Introduction

In modern times, technology has proffered humanity an ally and a foe, bringing about tremendous progress but also unforeseen destruction. Rather unsurprisingly, new technologies tend to inspire both enthusiasm and apprehension. This book embraces the view that, in the field of biomedicine, with adequate regulation, technology has the potential to greatly improve human experience in its relational dimension. In fact, for couples unable to conceive naturally, technology means access to biological parenthood. Since the birth in England in 1978 of Louise Brown, the first child in the world to be conceived via in vitro fertilisation (IVF),[1] reproductive technologies have become less exceptional and their capabilities have expanded. Only six years later, the first IVF pregnancy achieved with donor oocytes was reported;[2] by overcoming the intended mother's inability to produce viable oocytes, this technique permits a man to procreate with an infertile partner, as well as giving the woman the opportunity to experience pregnancy and form a prenatal bond with the baby. The novelty of third-party reproduction was followed by the advent of preimplantation genetic diagnosis (PGD), first successfully used in humans in 1989; designed as an alternative to prenatal diagnosis, it enables known carriers of serious hereditary conditions to have a biological child without that condition while avoiding a clinical termination of pregnancy.[3] Conception outside the human body also paved the way for gestational

[1] See Amel Alghrani, *Regulating Assisted Reproductive Technologies: New Horizons* (Cambridge: Cambridge University Press, 2018) 22.

[2] See Lorna Marshall, 'Ethical Issues in the Evolving Realm of Egg Donation', in Leslie Francis (ed.), *The Oxford Handbook of Reproductive Ethics* (Oxford: Oxford University Press, 2017) 478–498, at 478.

[3] See Lisa Rubin and Aliza Phillips, 'Infertility and Assisted Reproduction Technologies: Matters of Reproductive Justice', in Joan Chrisler (ed.), *Reproductive Justice: A Global Concern* (Santa Barbara: Praeger, 2012) 173–199, at 186; Karen Sermon, André Van Steirteghem and Inge

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surrogacy.[4] Unlike the less sophisticated traditional surrogacy (involving the use of the intended father's gametes to inseminate the surrogate), this collaborative reproductive method allows a woman who cannot sustain a pregnancy to become a genetic mother.[5] All these scientific developments have prompted new questions about what the law ought to prohibit, permit or facilitate in the regulation of assisted reproduction technologies (ARTs).

The overarching question, however, is whether the law should permit only treatment analogous to natural procreation – such as the woman's artificial insemination with her husband's gametes, or IVF procedures using the gametes of the couple – or whether it should go beyond the realm of biological possibility: (a) by allowing third-party reproduction, that is, the donation of gametes or embryos and surrogacy services, and/or (b) by allowing parents to predetermine, to a certain degree and in certain circumstances, the genetic make-up of the future child through embryo diagnosis and selection. Admittedly, third-party reproduction raises complex questions about the identity of the resulting child and possible exploitative elements of ova donation and surrogacy. While those questions invite further reflection, it would be oversimplistic to suggest that medically assisted reproduction should only emulate what is naturally achievable. Indeed, medical treatment regularly seeks to improve on nature, and even fight it, rather than copying it. It can also be conceded that PGD may raise ethical concerns if it is not confined to selection against serious genetically transmissible illnesses. At the same time, eugenic alarmism would be a reductive approach to a problem that affects certain core individual interests.

The book will argue that the availability of modern technologies for medically assisted reproduction has given rise to a set of new fundamental (albeit qualified) rights. Such is the right to have recourse to reproductive treatment (artificial insemination; IVF; potentially, in the future, gamete donation and

Liebaers, 'Preimplantation Genetic Diagnosis' (2004) 363 (9421) *The Lancet* 1633–1641, at 1633.

4 Surrogacy first captured the attention of the legal scholarship with the decision *In the Matter of Baby M*, 109 N.J. 396, 537A.2d 1227 (N.J. 1988), concerning a traditional surrogacy contract concluded in New Jersey in 1985, followed by *Johnson* v. *Calvert*, 5 Cal. 4th 84 (1993), a case of gestational surrogacy. For a comparative discussion, see Leslie Francis, 'Is Surrogacy Ethically Problematic?', in Leslie Francis (ed.), *The Oxford Handbook of Reproductive Ethics* (Oxford: Oxford University Press, 2017) 388–406, at 389–391.

5 For a snapshot of legal responses to surrogacy worldwide along a spectrum, including prohibition, non-regulation, permissive approach on an altruistic basis and legalisation of commercial surrogacy, see Sonia Allan, 'The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations', in Paula Gerber and Katie O'Byrne (eds.), *Surrogacy, Law and Human Rights* (London: Routledge, 2015) 113–143, at 130–132.

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surrogacy) in order to experience biological parenthood when natural procreation is hindered by infertility, gender reassignment, sexual orientation or the lack of a partner. Additionally, the infertile member of a couple can claim a right to the recognition of intention-based parenthood in relation to the partner's donor-conceived or surrogate-born children when they were jointly planned and cared for as a family. This new array of procreative rights further encompasses the right to pursue the birth of a healthy child, to the extent that genetic diagnosis and selection of embryos for implantation can avoid disease and disability at the conception stage; like prenatal testing (upon which the option of therapeutic abortion depends), embryo selection gives prospective parents control over the outcome of the reproductive process. In a distant future, procreative autonomy could conceivably include aspiring parents' right to choose certain traits in their offspring, irrespective of medical needs.

Procreative claims have emerged at the intersection between reproductive health concerns and the right to respect for privacy and family life. It is estimated that '48 million couples and 186 million individuals worldwide live with infertility'.[6] However, the inability to procreate is not merely a health issue; it touches upon important sociopsychological dimensions of personal identity and family life. In fact, parenthood is also a matter of self-fulfilment, which is comprised within the broader right to respect for private and family life.[7] Lisa Rubin and Aliza Phillips have noted the particularly strong link between motherhood and self-fulfilment: 'Although, at least in the West, women have an increasing array of choices other than motherhood as a path through adulthood, the "mandate" for motherhood, or the idea that motherhood is key to fulfilling a woman's adult identity, remains strong.'[8] Advances in medical technology have made the resigned acceptance of infertility more difficult and have elevated parenthood expectations, including the possibility to influence the genetic constitution of the future child. Gillian Douglas recalled the case of an American sperm bank set up in the 1970s to store the gametes of academically inclined high achievers, to be used by women with a high IQ, an initiative criticised by some for its 'overtly eugenic

[6] 'Infertility: Why the Silence?' (2022) 10(6) *Lancet Global Health* e773, at e773.

[7] See *Fernández Martínez* v. *Spain* [GC], App. No. 56030/07, 12 June 2014, [126]: 'The Court stresses the importance for individuals to be able to decide freely how to conduct their private and family life. In this connection, it reiterates that Article 8 also protects the right to self-fulfilment, whether in the form of personal development . . ., or from the point of view of the right to establish and develop relationships with other human beings and the outside world, the notion of personal autonomy being an important principle underlying the interpretation of the guarantees laid down in that provision.'

[8] Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 178.

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motivation'; Douglas rightfully queried whether, as long as this is a voluntary enterprise for all those involved, the desire of some people to use such a facility in the hope of having more intelligent children is necessarily problematic.[9] Indeed, the choice of a mating partner whose characteristics the woman hopes to see replicated in her offspring also occurs in natural procreation, albeit less clinically, and it needs to be respected as a matter of autonomy. Other aspects of collaborative assisted reproduction may, nevertheless, warrant or require State regulation.

A legal framework for the regulation of access to medical assistance to procreate cannot develop without proper analysis of the human rights engaged. Despite a degree of scepticism in the scholarly literature over the role of human rights methodology in bioethical debates,[10] there is a growing body of international jurisprudence in the area of assisted reproduction, in particular under the European Convention on Human Rights (ECHR).[11] More than any other treaty-based human rights body, the European Court of Human Rights (ECtHR) has been faced with numerous controversies regarding procreative rights, such as the ban on certain ARTs (e.g. heterologous fertilisation and IVF, ova donation, posthumous use of frozen gametes/embryos, embryo preimplantation screening for healthy carriers of serious genetic disorders), the recognition of legal effects arising from foreign surrogacy arrangements, and the subject of transgender or same-sex parenthood for children born through assisted insemination with donor sperm. By necessity, the book will therefore focus on ECHR practice, although references to other international instruments will be made where relevant material is available. Other human rights–monitoring bodies such as the Inter-American Commission and Court set up by the American Convention on Human Rights (ACHR)[12] and the UN Human Rights Committee (HRC) established under the International Covenant on Civil and Political Rights (ICCPR)[13] have not had the same opportunity to pronounce on more detailed aspects of

[9] Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991) 202–203.

[10] See Elizabeth Fenton, 'Genetic Enhancement – A Threat to Human Rights?' (2008) 22(1) *Bioethics* 1–7, at 7: 'The call for human rights to serve as the foundation and *lingua franca* of the new bioethics is misguided. Human rights form only a part of morality, and so should form only a part of bioethics.'

[11] European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, ETS No. 5. The book follows the Court's case law up until the end of March 2023.

[12] American Convention on Human Rights, San José, 22 November 1969, in force 18 July 1978.

[13] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, UNTS vol. 999 (p. 171).

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the regulation of procreative rights. Indeed, the volume of cases decided by other treaty-based human rights bodies is only a fraction of the hundreds of thousands of applications examined in Strasbourg.[14] The prevailing human rights concerns evidenced by the complaints brought elsewhere are also different. For example, a large proportion of applications under the ACHR concentrate on forced disappearances, extrajudicial killings, torture and the death penalty; freedom from torture and fair trial guarantees are frequently the subject of communications under the ICCPR. Thus, the use of ARTs features in an exiguous number of decisions outside the ECHR system.[15]

In light of this emerging jurisprudence, the book sets out to demonstrate that individual claims to assisted procreation can be resolved through human rights analysis rather than being deferred to the value-laden policy choices of deliberative majorities. It further contends that procreative rights, viewed as an extension of the rights to decisional autonomy, privacy (including identity) and respect for family life, should be restricted only inasmuch as they demonstrably harm equally important rights of others or societal interests. Thus, any restrictions on the pursuit of parenthood aspirations through ARTs must satisfy the well-established tests for State interferences with the exercise of fundamental rights: a pressing social need (not merely speculative fears or moral unease with novel practices) and recourse to the minimum interference necessary to achieve legitimate objectives.

Chapter 1 argues that parenthood aspirations have started to evolve into justiciable rights and sets the background for the discussion of such rights in the chapters that follow. First, it examines the rise of new human rights claims in international litigation and in the scholarly literature as a result of the development of reproductive technologies. On the one hand, individual reproductive decisions are seen to lie at the very core of privacy and physical self-determination rights. Elizabeth Wicks has powerfully suggested that 'few exercises of autonomy are more private, more fundamental, or more embodied, than those surrounding reproduction'.[16] On the other hand, the allocation of legal parenthood is a public matter, and public policy objections

[14] For statistical data, see European Court of Human Rights, Public Relations Unit, 'Overview 1959–2021' (February 2022), available at www.echr.coe.int/documents/d/echr/Overview_19592021_ENG.

[15] The Inter-American Court of Human Rights has condemned the absolute prohibition on IVF, the denial of access to therapeutic abortion and the use of involuntary sterilisation. The HRC has also pronounced on the prohibition of abortion on grounds of fatal foetal abnormality. See Chapter 1 (Section 1.2.1), Chapter 2 (Section 2.1.1) and Chapter 4 (Section 4.2.1).

[16] Elizabeth Wicks, *The State and the Body: Legal Regulation of Bodily Autonomy* (Oxford: Hart, 2016) 61.

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may be adduced to reproductive techniques involving third-party reproduction. As Robin Mackenzie aptly noted, 'under most countries' family law, parental rights and responsibility may not be simply transferred or waived as a matter of private ordering'.[17] Therefore, the State's cooperation is necessary to ratify the effects of gamete donation and surrogacy arrangements through the legal recognition of social parenthood. The chapter acknowledges the challenges to the development of reproductive rights stemming from the distinction between negative and positive obligations in international law and, in particular, the difficulties in placing positive duties on State authorities. The chapter identifies a number of potential negative and positive obligations in relation to human procreation as put forward in international litigation. It examines the ECtHR's justifications for treating a claim as engaging negative or positive obligations, and it considers whether that classification has any impact on the outcome of the case.

Chapter 2 inquires whether a person has the right to a genetically related child, understood as the right to have recourse to the available ARTs in order to become a biological parent. Any obstacles to an individual's endeavour to have genetically related children will affect their core interests. In fact, as Michael Boucai has noted, the right to procreate 'could be thought to serve a number of human interests, among them species survival, bodily integrity, sexual autonomy, and personal longings for genetic immortality'.[18] The chapter considers the right to make reproductive decisions – for example, resorting to artificial insemination or using frozen embryos created with one's gametes for the purposes of generating a pregnancy – including, potentially, the decision to use the genetic material of a deceased spouse or child for posthumous procreation. The right to make autonomous reproductive decisions may conflict with the rights of other private parties, in particular the other gamete contributor – for example, a former partner no longer consenting to the use of joint embryos following the breakdown of the parties' relationship, or a deceased spouse whose consent to the posthumous use of his genetic material cannot be verified. It can also collide with State interests: safeguarding public order by limiting prisoners' procreative activities, ensuring the lawful operation of assisted reproduction clinics, or protecting embryos no longer intended for a pregnancy (e.g. against donation for scientific research).

[17] Robin Mackenzie, 'Beyond Genetic and Gestational Dualities: Surrogacy Agreements, Legal Parenthood and Choice in Family Formation', in Kirsty Horsey and Hazel Biggs (eds.), *Human Fertilisation and Embryology: Reproducing Regulation* (London: Routledge-Cavendish, 2007) 181–203, at 194.

[18] Michael Boucai, 'Is Assisted Procreation an LGBT Right?' (2016) *Wisconsin Law Review* 1065–1125, at 1117.

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The right to a genetic child in cases of partial infertility also occupies an important place in this chapter. In fact, for individuals living with an infertile spouse, 'collaborative' reproduction, that is, the use of sperm/ova donated by a third party or surrogacy services, is the only route to achieving genetic parenthood without forgoing the marriage. The refusal to treat such couples with donated gametes requires the fertile member of the couple to choose between parenthood aspirations and the continuance of their family life with the infertile spouse; it thus affects not only prospective but also existing family life and requires justification. A related claim discussed in this chapter is the right to respect for the reality of biological parentage in surrogacy cases. This includes the right of genetic fathers whose children were born through surrogacy abroad to be recognised as legal parents in the State of residence, even if that jurisdiction does not permit surrogacy, as well as the right of genetic fathers having used domestic surrogacy arrangements (whether or not lawful or enforceable) to rebut presumptions of paternity benefitting others, for example, the surrogate's husband.

Chapter 3 shifts the perspective towards a putative right to the protection of intention-based parenthood in the absence of genetic ties to the child. Two situations are foregrounded here: social parenthood in relation to the child born to a (same-sex or opposite-sex) partner through assisted insemination with donor sperm, and the position of commissioning parents unrelated to the child in surrogacy cases. Janet Finch noted that 'the ways in which kinship is defined and lived in the contemporary world is a subtle blend of . . . the given and the chosen'.[19] At the same time, the scope of choice in family formation is not uncontroversial. As Mackenzie deftly pointed out, 'surrogacy remains contentious in that its potential to disrupt notions of kinship exceeds that of other means of treating infertility'.[20] This is particularly true of traditional surrogacy, in which the surrogate mother becomes pregnant through artificial insemination with the sperm of the intended father,[21] whereas the child is to be raised by the father and his partner – a woman, or indeed a man, who is not genetically related to the child. Moreover, for those who reject the idea of

[19] Janet Finch, 'Kinship as "Family" in Contemporary Britain', in Fatemeh Ebtehaj, Bridget Lindley and Martin Richards (eds.), *Kinship Matters* (London: Hart, 2006) 295–306, at 304.

[20] Mackenzie, 'Beyond Genetic and Gestational Dualities', 189.

[21] See, e.g., Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 190: 'In traditional surrogacy, a woman is inseminated with sperm for the purpose of conceiving a child for an intended recipient. . . . The advent of IVF has enabled gestational surrogacy, in which embryos created through IVF by intended parents either with their own, or donor gametes, are transferred into the surrogate's uterus . . . Thus, in gestational surrogacy, the "carrier" has no genetic link to the fetus.'

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surrogacy as medical treatment involving organ donation (or organ 'lending'), the debate veers onto the subject of child trafficking. The law of many countries (including the UK) criminalises the private transfer of children for adoption (save for in-family adoptions) and makes it an offence to provide payment for agreeing to an adoption or facilitating adoption arrangements; the analogy with adoption makes surrogacy suspect.[22] Relying on the well-established Strasbourg case law on the recognition of families based on social reality, as opposed to biological links, the chapter discusses the right to the protection of voluntary parenthood in assisted reproduction cases. In particular, it examines the ECtHR's outlook on non-genetic commissioning parents in foreign surrogacy cases (seen against the backdrop of cases concerning foreign adoption and foster care), as well as its approach to social parents raising children born to their life partners through donor insemination.

Chapter 4 defends the ambitious (and, no doubt, controversial) thesis that there is a human right to a healthy child, to the extent that medical technology can detect and prevent disease in future offspring. The chapter considers the relationship between healthcare rights and autonomy rights and proceeds to examine two claims arising in relation to the desire for a healthy child: (a) the right to prenatal diagnosis and therapeutic abortion if the foetus is found to suffer from any congenital illness, and (b) embryo preimplantation diagnosis aimed at disability screening, where the aspiring parents are afflicted by any serious hereditary illness. The chapter examines a series of objections to selection against disability. As Rubin and Phillips noted: 'Among the most deep-seated anxieties concerning ARTs are their "brave-new-world" associations with genetic engineering. PGD, often (albeit somewhat inaccurately) referred to as the "designer-baby" method, is one of the most recent of the [new reproductive technologies] to inspire anxiety about the appropriate limits of human intervention in the arena of reproduction.'[23] The chapter concludes by expanding the analysis to a potential future right to a bespoke child, for example, embryo screening aimed at sex selection for non-medical reasons, or the creation of saviour siblings through tissue typing and embryo selection so that the future child is a cord blood stem cell donor for a seriously ill existing child.

Chapter 5 examines the ways in which gender, civil status and sexual orientation impact access to ARTs or the recognition of de facto family life created through ARTs. Aspiring single parents and same-sex couples are

[22] See Mackenzie, 'Beyond Genetic and Gestational Dualities', 194.
[23] Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 185–186.

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entirely reliant on gamete donation and, for men, surrogacy in order to have a biologically related child. Consequently, in addition to laws reserving treatment to (heterosexual) couples, neutral prohibitions on certain reproductive techniques can affect singles, male couples or female couples with particular force. The chapter discusses the contribution of ECHR case law to safeguarding the *fait accompli* in donor insemination and surrogacy cases involving single, homosexual and transgender parents (typically following overseas treatment in permissive jurisdictions). Finally, the chapter challenges what it perceives to be a gender-based difference in the Strasbourg treatment of genetic commissioning parents. Even where the surrogate is neither genetically related to the child nor an effective social parent, many jurisdictions remain attached to the link between childbirth and motherhood.[24] The chapter suggests that the ECtHR ought to question domestic rules on the allocation of parenthood for surrogacy-born children that give priority to the surrogate's gestational function over the commissioning mother's genetic/intentional/social parenthood; in fact, the position of genetic commissioning mothers is indistinguishable in respect of all these three facets of parenthood from that of genetic commissioning fathers.

In its concluding remarks, the book reconstructs an emerging catalogue of reproductive rights based on the claims successfully established *de lege lata* in international case law, most notably within the ECHR framework. The final chapter also considers the obstacles to the development of procreative rights to date, from jurisdictional issues (such as the emphasis on the subsidiary nature of international supervision and States' wide margin of appreciation in sensitive moral-driven areas) to substantive assumptions underlying judicial analysis (e.g. the identification of marriage as the foundation of intentional non-genetic parenthood). Finally, the concluding chapter discusses incipient and potential rights, that is, claims that the ECtHR did not have an opportunity to examine, or those in relation to which it has adopted a *non liquet* position, leaving their protection to the discretion of national legislatures. Although it is conceded that many procreative rights are still aspirational in nature, the conclusions suggest that the evolving interpretation of the ECHR, aimed at aligning its requirements with medical advances and social perceptions, will eventually expand the scope of Article 8.

The legal analysis of procreative liberty put forward in this book, informed by modest engagement with bioethical perspectives on the subject, aims to enrich the scholarly debate on private choice and public regulation in

[24] See, e.g., for English law, s. 33 Human Fertilisation and Embryology Act 2008, which always treats the woman who gives birth to a child as the child's legal mother.

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reproductive matters as well as to aid the practical assessment of assisted reproduction policies. While ARTs have inspired a vast literature, the conversation has taken place predominantly in the realm of bioethics, medical law, comparative law and socio-legal studies, with a focus on issues such as the moral status and appropriate legal classification of the embryo and the foetus; the costs and risks of assisted reproduction, especially surrogacy; future inequalities and social justice in relation to procreation; and the principles governing reproductive treatment in specific jurisdictions. The place of universal human rights in the regulation of medically assisted procreation tends to feature in case commentaries and writings addressing discrete aspects. This book, therefore, aims to fill a gap in the literature on reproductive technologies by adding an international human rights perspective, based on a comprehensive and systematic analysis of this area of jurisprudence.

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