries translate these concepts into different public policies, more specifically in the field of access to sexual and reproductive rights of women and men. In order to better highlight these differences, I observe what citizens actually experience on the ground, and in so doing, it becomes clear that

E-mail address: jennifer.merchant@u-paris2.fr

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each country does not fully meet the principles they purport to defend.

Indeed, public discourse in France around the concept of 'solidarity' is powerful, and the French healthcare system is often admired abroad (Fielding and Lancry, 1993; Starr, 2013: Chapters 3 and 4). However, although medical care is 'free' for French citizens, access to sexual and reproductive rights is highly regulated by state authorities, and excludes many categories of the population from this supposed universal solidarity. Similarly, in the USA, the autonomy of the individual and her/his right to 'privacy' in terms of sexual and reproductive rights are emphasized, yet this access is strongly determined by an individual's socio-economic level.

I will thus attempt to illustrate how different legal/political approaches are reflected in healthcare practices in France and the USA [i.e. the French *Droit des patients* 2002 law (Loi Kouchner, 2002) and the history and evolution of the 'right to privacy' in the USA). In doing so, I will briefly touch on the historical and philosophical influences that contributed to each country's approach. Through concrete examples — access to contraception, abortion, medically assisted reproduction — I will present the shortcomings and dysfunctions specific to each country.

The first part of this article will discuss the French context, and the major events and actors (associations, ethics committees, consultants, citizen and patient groups) that led to the advent of the 2002 Kouchner Law (Loi Kouchner, 2002). This law might be considered as France's first attempt to integrate the concept of individual autonomy into healthcare public policy and regulation, and the role of the civil society, associations, patient groups and other major stakeholders is undeniable (Ogien, 2009, 2010; Hurpy, 2013). Hurpy (2013) highlights how the concept of personal autonomy only appeared recently in the European justice system as a means by which people can lead their lives as they wish. Her analysis focuses on advances permitted by the recognition of personal autonomy in the protection of individual rights and those of minorities.

In the second part of the article, the US context will be analysed. The focus here will be on the importance of judicial review — the power of federal courts to interpret *a posteriori* the constitutionality of laws that were previously enacted in a thoroughly democratic procedure, but later challenged by concerned or affected citizens and either 'struck down' or 'upheld' by the courts on constitutional grounds.

France

France has a robust centralized governance system which is observable in the public health coverage system in place (*Sécurité sociale*). This centralized nature of healthcare and research institutions in France guarantees access to health care for all, and the country prides itself on this reality. This system results less from its judicial system founded on law codes than on the political structure and functioning of the state, as well as the no-less-important fact that healthcare issues are deliberately placed outside of the market economy and considered as belonging to national healthcare policy. This approach certainly prevents the inequalities that one observes in the USA. However, in the realm of assisted reproductive technology (ART), French laws impose strict standards that are vigorously and increasingly contested by a certain number of population categories who are excluded from accessing what biotechnology has to offer; for example, ART is strictly limited to heterosexual couples diagnosed as suffering from medical infertility.

The differences observed in access to health care in general and ART in particular between the French and the Americans are also due to different cultural practices (e.g., in France, eating habits, government-subsidized time for holidays, public childcare institutions from kindergarten onwards, etc.). In addition, one should emphasize the historical and philosophical foundations of French politics and society. Indeed, in 2000, in one of only a handful of analyses of the French bioethics laws (first passed in 1994) by Anglo-American scholars, the American legal scholar, Nan T. Ball, published a refreshing article. In departing from traditional portraits of France as governed via a top-down, rigid political institutional context, Ball analysed, through a literary and historical prism, the importance of Enlightenment ideals in the relationship between family, nature and society, and how those ideals played as much of a role as institutional imperatives. Her juxtaposition of some of Jean-Jacques Rousseau's key writings to French discourse in the Parliamentary debates leading to the passage of the French bioethics laws in 1994 opened the reader's eyes to other avenues of comprehension as to how these laws came to be (Ball, 1999).

France before 2002

The flip side of the French human rights and solidarity approach to healthcare issues in general, and access to ART in particular, lies in the stubborn persistence of 'the doctor knows best' attitude on the part of the medical community. Before the Kouchner Law passed in 2002 (Loi Kouchner, 2002), patients did not have access to their medical files; the widespread and codified practice of informed consent did not exist; the concept and practice of refusing care if a patient so desired did not exist; and all medical practices surrounding ART were — and still are — strictly regulated and controlled. Thus, six inseminations and four cycles of in-vitro fertilization (IVF) are paid for by the healthcare system for women in heterosexual couples who are aged $\leq$ 43 years.

The sources of this reality lay in the widespread acceptance of 'paternalistic medicine', the perception that the patient was always vulnerable, and the adamant refusal of the concept or notion of autonomy (Rameix, 1995; Pierron, 2007). The important and accelerated role of the media and the Internet coupled with a series of events began to chip away at this foundation, and led patient groups and citizen associations to demand change. These events included, among others, the HIV-contaminated blood scandal (1983—1985; Riding, 1994); the birth of Amandine (1982; France's first baby conceived *in vitro*); the birth of Dolly the cloned sheep (1996) and President Chirac's ensuing speech on human reproductive cloning (Chirac, 1999); passage of the PACS (1999; Civil Union Contracts for hetero- and homosexual couples; PACS, 1999); the Perruche

'wrongful birth' case (Costich, 2006); and the Vincent Humbert case (2000—2003; assisted suicide; Henley, 2003). Considered together, such publicly discussed challenges to conventional notions of unwavering medical authority raised new challenges, both social and technological.

After 2002

Following passage of the Kouchner Law, the French context changed significantly (Loi Kouchner, 2002). Patients were now able to demand that her/his suffering be attenuated, and that s/he be fully informed and then consent or not to any medical decision or procedure. S/he could also now have access to her/his medical file, receive full and free legal assistance in the event of a medical or therapeutic accident, and partake in biomedical research. Full respect for her/his dignity was emphasized in the Law, as well as the principle of non-discrimination in access to health care (for health reasons, sexual orientation, age, sex, etc.), respect for her/his private life and the privacy of her/his medical information, and the freedom to choose one's own doctor or medical establishment.

To what extent is the law applied today? Many studies, among them those of the Centre d'études clinique at the Hôpital Cochin, still report serious discrepancies (Centre d'éthique clinique, 2020). There remain persistent gaps between what the law says — respect for dignity, privacy, access to files — and actual access to medical treatment or information. That being said, the latest revision of the French bioethics laws has brought about some changes. In large part, this can be attributed to coverage by the media and their representations of what occurs in the USA, where access to ART is not decided by the federal government. Parallel to this, one must highlight the strong mobilization of both advocates for same-sex couples' rights *and* conservative and/or religious groups against opening up access to homosexuals and/or single women (Merchant, 2019). This has led, at the time of writing, to allowing access to ART for all women, first passing the National Assembly on 27 September 2019; after the senate amendments, this access was finalized on 31 July 2020.

That being said, additional discriminatory measures remain; for example, access to ART for widowed women remains prohibited (even if they had started an ART procedure before their husband's death and had frozen embryos awaiting implantation), and, to the disappointment of same-sex family advocates, different kinship regimes have been established depending on whether the child is born into a heterosexual or homosexual couple.

USA

The political system in the USA is often described as a 'marble cake', decentralized in essence, and presenting intertwined and multiple state and local powers and competencies. This results in more rights and liberties for some to the detriment of others, a larger potential for abuse than in more centralized top-down forms of governance, and the important role of the judiciary *a posteriori* to resolve the seemingly endless conflicts that result (Merchant, 2016).

Behind this maze of unequal powers lies the fact that individual autonomy is taken for granted. It is generally understood to be a given, one that flows 'naturally' from another considered given, that is to say the notion of freedom, of liberty, the freedom to do with one's body as one wishes. Exercising one's autonomy is synonymous with exercising one's 'choice'.

These notions — freedom, liberty, autonomy, choice — are perceived to be protected by a constitutional right to non-interference by the Government in a variety of realms, beginning with free speech and extending to procreation. This constitutionally protected right is known as the 'right to privacy'.

In actuality, however, what exactly does the 'right to privacy' cover'? In the realm of reproduction, this right only means the right *not* to procreate. A constitutional right to procreate has never been established by the US Supreme Court. Secondly, this 'right to privacy' — be it in the realm of procreation, free speech, etc. — is not argued by the courts as based on promoting autonomy or the well-being of men and women for that matter. Its *raison d'être* is simply to fix a certain number of limits to state intervention in these aforementioned private spheres.

Genealogy of the 'right to privacy'

This 'right' does not exist in the US Constitution. There is no clause that refers to it at all. That being said, at different times in US history, this concept was presented, discussed and, in some cases, enshrined as a constitutional right. In 1888, for example, the legal scholar Thomas Colley spoke for the first time of the 'right to be left alone'. Soon after, in a famous article published in the *Harvard Law Review*, lawyers Warren and Brandeis (1890) pleaded for the protection of 'the sacred domains of private and domestic life'.

The notion of the 'right to privacy' reached the US Supreme Court in Olmstead v. United States (1928), wherein Justice Brandeis in his dissenting opinion reiterated comments on the 'right to be left alone', adding that it should be considered as 'the most comprehensive of rights and the right most valued by civilized men'.

Fourteen years later, in Skinner v. Oklahoma (1942) regarding the sterilization of second offenders as a form of punishment, the 'right to privacy' was developed in the majority opinion. It argued that the sterilization of second offenders in one state (in this case, Oklahoma) and not in another was an abuse of state power and a violation of the 14th Amendment's 'Equal Protection Clause'. In addition, this practice did not serve the interests of society such as sterilizing the 'unfit' did [see Buck v. Bell (1927) where forcible sterilization was upheld] because being a second offender had not been proven to be a hereditary trait while 'feeblemindedness' had.

Indeed, the Court was less interested in establishing a constitutional right to privacy in procreative matters, and more interested in harmonizing state penal laws and sanctions that, in this period of eugenic policies, were considered to be for the good of society [e.g. state-regulated birth control of those deemed unfit to reproduce (Haller, 1963; Smith and Nelson, 1989; Reilly, 1991; Kelves, 1995)].

The second wave of 'right to privacy' US Supreme Court decisions occurred 23 years later. First, in Griswold v. Connecticut (1965), the Court concluded that although a specific 'right to privacy' is not found in the US Constitution, certain clauses within the 'Bill of Rights' contained 'zones' or presented a 'penumbra' wherein this right thrived; certain clauses from the First, Third, Fourth and Ninth Amendments thus resulted in the creation of 'right to privacy' for married couples to access and use contraception. This constitutional argument was then extended to single persons and minors in 1971 and 1977 via the 'Equal Protection Clause' of the 14th Amendment in two subsequent cases: Eisenstadt v. Baird (1972) and Carey v. Population Services (1977).

Shortly thereafter, what was to become the elephant in the porcelain shop was decided: Roe v. Wade (1973). It is important to emphasize that *Roe* did not legalize recourse to abortion. Rather, it defined a very strict and limited framework within which, and in virtue of a constitutionally defined 'right to privacy' window, a woman could interrupt an unwanted pregnancy. The Court declared that this right was founded on a similar collection of clauses from different amendments, as in the case of Griswold's 'constitutional cocktail'. It then proceeded to create a trimester cut-off framework wherein, as the pregnancy advanced in time, the state's right to intervene and protect the life of a 'potential person' was greater than the woman's right to choose abortion.

Roe was hotly contested from the start by the two dissenting Justices, Rehnquist and White, who severely reprimanded the majority. In their minority opinion, they argued that abortion belonged to the realm of public health, and that the latter was the prerogative of states and their legislation based on the history, tradition, and the 9th and 10th Amendments to the Constitution. Indeed, this dissent was to become the driving juridical argument of the 'pro-life' movement and future presidential candidates around the issue of how to interpret the Constitution: should one rely on the doctrine of flexible interpretation as the *Roe* decision did (the Constitution is a 'living document') or on 'originalist' or a 'strict constructionist' interpretation of the US Constitution.

This debate exists to this day and has more often than not been decided in favour of the 'pro-life' movement. For example, in Harris v. McRae (1980), the Court declared that it was constitutional to prohibit federal public financing for abortions, even within the framework of the national Medicaid programme (healthcare services for the poor). Several years later, in Webster v. Reproductive Services (1989) and Planned Parenthood v. Casey (1992), the Court partook in the consolidation of the 'devolution revolution', rendering powers to decide the criteria of access to abortion back to the individual states. This has led us to the contemporary context wherein if *Roe v. Wade* were to be reversed by the US Supreme Court, 'trigger laws' are already in place in 21 states where abortion will be banned outright. In addition, if *Roe* is overturned, nine states plan to severely restrict its access, and in six states (including the District of Columbia), the right to abortion is, at present, at risk of being banned or severely restricted (Center for Reproductive Rights, 2020).

This brings us to the issue of access to ART and a 'right to privacy' that relies on what has become an obsolete decision in light of biomedical technological advances. Indeed, *Roe* is no longer sufficient to cover what is thought to be possible for all (i.e. no restrictions to access to ART).

First, from a juridical argumentative standpoint, *Roe* is criticized for its expansive interpretation of the Constitution (both in *Griswold* and *Roe*) with the creation of the aforementioned 'constitutional cocktail'. At the time, Justice Ruth Bader Ginsburg argued (she was not yet on the Supreme Court) that the 'Equal Protection Clause' of the 14th Amendment should have been used and not the 'Due Process Clause' (Waxman, 2018). In other words, there was no valid argument to allow for the discrimination against women and their bodies just because they got pregnant and men did not.

Secondly, critiques underline *Roe*'s 'original sin', that of having relied too heavily on the medical and scientific knowledge of the time so as to create a balancing test between the pregnant woman and the fetus, between her right to privacy and the state's right to intervene and protect the 'potential personhood' of the fetus. Indeed, no one foresaw the juridical challenges that *Roe* would face with changing fetal viability limits, the status of 'orphan embryos' following a successful IVF cycle, not to mention kinship issues with mitochondrial transfer procreation (still prohibited in the USA) or the potential for the artificial uterus. A perfect illustration of the limits of a woman's 'right to privacy' when based on *Roe* came with the 1992 *Davis v. Davis* case and the widespread referral to the doctrine of 'procreational avoidance' (Davis v. Davis, 1992). In this case, a divorced couple disputed the destiny of their frozen embryos: Mrs Davis wanted to have them implanted and create a family with her new husband; and Mr Davis refused and wanted them to be destroyed. The Tennessee Supreme Court ruled in favour of Mr Davis and served subsequently as an example to follow; one that the legal scholar Judith Daar has called the 'doctrine of procreational avoidance' (Daar, 2001).

More importantly, however, is the simple issue of access. Using contraception, having an abortion or procreating with the help of a medical team is expensive. In the aforementioned *Harris v. McRae* case, the majority decision agreed that one has the right to use contraception or get an abortion, just as one has the right to travel wherever one wants to; however, the state does not have to buy the 'plane ticket.

The result of this particular juridical mindset in the USA (i.e. rights exist but the Government does not have to pay for them) is that Medicaid only covers irreversible sterilization and implantable long-acting contraceptives (and does not cover the operation needed to remove them), very few health insurance plans cover infertility treatment, and only 17 states cover abortions for poor women (The Guttmacher Institute, 2020). The Affordable Care Act of 2010 ('Obamacare') tried to put an end to the latter fact, yet failed in a case brought before the US Supreme Court (Burwell v. Hobby Lobby Stores, 2014) where in a five to four decision, the Court argued that a company could refuse to finance the contraceptive mandate contained in Obamacare due to its religious convictions. In other words, the majority

opinion granted private companies the status of 'persons', and thus the power to invoke the terms of the Religious Freedom Restoration Act of 1993, and therefore refuse to apply certain clauses of the Affordable Care Act. The company in question, Hobby Lobby (associated with another company, Conestoga), may now refuse to finance certain forms of contraceptive methods provided for by the Affordable Care Act (such as the intrauterine device) because, according to the religious beliefs of this legal 'person', Hobby Lobby, these contraceptive methods are the same thing as an abortion (Burwell v. Hobby Lobby Stores, 2014).

Conclusion

This article has touched upon the differences in access to sexual and reproductive rights of women and men in France and the USA. It has hopefully made apparent that simply focusing on institutional norms in the two countries does not suffice in understanding how a specific public policy is formulated in the realm of health care or medicine. For example, the US constitutional right to privacy indirectly protects the freedom of men and women to sell their gametes, or for couples to enter into gestational surrogacy practices; however, privacy rights do not touch on anything about the socio-economic realities of these practices, especially in a globalized economy. Likewise, knowing that the French healthcare system provides free health care to all ignores the fact that some medical practices are not offered to certain categories of the population.

Moreover, analysing the functioning of political and judicial institutions does not reveal the diverse conceptualizations that underlie the relationships between the state and the civil society, and their consequences for public policy. Even when discussing the juridical perspective in the realm of health care and medicine, few analyses provide an explanation as to why individual liberties vary in degree and intensity from one country to the next (*i.e.* why the 'right to privacy' is predominant in the USA, and why the human rights principle and respect of bodily integrity and human dignity prevail in France).

Hence, it is necessary to compare and contrast the two countries from the standpoint of other disciplines, as in this collection of articles. This intellectual exercise raises important questions, such as 'are both countries as different as they appear to be, or do certain overlaps exist, and if so, which ones?' For example, does French civil society now place a high value on autonomy because it is an 'American' value, and likewise do opponents in France of open access to ART reject autonomy arguments for the very same reason (Ogien, 2009, 2010; Hurpy, 2013)? In the contemporary US presidential campaign (and in the 2016 presidential election), many candidates and categories of the population then and now seem to emphasize human rights and a sociodemocratic approach. Are they doing so because they are 'French' values (Fielding and Lancry, 1993; Starr, 2013)? In answering these questions, one understands that it is useful to look comparatively at both countries when trying to improve public policy.

Meanwhile, a comparative approach can also shed light on the weak points of each country's approach to health care in general, and access to ART in particular. For example, the French concept of 'solidarity' is bewildering. What is solidarity? How is it defined and perceived of by the civil society? Is it just about paying taxes? If this is the case, then we should be concerned that the anti-tax 'Government is the problem' (Reagan, 1981). A crusade, observable in the USA since Ronald Reagan coined the expression, has been creeping into France over the past 20 years, and has gained traction with the *Gilets jaunes* (Yellow Vests) movement (Delalande, 2011; Spire, 2018; Tonnelier, 2018).

Likewise, the utter dysfunction of the 'right to privacy' in the USA comes to the fore when a comparative study is carried out. Indeed, there is a pressing need to rethink and reformulate this 'right' in a way that would result in genuine access for each person to exercise her/his autonomy. Some legal scholars have been working hard on reformulating *Roe* in the event that it is reversed. Their suggestions are based on recourse to three previous US Supreme Court decisions in the effort to adapt them to a new 'right to privacy' framework in matters of reproductive rights (Washington v. Glucksberg, 1997; Bragdon v. Abbott, 1998; Lawrence v. Texas, 2003; Balkin et al., 2005); one that would rely not on the 'Due Process Clause' but on the 'Equal Protection Clause' of the 14th Amendment.

Whether in France or the USA, it is clear that, through comparative analysis, both countries can not only learn from each other, but can be inspired by public policy measures of the other in an attempt to improve their own. The USA is facing one of its most important (if not the most important) presidential and congressional elections in 2020. France has only just significantly changed its access to ART; meanwhile, President Macron is fighting right-wing extremism on all fronts, both within the country and in neighbouring countries (i.e. Italy, Hungary). Both countries should act towards guaranteeing the reproductive rights obtained thus far, and expanding them to all who still do not have access.

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