

# Natural Law Bioethics and Redefinition of Post-Modern Reproductive Legal Rationality

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## Abstract

Postmodern reproductive legal rationality is overtly driven by amorphous concepts of law, ethics, justice, rights and freedom which are diminutive of human life and dignity especially the life and dignity of the unborn and the child. These reproductive legal parameters, one way or another, hold out the unborn and the child as objects of possession and property of the parents. This legal minimalization of the status of the vulnerable unborn and the child is obviously inimical to their membership of the human family with its grave socio-economic and medico-technological consequences. The postmodern strategy is to enlarge the boundaries of parental reproductive rights and freedom-out-of-proportion and so to pitch the parents against their unborn/born children. By promoting such exaggerated regime of parental autonomy, postmodernism arrests and implicates law and ethics with intentions contrary and disruptive of the filial bond between parents and their unborn/born children. This development makes a mess of the dignity of parenthood and grossly undermines the sanctity of human life in general. The objective of this paper is to critique the postmodern reproductive legal rationality, x-ray its consequences especially in respect of whether or not to reproduce, how to reproduce and when to reproduce. To achieve these objectives, the doctrinal methodology and hermeneutical approach are used extensively. It is the finding of this paper that, postmodern reproductive legal rationality challenges the inherent order of the human nature and contradicts the proper teleology of the human reproduction. All-in-all, this paper recommends a recourse to the principles of natural law for the purposes of proper definition of the relevant reproductive-legal rationality that drives conversations in the field.

**Keywords:** Natural Law, Reproductive Law, Legal, Bioethics,

## 1. Introduction

The advent of postmodernism with its idolization of subjectivism has significantly altered the landscape of reproductive justice, law, and ethics. The emphasis on reproductive rights and freedom has led to a paradigm shift, where the notion of choice has become the overriding principle guiding reproductive decisions. However, this shift has also been accompanied by a plethora of heinous consequences, including the resurgence of eugenics, the commodification of human life, and the erosion of the inherent dignity of the human person. Further to this, the postmodern emphasis on reproductive rights and freedom has proven to be destructive of human nature and the proper end of human reproduction. By handing over to choice, the governance of human body even when it negatively impacts on the most vulnerable members of the society, the unborn and the child, postmodern reproductive rationality has created a culture of disposability, where human life is increasingly seen as a mere commodity to be used and discarded at will. Also, the postmodern emphasis involves the active removal of barriers on the way to limitless reproductive license. This has led to a situation where the reproductive rights of individuals are prioritized over the wellbeing and dignity of the most vulnerable members of society. The consequences of this approach are far-reaching and devastating, leading to a culture of death, where human life is increasingly devalued and discarded.

In this paper, we argue that the way out of this reproductive chaos is a paradigm return to the scholastic emphasis on natural moral order. By rediscovering the natural law principles that undergird human reproduction, we can reclaim a more balanced and sound reproductive justice, one that prioritizes the dignity and wellbeing of all human persons, from conception to natural death. This approach offers a more hopeful and life-affirming vision of human reproduction, one that is grounded in the natural moral order and the inherent dignity of the human person.

## 2. Natural Law and Reproductive Justice

Reproductive Justice has been defined as the complete physical, mental, spiritual, political, social and economic well-being of women and girls, 'based on the full achievement and protection of

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women's human rights'<sup>1</sup> Recently, it has come to mean the human right to control our sexuality, gender and reproduction. As a matter of fact, reproductive justice focuses on broader concerns than reproductive health and rights movements. It is minded to enable people, especially women, make self-determining choices about their bodies, children and family. Particularly, reproductive justice relates to a critical feminist framework which incorporates wider economic, social and health factors into the legal and political concerns that define reproductive rights. In this way, it operates to impact more significantly on women's reproductive choices and decision-making ability.<sup>2</sup> From this point of narrative, reproductive justice, implies a situation whereby persons are enabled to take uninfluenced decisions about their reproductive lives and have unhindered access to whatsoever will assist them live out their options. Such options include but are not limited to personal choices to avail oneself of the promises of assisted reproductive technologies. The justice of the situation is realized where, the various reproductive options are available and the personal choices are unhindered neither by law/policy nor by any socio-economic obstacle. In effect, the end of reproductive justice is such a time and condition when everyone has the economic, social and political power and resources to make healthy decisions about their bodies, sexuality and reproduction.<sup>3</sup> There are three primary principles undergirding the concept and practice of reproductive justice and they include:

(1) the right not to have a child (2) the right to have a child (3) the right to parent children in safe and healthy environments.<sup>4</sup>

In respect to the right not to have a child, it appears that there is a duty on the state to ensure, by law, policy and otherwise, that persons who do not want to have children can take the options of contraception, sterilization and abortion. And concerning the right to have a child, advocates of reproductive justice regime, press hard for a less or un-regulated assisted reproductive technologies. By this, persons can freely choose to have children without hindrances either as singles, same-sex couples etc. Also, reproductive justice argues that the right to have a child, includes the choice of the method, process or procedure for achieving the same. In that perspective, the difference between natural and technicalized conception lies in each being an alternative to the other, by reason of personal choice or preference. These positions have been held defended and advanced in one way or the other by the vendors of reproductive justice. Notable contributors in this field include but are not limited to: Dorothy E. Roberts,<sup>5</sup> Z Luna,<sup>6</sup> R Solinger,<sup>7</sup> K W Crenshaw,<sup>8</sup> and L Ross and R Solinger.<sup>9</sup>

In a plethora of Supreme Court decisions in various global jurisdictions the courts have strongly pressed the point of reproductive justice and have promoted the same. For instance, the German

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<sup>1</sup> 'Reproductive Justice' <<https://www.google.com/search?q=reproductive+justice+ie=UTF>> accessed on 27/05/2023.

<sup>2</sup> A Sanger, *Beyond Choice: Reproductive Freedom in the 21<sup>st</sup> Century* (New York: Public Affair Press, 2004) pp19-47.

<sup>3</sup> cf. 'What is Reproductive Justice – Forward Together' <<https://forwardtogether.org/what-is-reproductive-justice>> accessed on 20/06/2024.

<sup>4</sup> L Ross *et al*, *Radical Reproductive Justice* (New York: Feminist Press, 2017).

<sup>5</sup> *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Vintage Press, 1997).

<sup>6</sup> 'Reproductive Rights in a Global Context: South Africa, Uganda Peru, Denmark, United States, Vietnam, Jordan' *Vanderbilt Journal of Transnational Law*, [2010] (43)(3) 733-784.

<sup>7</sup> *Reproductive Politics: What Everyone Needs to know* (Oxford: Oxford University Press, 1992).

<sup>8</sup> Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Colour' [1991] (43)(6), *Stanford Law Review*, 1241-1299.

<sup>9</sup> *Reproductive Justice*, (California: University of California Press, 2017).

Supreme Court<sup>10</sup> in 2010 upheld the legality of Pre-implantation Genetic Diagnosis (PGD) under certain conditions. It further recognized the right to reproductive self-determination. Similarly, the Supreme Court of Canada<sup>11</sup> in the same year, while considering the constitutionality of certain provisions of the Assisted Human Reproduction Act, which regulates assisted reproductive technologies, confirmed the importance of protecting reproductive health and autonomy. In the same vein, the Supreme Court of Israel<sup>12</sup> in 2007 struck down a regulation that restricted access to assisted reproductive technologies based on marital status or sexual orientation. The Court held that such discrimination violated principles of equality and reproductive autonomy. Also, the European Court of Human Rights (ECHR)<sup>13</sup> pushed the frontiers of reproductive justice further by recognizing the right to access ART as part of the right to private and family life under the European Convention on Human Rights. While holding that the state's ban on anonymous sperm donation violated the applicant's right to respect for their private lives, the Court affirmed, without prevarication, the importance of reproductive autonomy and decision-making.

But from a natural law perspective, reproductive justice is a five-way traffic: justice for the woman/man who are desirous to have children by any means; justice for the child who is to be conceived; justice for the gamete donors; justice for the surrogate mother if involved; and justice for the human nature and humanity as a whole. Before one can rely on any conclusion as an outcrop of reproductive justice, these five situations must be balanced. A situation which favors the cravings of the man/woman desirous to have a child without considering the child to be conceived and the human nature as a whole is not just, but discriminatory. For men are under a serious obligation to respect the natural order of things and the best interest of the child to be born. Hence all technologies for controlling human reproduction must be subject to the demands of human nature, the best interest of the child and the needs of the man/woman desiring a child.<sup>14</sup> What is radically lacking in the modern reproductive justice narrative is justice for the human nature, justice for the child of ART and justice for the discarded embryos including those 'frozen' for another cycle of ART or preserved for research purposes. In defending a single traffic justice for the woman/man desiring fertility treatment, modern reproductive justice narrative fails the test of what is just. If justice is about giving each person or entirety its due, natural law requires that in enforcing one's due by the exercise of one's right, a person ought not to act in a way prejudicial to or inconsistent with what is due to others. In a context in which another has a right, the other one has a correlative duty and does not have a liberty of action. A good number of the ART procedures are obviously unjust to humanity and the human nature. According to M L Cook: 'These technologies place on our horizon unprecedented human control over our own genetic futures, our social and kinship patterns, and our relationship with our siblings and our offspring.'<sup>15</sup> In response to the suffering of infertile couples who want to have children, it is argued from the natural law perspective that couples do not have a right to a child. Such a right would make the child an 'object of ownership'.<sup>16</sup> It is indeed the tacit position of the natural law jurisprudence that: "A child is not something owed to me, but a gift. The supreme 'gift of marriage' is a human person. A child may

<sup>10</sup> Bundesverfassungsgericht (Federal Constitutional Court) Decision on Embryo Protection, IBvR420/09 (2010).

<sup>11</sup> cf. Assisted Human Reproduction Act Reference, 2010 SCC61-Supreme Court of Canada.

<sup>12</sup> *Levy v Israel Ministry of Health*, HCJ 3159/05 (2007) – Supreme Court of Israel.

<sup>13</sup> *S. H. and others v. Austria*, Application no. 57813/00 (2011) – European Court of Human Rights.

<sup>14</sup> cf. 'Reproductive Technology' <<http://www/med.nyu.edu>> accessed on 27/05/2024.

<sup>15</sup> M L Cook, Markkuka Centre for Applied Ethics 'Reproductive Technology and the Vatican', <<https://www.scu.edu/ethics/fucus-areas/religious-and-catholic-ethics/resources/reproductive-technologies-and-the-vatican/>> accessed on 01/07/2024.

<sup>16</sup> *Ibid*

not be considered a piece of property, an idea to which an alleged ‘right to a child’ would lead. In this area, only the child possesses genuine rights: the right ‘to be the fruit of the specific act of the conjugal love of his parents’, and the right to be respected as a person from the moment of his conception.”<sup>17</sup>

Hence, adults by reason of the natural law, have natural rights to many things but not to a child. This is because the child is but a gift. As a matter of fact, it is of the nature of a gift that it is never required or demanded. Were it to be demanded or required, it ceases to be a gift. The reproductive justice reasoning is such that once a child is thought to be owed to me or thought to be a right, then there is a duty on the society, state or the whole world to have it supplied to me as a matter of justice, after all, our rights are owed to us. Anytime one buys into this reproductive justice argument, then, one begins to justify the ways in which he/she will get the children which are owed. In which case, a human child is now a commodity to be made and possessed. And once a child is considered a piece of property, ‘...all manner of injustice against the child is now permissible...buying it, selling it, manipulating it, disposing it’<sup>18</sup> Suffice it to observe that the substance of the natural law critique of modern reproductive justice arguments as it relates to the child is that children are not one of the many ways available for realizing oneself and are not the possession of their presents.<sup>19</sup> Indeed, the essence of the UN Convention on the Rights of the child is that ‘Children are neither the property of their parents nor are they helpless objects of charity’.<sup>20</sup> Indeed, some of these assisted reproductive technologies, outrightly violate a more important right of the child namely, the right ‘to be conceived, carried in the womb, brought into the world and brought up within marriage.’<sup>21</sup>

### 3. Natural Law and Reproductive Law and Ethics

Reproductive law and ethics consist of a class of legal and ethical principles/rules relating to human reproduction. These principles of law and ethics operate to regulate the very many, often, controversial issues arising from modern advances in human reproductive technology namely: the use of reproductive materials like sperm, eggs, and embryos as well as the rights and responsibilities of persons in the realm of reproduction. Some major contributors in the field of Reproductive Law and Ethics include but are not limited to: M A Glendon,<sup>22</sup> an expert on reproductive rights, bioethics, and family law, who has contributed immensely to the understanding of the legal and ethical dimensions of reproductive technologies; R Macklin,<sup>23</sup> who has written extensively on reproductive autonomy, surrogacy, and the ethics of reproductive technologies; J. A Robertson,<sup>24</sup> who made great entries on the legal implications of assisted

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<sup>17</sup> The Catechism of the Catholic Church (CCC) 78.

<sup>18</sup> L Miller, ‘Children are a Gift not a Right’ <<https://www.catholic.com/magazine/online/i-was-astonished>> to find this-> accessed on 29/06/2024.

<sup>19</sup> Pope Francis, ‘The Right not have a child’ <<http://www.the-guardian.com/word/2015/Feb/11/Pope-Francis-the-choice-to-not-have-children-is-selfish>> accessed on 03/04/2024.

<sup>20</sup> Vatican Denies Obligation to uphold children’s right in the church’ <<https://www.concordatwatch.eu/vatican-denies-obligation-to-uphold-children’s-rights-in-the-church-2013-t-50219>> accessed on 17/04/2024.

<sup>21</sup> M L Cook, *op. cit.*

<sup>22</sup> cf. *Rights Talk: The Impoverishment of Political Discourse*, (New York: Free Press, 1991).

<sup>23</sup> cf. *Surrogates and other Mothers: The Debates Over Assisted Reproduction* (Philadelphia: Temple University Press, 1994).

<sup>24</sup> cf. *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994).

reproduction; L Andrews,<sup>25</sup> who explored various legal and ethical aspects of reproductive technologies, including genetic testing, cloning, and surrogacy; L Francis<sup>26</sup> and R Scott,<sup>27</sup> who rigorously, explored the intersection of law, ethics and reproductive decision making. Among the many areas covered by these principles of postmodern law and ethics are: assisted reproductive technology (ART), Invitro Fertilization (IVF), Surrogacy, assisted hatching, (Assisted hatching is a procedure performed during IVF in which a small hole is created in the outer shell [(Zona Pellucida) of the embryo to facilitate its implementation in the uterus], pre-implantation genetic diagnosis, genetic testing and selection, contraception and abortion etc. In particular, reproductive law concerns a set of legal rules/frameworks that govern issues appertaining to human reproduction.<sup>28</sup> It has been defined as: "...the branch of law that deals with legal issues arising from the use of assisted reproductive technologies, surrogacy, and other forms of reproductive intervention, as well as issues related to reproductive rights and the legal status of embryos and fetuses."<sup>29</sup>

Reproductive laws vary from country to country and cover such areas as: legal status of the embryos, parental rights and responsibilities, the rights of donors and surrogates, informed consent and resolution of disputes related to reproduction. On the other hand, reproductive ethics relates to ethical and moral considerations of reproductive options and practices. In very special ways, it engages the issues of; the value of human life at its beginnings, the autonomy of individuals, the rights of the child, the status human nature and humanity in connection with reproduction. Controversial ethical debates vis-à-vis human reproduction, often arise in respect of such areas as assisted reproductive technologies, sex selection, eugenics and genetic selection. Also, ethical conversations are sustained in the allied areas of commodification of reproduction and gametes, the use and disuse of reproductive materials as well as the boundaries of human reproductive rights.<sup>30</sup>

Any authentic reproductive law and ethics must strike a balance between individual rights and societal interests. Hence while promoting the autonomy and well-being of individuals, it must at the same time consider the many ethical concerns implied and also protect the rights of all the parties involved. Above all, such a legal and ethical framework must address in its sufficiency, the implications of reproductive practices and options for human nature. In this way, it shall be clear enough that law and ethics are made to serve man and not man to serve law and ethics. Furthermore, to be relevant, the laws and ethics of reproduction must be objective in their principles but dynamic in their applications. Thus, as science and technology evolve in their service to human reproduction, the regulatory systems of law and ethics must also rise to the occasion of the reproductive novelties. In this way, reproductive law and ethics shall provide necessary

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<sup>25</sup> cf. *The Clone Age: Adventures in the New World of Reproductive Technology* (New York: Henry Holt and Company, 2000).

<sup>26</sup> *Rights and Reproduction: The Moral and Legal Issues of Preserving Obligations to Future Generations* (Bloomington Indiana University Press, 2002).

<sup>27</sup> *Human Rights and the Ethics of Transnational Surrogacy* (Cambridge: Cambridge University Press, 2016).

<sup>28</sup> Universal Declaration on Bioethics and Human Rights, 2005; Convention on Human Rights and Biomedicine, 1997; The UN Declaration on Human Cloning, 2005 etc.

<sup>29</sup> IG Cohen, *Reproductive Technologies: Legal Issues* in Danan Gu and Matthew E. Dupre(eds.), *Encyclopedia of Gerontology and Population Aging* (Switzerland: Springer International Publishing, 2017) pp 1-6.

<sup>30</sup> See Generally G Marti, and FS Elizabeth, (eds.), *Reproduction, Ethics, and the Law: Feminist Perspectives* (Oxford: Oxford University Press, 2013).

guidelines for policymakers, and healthcare professionals as they navigate the complex terrain of reproductive decision making.

From the perspective of natural law jurisprudence, substantial case has been made out against postmodern reproductive laws and ethics. Considering that there are inherent moral principles that govern human reproduction; recognizing that the said principles are derived from the nature of human beings and the natural order of things; acknowledging that the principles are objective and discoverable through the light of reason; the advocates of natural law argue that only such universal, immutable and indispensable principles shall anchor our understanding of what is morally right or wrong in the realm of reproductive practices.

Postmodern reproductive law and ethics, while pretending to promote autonomy, has undermined the sanctity of life by treating embryos as commodities or disposable entities. For instance, in *Tysiak v Poland*,<sup>31</sup> the European Court of Human Rights found that Poland had violated a woman's rights by denying her access to an abortion, despite her medical condition and doctors' recommendation.<sup>32</sup> The natural law approach, on the contrary, emphasizes the inherent dignity and value of human life and contends that every human life, from the moment of conception, possesses an inherent dignity that should be respected. In this way, it presents a counterpoint to postmodern reproductive law and ethics.

Also, natural law advocates hold as self-evident the fact that the institution of the family and the natural process of procreation are essential to human well-being and survival of humanity. And from this vantage point, they critique postmodern reproductive laws and ethics which promote such practices as surrogacy or gamete donation as disrupting the natural bonds and relationship between parents and children. In this way, postmodern reproductive laws and ethics aid to undermine the fundamental importance of the biological and social bonds that exist within the family structure.<sup>33</sup>

One of the dangers lurking in the future of ART as currently sustained by the postmodern reproductive laws and ethics is the issue of genetic consequences like eugenics. Indeed, the use of genetic engineering techniques such as pre-implanting genetic diagnosis and gene editing will likely lead to a regime of designer babies. In such a regime, genetic discrimination becomes prevalent. In this connection, natural law experts have argued that accessing the structures of human genetics and editing same for eugenic purposes means interfering with the purpose of nature, manipulation, exploitation and instrumentalization of the human person with far-reaching long-term effects.<sup>34</sup>

Natural law proponents arguing from the backdrop of an inherent order of the human nature and the teleology of human reproduction<sup>35</sup> challenges the notion of absolute reproductive rights and freedom. They insist that an authentic reproductive law and ethics must conform to the uniqueness

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<sup>31</sup> Application No. 5410/03 (2007).

<sup>32</sup> See also *Roe v Wade*, 410 U. S. 113 (1973) United States, *Planned Parenthood Casey*, 505 U. S. 833 (1992) United States.

<sup>33</sup> cf. ZB Ardakani et al, 'The Impact of Third Party Reproduction on Family and Kinship' (2021)(22)(1), *Journal of Reproduction and Infertility*, 9

<sup>34</sup> cf. J Daar, 'The New Eugenics – Selective Breeding in an Era of Reproductive Technologies: A Review Essay, (2018)(44)(3) *Journal of Population Development Review*, pp 627-638.

<sup>35</sup> 'Is there an Inherent order in nature or just chance' <<https://www.quora.com/Is-there-an-inherent-order-in-nature-or-just-chance>> accessed on 07/06/2023.

of human nature<sup>36</sup> and reproductive faculties. This is because, there are inherent responsibilities associated with human reproduction. A natural law oriented reproductive law and ethics departs from an individualistic perspective to a human nature approach. It balances the well-being of all the parties involved in ART for instance namely: the child, the parents, and the broader community and insists that the human nature sets a limit to the liberty exercisable in reproductive freedoms.

#### 4. Natural Law and Reproductive Rights

Reproductive rights refer to the legal and ethical rights of individuals to make decisions regarding their reproductive health and autonomy. They are therefore, human rights grounded on principles of bodily autonomy, privacy and gender equality. It has been aptly defined as: “A person’s constitutionally protected rights relating to the control of his or her procreative activities; ...the cluster of civil liberties relating to pregnancy, abortion, and sterilization..., the personal bodily rights of a woman in her decision whether to become pregnant or bear a child. The phrase includes the idea of being able to make reproductive decisions free from discrimination, coercion, or violence.”<sup>37</sup> As it were, reproductive rights are legal rights relating to reproduction and reproductive health. As a concept, it is often used interchangeably with reproductive choice, Planned Parenthood and general ideas of bodily integrity.<sup>38</sup> Reproductive rights evoke a pervasive sense of procreative liberty and freedom to choose and further relates to having the ability to decide whether and when to have children.<sup>39</sup>

In general, the following class of rights are recognized as belonging to reproductive rights group namely: right to contraception, right to abortion, right to fertility treatment, right to reproductive health and access to information about one’s reproductive body.<sup>40</sup> Put a little differently, reproductive rights operate to secure people’s freedom to decide about their body’s capacities to or not to reproduce. In this way, postmodern reproductive rights’ advocacy intends to handover to individuals, the power to determine, unrestrictedly, what to do with their own body. Unfortunately, in most cases, such determinations, affects the rights of other persons, especially, the pre-born children. Pursuant to reproductive rights, a woman can lawfully decide to abort a child in the womb, persons can lawfully decide to submit their unimplanted embryos to the laboratories for research purposes and leftover embryos can as well be destroyed etc.<sup>41</sup>

Suffice it to point out that reproductive rights consist of three broad categories of rights namely

(1) right to reproductive self-determination (2) right to sexual and reproductive health services (3) right to equality and non-discrimination.<sup>42</sup>

The laws and courts in various jurisdictions have supported the postmodern reproductive rights statements and anchored its extreme claims. Hence, in the American case of *Roe v. Wade*,<sup>43</sup> the Court established the constitutional rights to abortion. By extension, it approved of multi-fetal

<sup>36</sup> ‘Human Nature’ <[https://en.m.wikipedia.org/wiki/Humans\\_nature#](https://en.m.wikipedia.org/wiki/Humans_nature#)> accessed on 3/07/2023.

<sup>37</sup> B A Garner (ed.), *Black’s Law Dictionary* (9<sup>th</sup> edn, Minnesota: Thomson Reuters, 2009) p 1418.

<sup>38</sup> Reproductive Autonomy <<https://www.oxfordconference.com/display>> on 05/05/2023.

<sup>39</sup> Reproductive Rights <<https://statusofwomendate.org/explore-the-data/reproductive-rights>> accessed on 19/5/2023.

<sup>40</sup> C Schurr and E Miltz, ‘Reproductive Rights’ in Akobayachi (ed.), *International Encyclopedia of Human Geography* (2<sup>nd</sup> Edn, Amsterdam: Elsevier, 2020) pp 433-442.

<sup>41</sup> cf. J N Erdman and R J Cook ‘Reproductive Rights: An Overview in Harold Kristian (ed.), *International Encyclopedia of Public Health* (2<sup>nd</sup> Edn, Amsterdam: Academic Press, 2008) pp 532-538.

<sup>42</sup> Reproductive Rights <<https://www.sciencedirect.com/topics/socialsciences/reproductive-rights>> accessed on 29/05/2023.

<sup>43</sup> 410 U. S. 113 (1973).

reduction procedures which is common in ART. This decision establishing right to abortion was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v Cassey*<sup>44</sup> where it was further stated that it is wrongful to place an undue burden on a woman's right to choose what she does with her body even in reproduction.<sup>45</sup> It was left for the American Supreme Court in *Gonzales v Carhart*<sup>46</sup> and *Burwell v Hobby Stores, Inc.*,<sup>47</sup> to reinforce the legality of postmodern reproductive rights. Note that many reputable scholars have made significant contributions in the field of reproductive rights. They include but are not limited to: M Sanger,<sup>48</sup> Simone de Beauvoir,<sup>49</sup> Germaine Greer,<sup>50</sup> Shere Hite,<sup>51</sup> Rebecca Traister,<sup>52</sup> and Gloria Steinern.<sup>53</sup>

The Natural law intervention discloses in the reproductive rights discourses, a misinterpretation of the term right. As it were, the term right is in pari materia with the Latin 'Jus' and there are two senses to it. In the first place, the 'right' relates to the moral sense of that which is righteous as opposed to evil. Hence, it is said that man is under obligation to do the 'right'. In this sense, the right means the morally sound, the morally correct, the morally obligatory and that which is just. In the second place, 'a right' as in the right to reproduce, derives its authenticity from the first sense of 'right' – the moral right. Indeed, the relationship between the first and the second sense of right was properly expressed by Mullaney when he observed that 'Every 'a right' is simply a claim to pursue the 'the right'.<sup>54</sup> For instance, I have 'a right' to life and 'a right' to human dignity because they are morally good things (the right) for the flourishing of man. The Natural law Jurisprudence has proceeded to demonstrate how 'the right' gives rise to 'a right' in this way: "The function of natural law is to make 'the right' obligatory, binding on human person. Now when the law commands some phrase of 'the right' it gives right to a duty in the persons so commanded. And duty in turn gives rise to 'a right', a moral claim to the means necessary to fulfill the duty. The sequence is as follows: (1) the right, (2) is made obligatory by law, (3) which gives rise to a duty in those bound by the law (4) which postulates in those so bound, a right to the means necessary to fulfill the duty. The right, law, duty, a right: such is the sequence."<sup>55</sup>

Accordingly, it is trite that my rights, spring proximately from my duties; immediately from the law; and ultimately from the claims of righteousness – the right, the moral universe upon me. This indeed is the history of any natural right. Ipso facto, for the right to reproduce or other kindred reproductive rights to be authentic, they must derive from and be guided by the moral universe in terms of the objective righteousness. Any other way to it, errs either by excess or defect. In this way, any reproductive right which cannot be traced in this order fails. And this is the error of post modern reproductive rights. Without doubt, what is currently being brandished and projected as reproductive rights is nothing short of consequentialism. The substance of this is that – if for instance, securing an abortion or undergoing any assisted reproductive procedure will make a

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<sup>44</sup> 505 U. S. 838 (1992).

<sup>45</sup> See also *Whale Woman's Health v Hellersdet*, 579 U. S. 15 (2016).

<sup>46</sup> 550 U. S. 124 (2007).

<sup>47</sup> 573 U. S. 682 (2014).

<sup>48</sup> *Woman and the New Race* (New York: Bretano's Publishers, 1920).

<sup>49</sup> *The Second Sex* (Paris: Gallimard Publishers, 1949).

<sup>50</sup> *The Female Eunuch*, (London: MacGibbon & Kee Publishers, 1970).

<sup>51</sup> *The Hite Report: A Nationwide Study of Female Sexuality* (New York: Macmillan Publishers, 1976).

<sup>52</sup> *All Single Ladies: Unmarried Women and the Rise of an Independent Nation* (New York: Simon & Schuster, 2016).

<sup>53</sup> *Outrageous Acts and Everyday Rebellions* (New York: Holt, Rinehat, and Winston Publishers, 1983).

<sup>54</sup> JV Mullaney, 'The Natural Law, Family and Education', 24 *Fordham L.*, Rev. 104 (1955).

<sup>55</sup> *Ibid*

woman feel good, then the said abortion or procedure is not wrongful. Meanwhile, that a thing is not wrongful, does not make it good.<sup>56</sup>

Thus, from a natural law narrative and without prejudice to the sufficiency of the reproductive rights, those rights, will become flawed in any way they pretend to prevail against 'the right'. This means that, where for instance the claim to reproductive self-determination violates the sanctity and dignity of human life, human nature and human reproduction, it will collapse on its weight, dead, as it were, on arrival. This is exactly the fate of the postmodern pretensions to reproductive self-determination. Similarly, in whichever way, the proponents of postmodern reproductive rights, while upholding the right to enjoy scientific progress, attempt to demonstrate that technology can be utilized to shape the conditions of human reproduction without reservations, they fail the test of the natural law.

Interestingly, the natural law regime was revived in the history of reproductive rights in the United States when in the case of *Dobbs v Jackson Women's Health Organization*,<sup>57</sup> the Supreme Court overturned *Roe v Wade*,<sup>58</sup> which for 50 years has guaranteed a constitutional right to abortion. Indeed, the landmark case of *Dobbs v Jackson Women's Health Organization* set in motion the review of postmodern reproductive arrogance and provides a counterpoint to same from a natural law rationality. It legitimized the concept of fetal life and protection in the face of women's ambitious claim to unfettered bodily autonomy.<sup>59</sup> Hence, at the oral argument in the case, counsel to the plaintiff repeatedly referred to fetuses as 'unborn children' and 'unborn girls and boys.'<sup>60</sup>

In furtherance of the natural law critique of postmodern reproductive rights, it has been shown that a reliance on right to privacy argument exclusively, is harmful to the rights of the unborn. Proponents of 'privatism' allude to many and varied interests which the international community has taken to in relation to the right to privacy. From such international support-base, they conclude, albeit wrongly, that everything about reproduction, marriage and family should be anchored on the exclusive preserve of 'choice'. Indeed, art. 12 of the Universal Declaration of Human Rights; art. 17 of International Covenant on Civil and Political Rights; art. 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms; art 7 of the Charter of Fundamental Rights of the European Union and art. 11 of the American Convention on Human Rights, are all in support of the right to privacy<sup>61</sup> as a defence for all forms/manners of reproductive options. This is but a step taken too far and it ends in an obnoxious fallacy. While right to privacy includes the right of a person to choose how to live his or her life and the right of a person to consent to the effects of a private party on his or her bodily integrity,<sup>62</sup> it does not claim to be absolute otherwise

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<sup>56</sup> cf. Pro-Reproductive Rights <<https://gradesfixer.com/free-examples/pro-reproductive-right-a-Christian-Immorality/>> accessed on 3/5/2023.

<sup>57</sup> 597 U. S. (more) 2022 WL 2276808; 2022 U.S Lexis 3057.

<sup>58</sup> *Supra*.

<sup>59</sup> cf. I Giles, 'Collateral Effects of Overturning Roe v. Wade: Expansion of Criminal Prosecutions and Penalizations against Pregnant Women' in *Georgetown Journal of Poverty Law and Policy* <<https://www.law.georgetown.edu/poverty-journal/blog/>> accessed on 27/5/2024.

<sup>60</sup> Transcript of Oral Argument at 5, *Dobbs v. Jackson Women's Organization* (U.S. argued Dec. 1, 2021), No. 19-1392 (2021).

<sup>61</sup> cf. F Falana, *Cases and Materials on Women Right Law* (Lagos: Legal Text Pub., 2008) pp. 157-221.

<sup>62</sup> EL Mc Donagh, 'My Body, My Consent: Securing the Constitutional Right to Abortion Funding' (1999) *Albany Law Review* <<http://en.wikipedia.org/wiki/Abortion.debate>> accessed on 21/02/2024.

it lapses into privatism. Indeed, ‘the right to be left alone’<sup>63</sup> as privacy is popularly tagged does not leave all questions relating to bodily integrity, procreation, marriage and sexuality, open to self-defining choices. If it does so, it falls prey to reductionism. The point of the natural law is that when concepts of autonomy in reproductive decisions are given wide constructions unimpeded by purpose, nature and morality, all imaginable human acts can conveniently be defended under the umbrella of right to privacy. Nature and reason as a matter of facts sets limit to personal independence in reproductive matters. Note that a limitation introduced by nature and reason cannot be said to be arbitrary. The point constantly made by privacy advocates is that because privacy protects self-defining and self-expressing activities, any attempt to limit it would be seen as arbitrary. Suffice it to say that limitations imposed upon the right to privacy by well-meaning legal systems are apropos and required. Such legal systems in construing the meaning of privacy, understand that autonomy without transcendence and/or relationality is an affliction to law and society. Thus, while observing the inviolability and /or sacrosanctity of the right to privacy, it must be understood that law and policy are allowed to invade the privacy of persons, in some cases, for compelling state/humanity interest. Note also that the compelling state ‘interest-test’ has been developed in accordance with standards of strict scrutiny.<sup>64</sup> Particularly, a clue can be taken from section 45 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)<sup>65</sup> which allows derogations from all rights as shall be reasonably justifiable in the interest of public defense, safety, order, morality or health, or for the purposes of protecting the rights of others. In that sense, the interest of public morality, human dignity, health, and even respect for the rights of unborn children are enough to derogate from the right to privacy in the reproductive domain. This will mean that a consideration of the above factors belongs to the class of that which is reasonably necessary for the strict regulation of assisted reproductive novelties and interventions. Hence not to anchor reproductive decisions on objective standards will arguably be an affliction on the dignity of human privacy and more so, an attack on society’s health. The substance of the argument is that at all times, the good, the true and the beautiful must be strictly considered in law and policy making. Looked at from a slightly different angle, pressing the right of privacy too far is objectionable because from a natural law angle, it is likely to result to an abysmal attack on good morals.

## 5. Natural Law and Reproductive Freedom

Reproductive freedom as a concept has been so much orchestrated in the defense of a liberal approach to Assisted Reproductive Technology. It holds that individuals, precisely as autonomous persons, are sufficiently equipped to make decisions about their reproductive health and choices devoid of any interference. This would mean that persons are free to access contraceptive or abortifacient devices if they want, to have or not to have children, and perhaps to have children through either natural or assisted means.<sup>66</sup> Particularly, the ‘lengths to which women go to control their conditions of reproduction whether, when, how, and with whom, they would bear children are amazing and persistent.’<sup>67</sup> What reproductive freedom stands for is, therefore; to avail persons unbiased information about all available reproductive options and without any obstacles, legal, policy or systemic, and to enable them to enjoy the liberty of choice. It recognizes that individuals

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<sup>63</sup> *Bowers v Hardwick*, 478 U.S 186, 198 (1986); TM Cooley, *The Law of Torts* (2<sup>nd</sup> ed. Chicago: Callahan Pub., 1988) p 29

<sup>64</sup> Wikipedia ‘Abortion Debate’ <<https://en.wikipedia.org/wiki/Abortiondebate>> accessed on 18/02/2015.

<sup>65</sup> Cap 23 LFN, 2004.

<sup>66</sup> cf. RP Petchesky, Reproductive Freedom: Beyond A Woman’s Right to Choose’ [1980] (5) (4), *Journal of Women in Culture and Society*, 681

<sup>67</sup> *Ibid*, 661.

especially women have the right to govern their body and make decisions relating to their reproductive life without hindrances. Hence, the concept is tied to the principles of bodily autonomy, privacy and gender equality. It recognizes that reproductive decisions are deeply personal and should be made by individuals themselves based on their own unique circumstances and needs.<sup>68</sup> It further fights restrictive laws or policies that operate to limit exercise of reproductive rights.

Reproductive freedom as it were, goes beyond the concept of reproductive rights and cultural conditions that enable individuals to exercise their reproductive rights. It involves active removal of barriers on the way to limitless reproductive license. While reproductive rights focus on the legal entitlements and protections individuals have in relation to their reproductive decisions, reproductive freedom relates to the larger societal context that enables individuals to exercise their reproductive rights without interference. It emphasizes the need for accessible and equitable reproductive healthcare services, education and support systems which empower individuals in making informed choices about their reproductive lives.<sup>69</sup> In various jurisdictions, the courts in the modern times have promoted the cause of extreme reproductive freedom by their judgments. The Canadian case of *R v Morgentaler*,<sup>70</sup> was used by the court to strike down a restrictive abortion law, ruling that it violated a woman's right to security of the person under Section 7 of the Canadian Charter of Rights and Freedoms. A similar decision was handed down in *Tremblay v Daigle*,<sup>71</sup> wherein the court declared that spousal consent for a woman seeking abortion infringed on a woman's right to security of the person.<sup>72</sup>

Natural law argument against reproductive freedom arises from the facts that certain moral principles are inherent in human nature and thus should guide man's understanding of how best to order his liberty as it concerns reproductive options. As a rational being, human freedom is not unlimited. To be free is to be seized with sufficient knowledge and capacity to know and choose what is good having rejected what is evil. This is on all fours with the natural law axiom - *bonum faciendum, malumque et vitandum* (Good is to be done and evil to be avoided). Human freedom cannot therefore be used in a way that is inconsistent with the prescriptive norms of the human nature. As a matter of fact, the extent of human freedom is determined by the 'good' and is limited by privative acts. In *Skinner v Oklahoma*,<sup>73</sup> the court declared that procreation relates to the very existence and survival of the race and therefore should be guarded jealously. Advocates of unmonitored reproductive freedom misunderstood the meaning of freedom completely when they interpret it to mean liberty to do whatever one wants in the matter of human reproduction. But then, it must be admitted that: "It flows from the very nature of man as a finite, bodily-spiritual, reasonable and social being that his freedom cannot be unlimited, as liberalism, anarchism and antinomianism (the rejection of all laws) would have it. Reason itself demands that man submits himself to the moral law on the basis of his own insights and not merely from external force."<sup>74</sup>

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<sup>68</sup> See generally M Steilen and C Treston 'Sexual and Reproductive Health Decisions are Personal' [2022] (33) (4) *Journal of the Association of Nurses in AIDS care*, 499.

<sup>69</sup> cf. American Civil Liberties Union, 'Reproductive Freedom,' <<https://www.aclu.org/issues/reproductive-freedom>> accessed on 20/6/2023.

<sup>70</sup> (1988) 1 S. C. R. 30

<sup>71</sup> (1989) 2 S. C. R. 530

<sup>72</sup> *R v Sullivan* (1991) 1 S. C. R. 489.

<sup>73</sup> (1942) 316 U. S. 541.

<sup>74</sup> W Brugger, 'Freedom' in W Brugger (ed.), *Philosophical Dictionary* (Washington: Gonzaga University Press, 1972) p 147.

Orchestrating the concept of reproductive freedom as an absolute norm is a fallacy. This is because it is self-evident that all these freedoms enjoyed by man, have some limitations so that they cannot be extended so far that they present a real danger to man himself, to the society and the values it protects.<sup>75</sup> This is the perspective from the natural law. Also, an arbitrary extension of freedom, in respect of reproductive concerns, beyond the moral limits required by right reason would derogate from freedom and degenerate into licentiousness. The term ‘licentiousness’ is an exaggerated expression of freedom in such an ambitious manner that works against the spirit of freedom itself. It directly relates to moral impunity or lasciviousness. In such an ambience, persons act without moral limits.<sup>76</sup> What eventually crystallizes from such over-reaching application of freedom is the relaxation of rigid moral codes and evolution of new concepts where ‘perversions became abnormalities, abnormalities became deviances, deviances became variances, variances became options, options became preferences, preferences became choices and choices became life enhancing experiences.’<sup>77</sup> Notice however that any attempt to change the quintessential character of a reality by merely using euphemisms is, simply put, an absurdity. Change of nomenclature does not affect reality.

On another note, licentiousness is about unregulated freedom, in this case, reproductive freedom. It involves pursuit of personal options without regard to the freedom of others. Indeed, in the matter of reproduction, another or other human beings are involved. Moreso, those involved are the most vulnerable class of human beings. Licentiousness, which is what is promoted in postmodern reproductive freedom campaign is quite different from liberty. While the latter is restrained by natural or positive law, and consists in doing whatever one pleases, which is not inconsistent with the freedom of others, the former does not respect those rights and freedoms of others. In short, in licentiousness, one is driven to act without regard to law, ethics, morality or the rights of others.<sup>78</sup> And when this becomes the case and is sustained in multiple and differential issues of life, a permissive society crystallizes. This, as it were, captures a society in which social norms become increasingly liberal.<sup>79</sup> A permissive society sponsors extreme forms of reproductive and sexual freedom. It presents assisted reproductive procedures as morally neutral and available for subjective preferences of persons. In this way, it ‘destroys the moral and socio-cultural structures for a civilized and valid society.’<sup>80</sup> The point is that the only perspective open for a valid appreciation of reproductive freedom is the metaphysics of human nature within the natural law regime. From that context, it is axiomatic that procreation is a fundamental aspect of human nature, such that intentionally preventing or interfering with it, is morally questionable. Natural law ethics and morality remains very critical of the unrestrained freedom to indulge in such reproductive procedures as IVF, surrogate motherhood etc. Its arguments revolve around the violation of the natural order of reproduction, separation of procreation from sexual intercourse, the potential for commodification of human life and the creation and destruction of human embryos.<sup>81</sup> Natural law

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<sup>75</sup> *Ibid*

<sup>76</sup> D Evans, *Without Moral Limits: Women, Reproduction, and New Medical Technology* (Illinois: Crossway Books, 1989) p. 1.

<sup>77</sup> *Ibid* p. xv.

<sup>78</sup> Legaldictionary.com ‘Legal Definition of Licentiousness’ <<http://legaldictionary.com/licentiousness>> accessed on 8/01/2015. See also, *West’s Encyclopedia of American Law* (2<sup>nd</sup> Edn, New York: The Gale Group Inc., 2008).

<sup>79</sup> A Petigny, ‘The Permissive Society: America, 1941-1965’, <http://en.m.wikipedia.org/wiki/permissivesociety> accessed on 8/01/2015.

<sup>80</sup> *Ibid*.

<sup>81</sup> See generally S Girgis, RT Anderson and RP George, *What is Marriage? Man and Woman: A Defence* (New York: Encounter Books, 2012).

jurisprudence also finds problematic the freezing of the embryo which it finds as a gross violation of the dignity and value of human life. The manipulation of the gametes outside of the marital act is equally offensive to the spirit of the natural law even as the disregard for marriage, family, lineage/kinship which ART sponsors are morally problematic.

As a matter of fact, the natural law remains the guiding principle or the moral foundation underlying every perceivable legal system, each reflecting it more or less. While the concept of freedom emphasizes autonomy and the right to define one's own concept of existence, of meaning and of the universe,<sup>82</sup> natural law emphasizes the concept of ordered liberty which allows for certain limitations on individual liberties in the interest of the common good.<sup>83</sup> For instance, informed by the natural law jurisprudence, the supreme court of Tennessee in *Davis v Davis*,<sup>84</sup> considered the freedom of a couple to dispose the embryo during a divorce. It upheld the moral status of the embryo and further recognized the embryos as 'pre-born children' and held that the best interests of the child should be considered when determining their fate. Compare this decision with *R. (on the Application of Quintavalle) v Human Fertilization and Embryology Authority*<sup>85</sup> in which the House of Lords, in the United Kingdom considered the moral status of the embryo and ruled that the use of embryo for research was lawful but that certain limitations and safeguards should be in place. The decision of the court in *R v Human Embryology Authority* above, is a victim of unmonitored reproductive freedom. It crossed the minimum acceptable moral limits.

## 6. Conclusion and Recommendations

In conclusion, the postmodern emphasis on reproductive legal rationality, rights and freedoms/laws and ethics, has led to a crisis of human dignity, where the most vulnerable members of the society are increasingly marginalized and discarded, where sex is depersonalized, and value of parenthood either minimized or totally rehearsed. To chart a course through these mucky waters, it is imperative that we rediscover the natural law principles that undergird human reproduction. Indeed, by reasserting the classical natural law understanding of reproductive justice, one that gives primacy to the dignity and wellbeing of all human persons, (born and unborn), we can create a more just and compassionate society. As the ancient Greek philosopher, Aristotle once said, "The whole is more than the sum of its parts" [Aristotle, *Metaphysics*, BK VIII, Chapter 6 1045a20-25]. It is apropos and timely too to recognize that human reproduction is not merely a matter of individual choice, but a fundamental aspect of human flourishing that requires a more holistic and integrated approach.

In the light of the above analysis, the following recommendations are hereby made: a reorientation of reproductive justice. This requires a paradigm shift in the way we approach reproductive justice to one that emphasizes the dignity of all members of the human family from conception to natural death. Also, it is almost an emergency to reassert natural law principles in reproductive medical conversations. In so doing, the inherent dignity of the human person is recognized, respected and protected. Furthermore, this paper calls for a holistic approach to reproductive health, one that addresses the physical, emotional, and spiritual needs of individuals and families. Next, education and awareness programs are desiderata for promoting the much-needed sound natural law jurisprudence of the reproductive legal rationality in the context of postmodern conversations. Indeed, by adopting the above recommendations, we can create a more just and compassionate

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<sup>82</sup> *Planned Parenthood v Casey*, (1992) 505 U. S. 833

<sup>83</sup> See *Palko v Connecticut*, (1937) 302 U. S. 319

<sup>84</sup> (1992) 842 S. W. 2d 588 (Tenn).

<sup>85</sup> 2003 2AC 49

society, one that recognizes the inherent dignity and worth of all human persons and promotes a natural law compliant approach to human reproduction.