Conclusions

The new reproductive technologies have not been unreservedly welcomed in the scholarship and law-making fora around the world. On the contrary, 'their tendency to press the limits of nature and transform definitions of family'[1] has inspired scepticism in many quarters. Support for 'the right of persons to use technology in pursuing their reproductive goals'[2] has been matched by staunch adherence to procreation as 'a personal act between a man and a woman'.[3] Against the background of this mixed reception, the book has explored the human rights justifications for the use of scientific advances in biomedicine to achieve individual self-fulfilment through parenthood. While adopting a normative perspective, the book has highlighted the contribution of international case law, most notably from the European Court of Human Rights (ECtHR), to the development of procreative rights as a matter of positive law.

Certainly, human rights treaties were not designed to address complex bioethical conundrums. Indeed, many technological advances examined in this book were beyond contemplation at the time of the adoption of the European Convention on Human Rights (ECHR). Despite the evolutive interpretation of ECHR provisions by the Strasbourg Court, its capacity to shape international bioethical standards has been questioned. Richard Ashcroft has argued that the ECHR 'is not a specifically "bioethical"

[1] 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 173–174.

[2] John Robertson, 'The Presumptive Primacy of Procreative Liberty', in Tom Beauchamp et al. (eds.), *Contemporary Issues in Bioethics* (Boston: Wadsworth Cengage Learning, 2014) 245–251, at 251.

[3] *S.H.* v. *Austria* [GC], App. No. 57813/00, 3 November 2011, Separate Opinion of Judge De Gaetano, [2].

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instrument, and the coherent development of any principles is hampered by the employment of the margin of appreciation in the regulation of biomedicine';[4] therefore, 'expecting bioethics to arise out of the European Convention jurisprudence is a mistake'.[5] Nevertheless, the recent Strasbourg case law examined in this book suggests that doubts over the ability of human rights methodology to respond to bioethical issues might be misplaced.

Section C.1 of this concluding chapter distils the extensive jurisprudence analysed in the foregoing pages into a brief catalogue of established rights, synthesising the key contributions of international law to procreative freedom. Section C.2 collects cross-chapter observations on the methodological and extrajudicial obstacles to the further development of reproductive rights to date. Finally, Section C.3 offers some reflections on claims not yet upheld in international litigation, but which the evolving social perceptions and legislative practice in Europe and beyond may in the future bring within the purview of human rights law.

C.1 THE CONTRIBUTION OF INTERNATIONAL CASE LAW TO THE DEVELOPMENT OF PROCREATIVE RIGHTS

This section focuses on positive international human rights law, primarily legal developments under the ECHR, insofar as very few claims have addressed assisted reproductive treatment (ART) in other treaty-based human rights systems. The argument advanced here is that several rights associated with procreative choice have been affirmed *de lege lata*, and notwithstanding their non-absolute nature, they can have a tangible impact on the domestic regulation of ART. In fact, it is currently undisputed that Article 8 ECHR protects every person's *right to respect for the decision to become (and not to become) a genetic parent*, which is encompassed in the notion of privacy, as well as the *right of couples to conceive a child and to make use of medically assisted procreation to that end*, such a choice being recognised as an expression of private and family life.[6] Specific applications of these principles include a couple's *access to artificial insemination* and the *ability to use*

[4] Richard Ashcroft, 'Could Human Rights Supersede Bioethics?' (2010) 10(4) *Human Rights Law Review* 639–660, at 655.

[5] Ibid., 656.

[6] See *Evans* v. *The United Kingdom* [GC], App. No. 6339/05, 10 April 2007, [71]; *Dickson* v. *The United Kingdom* [GC], App. No. 44362/04, 4 December 2007, [66]; *S.H. and Others* v. *Austria* [GC], [82]; *Knecht* v. *Romania*, App. No. 10048/10, 2 October 2012, [54]; *Lia* v. *Malta*, App. No. 8709/20, 5 May 2022, [39]; *Pejřilová* v. *The Czech Republic*, App. No. 14889/19, 8 December 2022, [42].

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embryos created with their gametes for implantation. The refusal of artificial insemination facilities concerns the aspiring parents' private and family lives, which notions incorporate the right to respect for their decision to become genetic parents.[7] In the same vein, the joint parental project of a couple who wish to have a child by making use of assisted procreation using their own embryos is an intimate aspect of the couple's private life and hence protected by Article 8.[8] Access to IVF is a further ramification of the right to use ART, although eligibility criteria remain within the State's discretion.[9] A total ban on the use of IVF was before the Inter-American Court of Human Rights (IACtHR) and deemed in breach of the obligation to grant couples access to the necessary techniques to resolve reproductive health problems, acknowledging that infertility is a disability.[10] Additionally, the notion of private life protects the right to respect for the decision to become a parent more broadly, not necessarily in a biological sense (recourse to gamete donation and surrogacy also evidencing a genuine intention to become parents), as well as prospective parents' personal development through the role of parents.[11]

These are, admittedly, qualified rights; while restrictions in the access to ART have been analysed as active interferences with the prospective parents' rights, requiring justification under Article 8(2),[12] in practice these new rights can be readily outflanked by State interests. Alice Margaria has noted that, although Strasbourg case law has made steps towards bringing Article 8 in line with medical advances and new ways of creating families, 'the "updating" effects do not go beyond the Court's first stage of review – concerning the applicability of Article 8 – and, therefore, are not reflected in the content of the obligations imposed by that provision on States'.[13] It would be inaccurate to suggest, however, that these rights never prevail over State interests, or that their recognition is merely symbolic and inconsequential. Albeit infrequently, they form the basis for a finding of violation, which demonstrates their potential to change the scope of international obligations. For instance, the indiscriminate refusal to grant access to artificial insemination facilities to

[7] *Dickson* v. *The United Kingdom* [GC], [66].
[8] *Knecht* v. *Romania*, [54]; *Nedescu* v. *Romania*, App. No. 70035/10, 16 January 2018, [70].
[9] *Lia* v. *Malta*, [60].
[10] *Artavia Murillo et al. ('In Vitro Fertilisation')* v. *Costa Rica*, Case No. 12.361, 28 November 2012, [289], [293].
[11] *Paradiso and Campanelli* v. *Italy* [GC], App. No. 25358/12, 24 January 2017, [163]; *Nedescu* v. *Romania*, [67].
[12] See, e.g., *Pejřilová* v. *The Czech Republic*, [47], and the general discussion on the classification of the alleged obligations in Chapter 1, Section 1.2.2.
[13] Alice Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2019) 53.

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prisoners was found to violate Article 8.[14] So, too, were the authorities' delays in returning a couple's cryopreserved embryos seized from a clinic, depriving them of the possibility of having another child.[15] In future, a different balancing exercise may see procreative rights take priority over other interests in a wider range of circumstances, especially if the European consensus assessment changes. To date, the Court has maintained a cautious approach in relation to controversial techniques, such as ova donation, sperm donation for heterologous IVF, posthumous insemination, posthumous use of cryopreserved embryos and surrogacy arrangements. In fact, the refusal to grant prospective parents access to these techniques (or to recognise their parental status when achieved abroad through such techniques) was found to lie within the States' margin of appreciation.[16]

Nonetheless, while the lack of success of claims regarding access to third-party and posthumous treatment remains unmitigated, new and concrete obligations have been established in relation to existing parent–child relationships arising from proscribed reproductive methods. Remarkably, *a right for children born through overseas surrogacy to the recognition of legal ties with the genetic intended father* was derived from the child's identity rights, given the importance of biological parentage as a component of identity.[17] Concerns for the surrogate-born child's private life have also generated an *obligation to provide a prompt, effective mechanism for creating legal ties between the non-genetic intended parent and the child* (e.g. step-parent adoption).[18] In fact, children's best interests require the legal identification of the persons responsible for raising them, enabling them to live and develop in a stable environment,[19] and hence the recognition of the parent–child relationship legally established abroad, *at the latest when that relationship has become a practical reality*.[20] The absolute impossibility of establishing legal ties between the

[14] *Dickson* v. *The United Kingdom* [GC], [84]–[85].
[15] *Nedescu* v. *Romania*, [72].
[16] See *S.H. and Others* v. *Austria* [GC], [115] (ova donation, sperm donation for IVF); *Pejřilová* v. *The Czech Republic*, [62] (fertilisation with the deceased husband's frozen sperm); *Mennesson* v. *France*, App. No. 65192/11, 26 June 2014, [94] (legal ties between commissioning parents, one of whom genetic, and children born through foreign surrogacy).
[17] See *Mennesson* v. *France*, [100].
[18] 'Advisory Opinion Concerning the Recognition in Domestic Law of a Legal Parent–Child Relationship between a Child Born through a Gestational Surrogacy Arrangement Abroad and the Intended Mother', Request No. P16-2018-001, 10 April 2019; *C. and E.* v. *France*, App. Nos. 1462/18; 17348/18, 19 November 2019, [39]–[41] (acknowledging that the case fitted the Advisory Opinion matrix).
[19] Advisory Opinion P16-2018-001, [42].
[20] Ibid., [52].

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surrogate-born child and the intended father for a long period of time constitutes a disproportionate interference with the child's private life.[21] Moreover, even cumulatively, means of protection of the relationship with the intended parent falling short of legal affiliation, such as arrangements relating to residence and parental authority, place children in a position of legal uncertainty as regards their identity in society.[22] Importantly, the case law has explicitly extended the application of these principles beyond the heterosexual couple; the same obligations arise in the case of *single commissioning genetic fathers*[23] and *same-sex commissioning couples in which one is a genetic parent*.[24]

The success of Strasbourg applications for the recognition of legal affiliation brought by children born through foreign surrogacy is explained, on the one hand, by the understanding of identity as covering genetic identity (biological ties with a parent), social identity (social ties with the other intended and de facto parent) and national identity (the belonging to the community and full citizenship rights) and, on the other, by the treatment of the interests of the child as the Court's paramount consideration. The origins of this stance, going beyond the international standard ('primary consideration', as codified chiefly in the UN Convention on the Rights of the Child (UNCRC)),[25] were questioned in a recent Dissenting Opinion:

> It is an intriguing feature in the Court's case-law that the phrase referring to the child's interests as 'paramount' is regularly cited, notwithstanding the fact that this is not the standard adopted in the special international law instrument in the field of children's rights. It is well known that according to Article 3 § 1 of the UNCRC, the requirement is that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. The latter standard is also the one enshrined in the EU Charter of Fundamental Rights (Article 24 § 2).[26]

[21] *D.B. and Others* v. *Switzerland*, App. Nos. 58817/15; 58252/15, 22 November 2022, [89].

[22] Advisory Opinion P16-2018-001, [40]; *D.B. and Others* v. *Switzerland*, [88]; *K.K. and Others* v. *Denmark*, App. No. 25212/21, 6 December 2022, [72].

[23] *Foulon and Bouvet* v. *France*, App. Nos. 9063/14; 10410/14, 21 July 2016.

[24] *D.B. and Others* v. *Switzerland*.

[25] See Art. 3 Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, UNTS vol. 1577 (p. 3).

[26] *K.K. and Others* v. *Denmark*, Joint Dissenting Opinion of Judges Kjølbro, Koskelo and Yüksel, [93]. The dissenters were concerned that the effect of this stricter test is 'to practically eliminate altogether, in substance, the margin of appreciation available to the Contracting States' ([88]), excluding 'general policy considerations' from the regulation of 'delicate and complex matters of family law' ([109]).

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Another progressive feature of ART case law is *the protection of the fait accompli* under Article 8, including an obligation to *ensure respect for de facto family life created through reproductive means inconsistent with, or not provided for, domestic legislation*. While permitting ECHR States to outlaw and discourage third-party reproduction, the Court remains concerned to protect social bonds already created, for instance, between a child born through donor insemination abroad and the same-sex partner of his/her biological mother, in circumstances where domestic law does not recognise the legal affiliation between the child and the social mother.[27] In such cases, the Court has also found breaches of the adults' rights where the conduct of State authorities affected the continuance of those bonds. Thus, the refusal to grant the social mother post-separation contact with the donor-conceived child failed to meet the positive obligation to ensure effective respect for private and family life.[28]

Conversely, the absence of avenues for the acquisition of parenthood by the social parent in relation to donor-conceived children was not seen as exceeding States' margin of appreciation.[29] Although, unlike surrogacy, undergoing donor insemination with a view to raising a child with a same-sex partner was not depicted as an egregious circumvention of domestic law (there are no references to the parents' unlawful or 'fraudulent' conduct),[30] the Court has afforded less protection in such cases: it did not require the recognition of affiliation but accepted that the State met its positive obligations as long as mechanisms for the protection of the de facto ties existed (e.g. shared parental authority, arrangements for alternate residence/contact after the couple's separation).[31] While both surrogacy and donor insemination are heterologous techniques involving a genetic parent and a joint parenthood project,[32] only in surrogacy cases is the child's identity seen to require the

[27] See *Honner* v. *France*, App. No. 19511/16, 12 November 2020 (available only in French); *C.E. and Others* v. *France*, App. Nos. 29775/18; 29693/19, 24 March 2022 (available only in French); *Callamand* v. *France*, App. No. 2338/20, 7 April 2022 (available only in French).

[28] *Callamand* v. *France*, [44]–[45].

[29] See *C.E. and Others* v. *France*, concluding that the respondent had not failed in its obligation to guarantee effective respect for the private and family life existing between a woman and the child born to her former companion through donor insemination. See also *Bonnaud and Lecoq* v. *France*, App. No. 6190/11, 1 March 2018, where the ECtHR agreed with domestic courts that shared parental responsibility by lesbian partners for their respective donor-conceived children was not required by the children's welfare or the circumstances of the case.

[30] Contrast with *D.B.* v. *Switzerland*, [92] (the ECtHR agreed with the domestic courts' assessment that recourse to foreign surrogacy in order to circumvent the domestic prohibition constituted fraudulent conduct).

[31] See *C.E. and Others* v. *France*, [94]–[95], [105].

[32] The comparison here is with cases of surrogacy in which only one commissioning parent is a genetic parent (the majority of surrogacy cases before the ECtHR).

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establishment of parent–child ties with the non-genetic intended parent. The explanation appears to lie in the existence of legal ties between both commissioning parents and the surrogate-born child in the foreign jurisdiction (where the birth took place and parenthood was legally transferred); in fact, the Court has distinguished the two situations on that basis.[33]

Another important right upheld in Strasbourg case law is the right to influence reproductive outcomes, during pregnancy and at the conception stage. Firstly, the ECtHR has recognised the right of the expectant woman to avail herself of *timely prenatal tests for the detection of foetal disability*, so as to make an informed decision on the continuance or termination of the pregnancy, as provided for by domestic law.[34] Although the Court acts as an enforcer of already available domestic rights, the ruling contributes to the consolidation of a right to informed procreative choice under the ECHR. Several pending cases will face the Court squarely with the question of whether a ban on abortion on grounds of foetal defects is compatible with the Convention.[35] This will give the Court an opportunity to align its position on therapeutic abortion with that of the inter-American bodies and the UN Human Rights Committee.[36] The significance of informed reproductive choice is reinforced by the recognition of a *right to compensation for wrongful birth*. The Court found States in violation of Article 8's procedural limb where domestic courts showed arbitrariness in proceedings for compensation for medical negligence resulting in wrongful birth (failure to refer a patient at risk of foetal abnormality for antenatal screening).[37] Secondly, the ECtHR has recognised that *the desire to conceive a healthy child* is protected by Article 8; consequently, it has upheld the *right of healthy carriers of serious genetic illnesses* to use the medical options available to that end, notably PGD, allowing them to *screen embryos against genetic illness* rather than becoming parents in circumstances inconsistent with their wishes or having to resort to a more traumatic therapeutic abortion.[38]

[33] *C.E. and Others* v. *France*, [102].
[34] See *R.R.* v. *Poland*, App. No. 27617/04, 26 May 2011.
[35] *K.C.* v. *Poland*, App. No. 3639/21; *A.L.-B.* v. *Poland*, App. Nos. 3801/21 et al.; *M.L.* v. *Poland*, App. No. 40119/21; *M.B.* v. *Poland*, App. No. 5014/21; *K.B.* v. *Poland*, App. No. 1819/21; *I.Z.* v. *Poland*, App. No. 57338/21.
[36] See Chapter 4, Section 4.2.1. Note, however, the focus on *fatal* foetal abnormality in those cases.
[37] *A.K.* v. *Latvia*, App. No. 33011/08, 24 June 2014.
[38] *Costa and Pavan* v. *Italy*, App. No. 54270/10, 28 August 2012, [57].

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C.2 OBSTACLES TO THE DEVELOPMENT OF PROCREATIVE RIGHTS IN INTERNATIONAL LAW

The breadth of States' margin of appreciation in assisted reproduction cases is a first major obstacle to the development of prescriptive obligations. In fact, that margin is wide when there is no European consensus on the relative importance of a right or the means best to protect it, especially where it conflicts with other rights and interests, and in sensitive areas involving ethical or moral judgment.[39] The regulation of assisted reproduction is thus viewed as the province of domestic legislatures:

> The Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation, in respect of procedures to be followed or authorities to be involved and to what extent, especially since the use of IVF treatment continues to give rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments. It is why, in such a context, the Court has considered that the margin of appreciation to be afforded to the respondent State is a wide one.[40]

At the same time, where a particularly important facet of an individual's existence (e.g. the ability to conceive a child)[41] or identity (e.g. establishing biological parentage)[42] is at stake, the margin allowed to the State will be restricted. In practice, the scope of discretion resulting from these two criteria, pulling in opposite directions, usually tips the balance in favour of the State.

For instance, although the surrogate-born child's right to establish affiliation benefits the entire family, genetic parents' rights are trumped by public policy objections against the recognition of foreign acts and by the State's interest in disincentivising the use of surrogacy by its citizens abroad. Consequently, applications brought by the parents in surrogacy cases almost invariably fail. Exceptionally, a genetic father was successful in Strasbourg when complaining about the length of paternity proceedings after the surrogate sold the baby to another couple, which predetermined the case to his detriment; however, the violation stemmed from the father's procedural rights under Article 8, rather than the acknowledgement of a right to establish paternity for the child

[39] See, e.g., *Lia* v. *Malta*, [59]–[60] (specifically in relation to IVF treatment).

[40] *Pejřilová* v. *The Czech Republic*, [43], consolidating principles laid down in X, Y *and* Z v. *The United Kingdom* [GC], App. No. 21830/93, 22 April 1997, [44]; *Evans* v. *The United Kingdom* [GC], [81]; *S.H. and Others* v. *Austria* [GC], [97].

[41] See *Dickson* v. *The United Kingdom* [GC], [85].

[42] See *S.H. and Others* v. *Austria* [GC], [94]; *Mennesson* v. *France*, [77].

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conceived through unlawful domestic surrogacy.[43] Problematically, even in the context of *lawful* domestic surrogacy, and despite examining an application brought by the child, the Court proved reluctant to interfere with the State's regulation of parenthood: it was satisfied that the surrogacy regime was ECHR-compliant insofar as the child's family life with the intended parents was protected (through residence and parental responsibility arrangements), and it refused to require the allocation of parenthood to the intended genetic father.[44] An irrebuttable presumption of paternity in favour of the gestational surrogate's husband, a man biologically unrelated to the child and not acting in a parental role, arguably fails to strike a fair balance. Against the background of legal avenues for children born through natural intercourse to align their paternal affiliation with genetic and social reality, it also discriminates on grounds of conception and ought to be found outside any reasonable margin of appreciation.

A further obstacle to the development of procreative rights, specifically women's rights, is the *understanding of motherhood as primarily gestational*, which results in an *ambiguous treatment of the genetic commissioning mother in surrogacy cases*. Indeed, she paradoxically appears to be treated like intended non-biological parents, in relation to whom a mere 'possibility of recognition' through a mechanism chosen by the State must be available,[45] even though the surrogate is not a genetic parent, did not intend to act as a parent at the time of conception and never acted as a social parent. This places genetic intended mothers at a disadvantage in surrogacy cases, as well as penalising the child in respect of their maternal affiliation; in fact, the refusal to register the genetic intended mother in accordance with the foreign birth certificate exposes both the mother and the child to the risks of (step-parent) adoption, in particular delays in establishing affiliation (with an impact on, e.g., inheritance rights in case of unforeseen death) and potentially intractable difficulties in case of relationship breakdown in the parental couple.[46] Since neither commissioning parent has a gestational relationship with the child, and they both enjoy an equal genetic link, the child's identity, to which genetic parentage is a key component, should require the recognition of legal ties with both parents on the same footing. To avoid any suggestion that it

[43] See *A.L.* v. *France*, App. No. 13344/20, 7 April 2022.

[44] See *H.* v. *The United Kingdom*, App. No. 32185/20, 31 May 2022.

[45] See Advisory Opinion P16-2018-001, [47]; *D.* v. *France*, App. No. 11288/18, 16 July 2004, [51]–[54].

[46] *A.M.* v. *Norway*, App. No. 30254/18, 24 March 2022, illustrates the extreme consequences of making legal motherhood dependent on step-parent adoption (the case regarded a non-genetic intended mother).

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condones differences in treatment between commissioning parents based on their gender, when faced with a first claim by a genetic mother, the Court unhelpfully read down its previous rulings on the obligation to recognise the genetic intended father, reinterpreting them to require the creation of legal ties through any means, not necessarily the transcription of the foreign birth certificate.[47]

Human rights law may have to tackle more complex reproductive arrangements in the future, such as the use of mitochondrial DNA and babies with 'two mothers'; recent scientific developments have permitted two women to be genetically related to a child, albeit one of them in a negligeable proportion, insofar as most of the genetic information in a cell is contained in its nucleus.[48] Women with genetic abnormalities in their mitochondrial DNA are thus able to avoid transmitting those abnormalities (causing illness or even death) if the nucleus is removed from the mother's fertilised egg and inserted into an empty egg cell donated by a woman whose mitochondrial DNA is healthy.[49] A more flexible approach to motherhood will have to prevail if rights-respectful solutions are to be found in the allocation of parental status.

The development of individual procreative autonomy is also hindered by unuttered assumptions about marriage and family foundation. Thus, non-genetic intended parents benefit indirectly from the finding that respect for the surrogate-born child's private life requires the recognition of legal ties with both commissioning parents; however, this is all contingent upon the social parent's marriage to the biological parent.[50] *The dependence of intentional parenthood upon marriage* makes the position of the non-genetic parent precarious if the genetic parent decides to exclude her/him from the child's life.[51] The Strasbourg Court's acceptance of legal schemes allowing the genetic parent to veto the acquisition of parenthood by the other party to the joint parental project, who is also a legal parent in the jurisdiction where the child was born, and who acted as a de facto carer after the child's birth, endorses an ill-balanced vision of intentional parenthood and a 'situation unfairly penalising individuals biologically unable to procreate'.[52] A recent complaint provided the Court with an opportunity to revisit this position; the case regarded the absence of a legal mechanism enabling the social father to

[47] *D.* v. *France*, [45]–[49].
[48] See Ruth Deech and Anna Smajdor, *From IVF to Immortality: Controversy in the Era of Reproductive Technology* (Oxford and New York: Oxford University Press, 2007) 158.
[49] Ibid., 159.
[50] See *C. and E.* v. *France* (where the intended mothers were the genetic fathers' wives).
[51] See *A.M.* v. *Norway*.
[52] Ibid., Dissenting Opinion of Judge Jelić, [46].

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maintain contact with the child born to his former partner through donor insemination, after living with the child during the first four years of her life and fulfilling a parental role.[53] While the Court recalled the positive obligation to protect de facto family life, it was satisfied – considering the State's wide margin of appreciation – that a public body had requested an investigation and contact had been found incompatible with the child's welfare due to the adults' acrimonious relationship.[54]

The dependence of legal parenthood on marriage and genetic parenthood in one member of the couple means that *intentional parenthood is not recognised in the absence of legal ties between the child and either of the commissioning parents*,[55] although family life more broadly is acknowledged in case of long-term care under a foster-parenting arrangement.[56] To that extent, the Court's case law adheres to a notion of ART anchored in biological parentage (and addressing partial infertility in the couple). Double gamete donation, expanding the ways in which humankind can reproduce in a manner more akin to adoption, seems to remain outside the ambit of Article 8.

Procedural limits to the application of the 'best interests' principle have further restricted the expansion of procreative rights. The Court treats the child's best interests as paramount *when the child is the alleged victim*, rather than every time domestic decisions affect the child. Thus, the Court *merely takes the child's interests into consideration when the commissioning parents lack locus standi to submit claims on behalf of the child*.[57] When the adults are the applicants, despite the use of the 'child's best interests' rhetoric, the Court does not treat them as paramount or even a primary consideration, allowing public policy to prevail.[58] This unwarranted distinction in the application of a key principle, based on a procedural detail, denies equal protection to children whose carers do not have legal standing to defend their rights.[59]

[53] *Carbonai* v. *Italy*, App. No. 9825/21, 29 November 2022 (available only in French); see, similarly, *Bortolato* v. *Italy*, App. No. 35967/19, 10 January 2023, and *Aspisi* v. *Italy*, App. No. 44453/19, 14 February 2023 (available only in French), concerning same-sex female couples.

[54] *Carbonai* v. *Italy*, [15]–[22].

[55] *Paradiso and Campanelli* v. *Italy* [GC]; *Valdís Fjölnisdóttir and Others* v. *Iceland*, App. No. 71552/17, 18 May 2021.

[56] *Valdís Fjölnisdóttir and Others* v. *Iceland*, [62].

[57] *Paradiso and Campanelli* v. *Italy* [GC], [87].

[58] See ibid., [215], finding that the domestic courts had struck a fair balance in removing the child from the commissioning parents based on the assessment that he would not suffer grave or irreparable harm from the separation.

[59] See ibid., [86] (noting that the complaints raised on behalf of the child had been dismissed by the Chamber for lack of locus standi), [135] (distinguishing the case from *Mennesson* v. *France*/*Labassee* v. *France*, App. No. 65941/11, 26 June 2014, where the complaints were

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Most inequitably, *legal standing in Strasbourg in foreign surrogacy cases is determined by the respondent's law*: the commissioning parents – that is, the legal parents under the law of the State where the child was conceived and born – are not permitted to represent the child's interests because the alleged perpetrator of violations does not recognise them as parents.[60] Given the principle of sovereign equality of States (in consequence of which, in an international court, the law of one State cannot be superior to that of another) and the Court's jurisdiction to entertain complaints regardless of the alleged victim's nationality or residence, the quality of legal parent in any State ought to allow submissions on behalf of the child to be heard. A recently communicated case will see the Court grapple with a new legal standing question in relation to foreign surrogacy: whether the surrogate mother of a child whose intended father was not recognised as a second parent can claim victim status.[61]

Another obstacle to the expansion of aspiring parents' rights is *the abstract application of the 'best interests' principle to potential future children*. When applied to an existing child, the best interests principle usually benefits the intended/social parents in foreign surrogacy and donor insemination cases.[62] Conversely, when applied *in abstracto* to hypothetical children, their best interests – including a right to know one's biological parents (part of a person's identity) and to be raised by one's birth parents (*per* Article 7 UNCRC) – are invoked to refuse gamete donation (i.e. the allocation of parenthood to individuals unrelated to the child) as well as posthumous conception.[63] These should not be seen, however, as insuperable objections. The *pater est* presumption and the institution of adoption suggest that the notion of parent

also successfully raised on behalf of the children). In *A.M.* v. *Norway*, the intended mother only applied on her behalf, possibly because of the Court's stance in *Paradiso and Campanelli*, rather than seeking to rely on her legal parenthood in the USA.

[60] See *Paradiso and Campanelli* v. *Italy* [Chamber], App. No. 25358/12, 27 January 2015, [48]–[49], on the representation of children before Convention institutions, denying the applicants such possibility due to the lack of biological ties and the child's new identity following adoption proceedings under Italian law. There is no discussion of the international relevance of the couple's parental status under Russian law.

[61] *S.C.* v. *Switzerland*, App. No. 26848/18. The surrogate mother is a co-applicant together with the same-sex couple and the child.

[62] For an exception, see *Honner* v. *France* (post-separation contact refused insofar as the acrimonious exchanges were detrimental to the child).

[63] See *Pejřilová* v. *The Czech Republic*, [59], accepting that the refusal to allow a widow's artificial insemination with the deceased husband's frozen gametes also served to protect 'the right of the unborn child to know his parents'. See also the respondent's successful submission in *S.H. and Others* v. *Austria* [GC], [70] that the ban on ova donation 'was intended to protect the child's welfare by ensuring the unambiguous identity of the mother'.

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can have a broad meaning, not strictly associated with genetic ties, especially in the context of marriage to the child's genetic parent. While, admittedly, the adults' equality and privacy rights may be outweighed by the well-being of the future child, one needs to query whether the future child is actually harmed by having a non-genetic parent by design. Berge Solberg has criticised the application of the child welfare principle, borrowed from adoption, to procreation choices, insofar as in ART cases 'the child at risk does not exist' and the child is not 'better off not coming into existence';[64] rather, he supported the alignment of ART with all human reproduction (i.e. the reality that people do not reproduce for the sake of the potential child, but for their own sake) by de-emphasising the welfare principle in policy deliberations and by focusing on the 'intentions to become functional parents' and on the feasibility of the parental project.[65]

Another problematic trait of ECHR case law is *the accommodation of State sovereignty by downplaying the principles of 'effective protection' and 'best interests'*. In relation to surrogacy, the Court expressly stated that it regards as legitimate under Article 8(2) the domestic authorities' *wish to reaffirm the State's exclusive competence to recognise a legal parent–child relationship*.[66] Attempts to make concessions to State sovereignty often see the Court dilute the requirements for the effective protection of de facto family life/best interests of the ART-born child: for example, identity rights were deemed adequately protected where the child 'ha[d] not been wholly deprived of a legal relationship with' the genetic father;[67] the fair balance test was satisfied where the child's separation from his de facto carers did not cause 'grave or irreparable harm';[68] the child's sense of identity was not considered impaired by the non-recognition of affiliation because the mother's male transgender partner 'was not prevented in any way from acting as [her] father in the social sense'.[69] States are thus allowed to prioritise their public policy and sovereign law-making powers at the expense of children's rights, in a way reminiscent of the Strasbourg approach to immigration cases; in fact, interferences with children's rights stemming from immigration control measures against their

[64] Berge Solber, 'Getting beyond the Welfare of the Child in Assisted Reproduction' (2009) 35(6) *Journal of Medical Ethics* 373–376, at 373.
[65] Ibid., 376.
[66] *Paradiso and Campanelli* v. *Italy* [GC], [177]; A.M. v. *Norway*, [124].
[67] *H. v. The United Kingdom*, [46].
[68] *Paradiso and Campanelli* v. *Italy* [GC], [215].
[69] X, Y *and* Z v. *The United Kingdom* [GC], [50].

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parents are not viewed as excessive as long as obstacles to relocating abroad are not 'insurmountable'.[70] The margin of appreciation appears particularly wide when aspiring parents resort to surrogacy domestically, and hence do not enjoy the title of parent in any other jurisdiction. In cases regarding purely domestic regulation, as opposed to rules of recognition of foreign acts, the State's choice from among several candidates at parenthood is allowed to prevail.[71]

Relatedly, *in cases with a cross-border element*, the ECtHR regrettably *accommodates the respondent's sovereign decision-making powers at the expense of ethical diversity, conflating illegality and conflict of laws*.[72] It is widely accepted, both in Strasbourg judgments and by commentators, that surrogacy tourism entails some illegal conduct. Andrea Mulligan has noted that the Grand Chamber's ruling in *Paradiso* 'appears to protect the entitlement of Member States to take robust action to deal with an illegal surrogacy arrangement after the child is born'.[73] It seems important to distinguish illegal domestic arrangements from legal overseas arrangements; their recognition concerns a conflict-of-laws dilemma, not clamping down on unlawful acts. Moreover, on occasion, the Court has commended the respondent for permitting its citizens to resort abroad to medical services not available domestically, a compromise seen as indicative of the law's proportionality (e.g. assigning paternity/maternity according to the wishes of parents having successfully used heterologous fertilisation abroad, notwithstanding the domestic ban).[74] There is no reason to treat procreative tourism differently when it

[70] See *Rodrigues da Silva and Hoogkamer* v. *The Netherlands*, App. No. 50435/99, 31 January 2006, [39]; *Omoregie and Others* v. *Norway*, App. No. 265/07, 31 July 2008, [66]; *Useinov* v. *The Netherlands*, App. No. 61292/00, 11 April 2006. For a discussion, see Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Oxford: Hart, 2017) 343–353.

[71] See *K.K.* v. *Denmark*, [74], distinguishing the case from situations in which other persons are claiming parentage in relation to an assisted reproduction process, which alludes to the discussion of *H.* v. *The United Kingdom* (at [69]).

[72] There are numerous references to the illegality of the commissioning parents' conduct in *Paradiso and Campanelli* v. *Italy* [GC], [131], [199], [204], [211], [214] and so on.

[73] Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements' (2018) 26(3) *Medical Law Review* 449–475, at 468.

[74] See *S.H. and Others* v. *Austria* [GC], [114]: 'the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents'. See also *A, B and C* v. *Ireland* [GC], App. No. 25579/05, 16 December 2010, [241]: '*having regard to the right to travel abroad lawfully for an abortion* with access to appropriate information and medical care in Ireland, the Court does not consider that the

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involves the lawful use of surrogacy according to the law of the forum. The portrayal of foreign surrogacy as illegal conduct is also at odds with the Court's reliance on the legal status attained by commissioning parents abroad in order to reject the analogy between surrogacy and donor insemination cases (in which legal parenthood was not established in any jurisdiction).[75]

Finally, another concession made to State sovereignty is the '*Schalk and Kopf* approach'[76] to assessing ECHR conformity, that is, the conclusion that, *considering intervening measures of protection, albeit not available at the material time, the respondent cannot be reproached for not having introduced reform earlier*.[77] This is apparently explained by the Court's reluctance to penalise States at the vanguard of protection of a particular right, having introduced reform at the end of a gradual process in society and the law. By contrast, in other cases, the Court avoids a finding of violation by declaring that it *applies the ECHR standards at the time of the domestic decisions*, even if the effects for the victims are still ongoing, *refusing to pronounce on the ECHR standards at the time of Strasbourg deliberations*.[78] Rarely, the Court goes too far in the opposite direction by retrospectively applying very recent ECHR standards, not crystallised at the time of the facts in the complaint.[79] This inconsistency in the temporal framework for assessment of compliance with the Convention ought to be carefully reconsidered in future judgments.

C.3 THE PROSPECTS OF EMERGING PROCREATIVE RIGHTS IN INTERNATIONAL JURISPRUDENCE

International litigation, particularly in the Strasbourg Court, has demonstrated the capacity of human rights discourse to adapt to the new challenges posed by developments in human reproduction. Having considered, in the previous sections, the cluster of procreative rights upheld to date and the roots of slow

prohibition in Ireland of abortion for health and well-being reasons … exceeds the margin of appreciation' (emphasis added).

75 See *C.E. and Others* v. *France*, [102].

76 See *Schalk and Kopf* v. *Austria*, App. No. 30141/04, 24 June 2010, [105]–[106].

77 *C.E and Others* v. *France*, [110]; *D. and B.* v. *Austria*, App. No. 40597/12, 31 October 2017, [24].

78 *S.H. and Others* v. *Austria* [GC], [84], viewing the issue before the Court as limited to whether the prohibitions 'were justified at the time they were considered by the Austrian Constitutional Court', and not 'whether the prohibition of sperm and ovum donation at issue would or would not be justified today under the Convention'.

79 See *D.B. and Others* v. *Switzerland*, Part-Dissenting Opinion of Judge Elósegui, [4]–[6], challenging the retrospective attribution of responsibility for ECHR standards not yet established at the material time.

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advances in other areas of ART, this final section will examine possible new trajectories for international case law. A noteworthy aspect of ECHR jurisprudence is that the Strasbourg position on heterologous procreative techniques[80] and non-genetic surrogacy[81] changed after the respondent governments referred the dispute to the Grand Chamber, a mechanism which appears to put pressure on the Court to restore State discretion. Indeed, the same backpedalling was visible in relation to the display of the crucifix in classrooms according to a long-standing national tradition (the Grand Chamber[82] overturning the Chamber decision pursuant to which this practice violated the parents' right to respect for their religious convictions).[83] The stark contrast between the two sets of rulings on gamete donation and non-genetic surrogacy demonstrates the fluidity of the balancing exercise in sensitive areas and its potential for change. Progressive Chamber decisions, albeit reversed by the Grand Chamber, can predict future developments in Strasbourg jurisprudence, subject to a larger number of ECHR States liberalising assisted reproduction laws.

Future developments in surrogacy tourism cases ought to include the *child's right to know and establish ties with the non-genetic moral author of conception irrespective of the breakdown in the couple's relationship*. While the means of recognition of legal ties with the non-genetic intended parent were left to States, the Court should take the next opportunity to clarify that an adoption mechanism which is conditional upon the continuing approval of the genetic parent is not satisfactory, especially where the non-genetic parent has already acted as a social parent at the start of the child's life. Mulligan has persuasively argued that, for surrogate-born children, 'the relationship to the intended parent should be captured by the Article 8 right to identity'.[84] Currently, this only applies to the intended parent who is married to, and continues to enjoy the support of, the genetic parent.[85] The notion of identity in ECHR jurisprudence is already broader than the mere reference to genetic origins; in the case of children placed in public care, it includes access to the social services records documenting their upbringing.[86] Similarly, children

[80] See the comparison in Chapter 2 between *S.H. and Others* v. *Austria* [Chamber], App. No. 57813/00, 1 April 2010, and *S.H. and Others* v. *Austria* [GC].
[81] See the comparison in Chapter 3 between *Paradiso and Campanelli* v. *Italy* [Chamber] and *Paradiso and Campanelli* v. *Italy* [GC].
[82] See *Lautsi and Others* v. *Italy* [GC], App. No. 30814/06, 18 March 2011.
[83] See *Lautsi and Others* v. *Italy* [Chamber], App. No. 30814/06, 3 November 2009.
[84] Andrea Mulligan, 'Identity Rights and Sensitive Ethical Questions', 472.
[85] See *D.B. and Others* v. *Switzerland*; *K.K. and Others* v. *Denmark*.
[86] *Gaskin* v. *The United Kingdom*, App. No. 10454/83, 7 July 1989.

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born through heterologous reproductive techniques should be recognised the right to information about their personal history, including knowledge of both individuals responsible for their genesis. In fact, the non-biological intended mother's role as 'the instigator of the pregnancy'[87] places her at the origin of conception.

Moreover, *where neither commissioning parent has genetic ties with the child*, since there is no other candidate at the child's parenthood and effective care, *the child's 'right to know and be cared for' by his/her parents under Article 7 UNCRC*[88] *should be construed as referable to the moral authors of conception*, that is, the persons who have 'intentional and causative responsibility for the birth of the child'.[89] Indeed, to treat donors and surrogates as parents, despite their State-endorsed arrangements with the commissioning parents, would be to coerce them into involuntary parenthood. Nor is the child's welfare better served by the vacancy of parenthood and by being brought up in public care. The case law on non-genetic surrogacy makes allowance for intentional parenthood, in that it does not treat the commissioning parents' position as a mere situation of de facto care (by contrast with foster carer rulings).[90] However, in those cases, Article 8 safeguards are not available as soon as the parties' effective family life is established; a genuine intention to conceive a child, coupled with de facto parenting, becomes constitutive of 'family life' only after a considerable period of time.[91]

The case law could also be more receptive to the notion of *parenthood as acted-upon intention to create life, corroborated by de facto care, in donor insemination cases*. There seems to be no valid reason for treating intended parents differently depending on the type of heterologous procreative method used, in particular whether the child was conceived abroad through surrogacy (in which case the ECtHR requires the creation of legal ties with both parents) or through assisted insemination with donor (in which case means of protection falling short of a parent–child relationship are deemed sufficient).

[87] Rachel Cook, 'Donating Parenthood: Perspectives on Parenthood from Surrogacy and Gamete Donation', in Andrew Bainham, Shelley Day-Sclater and Martin Richards (eds.), *What Is a Parent? A Socio-Legal Analysis* (Oxford: Hart, 1999) 121–136, at 135.

[88] See Art. 7(1) UNCRC: 'The child . . . shall have . . ., as far as possible, the right to know and be cared for by his or her parents.' On the interpretation of Art. 7(1) UNCRC as applicable to genetic parents, see Carmen Draghici, 'Unplanned Fatherhood Is Not Sperm Donation: An Unduly Moralistic Approach to Natural Fathers in ECHR Case Law' (2022) 2 *Child and Family Law Quarterly* 123–147, at 138.

[89] Mulligan, 'Identity Rights and Sensitive Ethical Questions', 471.

[90] See *Moretti and Benedetti* v. *Italy*, App. No. 16318/07, 27 April 2010.

[91] See *Paradiso and Campanelli* v. *Italy* [GC], [151]–[157]; *Valdís Fjölnisdóttir and Others* v. *Iceland*, [62].

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Two recent applications will give the Court an opportunity to align its jurisprudence on donor insemination with that on surrogacy, insofar as the intended parents were also named as legal parents on the foreign birth certificates,[92] and hence the distinction drawn between the two situations on the basis of parenthood abroad lapses.

Another desirable future development is the protection of the right to *respect for biological parentage in all ART cases, whether foreign or domestic, lawful or unlawful*. One must salute the ECtHR's readiness to require States prohibiting surrogacy to recognise parent–child relationships arising from lawful foreign surrogacy arrangements. However, while the child's privacy rights have been upheld, the adults are only accidental beneficiaries: it is on child welfare grounds, and not in the name of procreative rights, that the State of residence is expected to create legal ties between the surrogate-born child and the genetic parent. Aspiring parents' rights ought to be equally upheld, based on the reality of genetic and social ties and the intention to found/expand a family. Moreover, a dimension so far missing from the case law on intentional parenthood is the instrumental role of gamete donation/surrogacy in safeguarding the right to become a parent of the *fertile* member of the couple. Additionally, the right *not* to become a parent,[93] in particular the right not to be coerced into acting as a donor and the right to protection against unauthorised uses of one's genetic material,[94] justifies a finding of violation in cases where surrogacy legislation allows the gestational surrogate to assert her own parental title. In fact, prospective parents entering surrogacy arrangements do not agree to donate their gametes for the surrogate's reproduction.[95]

Furthermore, the case law should *elevate the interest in having a healthy child from idiosyncratic findings of violation to an explicit ECHR right*. In fact, decisions upholding the right to resort to medical technologies in order to control reproductive outcomes are largely dependent on the domestic legal system of reference. The ECtHR has thus found violations of Article 8 where domestic law already afforded access to prenatal testing and to therapeutic abortion but, in practice, access was hindered. The Court is yet to establish unambiguously that expecting parents are entitled to prenatal testing and

[92] See *Nuti* v. *Italy*, App. No. 47998/20; *Dallabora and Others* v. *Italie*, App. No. 23142/21 (donor insemination in female same-sex couples). In *Dallabora*, both the parents and the children are applicants, giving the Court an opportunity also to revisit adults' rights in ART cases.

[93] See *Evans* v. *The United Kingdom* [GC], [71], [90].

[94] See *Pejřilová* v. *The Czech Republic*, [52], [59].

[95] See *Johnson* v. *Calvert*, 5 Cal. 4th 84 (1993), 93.

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reproductive choice as a matter of ECHR rights. Similarly, the right to use PGD in order to avoid the transmission of a serious hereditary illness was upheld in circumstances where selective abortion was (incongruously) available; this may lead to the paradoxical conclusion that a State not offering either PGD or abortion on grounds of foetal abnormalities is ECHR-compliant. A future case might provide the Court with an opportunity to refine its position and cement the right of prospective parents at risk of transmitting genetic illnesses to resort to PGD, regardless of whether abortion is an option. That, for centuries, humankind lacked the capacity to avert severe congenital disabilities in offspring does not make the choice of a healthy child less deserving of respect than other reproductive decisions. Given the direct and far-reaching impact of restrictions on procreative autonomy on the parents, they cannot be justified by the unease with novel genetic techniques of a large section of the population (likely unaffected by the problems addressed by PGD). Rubin and Phillips have also noted that, while 'the "designer-baby" rhetoric conjures up notions of eugenics, with images of elite parents selecting physically and intellectually superior children', research shows that parents using PGD wish to prevent the suffering and premature death of their children, and not choose desired traits.[96]

A next step for human rights jurisprudence, potentially prompted by the principle of non-discrimination, is to *domesticate access to ART*. ECHR case law has safeguarded parent–child relationships created abroad and has accepted that a ban on heterologous reproduction was proportionate, inter alia, because there was no impediment to travelling abroad to permissive jurisdictions.[97] This position ought to be revisited if the ECtHR is to promote reproductive justice. For the IACtHR, a ban on IVF, forcing infertile couples to travel abroad for treatment, amounts to indirect discrimination on grounds of economic status.[98] Interestingly, a case pending before the ECtHR claims the medical costs related to having an abortion on grounds of foetal abnormality abroad, owing to a domestic ban.[99]

Non-discrimination in access to ART may also bring economic claims – for example, free provision of ART services – within the ambit of the ECHR, notwithstanding the notorious difficulty in mounting a case for specific healthcare access conditions, given the dependency of services on public

[96] Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 186.
[97] *S.H. and Others* v. *Austria* [GC], [114]–[115].
[98] *Artavia Murillo et al.* v. *Costa Rica*, [303].
[99] See *I.Z.* v. *Poland*, App. No. 57338/21.

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resources. Challenges to the allocation of ART services are already starting to make their way through domestic courts, the scholarship and the ECtHR. In the UK, the lack of access of single women to publicly funded fertility treatment was denounced as discriminatory.[100] In a recent case in Northern Ireland, a same-sex couple challenged the lack of access to publicly funded fertility services (IVF with donor ova) where the prospective surrogate was voluntarily sterile.[101] A thought-provoking Strasbourg application under Articles 8, 12 and 14 ECHR, struck out following the parties' friendly settlement, concerned the dismissal of a claim, brought against the insurance company by a man whose reproductive function was impaired by a road accident, for medical expenses for his wife's IVF.[102] The refusal of sick leave on account of pregnancy-related complications to a woman who had undergone IVF shortly before taking up employment was found in breach of Article 14 taken in conjunction with Article 1 of Protocol 1.[103] Further pecuniary aspects of reproductive freedom are likely to be placed before the Court.

The number of Strasbourg applications regarding procreative rights is on the rise,[104] some of them presenting the Court with rather novel claims. For instance, while, so far, complaints have sought to assert the right of the intentional parent to establish legal ties with the ART-born child, a recently communicated case will require the Court to pronounce on the opposite situation: the claim by a child conceived through IVF with donor gametes and her mother that their rights were breached by domestic decisions permitting the intended father to disclaim paternity after divorce, reneging on the

[100] See Atina Krajewska, 'Access of Single Women to Fertility Treatment: A Case of Incidental Discrimination?' (2015) 23(4) *Medical Law Review* 620–645.

[101] See *Re JR176(2)* [2022] NIKB 21. For the High Court, there had been no difference of treatment and, even if that was the case, it was justified, primarily because a very wide margin had to be afforded to the State. While a well-founded reason might exist to consider a woman who has undergone voluntary sterilisation ineligible for public funding for IVF to further her own parenthood plans, when the funding is sought to enable a male couple to have a child, that justification lapses; in a jurisdiction not permitting commercial but only altruistic surrogacy, and given the emotional and legal intricacies of traditional surrogacy, this regulatory framework penalises structurally infertile couples.

[102] *Ristevska and Ristevski* v. *Former Yugoslav Republic of Macedonia*, App. No. 54344/07, 2 July 2013.

[103] *Jurčić* v. *Croatia*, App. No. 54711/15, 4 February 2021.

[104] Several claims have been brought against Italy in relation to the refusal to transcribe the full details of the birth certificates of children lawfully conceived through surrogacy abroad, by both heterosexual and homosexual couples; see *Modanese* v. *Italie*, App. No. 59054/19; *Bini and Others* v. *Italy*, App. No. 12109/20; *B.K. and Others* v. *Italy*, App. No. 45426/21; *Bonzano and Others* v. *Italy*, App. No. 10810/22; *Corona and Others* v. *Italy*, App. No. 29038/20, *Andrisani and Others* v. *Italy*, App. No. 2738/21, *C.B.* v. *Italy*, App. No. 47196/21.

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parental project and leaving the child fatherless.[105] Additionally, some concerns emerging in relation to step-parent adoption in same-sex couples will likely transfer to ART cases, for example, the alleged right to a birth certificate template not disclosing the lack of biological link with the second female parent.[106] It is also worth noting the Court's warning that the issue of gamete donation 'must be kept under review',[107] and that in relation to 'evolving rights', such as the establishment of legal ties between an intended parent and the child born to his/her partner through donor insemination, States retain 'a *certain* margin of appreciation in the *timing* of the introduction of legislative changes'.[108] The margin will grow narrower as the practice of Council of Europe States becomes more convergent. Despite the regulatory hesitations (and indeed errors) accompanying any new socio-legal phenomenon, the expansion of parenthood through ART is an irreversible process. Upcoming legal cases can reinforce the notion that, to achieve the full realisation of procreative rights, technology must be embraced as an ally rather than being cast off as a foe.

[105] See *A. and B.* v. *France*, App. No. 12482/21; the intended father successfully annulled his recognition of parentage, in circumstances where the embryo had been transferred into the mother's uterus after the institution of divorce proceedings but before the divorce was granted.

[106] In *S.W. and Others* v. *Austria* (App. No. 1928/19, 6 September 2022), the complainants alleged that the refusal to issue a post-adoption birth certificate indicating both the biological mother and her same-sex partner as mothers was discriminatory, insofar as the indication of mother/parent and father/parent on the birth certificate revealed that one of them was an adoptive parent, whereas heterosexual parents did not face this problem. The same issue may arise in connection with the registration of the non-genetic intended parent in the case of surrogacy-born children.

[107] See *S.H. and Others* v. *Austria* [GC], [118]: 'Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States.'

[108] *D. and B.* v. *Austria*, [24] (emphasis added).

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