2

A Right to a Genetically Related Child?

2.1 THE RIGHT TO MEDICALLY ASSISTED PROCREATION AND TO CONTROL OVER ONE'S GENETIC MATERIAL

However central to human experience, the right to have a genetically related child is not free from controversy in scholarly debates. For many, procreation is essential for individual self-fulfilment for a whole host of reasons: a primordial sense of ensuring the survival of the species; partaking in the miracle of creating new life; perpetuating the family's lineage and gene pool as a responsibility towards ancestors; giving one's parents the satisfaction of grandchildren that continue their genetic heritage; the ability to recognise oneself and identify traits of family members in one's child; the immutable bond with a child that is an extension of oneself; the sense of gaining immortality by producing offspring; the desire to avoid the genetic lottery of adoption of unrelated children; the fear of rejection by a non-biological child in adulthood, sometimes associated with the search for the birth family. Prominent amongst these motivations is the innate, but also socially fortified, need to seek genetic continuity and permanence. As Maya Sabatello noted, 'procreation is often regarded as a natural desire to "continue the family line" and a desire to leave a piece of oneself behind'.[1]

Others, however, equate procreation with the opportunity to experience parenthood and hence view genetic continuity as immaterial. The desire for parenthood in a social sense is also associated with 'the need for children who will provide economic support for parents in their old age'.[2] This understanding of procreation occasionally leads to unfair criticism of the right to a genetic

[1] Maya Sabatello, 'Posthumously Conceived Children: An International and Human Rights Perspective' (2014) 27 *Journal of Law and Health* 29–67, at 61.

[2] Gillian Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991) 103.

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child as devaluing social parenthood. According to Michael Boucai, promoting the geneticist ideal of procreation 'might demean nonbiological parenthood',[3] and human rights arguments for assisted reproduction treatment (ART) carry the risk of 'glorifying biological reproduction at the expense of adoption'.[4]

Nonetheless, a right cannot be negated due to the fear of offending those who value it less. To deny medical support for biological parenthood on the basis that non-biological parenthood is available is to prevent individuals from making their own judgments on the meaning of procreation. The deferral to personal choice in family formation does not diminish the importance of social parenthood; it merely recognises that individuals have different priorities. The fact that some people derive self-fulfilment from *rearing children* (whether or not biological) cannot justify restrictions on others' desire to *reproduce*. It was reported that women mistakenly implanted with other patients' embryos following in vitro fertilisation (IVF) underwent emergency procedures to have those embryos removed;[5] given the costs of IVF treatment, the low chances of an embryo becoming a foetus and the trauma of a further surgical intervention, the decision to remove unrelated embryos showcases the importance some aspiring parents attach to genetic continuity in reproduction. A pluralist, tolerant and open-minded society ought to safeguard the right to choose genetic parenthood, even if it is not a high-ranking priority for everyone.

The same reductive view of parenthood as rearing children has inspired some commentators to suggest that it is selfish and irresponsible of individuals to wish to bring new biological children into the world when there are many abandoned minors in need of a home.[6] However, those children are not the responsibility of reproductively challenged individuals any more than they are of individuals who can reproduce without medical assistance; by the same token, one could argue that fertile couples should refrain from reproducing as long as there are children needing a family. This would require some individuals to sacrifice their procreative rights in order to repair the damage created

[3] Michael Boucai, 'Is Assisted Procreation an LGBT Right?' (2016) *Wisconsin Law Review* 1065–1125, at 1121.

[4] Ibid., 1123.

[5] See Merle Spriggs, 'IVF Mixup: White Couple Have Black Babies' (2003) *Journal of Medical Ethics* 65.

[6] See Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston, MA: Houghton Mifflin, 1993) 35–36, cited in Boucai, 'Is Assisted Procreation an LGBT Right?', 1117: 'A sane and human society should encourage people to provide for existing children rather than bringing more children into the world.'

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by others who exercised theirs irresponsibly (by reproducing while unfit or ill-equipped to become parents); the inequity of this position is obvious. Society as a whole has a responsibility for children in care (borne by taxpayers collectively); conversely, every individual is entitled to the same choice between adoption and reproduction (whether natural or assisted). The right to resort to ART in pursuit of a genetic child must be disconnected from social agendas. As Gillian Douglas aptly pointed out:

> It may also be argued that childless couples should seek to adopt the many children waiting in care, or the millions who suffer deprivation in the third world. . . . But there is no reason why infertile couples should be expected to fulfil the needs of such children, rather than anyone else. . . . To expect them to be taken on, for lack of anything else, by infertile couples, is to devalue both the children and the childless.[7]

In addition, the moral interest in procreating does not hinge upon whether or not an individual or a couple requires medical assistance to do so.[8] Nor is the criticism of assisted conception as unnatural a sufficient justification against the provision of treatment to those who depend on it to have a biological child. As Emily Jackson noted, 'in order to restrict other people's reproductive freedom, these critics must do more than establish personal distaste for artificial means of reproduction'.[9]

Medically assisted procreation remains, however, particularly controversial when it involves third-party contributions: the donation of gametes or surrogacy. There are qualitative distinctions between the functions performed by gamete donors and surrogate mothers. The surrogate's role 'involves the nurture of the child for nine months followed by a painful and risky delivery'.[10] However, both techniques presuppose the participation of an individual who does not intend to reproduce but merely to facilitate another's reproductive plans. They raise the question of whether the right to respect for private

[7] Douglas, *Law, Fertility and Reproduction*, 106–107. See also Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford: Hart, 2001), 174, arguing that, since deliberate procreation among the fertile population is not dismissed as selfish and immoral, there is no reason to assign moral responsibility for neglected children to the infertile.

[8] See John Robertson, 'The Presumptive Primacy of Procreative Liberty', in Tom Beauchamp, LeRoy Walters, Jeffrey Kahn and Anna Mastroiani (eds.), *Contemporary Issues in Bioethics* (Boston, MA: Wadsworth Cengage Learning, 2014, 8th ed.) 245–251, at 248: 'The moral right of the coitally infertile to reproduce is based on the same desire to reproduce . . . They too wish to replicate themselves, transmit genes, gestate and rear children biologically related to them . . . neither the noncoital nature of the means used nor the infertility of their beneficiaries mean that the presumptively protected moral interest in reproduction is not present.'

[9] Jackson, *Regulating Reproduction*, 169.

[10] Douglas, *Law, Fertility and Reproduction*, 150.

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and family life requires the State to facilitate genetic or gestational assistance to procreate and to allocate parenthood according to the parties' intentions.

To date, the European Court of Human Rights (ECtHR) has proved cautious when interpreting obligations related to medically assisted reproduction, affording States a wide margin of appreciation in this sensitive area:

> 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, … especially since the use of IVF treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments. … The margin of appreciation to be afforded to the respondent State is a wide one.[11]

Nevertheless, the Court was prepared to uphold a number of minimal guarantees regarding access to ART and relationships created through recourse to ART. These will be examined in the following sections.

2.1.1 *Respect for the Decision to Become a Parent and Make Use of ART*

It is currently well established that the European Convention on Human Rights (ECHR) protects the right to respect for a person's decision to become a genetic parent. The issue has first arisen in the context of deprivation of liberty, specifically in relation to the claim that the denial of conjugal visits in prison breached the right to found a family under Article 12. In X v. *The United Kingdom*, the former European Commission on Human Rights acknowledged the absolute nature of the right to found a family (to which no express restrictions similar to those in Article 8(2) apply), but clarified that Article 12 does not require States to guarantee 'that a person must at all times be given the actual possibility to procreate his descendants'.[12] In *E.L.H. and P.B.H.* v. *The United Kingdom*, the Commission analysed the rule prohibiting 'conjugal visits' in prison as an interference with both Articles 8 and 12, but legitimate (i.e. responding to the need to prevent disorder or crime) and proportionate (in that artificial insemination was allowed).[13] The parties'

[11] *Knecht* v. *Romania*, App. No. 10048/10, 2 October 2012, [59].

[12] X v. *The United Kingdom*, App. No. 6564/74, 21 May 1975 (Commission). For a discussion, see Bart van der Sloot, 'Between Fact and Fiction: An Analysis of the Case-Law on Article 12 of the European Convention on Human Rights' (2014) 26(4) *Child and Family Law Quarterly* 397–420, at 408.

[13] *E.L.H. and P.B.H.* v. *The United Kingdom*, App. Nos. 32094/96; 32568/96, 22 October 1997 (Commission), [2].

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conscientious objection to artificial insemination did not detract from this conclusion; in fact, Article 9 'does not guarantee the right to be exempted from rules which apply generally and neutrally'.[14] The decision suggests that, as long as a route to conceive is available, States are not required to respect the prisoner's preferred method of conception.

The Grand Chamber in *Evans* v. *The United Kingdom* firmly anchored the right to pursue genetic parenthood in Article 8 as a ramification of 'privacy':

> 'Private life', which is a broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world . . ., incorporates the right to respect for both the decisions to become and not to become a parent.[15]

While noting that nothing precluded the applicant from becoming a parent in a social sense (through adoption), the Court agreed that the 'right to respect for the decision to become a parent in the genetic sense' also fell within the scope of Article 8.[16] The ruling thus acknowledged that biological parenthood is qualitatively different from parental status and that the interest in becoming a genetic parent is protected by the Convention. The importance of the right to make decisions about procreation was reaffirmed by the finding in *Dickson* v. *The United Kingdom* that this right is not automatically forfeited upon imprisonment; on the contrary, any restrictions upon detainees' right to make procreative decisions require justification.[17] The subsequent *Lukács* v. *Hungary* decision, while dismissing the complaint because the parties had not availed themselves of domestic avenues for pursuing conjugal meetings,[18] did not contest the premise that the couple's ability to procreate remains protected during the course of detention.

Depending on personal circumstances, the effective enjoyment of the right to respect for the decision to become a genetic parent may require medical assistance. In *Dickson* v. *The United Kingdom*, the Grand Chamber held that 'the refusal of artificial insemination facilities concerned [the applicants'] private and family lives, which notions incorporate the right to respect for

[14] Ibid.
[15] *Evans* v. *The United Kingdom* [GC], App. No. 6339/05, 10 April 2007, [71].
[16] Ibid., [72].
[17] See *Dickson* v. *The United Kingdom* [GC], App. No. 44362/04, 4 December 2007, [68] and [75] (reiterating *Hirst* v. *United Kingdom (No. 2)* [GC], App. No. 74025/01, 6 October 2005, [70]).
[18] See *Lukács* v. *Hungary*, App. No. 61924/15, 16 December 2020, [18]–[20].

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their decision to become genetic parents'.[19] Furthermore, the availability of ART when it is 'the only realistic hope . . . of having a child together' becomes a matter 'of vital importance' to the couple.[20] This in turn narrows the State's margin of appreciation: 'Where a particularly important facet of an individual's existence or identity is at stake (such as the choice to become a genetic parent), the margin of appreciation accorded to a State will in general be restricted'.[21] *S.H. and Others* v. *Austria* expressly articulated the *right* to resort to ART in order to become a parent; according to the Grand Chamber, 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life'.[22] Article 12 should equally apply whenever fertility treatment is sought by a married couple, because restrictions affect their right to 'found a family'; however, ECHR case law on ART has developed exclusively around Article 8. In *Dickson* v. *The United Kingdom*, having ascertained a violation of Article 8, the Court found it unnecessary to consider the complaint under Article 12,[23] and subsequent applications have focused on Article 8. Article 12 was no longer invoked in *S.H. and Others* v. *Austria* by married couples prevented from using gamete donation to found a family.[24] Similarly, in *Nedescu* v. *Romania*, although a married couple's loss of the opportunity to have a second child due to the seizure of their embryos was eminently relevant under Article 12, the complaint only relied on Article 8.[25]

While the right to make use of ART is not absolute, measures precluding access require justification. The *Dickson* v. *The United Kingdom* ruling found that the blanket refusal to provide access to assisted fertilisation facilities to individuals deprived of liberty, and hence incapable of natural procreation for a considerable time, failed to strike a fair balance between the interests at stake. The applicant, a prisoner serving a lengthy sentence for murder, had unsuccessfully sought access to artificial insemination, indicating that his wife would no longer be likely to conceive by the time he was released. The Court

[19] *Dickson* v. *The United Kingdom* [GC], [66].

[20] Ibid., [72]. In *Dickson*, artificial insemination was the only option due to the wife's age and the incarcerated husband's release date, but it is also the only option when medical conditions in either member of the couple preclude natural procreation.

[21] Ibid., [78].

[22] *S.H. and Others* v. *Austria* [GC], App. No. 57813/00, 3 November 2011, [82]. See also *Knecht* v. *Romania*, [54].

[23] *Dickson* v. *The United Kingdom* [GC], [86].

[24] The applicants had invoked Article 12 in the domestic proceedings; see *S.H. and Others* v. *Austria* [GC], [15].

[25] See *Nedescu* v. *Romania*, App. No. 70035/10, 16 January 2018, [54].

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agreed that the punitive function of imprisonment and maintaining public confidence in the penal system constituted legitimate aims;[26] the welfare of the child to be born, while playing a role, could not go so far as to prevent couples from attempting to conceive, since the wife could look after the child until her husband's release[27] (a finding potentially important for single aspiring parents). The judgment also confirmed that, although many States had introduced conjugal visits in prison, the Convention could not be interpreted as mandating them;[28] the choice of the method of conception remains, therefore, subject to limitations, as long as the right to procreate is safeguarded (as seen in *E.L.H. and P.B.H.* a decade earlier).

Although the lack of European consensus widened the State's margin of appreciation in *Dickson*, it was held that the absence of an assessment of proportionality in a specific case, on a matter of 'significant importance' to the individual, 'must be seen as falling outside any acceptable margin of appreciation so that a fair balance was not struck between the competing public and private interests involved'.[29] The policy contested in *Dickson* 'effectively excluded any real weighing of the competing individual and public interests, and prevented the required assessment of the proportionality of a restriction, in any individual case', in that it 'placed an inordinately high "exceptionality" burden on the applicants when requesting artificial insemination facilities'.[30] Equally unsatisfactory was the nature of the instrument prohibiting the assistance sought by the applicants, namely a policy issued by the Secretary of State. For the Court, this did not allow for democratic debate, as Parliament had not had an opportunity to weigh the competing interests at stake and consider proportionality issues.[31]

Another weighty contribution of *Dickson* v. *The United Kingdom* to the consolidation of procreative rights was the rejection of 'the possibility of justifying the restriction of the applicants' Convention rights by the minimal number of persons adversely affected'.[32] This principle can also be applied against the denial of other procreative rights benefitting small segments of the population, such as the ban on the use of IVF and embryo screening by prospective parents who are carriers of genetic illnesses.[33]

[26] *Dickson* v. *The United Kingdom* [GC], [75].
[27] See ibid., [76].
[28] See ibid., [81].
[29] Ibid., [85].
[30] Ibid., [82].
[31] Ibid., [83].
[32] Ibid., [84].
[33] See Chapter 4, Section 4.3.

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The right to pursue biological parenthood was indirectly cemented by the ECtHR's support for the right to know one's origins, which acknowledged the importance of genetic ties. In *Odièvre* v. *France*, the Grand Chamber stressed that 'a person's identity as a human being' is relevant to 'personal development', hence 'the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents'.[34] Consequently, as emphasised in *Jäggi* v. *Switzerland*, cogent justifications are required for restrictions on the right to establish parentage.[35] *Mennesson* v. *France* further upheld 'the importance of biological parentage as a component of identity'[36] even in the context of reproductive methods running counter to public policy (e.g. surrogacy).[37] Andrew Bainham also noted a 'strongly genetic flavour' in the approach to parenthood in the UN Convention on the Rights of the Child (UNCRC), whose Article 7 proclaims 'the right of the child *from birth* "to know and be cared for by his or her parents", that is to say, surely, the mother and the genetic father'.[38] In addition, the value of genetic ties emerges distinctly from the Strasbourg case law on parenthood outside wedlock. As recalled in *Anayo* v. *Germany*, a child and his/her biological father 'are inalterably linked by a natural bond'.[39] Arguably, the right to know one's birth parents and the right to respect for the decision to have a biological child are symmetrical expressions of a broader right; in fact, a person's genetic make-up and linkage to a family are core components of their identity, both as ascendants and as descendants.

An absolute prohibition on IVF treatment, albeit not examined by the ECtHR, was found to violate several provisions of the American Convention on Human Rights (ACHR) in *Artavia Murillo et al.* v. *Costa Rica*: Article 5(1) (right to physical, mental and moral integrity), Article 7 (personal liberty), Article 11(2) (prohibition of arbitrary interference with private life and the family) and Article 17(2) (right to marry and raise a family); additionally, it amounted to indirect discrimination in relation to disability, gender and

[34] See *Odièvre* v. *France* [GC], App. No. 42326/98, 13 February 2003, [29].

[35] See *Jäggi* v. *Switzerland*, App. No. 58757/00, 13 July 2006, [37]: 'The right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests.'

[36] *Mennesson* v. *France*, App. No. 65192/11, 26 June 2014, [100].

[37] See Section 2.4.

[38] Andrew Bainham, 'Whose Sperm Is It Anyway?' (2003) 62(3) *Cambridge Law Journal* 566–570, at 569 (original emphasis).

[39] *Anayo* v. *Germany*, App. No. 20578/07, 21 December 2010, [60].

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financial situation.[40] Relying on Article 25 of the UN Convention on the Rights of Persons with Disabilities (CRPD), which requires States to take 'all appropriate measures' to ensure the right of such persons to enjoy 'the highest attainable standard of health',[41] the Inter-American Court of Human Rights (IACtHR) inferred a right 'to have access to the necessary techniques to resolve reproductive health problems'.[42]

Considering the wide definition of disability, extending to functional limitations, in the CRPD's Preamble, in Article 18 of the Additional Protocol to the American Convention[43] and in the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities,[44] as well as the definition of infertility by the World Health Organisation as a 'disease of the reproductive system',[45] the IACtHR concluded that 'a disability is not defined exclusively by the presence of a physical, mental, intellectual or sensorial impairment, but ... it is interrelated to the barriers or limitations that exist in society for the individual to be able to exercise his rights effectively'.[46] In particular, 'infertility is a functional limitation recognized as a disease' and requires special measures of protection.[47] Additionally, due to the existence of stereotypes in society (acknowledged but not validated by the IACtHR),[48] whereby the woman's status is often defined by motherhood,[49] and due to the fact that 'the use of assisted reproduction technologies is especially related to the woman's body', the ban on IVF 'has a disproportionately negative impact on women'.[50] Finally, 'the ban on IVF had a disproportionate impact on infertile couples who did not have the financial resources to undergo IVF abroad'.[51]

The respondent's justification for the ban, namely avoiding embryonic loss, gave the IACtHR an opportunity to assess the relative importance of the

[40] *Artavia Murillo et al. ('In Vitro Fertilisation')* v. *Costa Rica*, Case No. 12.361, 28 November 2012.
[41] Convention on the Rights of People with Disabilities, New York, 13 December 2006, in force 3 May 2008, UNTS vol. 2515 (p. 3).
[42] *Artavia Murillo et al.* v. *Costa Rica*, [289].
[43] Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, San Salvador, 17 November 1988, in force 16 November 1999.
[44] Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities, Guatemala City, 8 June 1999, in force 14 September 2001.
[45] See *Artavia Murillo et al.* v. *Costa Rica*, [288].
[46] Ibid., [291].
[47] Ibid., [293].
[48] Ibid., [302].
[49] Ibid., [294]–[296].
[50] Ibid., [302].
[51] Ibid., [303].

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protection of the embryo when compared to infertile couples' rights. The IACtHR criticised the absolute protection of the embryo in the domestic court's decision, which, by failing to weigh up competing rights, 'involved an arbitrary and excessive interference in private and family life', compounded by 'discriminatory effects'.[52] On the one hand, the impact of IVF treatment on the protection of prenatal life was said to be limited, since the risk of embryonic loss is also present in natural pregnancy, and before implantation embryos do not enjoy the right to life enshrined in Article 4 ACHR;[53] on the other hand, the Court emphasised 'the severity of the limitation of the rights involved in this case as compared to the importance of the protection of the embryo', in particular 'the effects on the rights to personal integrity, personal liberty, private life, intimacy, reproductive autonomy, access to reproductive health services, and to found a family', which 'are annulled for those persons whose only possible treatment for infertility is IVF'.[54] The incompatibility with ACHR provisions of the absolute prohibition on IVF was reiterated by the Inter-American Commission on Human Rights in *Gómez Murillo and Others* v. *Costa Rica*.[55]

The Strasbourg Court has faced more detailed questions on access to IVF as opposed to total bans. For instance, in *Lia v. Malta*, it was called upon to consider the rejection of a couple's request for a self-funded second homologous IVF procedure owing to the woman's age.[56] The ECtHR held that the interference was not 'in accordance with the law', because the judicial and administrative authorities' interpretation and application of the statute lacked consistency and foreseeability. Specifically, the administrative authorities had interpreted the word 'desirable' as 'mandatory' in the statutory guidance on eligibility and applied this version without consideration of individual circumstances, despite the highest courts' contrary interpretation.[57] The least favourable interpretation was thus applied and the one 'most at odds with the clear wording of the law, as supported by its drafters as well as the highest courts'.[58]

[52] Ibid., [316].
[53] Ibid., [315].
[54] Ibid., [314].
[55] *Gómez Murillo and Others* v. *Costa Rica*, Report No. 1/15, Case 12.798 (Merits), 29 January 2015, [39]–[44]. The report was followed by a friendly settlement, noted by the IACtHR in *Gómez Murillo and Others* v. *Costa Rica*, Case No. 12.798, 29 November 2016, [11], [44]–[48].
[56] *Lia* v. *Malta*, App. No. 8709/20, 5 May 2022. Other aspects of IVF regulation challenged in Strasbourg proceedings concerned the use of donated gametes and posthumous treatment; see Sections 2.2 and 2.3.
[57] *Lia* v. *Malta*, [56], [63]–[69].
[58] Ibid., [66].

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The Court did not proceed to a substantive analysis of the age limit of forty-three, because the interference failed the first hurdle (legality); nor did the Court find it necessary to examine the discrimination claim separately. However, the Court has addressed a discrimination case based on the prospective mother's age in relation to adoption. In *Schwizgebel* v. *Switzerland*, concerning the refusal to allow a forty-seven-year-old single woman to adopt a second child, the Court accepted that there was no common denominator in Europe as regards the upper age limits for adopters, and hence the respondent had acted within the boundaries of its broad margin of appreciation.[59] Future litigation might establish whether the narrower margin in relation to procreative autonomy yields different results.

2.1.2 *Gamete Providers' Right to Use Their Embryos for Reproductive Purposes*

The legal status of the embryo remains an unsettled issue in international human rights law. Questions of when human life begins and whether the embryo or the foetus have any autonomous rights were deferred to States in cases challenging the authorisation of an abortion without consulting the father of the unborn child and the non-criminalisation of medical errors causing an involuntary abortion.

In *Paton* v. *The United Kingdom*, the former Commission concluded that the use of the term 'everyone' in the Convention (Articles 1, 5, 6, 8–11, 13) 'is such that it can apply only postnatally', although prenatal application in a rare case (e.g. under Article 6 (1)) 'cannot be entirely excluded'.[60] Moreover, the decision noted that the express limitations in Article 2 (death penalty, deprivation of life during law enforcement operations) suggest that it does not address prenatal life, because 'all the above limitations, by their nature, concern persons already born and cannot be applied to the foetus'.[61] Therefore, cumulatively, the general use of the term 'everyone' and the contexts in which it is used in Article 2 'tend to support the view that it does not include the unborn'.[62] The Commission recalled, *a contrario*, the express protection of life 'since the moment of conception' in Article 4(1) ACHR.[63] It also acknowledged 'the wide divergence of thinking on the question of

[59] *Schwizgebel* v. *Switzerland*, App. No. 25762/07, 10 June 2010.
[60] *Paton* v. *The United Kingdom*, App. No. 8416/78, 13 May 1980 (Commission), [7].
[61] Ibid., [8].
[62] Ibid., [9].
[63] Ibid., [11].

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where life begins', whether 'with conception' or 'upon the moment of nidation, upon the point that the foetus becomes "viable", or upon live birth'.[64] The Commission noted that construing Article 2 as protecting life since conception in absolute terms could compromise the expectant woman's right to life, in that it would prohibit an abortion even where the continuance of the pregnancy poses serious risks to the woman's life, effectively assigning unborn life higher value than the life of the pregnant woman.[65] The Commission discounted this interpretation insofar as 'contrary to the object and purpose of the Convention', given that, in 1950, all signatories permitted abortion when necessary to save the life of the mother, and abortion laws had since evolved towards further liberalisation.[66] It also held that, even assuming that Article 2 applied to the foetus at the initial stage of pregnancy, there was an implied limitation, designed to protect the life and health of the woman.[67]

As regards the male progenitor's rights under Article 8, the Commission found that the authorisation of the abortion interfered with his family life, but that interference was necessary for the protection of the rights of others, namely his wife, seeking 'to avert the risk of injury to her physical or mental health'.[68] The ancillary claim – that the law denied the father of the foetus a right to be consulted about a proposed abortion – was judged inadmissible *ratione materiae*; in fact, the Convention could not guarantee procedural rights vis-à-vis an abortion the pregnant woman intends to have performed on her, given the latter's right to respect for her private life as 'the person primarily concerned in the pregnancy and its continuation or termination'.[69]

In *Vo* v. *France*,[70] the Grand Chamber recognised that, while 'there is no consensus on the nature and status of the embryo and/or foetus', it is common ground among ECHR States that they 'belong to the human race', and that 'the potentiality of that being and its capacity to become a person … require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2'.[71] The Court dismissed the applicant's argument that the unintentional killing of an unborn child as a result of medical negligence ought to be classified as manslaughter, entitling the parent to institute criminal proceedings; instead, it regarded an action for

[64] Ibid., [12].
[65] Ibid., [19].
[66] Ibid., [20].
[67] Ibid., [23].
[68] Ibid., [26].
[69] Ibid., [27].
[70] *Vo* v. *France* [GC], App. No. 53924/00, 8 July 2004.
[71] Ibid., [84].

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damages in the administrative courts as an effective remedy.[72] The Strasbourg assessment of the rights of embryos/foetuses in *Vo* is broadly aligned with the IACtHR's stance in *Artavia Murillo* v. *Costa Rica* on the 'gradual and incremental protection of prenatal life'.[73]

The legal treatment of cryopreserved embryos engages not only their protection in the name of human dignity but also the rights of the progenitors: the right to respect for the decision to become genetic parents, and privacy rights, insofar as their genetic material is linked to their identity. The contribution of Strasbourg case law to placing human rights constraints on the regulation of the use of embryos has been twofold. First, the Court has recognised the applicability of Article 8 to decisions regarding the use of embryos destined to generate a pregnancy. Second, it has confirmed that respect for private life includes, in principle, an individual's right to decide the fate of embryos no longer intended for a pregnancy.

The issue of Article 8 rights in private disputes over frozen embryos intended for procreation arose in *Evans* v. *The United Kingdom*. The case concerned the absolute ban on the use of embryos by one progenitor after the other withdrew consent thereto, even where the former could not produce further gametes and the latter had given consent in contemplation of this precise circumstance. The applicant had resorted to IVF treatment with her partner before receiving cancer treatment, which entailed the removal of her ovaries and the loss of her ability to produce ova. After the creation of the embryos, the relationship had broken down and the man had asked the clinic to destroy the embryos, relying on the right provided by law to withdraw consent any time prior to implantation. Domestic courts had upheld that right. In Strasbourg proceedings, the applicant complained that the destruction of the embryos, depriving her of the only chance of having a genetic child, would breach her Article 8 rights.

For the Court, the dispute engaged two irreconcilable rights: the right to become a parent and the right not to become a parent; to allow either the use or the destruction of the embryos would have led to the interests of one party to the treatment or the other 'being wholly frustrated'.[74] Couching one of the rights at stake as 'the right not to become a parent' distorted the reality of the parties' positions. Coerced parenthood is different from a bar on unilateral retraction from consensual, jointly planned parenthood, when the other party stands to lose everything if retraction is permitted. Mr Jones had voluntarily

[72] Ibid., [94].
[73] *Artavia Murillo et al.* v. *Costa Rica*, [264].
[74] *Evans* v. *The United Kingdom* [GC], [73].

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embarked upon fertility treatment with his partner for the purpose of enabling her to have a genetic child after her ovarian cancer treatment. Once a woman becomes (deliberately or accidentally) pregnant, the man cannot assert his right 'not to become a parent' at any cost, for example, by compelling the woman to undergo an abortion. Although the woman's physical self-determination is not at stake when the embryos are outside her body, other aspects of her privacy are involved. While the ECtHR majority interpreted the *Evans* complaint as requiring some positive obligation from the State,[75] authorising the destruction of the applicant's genetic material went beyond a decision not to offer her affirmative assistance to have a genetic child. Rather, it was an active interference with her rights over her own genetic material and her *existing* chances at motherhood. The ruling overlooked the fact that domestic courts had authorised the destruction of the applicant's own genetic material – indeed, her only surviving procreative material. The Dissenting Opinion perceptively emphasised that 'the act of destroying an embryo also involves destroying the applicant's eggs'.[76] Arguably, once the procreative treatment is well underway, the ability of the male progenitor to reject fatherhood should be rather exceptional and subordinated to a judicial determination that weighs competing interests. Allowing the man to destroy joint embryos *at will* undervalues the physical and financial costs of ova extraction, fails to protect the dignity and potentiality for life of the embryos and inflicts greater psychological harm on the woman where the destruction of embryos entails childlessness *tout court*.

Moreover, the analysis in *Evans* is predicated on the equal worth of the rights at stake: purportedly, the Court 'does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically related child with her'.[77] However, in practice, the judgment protected the man's right not to have *this child* at the expense of the woman's right to *ever* have *any child* at all. Therefore, it attached *greater* – not *as great* – importance to his right, instead of avoiding 'the unjust preservation of one person's right by negating the rights of the other'.[78] The dissenters' account of the implications of the decision for one party is compelling:

[75] Ibid., [76].
[76] *Evans* v. *The United Kingdom* [GC], Joint Dissenting Opinion of Judges Türmen et al., [8].
[77] *Evans* v. *The United Kingdom* [GC], [90].
[78] Jacco Bomhoff and Lorenzo Zucca, 'The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans* v. *The United Kingdom*, Fourth Section Judgment of 7 March 2006, Application No 6339/05' (2006) 2(3) *European Constitutional Law Review* 424–442, at 429.

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> The majority's approach resulted not simply in the applicant's decision to have a genetically related child being thwarted but in the effective eradication of any possibility of her having a genetically related child, thus rendering any such decision now or at any later time meaningless.[79]

As expected, the Court afforded the respondent a wide margin of appreciation in regulating IVF treatment, insofar as it 'gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments' and 'there is no clear common ground amongst the member States'.[80] However, considering the importance of the matters at stake to the individual (a criterion recognised in *Dickson* a few months later), an inflexible rule applying regardless of personal circumstances and with no recourse in case of dispute should have been found outside the scope of State discretion. According to the Grand Chamber, 'the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis, what the Court of Appeal described as "entirely incommensurable" interests'.[81] Yet, only the opportunity for a case-by-case assessment can avoid a disproportionate impact on an individual. In other judgments, bright-line rules preventing tailored decisions were deemed intrinsically disproportionate – for example, irreducible life sentences, the blanket prohibition on prisoners' right to vote, prisoners' lack of access to ART facilities;[82] the *Evans* situation was no different. Additionally, as Nicole Gallus has perceptively noted, the preference for the general and abstract norm over the norm's application to the individual case is incompatible with the principle of effective protection of Article 8 rights.[83]

Regrettably, the Court attached insufficient weight to several case-specific facts when accepting the respondent's balancing exercise as appropriate. First, for the now-infertile woman, authorising the destruction of embryos brought about the complete loss of any chance at parenthood, rather than a one-off interference with the use of her genetic material in a particular instance.[84]

[79] *Evans* v. *The United Kingdom* [GC], Joint Dissenting Opinion of Judges Türmen et al., [6].
[80] *Evans* v. *The United Kingdom* [GC], [81].
[81] Ibid., [89].
[82] See Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Oxford: Hart, 2017) 142–143.
[83] Nicole Gallus, 'La procréation médicalement assistée et la jurisprudence de la Court européenne des droits de l'homme', in Nicole Gallus (ed.), *Droit des familles, genre et sexualité* (Limal: Anthemis, 2012) 203–225, at 216.
[84] See Craig Lind, '*Evans v United Kingdom* – Judgments of Solomon: Power, Gender and Procreation' (2006) 18(4) *Child and Family Law Quarterly* 576–592, at 587: 'I . . . do not wholly approve of the obsession we have with raising our own children, but I understand that we have this desire embedded (socially) within us. . . . If having a child genetically related to a

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Second, both gamete providers had embarked upon IVF treatment specifically to preserve the woman's ability to have a biological child following the removal of her ovaries. Third, the male partner had given reassurances that he would not oppose the future use of the embryos, despite the legal opportunity to reconsider, especially since the woman was accommodating *his* desire for future children related to both of them; the woman had relied on her partner's reassurances to her detriment (by fertilising her ova with donor sperm, she would have retained sole control over the embryos), and the law should have made provision for a bar on withdrawal of consent to avoid situations of injustice. Fourth, the impact on the applicant of not having a biological child was unmitigated, whereas the male partner could have acted as a donor, relinquishing parental status.[85] Finally, unlike sperm donation, ova extraction is an invasive surgical procedure, and the substantially unequal contribution of the parties to the creation of the embryo ought to give the female participant protection against the change of mind of the male participant, at least in extreme circumstances such as the case at hand. The disproportionate power given to the male partner – while the process of creating embryos was much more onerous for the female partner – and his lack of accountability for breach of promise, at the expense of the woman's last hope for genetic motherhood, make for an unbalanced scheme.

The absence of any legal recourse against the automatism of the law is all the more problematic in the context of private agreements, potentially vitiated by undue influence or misrepresentation. Effective protection of Article 8 rights extends to protection against third-party conduct. The law challenged in *Evans* gave the man an unqualified right to withdraw consent, compounded by the courts' refusal to treat his self-binding promise as a waiver of his statutory right. This application of the law was particularly rigid against the background of English law's treatment of verbal agreements as enforceable when ignoring them would have unconscionable results (e.g. in case of detrimental reliance on an agreement to share property, in relation to

person remains of considerable importance in this society, we should be slow to terminate a person's final capacity to do so – even if to do so would compel another, who wishes to avoid genetic parenthood, into parenthood.'

[85] This is not to downplay the psychological implications of knowing that a genetic child exists and is raised by someone else; domestic courts had noted that 'J.'s clear position in withdrawing his consent was one of fundamental rather than purely financial objection' (*Evans* v. *The United Kingdom* [GC], [24]). However, treating the man as an anonymous donor where *his* change of mind permanently ends the woman's chance at parenthood is a more balanced compromise than affording the man no accountability at the woman's expense.

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constructive trusts and proprietary estoppel);[86] the law of nullity also recognises waivers of a statutory right through conduct, barring an application for annulment on grounds of, for example, pregnancy by another man if the husband encouraged the wife to believe that he would not avail himself of the option to have the marriage annulled.[87] Additionally, legal certainty cannot take priority over the need to avoid disproportionate adverse effects on a person's rights. While Ms Evans had made a conscious decision to fertilise her ova with her partner's (as opposed to donor) gametes, the law placed the entire responsibility for the outcome of the reproductive arrangement on the woman, penalising her for trusting her partner's reassurances, rather than holding him accountable for misleading her.

According to Judit Sándor, 'the Court recognized that [in cases of *in vitro* treatment] the father's right not to become a parent should prevail over the woman's interest in becoming a mother'.[88] This may be an unwarranted extrapolation, because the Court conceded that a different legislative scheme, permitting the woman's use of the embryos, would have also been compliant with the Convention.[89] However, the ruling sanctioned as acceptable an unbalanced approach to competing rights. The interest in protecting the embryos from destruction if at least one progenitor wanted them to survive should have further tipped the balance in favour of the woman's position, if the two rights of the former partners were otherwise equally worthy of protection.

The ECtHR's dismissal of the discrimination claim in *Evans* was also unsatisfactory. For the Court, the law did not discriminate against the applicant when compared to women who could conceive naturally 'because the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14'.[90] While the balance struck between gamete providers' rights may have been found in principle justified, a different balancing exercise was required in the case of a woman in the applicant's position. The bright-line rule treated dissimilar cases alike: a woman having lost her capacity to produce further oocytes, therefore

[86] See Jonathan Herring, *Family Law* (Harlow: Pearson, 2021, 10th ed.) 185–189, 193–196.
[87] See s. 13(1) Matrimonial Causes Act 1973.
[88] Judit Sándor, 'Bioethics and Basic Rights: Persons, Humans, and Boundaries of Life', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1142–1162, at 1149.
[89] *Evans* v. *The United Kingdom* [GC], [91].
[90] Ibid., [95].

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dependent on existing embryos to achieve genetic parenthood, and a woman who can conceive naturally or undergo fertilisation treatment again. ECHR case law recognises that treating unlike situations alike, to the detriment of the category insufficiently distinguished in its special needs, constitutes reverse discrimination. As held in *Thlimmenos* v. *Greece*:

> The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.[91]

The rule allowing the man to withdraw consent to the use of the embryos at any stage affected a woman with impaired reproductive capacity differently. She was denied not just the child potentially born through that course of treatment but also any future child. This unnuanced law failed to protect her against the bad faith of a partner prevailing upon her to create joint embryos. The clarity of the rule does not relieve the State from an obligation to ensure that persons whose characteristics or circumstances make them vulnerable in respect of reproduction are adequately safeguarded (the law should recognise the vulnerability of a woman facing cancer, preparing for infertility and having one opportunity to choose joint children with her partner over single motherhood with the use of an anonymous donor). For instance, in similar circumstances, the law could only permit the creation of embryos with a man's sperm if he gives irrevocable consent. This is regardless of any European consensus on the substantive rules of IVF treatment and embryo cryopreservation. To be ECHR-compliant, the domestic scheme cannot be excessively detrimental to one party to ART. The Strasbourg Court ought to have required special measures of protection in cases of impaired procreative capacity, departing from the general rule on withdrawal of consent.

An interesting example of accommodation of exceptional circumstances is offered by the UK Supreme Court's ruling in *Whittington Hospital NHS Trust* v. XX, addressing the issue of compensation for the loss of procreative capacity.[92] Several negligent tests had failed to detect the claimant's cervical cancer before it was too advanced for her to retain the ability to bear her own child. The judgment awarded the woman the cost of donor ova and a commercial surrogacy abroad. This solution is highly innovative, inasmuch as it afforded the victim a remedy clashing with the domestic prohibition of

[91] *Thlimmenos* v. *Greece* [GC], App. No. 34369/97, 6 April 2000, [44].
[92] *Whittington Hospital NHS Trust* v. XX [2020] UKSC 14.

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commercial surrogacy.[93] It thereby acknowledged that exceptions from the rules may be necessary to ensure effective respect for the right to have a child.

The IVF regime sanctioned in *Evans* presented two further discriminatory features. First, as Lind has noted, the mutual continued consent rule merely offered *formal* equality between men and women (both being able to withdraw consent before implantation); sperm storage has the same chances of fertilisation as embryo storage, whereas ova storage is less successful, making women dependent on embryos to increase the likelihood of conception and subjecting them to the male veto.[94] Men can also store sperm unilaterally – with minimal costs and no physical discomfort or risks – for future use in case the woman withdraws consent. In practice, the right to reconsider only benefitted men, whereas the partner's withdrawal of consent only affected women. It was therefore open to the ECtHR to conclude that the rule failed to achieve substantive equality.

Second, this de facto inequality was deepened by the law's failure to acknowledge 'the difference in the burden of physical involvement in the procedure' of creating embryos, that is, the lengthy hormonal treatment for women and the invasive extraction of ova.[95] In fact, the woman is 'the locus of medical treatment' in IVF procedures, including when infertility arises from a male factor: she receives injections to stimulate her ovaries, and she is put under general anaesthesia for her oocytes to be aspirated.[96] The oocyte retrieval procedure is very different from sperm donation; oocytes 'are obtained through an ultrasound-guided needle inserted into the ovaries through the vaginal wall'.[97]

Douglas has suggested that 'the woman's interest in the fate of the in vivo embryo is much greater, since she must carry it and bear the risks, while the stored embryo presents no such problem and its genitors are in an equal position'.[98] However, the woman's interest in stored embryos is also superior to the man's, given the financial costs, the physical and psychological burden and the health risks involved in obtaining ova to create other embryos. Her

[93] See s. 2(1) Surrogacy Arrangements Act 1985. For Lord Carnwarth, dissenting, it would go against the principle of legal coherence for civil courts to award damages based on conduct which, in the UK, would conflict with criminal law.

[94] See Lind, '*Evans v United Kingdom*', 587–588. See further ibid., 588: 'The *de facto* privileging of one gender is as unacceptable in law as is (unlawful) direct discrimination.'

[95] See Sándor, 'Bioethics and Basic Rights', 1149.

[96] 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 177–178.

[97] Ibid., 192 (note 10).

[98] Douglas, *Law, Fertility and Reproduction*, 127.

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investment in in vitro embryos is higher, and her ability to replace destroyed embryos lower. For genuine equality to be achieved, the man's consent to the provision of sperm for the creation of embryos should arguably be irrevocable, with possible mitigations, such as an option for him to convert his initial agreement into sperm donation and be released from parental obligations.[99] This solution would reconcile, rather than choose between, incompatible rights.

Even making allowance for the light-touch nature of international supervision in the sensitive area of assisted reproduction, the Grand Chamber in *Evans* v. *The United Kingdom* failed to address the crux of the case: whether States are required to protect the right to have a biological child against the blunt application of indiscriminate laws, which only secure formal equality between the parties to the assisted reproduction process and do not cater for exceptional circumstances.

Where there is no conflict between private interests in reproduction, a person's rights in relation to their genetic material acquire even greater force. The ECtHR recognised in *Knecht* v. *Romania* that Article 8 may be breached whenever State authorities prevent a person from using embryos containing their genetic material and obstruct their reproductive plans. The applicant in this case had her frozen embryos stored at a private fertility clinic. Further to a criminal investigation into that clinic's accreditation, the applicant's embryos had been seized by the authorities and deposited elsewhere. Her request to have the embryos retrieved and transferred to a specialised clinic of her choice, licensed to carry out IVF procedures, was initially refused. The applicant complained about the difficulties in securing the transfer of the embryos to a licensed clinic, which had prevented her from progressing with her planned IVF treatment.

The *Knecht* judgment reaffirmed the right to respect for the decision to become a parent and 'to make use of medically assisted procreation'.[100] The ECtHR agreed that the applicant's private life had been affected, since the Romanian authorities had temporarily prevented her from using her embryos. It was not disputed that the interference arising from the placement of the embryos in custody during the investigation pursued legitimate aims: the prevention of crime, the protection of health or morals and the protection of

[99] If the woman reconsiders, there are no compelling reasons to allow the man to use the embryos to become a father with another woman or through gestational surrogacy, unless he is unable to produce new sperm. Naturally, the female gamete provider may consent to repurposing the embryos and her treatment as a donor.

[100] *Knecht* v. *Romania*, [54].

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the rights and freedom of others.[101] The parties' arguments focused on the necessity of the measure. The ECtHR reasoned that domestic courts had ultimately ordered the transfer of the embryos to an authorised specialist clinic, acknowledged that the authorities' refusal to allow the transfer breached the applicant's Article 8 rights, and offered redress, and the judgment had been enforced within a relatively short period of time. The respondent had therefore complied with its obligations to secure respect for the applicant's private life.[102] This suggested, *a contrario*, that significant delays in gaining access to stored embryos for the purpose of IVF treatment would constitute a disproportionate interference.

Indeed, *Nedescu* v. *Romania* presented the Court with a case concerning protracted obstacles to the use of frozen embryos. A married couple had undergone successful IVF treatment at a private clinic and had the remaining embryos cryogenised and deposited with the clinic for a second pregnancy. Following a criminal investigation into its authorisation, the clinic was closed, and the prosecuting authorities seized all genetic material stored there; the applicants' embryos were transferred between different public bodies, and the bureaucratic requirements for their retrieval changed repeatedly.[103] Although, as in *Knecht*, the couple obtained a High Court order permitting them to retrieve the embryos, they were unable to enforce it. During the attempts to retrieve the embryos, it was ascertained that Ms Nedescu's state of health did not allow her to undergo another ovarian stimulation, which made the couple entirely reliant on using the existing embryos before they became non-viable or got damaged. In Strasbourg proceedings, the applicants claimed that, overall, the various public authorities' conduct amounted to a disproportionate interference with their private and family life; for over six years, they had not been allowed to use their embryos for a new insemination procedure, thereby irreversibly losing the chance of having another child.

[101] Ibid., [57].
[102] Ibid., [61].
[103] The embryos were initially placed in the custody of the Institute of Forensic Medicine (IFM); the applicants were advised that, to retrieve them, they had to be accompanied by an embryologist and provide a special container with liquid nitrogen for the transfer to a different clinic. Having done so, they were instead told that they had to obtain the approval of the National Transplant Agency (NTA) for the transfer; this was denied due to the prosecutorial authorities' irregular transfer of embryos to the IFM, which was not accredited as a bank of genetic material. The investigating authorities appointed a public hospital as the new custodian, which raised unreasonably high bureaucratic hurdles for the retrieval (to be accompanied by an NTA representative, an embryologist from the closed clinic and a representative of the prosecutorial authorities). The applicants unsuccessfully asked the public prosecutor's office to appoint them as custodians of the embryos.

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The *Nedescu* judgment relied on the Court's earlier jurisprudence, developed in the context of surrogacy, on the relevance of 'a genuine intention' to become parents 'both for their right to respect for their decision to become parents, and for their personal development through the role of parents that they wished to assume vis-à-vis the child'.[104] The Court held that 'the joint parental project of the applicants ... is an intimate aspect of their private life'.[105] It distinguished the case from *Knecht*, in that the refusal by various administrative authorities to comply with judicial orders to return the embryos had deprived the couple from the possibility of having another child.[106] The Court found that the interference was not 'in accordance with the law', as required by Article 8(2):[107] by preventing the applicants from retrieving their embryos, despite a court order, the authorities had interfered with their right to respect for their private life in a manner not provided for by law. This allowed the Court to conclude that Article 8 had been breached without having to examine the aim and proportionality of the interference.[108]

2.1.3 *The Right to Decide the Fate of Embryos No Longer Intended for a Pregnancy*

Reproductive autonomy claims are also indirectly advanced by the recognition in Strasbourg case law of a qualified right for gamete providers to decide the fate of embryos no longer intended for a pregnancy. The Court's approach to the issue of 'custody' of such embryos expands self-determination rights from the ability to make decisions over one's own body[109] to decisions about one's genetic material. In *Parrillo* v. *Italy*,[110] the Grand Chamber was called upon to rule on the right to decide the fate of one's embryos, specifically the right to donate them to scientific research. The applicant had started IVF treatment with her partner and no longer wished to proceed with the embryo implantation after his death. She complained that the clinic refused to release the embryos to her, so that she could donate them to scientific research,

[104] *Nedescu* v. *Romania*, [67], citing *Paradiso and Campanelli* v. *Italy* [GC], App. No. 25358/12, 24 January 2017, [163]–[164].
[105] *Nedescu* v. *Romania*, [70], citing *Knecht* v. *Romania*, [54].
[106] *Nedescu* v. *Romania*, [72].
[107] See ibid., [84]: 'The manner in which the judicial and administrative authorities involved implemented and interpreted the relevant legal provisions concerning the seizure, the storage following such a seizure and the return of the applicants' embryos was incoherent and thus lacked the required foreseeability.'
[108] Ibid., [86]–[87].
[109] See *Pretty* v. *The United Kingdom*, App. No. 2346/02, 29 April 2002.
[110] *Parrillo* v. *Italy* [GC], App. No. 46470/11, 27 August 2015.

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compelling her to keep them in cryopreservation until natural death. The complaint relied on both Article 8 (respect for private life) and Article 1 of Protocol No. 1 (protection of property).

Importantly, the Court recognised 'the link existing between the person who has undergone *in vitro* fertilisation and the embryos thus conceived', because 'the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity'.[111] Consequently, Article 8 applied to a person's ability to dispose of their embryos. Indeed, 'the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination'.[112] Conversely, the complaint under Article 1 of Protocol No. 1 was dismissed as incompatible *ratione materiae*: 'Human embryos cannot be reduced to "possessions", given the "economic and pecuniary scope" of that provision.'[113]

Under Article 8, the ban on donating embryos no longer intended for implantation to scientific research was found to interfere with privacy rights.[114] The ECtHR accepted that the 'protection of the embryo's potential for life', invoked by the respondent, 'may be linked to the aim of protecting morals and the rights and freedoms of others'.[115] It stressed, however, confirming the view in *Vo* v. *France*, that it was not thereby taking a position on whether the word 'others' in Article 8(2) extends to human embryos.[116] As regards the 'morals' justification for the restriction, the applicant challenged the consistency of Italian legislation (an argument previously successful in *Costa and Pavan* v. *Italy*),[117] because researchers could lawfully use cell lines obtained from embryos destroyed abroad. For the Court, this was not a circumstance directly affecting the applicant and therefore it was irrelevant.[118] This assessment arguably misreads the applicant's observation, which did not concern proportionality (to which impact is relevant), but the credibility of the moral ground invoked.[119] Arguably, even conceding that the State's interest in

[111] Ibid., [158].
[112] Ibid., [159]; reiterated in *Nedescu* v. *Romania*, [68].
[113] *Parrillo* v. *Italy* [GC], [215].
[114] See ibid., [161].
[115] Ibid., [167].
[116] Ibid.
[117] *Costa and Pavan* v. *Italy*, App. No. 54270/10, 28 August 2012, [71]. See further Chapter 4, Section 4.3.1.
[118] See *Parrillo* v. *Italy* [GC], [189]–[192].
[119] Admittedly, 'the deliberate and active destruction of a human embryo cannot be compared with the use of cell lines obtained from human embryos destroyed at an earlier stage' (ibid.,

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protecting embryos trumped self-determination rights, that interest was not served by their preservation until natural disintegration. The second legitimate aim identified in *Parrillo* as a basis for the ban was the right to self-determination of the deceased partner whose gametes had contributed to the embryos; in fact, there was no evidence that he would have wished to donate them to medical research.[120] Additionally, the Court afforded the State a wide margin of appreciation on delicate moral and ethical questions in the absence of European consensus. It further attached weight to the extensive parliamentary debates leading to the enactment of the relevant legislation, during which all the rights and interests at stake had been considered. The Court concluded that Italy had not overstepped its margin of appreciation.

Significantly, the decision was influenced by the consideration that donating embryos to scientific research was not one of the core rights under Article 8, by contrast with the use of embryos for procreative purposes. This indicates that the Court is prepared to engage in closer scrutiny of measures interfering with the use of one's embryos when it affects the right to become a parent:

> The instant case does not concern prospective parenthood. Accordingly, while it is of course important, the right . . . to donate embryos to scientific research is not one of the core rights attracting the protection of Article 8 of the Convention, as it does not concern a particularly important aspect of the applicant's existence and identity.[121]

For some commentators, the *Parrillo* judgment 'is a strong foundation for the pro-life movement', in that 'the Court moved away from allowing a parent to have complete control over the fate of an embryo'.[122] This may be an overstatement. Firstly, the ban on donation to research did not ensure the survival of the embryos, but merely their cryopreservation until natural death (unlike the donation of the embryos for a third-party pregnancy). Secondly, an important rationale underlying the Court's decision was the equal self-determination right of the deceased progenitor, whose intentions could not be ascertained; it is not obvious if, in case of embryos conceived with donor sperm, the public interest would trump the woman's rights, or if the same outcome would be reached when both progenitors support donation to

[194]). However, complicity in a practice seen as morally repugnant (and encouraging it by offering an outlet) casts doubt on the justification for interfering with privacy rights.

[120] Ibid., [196].

[121] Ibid., [174].

[122] Palmer Hurst and Christina Hurst, 'Baby Steps: The European Court of Human Rights Moves Closer to Protecting the Unborn in *Parrillo v. Italy*' (2015) (2) *Journal of Global Justice and Public Policy* 155–163, at 156.

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research. Indeed, the judicial recognition of the progenitors' decisional autonomy in relation to embryos no longer intended for procreation is not unremarkable, as this is an area of ethical controversy. Some question the priority of parental consent over the interests of the embryos (e.g. to be used by another patient), of the scientific community or of society at large.[123]

The *Parrillo* case left several questions unanswered. First, should the parties contributing genetic material to the embryo be seen as 'joint tenants', leaving the use of the embryos to the survivor in case one of them dies? Arguably, the surviving partner's rights, especially prospective parenthood, are more immediate and compelling and should prevail over the unascertainable wishes and more remote interests of the deceased. A parallel with joint custody of children/shared parental responsibility may be informative. If one parent dies, it is incumbent on the other to make all the decisions about the child's upbringing, even going against the wishes of the deceased parent (as evinced by past decisions or court proceedings regarding the choice of religion, education or medical treatment); for example, the deceased parent may have formerly objected to the change of surname or relocation abroad, but no legal dispute arises once there is only one holder of parental authority.

Moreover, since the deceased intended the embryos for joint parenthood, once that purpose is frustrated by death, the legislator is ill-placed to infer the deceased's wishes (donation for a pregnancy/donation to research/destruction/cryopreservation until natural death). The next of kin is often permitted to make decisions such as the authorisation to harvest the deceased's organs for donation and transplant; this is predicated on the closer link between the deceased and their immediate family. A global survey, reviewing the practice of fifty-four States (75 per cent of States with an organ donation programme, according to the World Health Organisation), has concluded that the next of kin are involved in the organ procurement process in most nations, regardless of whether the wishes of the deceased to be a donor were expressed or unknown.[124] For most of the jurisdictions requiring explicit consent to organ donation, the next of kin's consent is necessary even if the deceased's wishes are documented;[125] in many cases, the next of kin can veto donation notwithstanding the deceased's express advance consent, as the law takes into account

[123] 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) 42.

[124] Amanda Rosenblum, Lucy Horvat, Laura Siminoff, Versha Prakash, Janice Beitel and Amit Garg, 'The Authority of Next-of-Kin in Explicit and Presumed Consent Systems for Deceased Organ Donation: An Analysis of 54 Nations' (2012) 27(6) *Nephrology Dialysis Transplantation* 2533–2546, at 2541.

[125] Ibid., 2543.

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the impact on the family.[126] If the next of kin can make decisions about the deceased's organs, and the law deems it compatible with the deceased's autonomy rights and human dignity,[127] they should also be entitled to decide the fate of embryos conceived with the deceased's gametes, especially joint embryos, containing their own genetic material.

Even assuming that a presumption of intention is preferable to granting sole decision-making powers to the surviving gamete provider, why should the law presume that the deceased would have wished for the embryos to be preserved until their natural death? Further assuming that indefinite preservation is viewed by default as the likely wish of the deceased, why should it prevail over the survivor's express wish? If a pregnancy is no longer pursued due to a supervening event, but the parties agree on donating the embryos to infertile couples or to research, self-determination rights presumably require State authorities to yield to that joint decision (indeed, the *Parrillo* ruling hinged on the self-determination rights of the deceased; the State's interests were not decisive on their own). If the supervening event is the death of one of the partners, the survivor has a greater right to decide the fate of their genetic material, because he/she is immediately impacted.

The alternatives to donation to scientific research deserve further consideration. As Judge Sajò, dissenting, explained: 'The choices open to [Mrs Parrillo] were to use the embryos herself, or allow another couple to use them, or to let her biological material languish indefinitely.'[128] Both outright destruction and indefinite cryopreservation result in the death of the embryos, just like their utilisation for research, except they will have served no useful purpose. Jessica Giles and Simon Lee noted the life-affirming aspect of donation to research when compared to indefinite preservation: 'The human embryos were then not going to be given the opportunity to grow in a womb. . . . The best she thought she could do to give meaning to the creation of life in these embryonic forms was to offer them for medical research.'[129] The option of donating to infertile couples clashed with the right not to become a biological parent (and live in perpetual anxiety about the fate of a child raised by others in unknown conditions). As eloquently captured by Ruth Deech and Anna Smajdor, for couples whose fertility treatment led to the creation of surplus embryos, 'leaving their embryos unclaimed in clinics

[126] Ibid., 2542.

[127] The discussion could be extended to the next of kin's life-and-death decision-making power for comatose patients.

[128] *Parrillo* v. *Italy* [GC], Dissenting Opinion of Judge Sajò, [14].

[129] Jessica Giles and Simon Lee, '*Parrillo v Italy*: Is There Life in the European Court of Human Rights?' (2016) 5(1) *Oxford Journal of Law and Religion* 162–167, at 166.

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may be preferable to the idea that "their" child would go into the world in circumstances beyond their control on being donated to another couple'.[130] A law requiring the donation of unused embryos for the treatment of others would be as extreme an interference with the rights of gamete providers as non-consensual adoption, except children's rights would not be in the balance to justify it.

The flaw in the *Parrillo* approach to self-determination is that, by not authorising the surviving spouse to make decisions about joint frozen embryos, the State does not necessarily respect the wishes of the deceased (the purported justification for the interference). The deceased's wishes (use of embryos for procreation) become unattainable as a result of death, and the decision to store the embryos indefinitely is not more 'neutral' than the decision to repurpose them; it is just another deviation from the deceased's original plans, benefitting no one. Critically, it affects the surviving spouse's right 'to act as a free and autonomous individual with regard to her genetic footprint'.[131]

2.2 GAMETE DONATION: RECONCILING GENETIC PARENTHOOD AND FREE CHOICE OF PARTNER

While Article 8 protects 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose',[132] it does not entitle them to the choice of *any* reproductive method. A highly contentious technique is heterologous fertilisation, involving the use of donated gametes, as opposed to homologous artificial insemination or IVF procedure, involving the use of only gametes from the aspiring parents. According to Douglas, the idea of assisted insemination with donor is resisted on two related grounds: first, 'traditional sexual morality', in that 'the use of donor semen introduces a third party into the marital relationship', and second, the fact that it 'introduces a stranger's genes into the blood line of the man's family, thus spoiling the line of succession'.[133] Some authors support an absolute prohibition or narrow eligibility for heterologous fertilisation (limited to certain forms of infertility or genetically transmissible diseases), because the attribution of parenthood to the non-biological intended parent (the mother in case of ova

[130] Deech and Smajdor, *From IVF to Immortality*, 41.
[131] *Parrillo* v. *Italy* [GC], Dissenting Opinion of Judge Sajò, [1].
[132] *S.H. and Others* v. *Austria* [GC], [82], reiterated in *Knecht* v. *Romania*, [54].
[133] Douglas, *Law, Fertility and Reproduction*, 109.

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donation, or the father in case of sperm donation) affects the certainty of affiliation and the child's identity.[134]

Arguments based on the certainty of affiliation and the child's identity appear weak to the extent that the law makes no effort to ensure the accuracy of birth records, that is, it allows registration by the alleged parents without the submission of genetic proof, and it presumes the husband of the woman who gives birth to be the father. The emphasis on the certainty of affiliation is also at odds with the availability of paternity challenges, while the existence of bars on such proceedings calls into question the prevalence of the child's right to know the biological truth. Additionally, the law views neither the certainty of affiliation nor identity rights as impaired by adoption, even though the new birth certificate reallocates parenthood and does not reflect the child's parentage. In *Odièvre* v. *France*, the ECtHR accepted that the adopted child's right to know is not an absolute one and can be limited by the birth mother's right to confidential birthing.[135] The adoptive parents' rights also prevail over the child's right to know, since the law grants them discretion whether to reveal the circumstances of the child's arrival into the family. If the attribution of legal parenthood to individuals who are not the genetic parents is not seen as detrimental to the child's sense of identity, it cannot be an insurmountable objection to heterologous fertilisation. Furthermore, the right to knowledge of one's origins could be promoted through access to information about the donor; a complete ban on the practice of gamete donation, going beyond the objective of safeguarding identity rights, is arguably a disproportionate interference with prospective parents' rights. In fact, for some individuals, the use of donor gametes is the only way to reconcile their choice of partner with the desire to have a biological child. A person whose spouse is infertile should not have to choose between ending the marriage and renouncing biological parenthood. The law could, for instance, allow the woman to be treated with donor sperm alone (rather than as part of a couple) and permit her husband to adopt the child; however, it is doubtful whether the child's welfare is better protected by step-parent adoption than parenthood *ab initio*, as the latter facilitates the full integration into the family since birth.

The ECtHR examined the issue of heterologous fertilisation in *S.H. and Others* v. *Austria*, a case challenging the ban on the use of donated gametes for IVF treatment and the absolute prohibition of ovum donation. The impugned legislation permitted the unification of ovum and sperm in vitro only if they

[134] See Paolo Morozzo Della Rocca, 'Riflessioni sul rapporto tra adozione e procreazione medicalmente assistita' (2005) 1 *Il diritto di famiglia e delle persone* 211–226, at 217.

[135] See *Odièvre* v. *France* [GC], [49].

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both proceeded from the intended parents, whereas it allowed sperm donation for in vivo fertilisation.[136] The applicants were two married couples wishing to conceive through IVF: one couple needed a sperm donor, while the other needed donated ova. They complained in Strasbourg that the impossibility of conceiving a child genetically related to one parent – due to the law permitting only homologous IVF, using both male and female gametes from the spouses – breached their Convention rights.

The initial Chamber judgment held that the right of couples to procreate by availing themselves of ART fell within the ambit of Article 8, the decision to embark upon such treatment being an expression of the right to private and family life.[137] The Chamber rejected the idea that the unease of certain sections of the population with the new techniques can justify the interference with other individuals' rights; in fact, 'concerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique'.[138] While accepting as legitimate the aim of avoiding the risks of exploitation of women from poor backgrounds or the abuse of the technique for genetic selection, the Chamber found that the prohibition of ova and sperm donation for IVF is not 'the only or the least intrusive means of achieving the aim pursued'.[139] A regulatory framework, as opposed to a total ban, would have been a proportionate response (the decision cites the existing prohibition on the remuneration of gamete donation).[140] As regards the concerns over the division of motherhood between biological/gestational/social aspects and legal certainty, the Court noted that the family law framework already accommodated 'unusual family relations', 'which do not follow the typical parent–child relationship based on a direct biological link' (the institution of adoption).[141] The conflict between the interests of donors requesting anonymity and the children's right to know their genetic origin, which is not an absolute one,[142] was similarly rejected as an insufficient justification.[143] The Chamber concluded that the prohibition violated Article 14 taken in conjunction with Article 8, because the different treatment of couples who needed ova/sperm donation for IVF and those who

[136] *S.H. and Others* v. *Austria* [GC], [28]–[31].
[137] *S.H. and Others* v. *Austria* [Chamber], App. No. 57813/00, 1 April 2010, [60].
[138] Ibid., [74].
[139] Ibid., [76].
[140] Ibid., [77].
[141] Ibid., [81].
[142] The Court recalled *Odièvre* v. *France* [GC], [49].
[143] *S.H. and Others* v. *Austria* [Chamber], [82]–[84].

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could use sperm donation for in vivo fertilisation had no objective and reasonable justification and was disproportionate.[144]

Regrettably, the Grand Chamber reversed the Chamber decision, finding that Austria had not exceeded its margin of appreciation as regards the regulation of gamete donation. It accepted the precautionary principle as a justification for the prohibition, namely the unforeseeable consequences of allowing a dissociation between genetic and legal parenthood. It reasoned that, given the fast development of artificial procreation and the difficulties in anticipating the effects of a regulatory measure, it was 'understandable that the States find it necessary to act with particular caution'.[145] The Court accepted further unconvincing justifications for the ban on ovum donation, such as avoiding the possibility that two women could claim to be the biological mother of a child.[146] The very practice of gamete donation is premised on the fact that donors are not treated as legal parents and hence on the distinction between donation for the treatment of others and self-reproduction. Moreover, the law already allowed a person to acquire parental status without being the child's genetic parent, through adoption and artificial insemination with donor sperm in cases of male infertility.[147] According to the respondent, the use of donor sperm for in vivo fertilisation was lawful because that technique was already in practice and, since it did not require a medical professional, any prohibition would have been unenforceable. Justifications based on practice or tradition alone have been rejected elsewhere in ECHR case law as inadequate.[148]

Rosamund Scott has argued that 'in *SH* the Grand Chamber diminished the function of donated gametes as *treatment* and portrayed their use as aligned with *choice*, thereby disregarding the applicants' underlying treatment *needs*'.[149] While treatment and choice are not mutually exclusive, the Court failed to acknowledge that, for some couples, the choice to procreate is intrinsically related to the availability of treatment enabling them to overcome infertility issues. The Chamber's focus on the different needs of couples

[144] Ibid., [70]–[85], [94].
[145] *S.H. and Others* v. *Austria* [GC], [103].
[146] Ibid., [104].
[147] On this inconsistency, see also Jens Scherpe, 'Medically Assisted Procreation: This Margin Needs to Be Appreciated' (2012) 71(2) *Cambridge Law Journal* 276–279.
[148] See *Burghartz* v. *Switzerland*, App. No. 16213/90, 22 February 1994, [28] (even in the presence of a tradition, the ECHR 'must be interpreted in the light of present-day conditions, especially the importance of the principle of non-discrimination').
[149] Rosamund Scott, 'Reproductive Health: Morals, Margin and Rights' (2018) 81(3) *Modern Law Review* 422–451, 444 (original emphasis).

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disadvantaged by the ban on gamete donation for IVF was closer to the Inter-American Court's position in *Artavia Murillo* v. *Costa Rica*, which viewed infertility in the context of reproductive health, as a disability requiring measures of protection. Another lacuna in the Grand Chamber's judgment, also overlooked in the Chamber proceedings and the literature, is the insufficient consideration of the fertile person's right to become a genetic parent, the enjoyment of which is disproportionately affected if it requires divorce and repartnering.

Additionally, the Grand Chamber placed excessive emphasis on the lack of a common European approach to gamete donation and the wide margin of appreciation retained by States.[150] Although it acknowledged a 'clear trend in the legislation of Contracting States towards allowing gamete donation' and hence 'an emerging European consensus', it unduly raised the bar for evolutive interpretation, adducing that said consensus was not 'based on settled and long-standing principles' and hence it did not 'decisively narrow the margin of appreciation'.[151] The 'settled and long-standing' qualification appears inconsistent with the Court's case law. While the practice in a small number of jurisdictions was considered insufficient to establish consensus (e.g. in *Schalk and Kopf* v. *Austria* on same-sex marriage),[152] an enduring tradition was not required. On the contrary, in *Marckx* v. *Belgium* the Court relied on legislative reforms still in progress, noting that 'the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve'.[153] In *Goodwin* v. *The United Kingdom*, the Court 'attache[d] less importance to the lack of evidence of a common European approach . . . than to the clear and uncontested evidence of a continuing international trend'.[154] Against this background, 'a clear trend' across the ECHR membership in favour of gamete donation for IVF should have satisfied the test for consensus. The superimposition of an additional criterion attracted justified criticism from the dissenters, for whom a high threshold for consensus is 'potentially extending the States' margin of appreciation beyond limits'.[155] Moreover, requiring long-term practice to establish European consensus delays the

[150] *S.H. and Others* v. *Austria* [GC], [94]–[116].
[151] Ibid., [96].
[152] See *Schalk and Kopf* v. *Austria*, App. No. 30141/04, 24 June 2010, [58] (same-sex marriage was permitted in only six out of forty-seven States).
[153] See *Marckx* v. *Belgium*, App. No. 6833/74, 13 June 1979, [41]. On the consensus doctrine, see Carmen Draghici, 'The Strasbourg Court between European and Local Consensus: Anti-democratic or Guardian of Democratic Process?' (2017) *Public Law* 11–29, at 13–20.
[154] *Christine Goodwin* v. *The United Kingdom* [GC], App. No. 28957/95, 11 July 2002, [85].
[155] See *S.H. and Others* v. *Austria* [GC], Dissenting Opinion of Judges Tulkens et al., [8].

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development of human rights standards in an era of fast advances in medical technology.

Equally problematic is the Court's reasoning that the restriction was mitigated by the option left to couples needing gamete donation to travel abroad and receive this type of treatment in jurisdictions where it was legally available. On the one hand, the respondent's reliance on 'procreative tourism' to defend the proportionality of the ban undermines its claim that the restriction was rendered necessary by the community's core ethical values.[156] Couples seeking ova donation, to allow a man to become a genetic father and his wife to experience gestational motherhood, are a very small section of the population. As any exiguous minorities with an unpopular cause (much like prisoners in *Dickson v. The United Kingdom*), they run the risk of unempathetic majorities being dismissive of procedures on which they themselves do not depend. The ECtHR can correct the imbalance of a situation in which individuals who are not affected by an issue make decisions impacting those who are. On the other hand, as the IACtHR recognised in *Artavia Murillo*, treating overseas IVF as a solution discriminates against couples based on their financial status.

Albeit disappointing in its deference to national regulation, the Grand Chamber's ruling in *S.H.* v. *Austria* had the merit of consolidating the principle that Article 8 protects the right to make use of medical advances for procreation. This contribution is highlighted by the contrast with the ultra-conservative Separate Opinion of Judge De Gaetano, for whom all assisted reproduction techniques (ARTs) are contrary to human dignity and 'the "desire" for a child cannot … become an absolute goal which overrides the dignity of every human life'.[157] More moderate objections to ART in the literature do not view human dignity as incompatible with all non-natural procreation, but only with commercial or eugenic abuses of ARTs.[158] Judge De Gaetano's opinion also overlooks the fact that the reproductive function of the human body is not less worthy of medical assistance than any other function; therefore, ART cannot be condemned any more than other medical treatment – for example, organ transplant – which seeks to offer a better quality of life.

The Court's preference for categorising the ban on gamete donation for IVF as an interference is also significant,[159] especially since it stressed the

[156] See Gallus, 'La procréation médicalement assistée', 222.
[157] *S.H. and Others* v. *Austria* [GC], Separate Opinion of Judge De Gaetano, [2].
[158] See Gallus, 'La procréation médicalement assistée', 223.
[159] See *S.H. and Others* v. *Austria* [GC], [88].

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importance of keeping under review the law's response to fast-moving scientific developments in the field of artificial procreation. As with previous judgments containing future-oriented *obiter dicta* (e.g. on transgender rights in *Rees* v. *The United Kingdom* and *Cossey* v. *The United Kingdom*),[160] the Court noted that this is an area in which ECHR standards may change subject to further domestic developments: '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.'[161] This suggests that a different conclusion on heterologous fertilisation may be reached in the future. Indeed, *Christine Goodwin* v. *The United Kingdom* has demonstrated the Court's willingness to revisit its position and condemn a State persisting in its restrictive approach to evolving rights.[162]

Significantly, the Grand Chamber passed judgment in *S.H. and Others* v. *Austria* well over a decade after the applicants' complaint before the Austrian Constitutional Court, and it expressly confined its findings to the prevailing circumstances at the time of the domestic proceedings. In particular, it emphasised that the judgment was not reflective of ECHR standards at the time of the ruling:

> It is not for the Court to consider whether the prohibition of sperm and ovum donation at issue would or would not be justified today under the Convention. The issue for the Court to decide is whether these prohibitions were justified at the time they were considered by the Austrian Constitutional Court. … Since the Constitutional Court's decision in the present case many developments in medical science have taken place to which a number of Contracting States have responded in their legislation.[163]

[160] See *Rees* v. *The United Kingdom*, App. No. 9532/81, 17 October 1986, [47]: 'The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.' See, analogously, *Cossey* v. *The United Kingdom*, App. No. 10843/84, 27 September 1990, [42].

[161] *S.H. and Others* v. *Austria* [GC], [118]. See also Andrea Mulligan, 'Reproductive Rights under Article 8: The Right to Respect for the Decision to Become or Not to Become a Parent' (2014) 4 *European Human Rights Law Review* 378–387, at 383: 'The Court did take the time to warn the Austrian government that it was under a duty to ensure that its laws keep up to date with developments in this dynamic and evolving area of science.'

[162] See *Christine Goodwin* v. *The United Kingdom*, [92]–[93]: 'The respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention.'

[163] *S.H. and Others* v. *Austria* [GC], [84].

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This caveat suggests that Convention standards at the time of the *S.H. and Others* decision may have already evolved so as to require States to permit gamete donation for IVF treatment.

2.3 POSTHUMOUS PARENTHOOD: DEFERRED PROCREATION AND RESPECT FOR PRIVACY BEYOND DEATH

2.3.1 *Posthumous Conception and Reproductive Testaments*

Assisted reproduction technologies allow conception after death through (a) the use of a deceased man's frozen sperm for artificial insemination or IVF, enabling a woman to have children biologically related to her late partner; (b) the use of frozen eggs proceeding from a deceased woman for IVF followed by the implantation of the resulting embryos into a surrogate mother, enabling the surviving male partner to become a father; or (c) the use of frozen embryos after the death of one or both members of the couple (in the latter case, allowing their parents to have biologically related grandchildren). Couples may have a legitimate interest in the use of these techniques – for example, due to a sudden illness of one spouse and the other spouse's desire to have a child biologically related to both; to give an existing child a sibling of the full blood; or because existing embryos created with both parties' gametes are the only route to conceiving a biological child due to intervening reproductive health issues.

In principle, deferred procreation is protected by the ECHR to the extent that Article 8 entitles everyone to respect for the decision to conceive a child, to make use of medical assistance to that end and to decide on the timing of a pregnancy (*Dickson* v. *The United Kingdom*, *S.H.* v. *Austria*). Consequently, the couple's right to conceive after the death of one partner cannot be denied without adequate justification. The to-be-born child's welfare could be invoked, although single parenthood is a widespread social phenomenon, and the law of many countries accepts single adopters and provides donor insemination treatment to single women. Moreover, the availability of only one parent for the effective care of the child was not seen as a sufficient justification for restrictions on the right to procreate in *Dickson* v. *The United Kingdom*. Part of the scholarship has advocated for the right to a family life that the spouses have consciously decided to postpone and that the woman wishes to prolong.[164] This view finds support in Strasbourg case law on the

[164] See Vincent Coussirat-Coustère, 'Famille et Convention Européenne des Droits de l'Homme', in Paul Mahoney et al. (eds.), *Protection des droits de l'homme: la perspective*

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protection of the 'intended family life' of natural fathers with their children (despite the absence of effective ties after birth),[165] usually linked to a planned pregnancy.[166] Naturally, the widow's desire to use her deceased husband's frozen sperm without his advance (express or implied) consent to the posthumous use of his genetic material might be problematic. Her claim is stronger for the use of frozen embryos, created for reproductive purposes with both parties' genetic material, but superseded by the intervening death of her husband. Symmetrically, the husband might have a legitimate claim to the use of the embryos through a surrogacy arrangement to continue the parenthood project interrupted by the wife's death. Additionally, a person's right to exercise control over their genetic material (*Parrillo* v. *Italy*) should arguably extend to their ability to decide the fate of frozen gametes/embryos in the event of their death, including their use for a pregnancy (within the family or to assist third parties afflicted by infertility), as opposed to their destruction or donation to medical research.

The question of whether a person's decision-making rights in relation to their stored gametes/embryos end after death, or whether their next of kin can substitute them, was addressed in *Petithory Lanzmann* v. *France*.[167] The Court viewed with scepticism the applicant's request for access to her deceased son's frozen gametes for the purposes of donation to an infertile couple or gestational surrogacy, enabling the applicant to become a grandparent. Firstly, the Court dismissed the claim that the refusal to allow the applicant to use her deceased son's sperm, so as to become a grandparent, prevented her from continuing the family line. Article 8 was said not to encompass the right to found a family and have grandchildren.[168]

Secondly, the complaint brought as an indirect victim on behalf of her son was declared inadmissible; the Court held that the right to become a parent was a non-transferable right.[169] This assessment is disappointing, because the son himself, upon being diagnosed with a fatal illness, had taken steps to

européenne. Mélanges à la mémoire de Rolv Ryssdl (Köln: Carl Heymanns, 2000) 281–307, at 306.

[165] *Tóth* v. *Hungary*, App. No. 48494/06, 12 February 2013, [27].

[166] See *Keegan* v. *Ireland*, App. No. 16969/90, 26 May 1994, [45]; *M.B.* v. *The United Kingdom*, App. No. 22920/93, 6 April 1994 (Commission), [2]; *Ahrens* v. *Germany*, App. No. 45071/09, 22 March 2012, [58]–[59]. For an analysis, 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.

[167] *Petithory Lanzmann* v. *France*, App. No. 23038/19, 12 November 2019 (available only in French).

[168] See ibid., [20]. See further Subsection 2.3.2.

[169] *Petithory Lanzmann* v. *France*, [16].

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ensure he would be able to have offspring in the event of his death, by banking sperm with a French hospital and contacting a healthcare establishment abroad for artificial insemination services. The refusal of the French medical authorities to allow the deceased's mother to have the gametes transferred to a country permitting their post-mortem use for medically assisted reproduction or gestational surrogacy, therefore, ran contrary to the express wishes of the deceased.

Although the evidence did not include a formal authorisation by the deceased to his mother to continue his reproduction plans,[170] he had clearly embarked upon that enterprise in contemplation of his own death, and his mother, as next of kin, should have been found entitled to act on his behalf to ensure respect for his wishes. In denying the mother legal standing, the Court referred to its previous case law on the notion of indirect victim, summarised in *Centre for Legal Resources on Behalf of Valentin Câmpeanu* v. *Romania*: the next of kin may pursue the application, provided that he/she has sufficient interest in the case,[171] for example, in the event of death or disappearance allegedly engaging the State's responsibility,[172] where they have a moral interest in having the late victim exonerated of guilt or in protecting the reputation of their family, or where they have a material interest owing to the effect of the alleged violation on their pecuniary rights.[173] Nothing in this jurisprudence would have been inconsistent with allowing the applicant in *Petithory* to challenge the domestic authorities' interference with her son's posthumous parenthood plans. There was, in fact, a sufficient link between the alleged violation and the mother's moral interest in protecting the survival of the family line and her late child's decisional autonomy. While the right to control over one's genetic material is non-transferable, so is the right to life or to protection against torture or slavery, or the right to personal liberty, and yet parents have been found to have *locus standi* to bring a claim on behalf of deceased children. In forced disappearance, torture, human trafficking and unlawful killing cases, the Court has accepted applications under Articles 2, 3, 4 and 5 brought on behalf of the victims by their next of kin.[174] Although what

[170] See ibid., [19].

[171] *Centre for Legal Resources on Behalf of Valentin Câmpeanu* v. *Romania*, App. No. 47848/08, 17 July 2014, [97].

[172] Ibid., [98].

[173] Ibid., [100].

[174] See *McCann and Others* v. *The United Kingdom* [GC], App. No. 18984/91, 27 September 1995 (death during law enforcement operations); *Timurtaş* v. *Turkey*, App. No. 23531/94, 13 June 2000 (disappearance while in State custody); *Kurt* v. *Turkey*, App. No. 24276/94, 25 May 1998 (failure to account for the fate of a person taken into custody);

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these cases had in common was the family member's death in circumstances engaging the responsibility of the State, it is not obvious that an alleged breach of Article 2 is necessary to activate the next of kin's legal standing in relation to breaches of other provisions. Indeed, in decided cases, the Article 2 claim failed, but the claim in relation to another provision was upheld.[175]

By raising a questionable admissibility hurdle, the Court missed the opportunity to examine a possible right to leave advance directions on the use of one's genetic material, the implementation of which can be legitimately overseen by the next of kin. There was, in fact, no ambiguity over the deceased's wishes for his sperm to be used either for the treatment of infertile couples seeking a donor or for a gestational surrogacy arrangement. The case was incorrectly framed as regarding the *mother's* right to decide on the use of the late son's genetic material. Rather, it regarded the son's self-determination rights, including the ability to decide the fate of his genetic material after his death; the mother was instrumental in enforcing *his* rights. The Court may have decided that public authorities were under no obligation to respect a person's reproductive testament rather than deny the next of kin's indirect victim status. In cases concerning frozen embryos (as opposed to frozen gametes), it would arguably be more difficult to defend that position, since it also involves the death of the embryos.

The *Petithory* decision left further questions unresolved. Would the Court have treated the case differently had the complaint been brought by the deceased's wife seeking posthumous insemination for herself? Does the welfare of the child resulting from the use of the frozen gametes, growing up without a father, play any role if the law already allows *donor* insemination? Where does the balance lie between the adults' rights and the interests of the children born to satisfy the aspirations of adults? The case of *Pejřilová* v. *The Czech Republic* required the Court to consider some of these questions.[176] The application concerned the dismissal of a widow's request to have her ova fertilised with her deceased husband's frozen sperm, in circumstances where they had started IVF treatment together, interrupted by the husband's death. Domestic law only permitted fertilisation treatment for couples and *inter vivos*,

Salman v. *Turkey* [GC], App. No. 21986/93, 27 June 2000 (death and torture while in custody); *Keenan* v. *The United Kingdom*, App. No. 27229/95, 3 April 2001 (failure to protect against suicide in the course of detention); *Budayeva and Others* v. *Russia*, App. No. 15339/02, 20 March 2008 (failure to protect life against foreseeable mudslides); *Rantsev* v. *Cyprus and Russia*, App. No. 25965/04, 7 January 2010 (inadequate protection against human trafficking).

[175] See *Kurt* v. *Turkey*, finding the Article 2 and Article 3 claims unsubstantiated, but upholding the Article 5 complaint.

[176] *Pejřilová* v. *The Czech Republic*, App. No. 14889/19, 8 December 2022.

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and the consent of both parties before each occasion on which sperm was thawed for IVF had to be less than six months old.

The Court reiterated in this context that Article 8 protected the right to conceive a child and to make use of medically assisted procreation for that purpose.[177] It recognised the State's wide margin of appreciation in the regulation of IVF treatment, the use of which gives rise to sensitive moral and ethical issues,[178] especially against the background of a lack of common ground among Member States in this area.[179] As in previous cases, the Court approached the complaint as involving an interference with the widow's right to avail herself of ARTs.[180] However, it concluded that her right to respect for the decision to have a child genetically related to her late husband did not outweigh the legitimate general interests protected by the legislation: the right of to-be-born children to know their parents and the respect for the free will of gamete providers, whose further consent to treatment could not be prejudged or replaced by a court decision after death.[181]

The judgment failed to take notice of the lacuna in domestic law whereby a person was unable to leave a reproductive testament, enabling their spouse to continue a joint parental project. The Czech government successfully relied on the indication, in the informed consent form signed by the deceased, that the storage of sperm would be discontinued in the event of death;[182] however, the pro forma did not permit the individual undergoing treatment the choice of authorising the use of his gametes post mortem. It could further be argued that, even where advance directives have not been given, the law should allow sufficient flexibility to assess continuing consent. A court decision ascertaining the deceased's wishes on procreation after death, based on written evidence and testimonies, would not be more ill-suited to protect free will than existing procedures relating to comatose patients' views on withdrawal of life support or the retrospective assessment of liability in cases of assisted dying.[183]

Two applications currently pending before the ECtHR are expected to cast light on these issues. They concern the prohibition of the transfer abroad, for posthumous assisted reproduction, of a deceased spouse's frozen gametes or of embryos created with the deceased spouse's gametes, notwithstanding the

[177] Ibid., [42].
[178] Ibid., [46].
[179] Ibid., [45], [55].
[180] Ibid., [47].
[181] Ibid., [51]–[52], [59]–[62].
[182] See ibid., [61].
[183] See Carmen Draghici, 'Assisted Dying', in Ian Loveland (ed.), *Canadian and British Public Law in Comparative Perspective* (Oxford: Hart, 2021) 25–74, at 28, 49.

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man's advance consent to the procedure. The claimant in *Dalleau* v. *France*[184] is a woman whose civil partner had asked the clinic where he had deposited a sperm specimen to transfer it to a hospital for artificial insemination shortly before he died of cancer. After his death, the applicant had requested the clinic to transfer the specimen to a medical centre in Spain, where medical assistance is provided based on advance directives by the deceased to initiate a pregnancy in his wife/partner, and legal fatherhood is recognised if treatment is provided within twelve months of the death. In the absence of a reply from the clinic, the applicant unsuccessfully sought relief in the courts. Her application and appeals were dismissed on the grounds that the prohibition of exportation of gametes for uses banned in France was intended to prevent any circumvention of French law. Two factors were emphasised in the domestic decisions: first, the deceased partner had been informed that the storage of spermatozoa was strictly personal and would be terminated in the event of death; second, the absence of any link between the surviving civil partner and Spain.

Key features of this case are the existence of advance directives and hence the denial of posthumous insemination notwithstanding the deceased's express prior consent; the surviving civil partner's standing to apply both for herself and on behalf of her late partner; and the prohibition on the transfer of the deceased's frozen gametes to an overseas clinic for the purposes of ART. The case thus requires the respondent to demonstrate not only why posthumous insemination with consent from both parties is not permitted but also why preventing the surviving member of the couple from receiving treatment abroad is a proportionate interference with the right to respect for the couple's decision to become parents through the use of ART. In fact, the *Pejřilová* ruling invoked the protection of the deceased's free will, noting that in jurisdictions permitting posthumous ART procedures, those were 'surrounded by guarantees related to the deceased man's prior informed consent'.[185] As part of the proportionality assessment, it also relied on the absence of prohibition on the transfer of frozen gametes abroad for post-mortem treatment in countries permitting it, subject to the deceased's advance consent.[186] By contrast, the legislation impugned in *Dalleau* prevents overseas treatment notwithstanding the deceased's express prior consent, a restriction which ought to be found unnecessary in a democratic society.

[184] *Dalleau* v. *France*, App. No. 57307/18.
[185] See *Pejřilová* v. *The Czech Republic*, [59]–[60].
[186] Ibid., [60].

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The second pending case, *Caballero* v. *France*,[187] differs from *Dalleau* in that the measure affected the applicant's right to use embryos created with her own genetic material (in addition to her deceased husband's gametes). Consequently, the French courts' refusal to allow the transfer of the embryos abroad for posthumous implantation ran counter to both the deceased's advance directives and the woman's privacy rights; the Court's jurisprudence has already acknowledged that Article 8 protects the woman's right to make decisions in relation to embryos created with her ova, especially for procreative purposes (*Knecht* v. *Romania*, *Nedescu* v. *Romania*),[188] albeit potentially also for scientific research (*Parrillo* v. *Italy*).[189] The respondent's case hinges on the State's prerogative to prevent individuals from circumventing the French prohibition on posthumous reproduction. While the Court might find that the Convention does not require States to permit posthumous embryo implantation domestically, even with adequate safeguards, it should decide that measures preventing individuals from using embryos created with their genetic material for treatment abroad to which the deceased gamete provider consented in advance is a disproportionate interference with the right to respect for private and family life.

A further factor, recalled in the Court's information note, is a 2019 Opinion of the French Conseil d'État highlighting the inconsistency between the prohibition of embryo implantation/use of the husband's gametes if one partner is deceased, and the option for the widow to use insemination with donor sperm. Indeed, concerns over the right of the to-be-born child to know his/her father in one case but not the other are illogical; if anything, in the former case, the child would have adequate information about the birth father and a connection with the paternal family. The Opinion recommended legal reform to authorise posthumous artificial insemination or embryo transfer, subject to the deceased spouse/partner's prior consent and a specified time-frame for the procedure. Relying on *Costa and Pavan* v. *Italy* (internal inconsistency of reproductive laws discrediting bioethical justifications)[190] and *Oliari* v. *Italy* (popular and judicial support for change ignored by the legislative),[191] the Court could well reach a conclusion, at least limited to

[187] *Caballero* v. *France*, App. No. 37138/20.
[188] See Section 2.1.2.
[189] See Section 2.1.3.
[190] See *Costa and Pavan* v. *Italy*, [71].
[191] See *Oliari* v. *Italy*, Apps. No. 18766/11 and 36030/11, 21 July 2015, [179]–[185]. For a discussion, see Carmen Draghici, 'The Strasbourg Court between European and Local Consensus', 25–28.

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France, that an obligation to permit posthumous embryo implantation with the consent of both spouses can be derived from Article 8 ECHR.

2.3.2 *Use of a Deceased Child's Cryopreserved Gametes to Become a Grandparent*

While Strasbourg case law has established that the relationship between grandparents and grandchildren amounts to 'family life' and is entitled to protection under Article 8,[192] the *Petithory Lanzmann* v. *France* decision indicated that the Convention does not guarantee a right to *become* a grandparent. The applicant had unsuccessfully attempted to have her deceased son's sperm transferred to an overseas establishment (in Israel or the United States) for the purposes of medically assisted reproduction or gestational surrogacy – procedures permitted in those jurisdictions. In addition to bringing a complaint on behalf of her deceased son,[193] she also claimed to be a direct victim of a violation of Article 8, insofar as she had been deprived of the possibility of becoming a grandparent. The decision suggested, however, that the desire to become a grandparent does not benefit from the Court's approach to parenthood aspirations; Article 8 only protects the interest in becoming a genetic parent.

Arguably, the Court ought to have acknowledged at least the special position of individuals whose child is deceased and who have an opportunity of second-generation procreation through ART. The argument made in relation to *Evans* v. *The United Kingdom* applies here as well: the ECHR minimum standards should require States to cater for exceptional circumstances, so as to mitigate personal tragedies. A person having lost a child and wishing to extend that child's life through the posthumous use of their gametes should be seen as having at least an arguable case, worthy of further examination. This is especially so when the applicant's wishes coincide with the child's genetic testamentary disposition. On the facts, the advanced age or economic capacity of the prospective grandparent might raise child welfare concerns. The adult-centric idea of bringing into the world an orphan to satisfy the grandparent's emotional needs may also inspire opposition on moral grounds. Additionally, the recognition of the grandmother as a parent, if she wishes to carry the child herself, might be said to lead to confusion for the

[192] See *Marckx* v. *Belgium*, [45]: '"Family life", within the meaning of Article 8 (art. 8), includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life.'

[193] See Section 2.3.1.

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child. However, the deprivation of the last opportunity of family life with a biologically related grandchild should be analysed as an interference with Article 8 rights and should require the demonstration of a pressing need.

2.4 RECOGNITION OF LEGAL TIES FOLLOWING OVERSEAS SURROGACY ARRANGEMENTS: RESPECT FOR BIOLOGICAL PARENTAGE

One of the most controversial aspects of the right to become a genetic parent is the recourse to surrogacy arrangements. The literature is highly divided on the subject. Some scholars see surrogacy as a legitimate alternative for aspiring parents afflicted by infertility, an exercise of procreative choice and an expression of bodily autonomy for the surrogate; conversely, others condemn surrogacy for the alleged commodification of the woman's body; the exploitation of vulnerable, underprivileged women; the commercialisation of babies (especially in the case of remunerated surrogacy services); the psychological trauma of the surrogate relinquishing the baby; and the endangerment of the welfare of the children born as a result of such agreements (inter alia the emotional impact of being abandoned by the 'mother' at birth).[194]

Although, in principle, such objections can form the basis of an interference with aspiring parents' rights, they do not fare well under close scrutiny. The moral objection that 'the surrogate is seen as no more than an incubator for the child'[195] loses strength if a comparison is drawn with organ (e.g. kidney) or bone marrow donation, which are not seen as exploitative or morally reprehensible, and in which the donor is not treated as a means to an end (their status as donor does not mean that their worth is reduced to a

[194] As noted by 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 189, 'surrogacy arrangements have been equated with baby-selling, prostitution and slavery'. According to Claire Achmad, 'Children's Rights to the Fore in the European Court of Human Rights' First International Commercial Surrogacy Judgments' (2014) 6 *European Human Rights Law Review* 638–646, at 638–639, international commercial surrogacy jeopardises the human rights of women, especially from less developed countries, whose reproductive function is used as a result of their economic marginalisation. Against the legalisation of surrogacy, citing the exploitation of underprivileged women, given their financial pressures, reduced bargaining power and lack of informed consent, 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 122–128, 142–143. For a survey of arguments for and against surrogacy and further references, see Douglas, *Law, Fertility and Reproduction*, 145–151.

[195] Douglas, *Law, Fertility and Reproduction*, 147.

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source of transplant organs); nor are human organs seen as commodified by that process. The same medical risks are associated with organ donation, and the same incentive is created for less-well-off members of society to act as donors. If surrogacy is appropriately regulated, surrogates are assessed for (physical and psychological) risk and rejected if the risks are too high, in the same way as living donors of organs are; indeed, other services involving physical labour that poses risks are deemed ethically permissible (e.g. nursing).[196] Allowing individuals to help the medical treatment of others is not more debasing in case of reproductive, as opposed to other, health issues. Leslie Francis has warned against the hasty assumption that kidney or liver donation is acceptable insofar as it is a life-saving measure, whereas carrying a child for another person is not: 'To defend this distinction … is to rely on contested judgments about whether assisted reproduction is a sufficiently weighty purpose to override the risks it might impose.'[197] While most critics of surrogacy emphasise the risks of harm to the surrogate, Emily Jackson has aptly drawn attention to the vulnerability of the commissioning parents, especially where the law creates an opportunity for extortion (e.g. where it gives the surrogate absolute freedom to withdraw from the contract) or offers no remedy if the arrangement breaks down.[198]

Objections based on the transactional nature of paid surrogacy, often likened to the sale of children and prostitution, overlook the economic motivation underlying adoption. Deech and Smajdor have pointed out that 'financial considerations are frequently a primary factor in motivating mothers to give their children up for adoption',[199] namely 'their future lives are relieved of the financial burden that the child would have represented'.[200] Additionally, studies have shown that, although financial gain is an important incentive for surrogates, the factors underlying that decision are complex, including sympathy with childless couples, the desire to re-experience pregnancy and childbirth without the responsibility of rearing the child, the desire for enhanced self-worth, and 'attempts to resolve feelings associated with previous reproductive losses'.[201]

[196] 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 392.
[197] Ibid.
[198] See Jackson, *Regulating Reproduction*, 314.
[199] Deech and Smajdor, *From IVF to Immortality*, 162.
[200] Ibid., 162–163.
[201] 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.

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Nonetheless, some authors have gone so far as to consider that commercial surrogacy may fall under Article 2 of the 2000 Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography.[202] This provision prohibits the sale of children, defined as 'any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration'. Nevertheless, the interpretation of this provision 'in its context' (as required by Article 32 of the Vienna Convention on the Law of Treaties)[203] must take into account Article 3(a)(i), which lists the purposes of transfers of children deemed unlawful: 'sexual exploitation', 'transfer of organs of the child for profit', 'forced labour'. The purpose of surrogacy – enabling infertile couples to become parents through third-party gestation – is too remote from the text and spirit of Article 3(a)(i) for the situation to fall within the purview of the Protocol. Furthermore, Katherine Wade has aptly noted that the purpose of surrogacy is non-exploitative, that the child is born to parents capable of providing adequate care and that the intended parents do not acquire ownership over the children.[204] Supporting a similar conclusion, Paula Gerber and Katie O'Byrne have pointed out that compensated surrogacy arrangements are not premised on a transfer of any entitlement over the child, but rather on 'an allocation of responsibility between the parties to the arrangement as to the care of the child at different points in time, with the aim of bringing the child into its intended family'.[205] It is also worth recalling that the 2018 Report of the Special Rapporteur on the sale and sexual exploitation of children – mandated by the UN Human Rights Council to investigate these issues – while expressing concerns over the dangers of improper regulation of

[202] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, New York, 25 May 2000, in force 18 January 2002, UNTS vol. 2171 (p. 227). See John Tobin, 'To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?' (2014) 63(2) *International & Comparative Law Quarterly* 317–352, at 335–338, arguing that Article 2 does apply to surrogacy arrangements because Article 3 of the Protocol only specifies a minimal, non-exhaustive list of acts that States must prohibit and because any transfer of the child in exchange for remuneration, not necessarily for exploitative purposes, falls within the definition of sale.

[203] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, UNTS vol. 1155 (p. 331).

[204] Katherine Wade, 'The Regulation of Surrogacy: A Children's Rights Perspective' (2017) 29(2) *Child and Family Law Quarterly* 113–131, at 120–121.

[205] Paula Gerber and Katie O'Byrne, 'Souls in the House of Tomorrow: The Rights of Children Born via Surrogacy', in Paula Gerber and Katie O'Byrne (eds.), *Surrogacy, Law and Human Rights* (London: Routledge, 2015) 81–112, at 98.

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surrogacy does not suggest that either altruistic or commercial surrogacy are incompatible with the Optional Protocol to the UNCRC.[206]

Furthermore, the object of the transaction in commercial surrogacy is not the child but the services necessary to complete the process of bringing the child into the world: hosting the embryo/allowing the development of the foetus and delivering the child. Gamete donors lend remunerated support in the early stage of the reproductive process without being seen as prostituting themselves or 'selling a baby'; similarly, the surrogate participates in the later stages, by allowing the use of her uterus. According to Robin Mackenzie, the social acceptability of gamete donation 'has hinged upon analogies made with praiseworthy altruistic and socially valued activities such as blood or organ donation and medico-surgical procedures'.[207] Lisa Rubin and Aliza Phillips perceptively noted the duplicity of the language distinguishing between gamete 'donation', which actually involves a costly transaction, and surrogacy:

> The common use of the term *donation*, which suggests generosity and gift giving, illustrates the ways in which language regarding *third-party* reproduction is euphemized to avoid discomfort with a marketplace model of reproduction, despite the fact that the majority of gamete transfers involve monetary exchanges.[208]

In gestational surrogacy, where genetic reality and the parties' intentions overlap, the autonomy rights of the surrogate and the intended parents should require State authorities to recognise the arrangement and register the birth accordingly. Indeed, 'the activities involved in surrogacy arrangements, impregnation, child-birth and the formation of a family, might be regarded as quintessentially private decision-making protected by human rights'.[209] Empirical studies conducted in jurisdictions permitting commercial surrogacy have shown the parties involved in surrogacy arrangements 'as capable of protecting their own interests and making responsible and realistic judgments', so that 'fears of exploitation and commodification' are not borne out by the evidence.[210] It has also been noted that the liberalisation of surrogacy, albeit viewed as anti-feminist by those concerned by 'the commodification and

[206] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60, 15 January 2018.
[207] Mackenzie, 'Beyond Genetic and Gestational Dualities', 189.
[208] Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 189 (original emphasis).
[209] Mackenzie, 'Beyond Genetic and Gestational Dualities', 189.
[210] Ibid., 196.

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control of women's bodies', is for others eminently feminist; in fact, 'any attempt to restrict surrogacy is paternalistic and represents a threat to reproductive autonomy'.[211]

Speculative objections to surrogacy include the concern that, upon learning of the circumstances of their conception, children may experience 'emotional insecurity' knowing that they were 'given away by the carrying mother – or sold'.[212] On the contrary, for surrogacy-born children, the knowledge that they were very much wanted, and that their parents went to great lengths to conceive them, is more likely to reinforce the security of a loving family environment. The aforementioned objection also assumes that children perceive the surrogates as their 'mothers', hence the idea of abandonment, which is certainly mistaken in cases of gestational surrogacy. Even in traditional surrogacy cases, it is improper to speak about abandonment when, from the outset, the woman carrying the child did not intend to procreate.

To date, surrogacy-related Strasbourg litigation has focused on *existing* children born as a result of (usually overseas) surrogacy arrangements, rather than on *access* to surrogacy. The first case, however, concerned the treatment of private organisations facilitating surrogacy arrangements. In *Lavisse* v. *France* ('Les Cigognes' case),[213] the authorities had declared illegal an association assisting infertile couples in contacting women willing to act as gestational mothers. Although the case revolved around Article 11 ECHR (the interference with the applicant's right to freedom of association), the analysis touched upon Article 8 issues. The Commission held that the interference pursued the legitimate aim of preventing the offence of inciting the abandonment of babies at birth. States were found to enjoy wide discretion in an under-regulated and divisive area such as surrogacy, and given the need to strike a fair balance between the collective and individual rights concerned, the interference was 'necessary in a democratic society'.

The Strasbourg response is more nuanced when at stake is not the advertisement of surrogacy services but actual parent–child relationships arising from such agreements. Most applications have revolved around the recognition, in jurisdictions prohibiting surrogacy, of legal effects flowing from surrogacy agreements lawfully concluded abroad. In *Mennesson* v. *France* and *Labassee* v. *France*,[214] the applicants were two married heterosexual couples who had resorted to gestational surrogacy in the United States (the

[211] Rubin and Phillips, 'Infertility and Assisted Reproduction Technologies', 191.
[212] Douglas, *Law, Fertility and Reproduction*, 149.
[213] *Lavisse* v. *France*, App. No. 14223/88, 5 June 1991 (Commission).
[214] *Labassee* v. *France*, App. No. 65941/11, 26 June 2014 (available only in French).

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Mennessons in California and the Labassees in Minnesota) and their respective children. In both cases, the procedure had involved embryos created through IVF using the husband's gametes and donor ova. The California and Minnesota courts had ordered prenatally that the applicants were to be considered parents once the children were born, and the birth certificates were issued accordingly. The French authorities had refused to register the births in accordance with the children's US birth certificates, on the basis that recording the commissioning parents as the children's parents would give effect to agreements that were null and void in France insofar as contrary to public policy.[215]

Significantly, Article 8 was found applicable under both its 'private life' and 'family life' limbs. 'Family life', a notion depending on the reality of the relationships between the parties, was found engaged, insofar as the commissioning parents had raised the children since birth and they lived together in a manner indistinguishable from the usual understanding of family life; 'private life' was said to encompass social identity and affiliation, hence the direct link between the surrogate-born children's private life and the legal determination of their affiliation.[216] The Court agreed that the refusal to recognise the parent–child relationship interfered with both the children's and the adults' rights.[217] However, the Court accepted that the measure pursued the legitimate aim of protecting public health and the rights of others (children, surrogate mothers) by deterring nationals from engaging abroad in practices contravening domestic public policy.[218] The Court also considered the State's wide margin of appreciation as regards the lawfulness of surrogacy and the recognition of such arrangements when lawfully concluded abroad, given the absence of European consensus on the matter.[219] While recognising the daily difficulties that could arise from the lack of registration (e.g. having to present the US documents accompanied by an official translation to demonstrate the relationship), the Court noted that the applicants were not prevented from leading a family life together in France.[220] There was no discussion of the obligation to allow those concerned – at least the biological fathers and their children – to 'lead a normal family life', as required in *Marckx* v. *Belgium* in relation to a biological mother and her child.[221] For the Court, the interference with the

[215] See *Mennesson* v. *France*, [60].
[216] Ibid., [45]–[46]. See, analogously, *Labassee* v. *France*, [38]–[39].
[217] *Mennesson* v. *France*, [48]; *Labassee* v. *France*, [49].
[218] *Mennesson* v. *France*, [62]; *Labassee* v. *France*, [54].
[219] *Mennesson* v. *France*, [77]–[79]; *Labassee* v. *France*, [56]–[57].
[220] *Mennesson* v. *France*, [92],[94]; see also *Labassee* v. *France*, [71], [73].
[221] See *Marckx* v. *Belgium*, [31].

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parents' family life was not disproportionate; in fact, the practical difficulties they faced as a result of the refusal of recognition were not so egregious as to outweigh the public interests at stake.[222]

Conversely, the Court found that the respondent State's discretion as regards the children's Article 8 rights was narrowed by several factors. First, 'an essential aspect of the identity of individuals is at stake where the legal parent–child relationship is concerned' and hence 'the margin of appreciation … needs to be reduced'.[223] The refusal to register the foreign birth certificates deprived the children of the recognition of parentage in respect of the biological parent (the father); given 'the importance of biological parentage as a component of identity', this was not in the children's best interests.[224] Second, for the children, the consequences of the non-recognition were far-reaching, adversely impacting their identity rights, the acquisition of French nationality (despite the fact that their biological fathers were French) and inheritance rights. The Court noted the misalignment between the acceptance that the children were related to the applicants under US law and the denial of that status under French law, which both deprived them of the opportunity to become French citizens and undermined their identity as full members of French society.[225] The French authorities had not safeguarded the children's best interests, which should be the primary consideration whenever decisions concerning children are made.[226] Moreover, while the parents were aware of the consequences of their actions when they embarked upon surrogacy abroad, the law greatly affected the children as well.[227] The Court thus applied a stricter proportionality test to the interference with the children's rights, insofar as the latter were not responsible for the parents' choices, and found that the respondent had overstepped its margin of appreciation when regulating the consequences of foreign surrogacy. The judgment, therefore, unanimously found a violation of the children's Article 8 rights:[228] the refusal to recognise the parent–child relationships lawfully

[222] *Mennesson* v. *France*, [94], [102]; see also *Labassee* v. *France*, [73], [81].

[223] *Mennesson* v. *France*, [80]. See also ibid., [81], on the Court's continued supervisory role even when a wide margin is left to the State: 'The solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution.'

[224] See ibid., [100]; see also *Labassee* v. *France*, [79].

[225] *Mennesson* v. *France*, [97]; see also *Labassee* v. *France*, [75].

[226] *Mennesson* v. *France*, [84], [99]–[101]; see also *Labassee* v. *France*, [78]–[80].

[227] *Mennesson* v. *France*, [99]; see also *Labassee* v. *France*, [78].

[228] *Mennesson* v. *France*, [102]; see also *Labassee* v. *France*, [81].

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established overseas between children born through surrogacy and their commissioning parents breached the children's right to respect for their private life.

The judgment is particularly emphatic about 'the need to strike a fair balance between the interest of the community … and the interest of the applicants – *the children's best interests being paramount* – in fully enjoying their rights'.[229] A parallel can be drawn between the Court's case law on children born through overseas surrogacy, in circumstances where the commissioning parents' national law prohibits it, and its case law on children's rights in unlawful immigration cases. As held in *Jeunesse* v. *The Netherlands*, in immigration decisions, the children's best interests must be afforded significant weight;[230] general immigration policy considerations are not sufficient to justify a measure resulting in hardship for the children (if the primary carer is returned to the country of origin or if the entire family must relocate abroad).[231] While parents crossing borders illegally cannot face the destination States with a *fait accompli* and expect the authorities to uphold the family life established after an illegal settlement in the country, children at risk of deportation cannot be held responsible for the parents' illegal conduct.[232] Similarly, in *Mennesson*, the Court accepted that the respondent 'may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory';[233] however, the law was also penalising the children:

> The effects of non-recognition in French law of the legal parent–child relationship between children thus conceived and the intended parents are not limited to the parents alone, who have chosen a particular method of assisted reproduction prohibited by the French authorities. They also affect the children themselves, whose right to respect for their private life – which implies that everyone must be able to establish the substance of his or her identity, including the legal parent–child relationship – is substantially affected. Accordingly, a serious question arises as to the compatibility of that

[229] *Mennesson* v. *France*, [84] (emphasis added); see also *Labassee* v. *France*, [78]. Although the Court's conclusion is driven by the paramountcy of the children's interests, the requirement to respect biological reality in the treatment of overseas surrogacy arrangements is an important principle, which may in future consolidate the biological intended parent's free-standing right to recognition.

[230] *Jeunesse* v. *The Netherlands* [GC], App. No. 12738/10, 3 October 2014, [118].

[231] Ibid., [119]–[121].

[232] See Draghici, *The Legitimacy of Family Rights*, 356–357.

[233] *Mennesson* v. *France*, [99]; see also *Labassee* v. *France*, [78].

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> situation with the children's best interests, respect for which must guide any decision in their regard.[234]

Lydia Bracken also remarked that laws penalising surrogate-born children fall foul of the international obligation, enshrined in Article 2(2) of the UNCRC,[235] to protect children against 'all forms of discrimination or punishment' based on their parents' 'activities'.[236]

The case of *Laborie* v. *France*[237] gave the Court an opportunity to consolidate its jurisprudence in *Mennesson* v. *France* and *Labassee* v. *France* (which had been followed in *Foulon and Bouvet* v. *France* in relation to single commissioning fathers).[238] The applicants were a French married couple who had entered into a lawful surrogacy agreement in Ukraine, the children being genetically related only to the father. The registration of the birth certificate had been refused on the ground of incompatibility with public policy, insofar as the surrogacy arrangement was null and the birth certificate was inaccurate as regards maternal affiliation. The Court concluded again that the non-recognition of the parent–child relationship did not breach the family life of the commissioning parents or the children but breached the children's privacy rights. The Court limited its analysis to a referral to its previous rulings, indicating that the factual matrix was similar and there was no reason to depart from the principles already established.[239] This line of jurisprudence marks a modest ideological triumph, but an important practical victory, for families formed through overseas surrogacy arrangements. ECHR States can no longer deny legal recognition to the relationship between a biological parent and the surrogate-born child; this would violate children's right to the protection of not only their social identity as members of the community where they reside but also their genetic identity, defined by the link with biological parents.

The importance of genetic ties also pervades the 2019 Advisory Opinion No. P16-2018-001 on the recognition of the intended mother of a surrogate-born child,[240] in principle confined to a situation where the child was

[234] *Mennesson* v. *France*, [99]; see also *Labassee* v. *France*, [78].

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

[236] See Lydia Bracken, *Same-Sex Parenting and Best Interests* (Cambridge: Cambridge University Press, 2020) 209.

[237] *Laborie and Others* v. *France*, App. No. 44024/13, 19 January 2017 (available only in French).

[238] *Foulon and Bouvet* v. *France*, App. Nos. 9063/14; 10410/14, 21 July 2016. See Chapter 5, Section 5.4.

[239] See *Laborie* v. *France*, [29]–[32].

[240] 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. See Chapter 3, Section 3.3.1.

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conceived using the intended father's sperm and donated ova. In addition to requiring the recognition of the non-biological commissioning mother's relationship with the child through an expedited procedure (not necessarily the transcription of the foreign birth certificate), the Court suggested in an *obiter dictum* that, where the embryo was created with the intended mother's ova and donor sperm, 'the need to provide *a possibility of recognition* of the legal relationship between the child and the intended mother *applies with even greater force*'.[241] Problematically, the Court's wording left States a spectrum of options, rather than mandating registration as the legal mother and hence parental status *ab initio*.

A subsequent ruling confirmed that States meet their Article 8 obligations where legal affiliation with the commissioning genetic mother is established through step-parent adoption. *D. v. France*[242] concerned the refusal to record in the French civil register the full details of the Ukrainian birth certificate of a child born through gestational surrogacy, designating the intended genetic mother as the legal mother and her husband as the legal father. Under French law, a presumption of accuracy and direct effect applied to foreign birth certificates as regards the legal father (save for situations of demonstrable fraud),[243] and therefore the husband's paternity was not queried (while the applicants claimed that they were both genetic parents,[244] this did not appear tested). Conversely, the authorities refused to register the mother's details, insofar as she had not given birth to the child. In Strasbourg, the applicants complained that the authorities had breached the child's Article 8 right to respect for her private life and had discriminated against her on the grounds of birth.[245]

The parties and the Court agreed that the refusal to register the intended mother as the legal mother constituted an interference with the child's right to private life, carried out in accordance with the law.[246] For the Court, the protection of the interests of the child and the surrogate mother and the policy of discouraging surrogacy (a practice which was unlawful in France) fell

[241] Advisory Opinion P16-2018-001, [47] (emphasis added). As Alice Margaria noted, the Court 'ends up partially ignoring its own disclaimer . . . by providing some guidance . . . on a situation that is different from the one pending before the national court'; see Alice Margaria, 'Parenthood and Cross-Border Surrogacy: What Is "New"? The ECtHR's First Advisory Opinion' (2020) 28(2) *Medical Law Review* 412–425, at 419.

[242] *D. v. France*, App. No. 11288/18, 16 July 2004 (available only in French).

[243] See ibid., [10], [13].

[244] See ibid., [38].

[245] See ibid., [29], [73].

[246] See ibid., [40]–[43].

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within the legitimate aims in Article 8(2).[247] The application did not appear to substantiate the claim that the measure failed to protect the child or the surrogate;[248] however, the surrogate's disinterest in acting as a parent and the child's interest in preserving the relationship with the genetic mother should have been discussed. As to the necessity of the interference, the Court recalled that the failure to recognise the legal relationship between a child and the intended biological father violated Article 8, but sought to reinterpret the authorities.[249] It maintained that *Mennesson/Labassee* did not require the State to establish legal ties between the child and the father through the transcription of the foreign birth certificate; rather, respect for the child's private life had to be ensured through an effective and speedy mechanism for establishing legal affiliation, but not necessarily through the transcription of the birth certificate. Adoption, a procedure with an average duration of 4.1 months according to the government, was deemed equally satisfactory. The Court further noted that, as indicated in its Advisory Opinion No. P16-2018-001, adoption produced similar effects to registration of the foreign birth details and adequately recognised the legal relationship between the child and the intended (non-genetic) mother.[250] In attempting to rationalise its decision that no violation of Article 8 had occurred, because the impugned decision was within the respondent's margin of appreciation, the Court took a regrettable step back from the advances made in *Mennesson* and *Labassee*. Its restatement of the previous jurisprudence unhelpfully downplays genetic affiliation, requiring States to ensure *some avenue* for establishing legal ties between the child and the commissioning genetic parent.[251]

D. v. *France* further found no violation of Article 8 read in conjunction with Article 14 in relation to the different treatment of French children born abroad through surrogacy, when compared to other French children born abroad, as regards the means of recognition of legal ties with the genetic mother. For the Court, adoption achieved the same result as the registration of the foreign birth details, and judicial scrutiny of the circumstances was necessary to protect the interests of the child.[252] To some extent, the *D.* v. *France* anomaly (and the step backwards from *Mennesson*) can be explained by the Court's unease with split motherhood and its deference to States' order of priority between gestational and genetic motherhood. However, where the

[247] See ibid., [44].
[248] See ibid., [35].
[249] See ibid., [45]–[49].
[250] See ibid., [51]–[54].
[251] See ibid., [51].
[252] See ibid., [85]–[88].

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surrogate is not biologically related to the child, accepted to carry the foetus for the intended parents and consented to the latter's treatment as the legal parents, there is no compelling reason to depart from the general principle that the child's identity rights require the recognition in law of the genetic links with the commissioning mother. This would not compel States to revisit the domestic meaning of 'mother'; it would merely require them to accommodate an agreement lawfully entered into abroad with the consent of all relevant parties, lest they disadvantage the surrogate-born child. The recognition of maternal affiliation also finds support in the effectiveness of social ties and in the legal ties in the jurisdiction where the child was born.

The procedural discretion enjoyed by ECHR States vis-à-vis the recognition of parent–child relationships established through a foreign surrogacy was confirmed in *D. and Others* v. *Belgium*.[253] The application regarded the temporary separation (almost four months) of a child born through surrogacy in Ukraine from his Belgian parents. This separation arose from the refusal by Belgian authorities to issue the child a Belgian passport or other travel documents permitting entry into the country, based on the Ukrainian birth certificate, which identified the applicants – a Belgian married couple – as his parents. The Court reasoned that the applicants wished to look after the child since his birth and had taken action to establish an effective family life; it recalled that, despite the separation, 'intended family life' is also covered by Article 8.[254] The Court drew on its jurisprudence regarding adoptive parents who are not yet living with their adopted children; spouses who have not yet set up home together after the marriage ceremony; and the potential family life that natural fathers may expect to develop with children born out of wedlock after a relationship breakdown. The application of these principles to foreign surrogacy cases is particularly useful where the parents have not had a chance to establish an effective family life with the child. The protection of intended family life allowed the Court to analyse the separation in *D. and Others* as an interference with the applicants' right to respect for their family life.[255]

The Court conceded, however, that the interference pursued the legitimate aim of preventing crime, specifically the traffic in human beings, by verifying compliance with Belgian and Ukrainian legislation.[256] There was also a brief reference to the protection of the 'rights of others' – the surrogate and the

[253] *D. and Others* v. *Belgium*, App. No. 29176/13, 8 July 2014.
[254] Ibid., [49].
[255] Ibid., [50].
[256] Ibid., [52].

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child.[257] It further held that 'the Convention cannot require States Parties to authorise the entry into their territory of children born to a surrogate mother without prior legal verifications on the part of the national authorities'[258] and found that the length of the proceedings had not been 'unreasonably long'.[259] The Court stressed the foreseeability of the procedure required for the recognition of the family relationship and the child's ability to enter the country[260] as well as the applicants' partial contribution to the delay.[261] Nor was the government responsible for the applicants' difficulties in remaining in Ukraine with the child while proceedings were pending before the Belgian authorities.[262] The application was dismissed as manifestly ill-founded, a conclusion perhaps unwarranted since the separation stemmed from the non-recognition of a valid foreign document.

All the surrogacy cases considered by the Court until 2022 focused on the effects of *lawful overseas* surrogacy arrangements. The recent A.L. v. *France* judgment confirmed that, even when created through an *unlawful domestic* surrogacy agreement, the biological link between the intended parent and the child remains protected by Article 8.[263] The domestic case at the origin of the Strasbourg complaint was a triangular paternity dispute after a failed surrogacy arrangement. The applicant (and his male companion) had been deceived by the surrogate mother, who had claimed that the child had died, whereas she had entrusted him to another couple in exchange for payment; that couple had recognised and raised the child since birth. Unlike *Mennesson* and similar applications, the A.L. complaint was introduced exclusively on behalf of the genetic intended father.[264] To that extent, it is the first judgment upholding the parent's, rather than the child's, right to private life in the context of surrogacy.

The Court found a breach of Article 8 due to the unreasonable delays in the conduct of paternity proceedings, which irreversibly affected the relationship between the child and his biological father; in fact, due to the passage of time, the recognition of affiliation and the transfer of care from the social parents to the biological father were no longer in the child's best interests. There is an

[257] Ibid., [53].
[258] Ibid., [59].
[259] Ibid., [58].
[260] Ibid., [60].
[261] Ibid., [62].
[262] Ibid., [61]. Due to the imminent expiry of their Ukrainian residence permit, the applicants had to return to Belgium, leaving the child behind with a nanny (see ibid., [14]).
[263] A.L. v. *France*, App. No. 13344/20, 7 April 2022 (available only in French).
[264] Ibid., [1].

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evident parallel with *Keegan* v. *Ireland*,[265] although in that case the planned conception by a betrothed couple also engaged 'family life'. With that distinction, the principle upheld in *A.L.* is reminiscent of *Keegan*. Although surrogacy was illegal in France, and the father had been found guilty of incitement to abandon a child,[266] the Court held that the time elapsed since the introduction of the paternity action did not meet the special diligence standard required under Article 8; in fact, in paternity cases, such delays are likely to predetermine the outcome of the case (the child was four months old when paternity proceedings were instituted and was six years old by the time the case was decided).[267]

The ECtHR was satisfied that the domestic courts' decision was primarily motivated by the child's best interests, which included a right to a stable home with the family that had raised him since birth, especially in light of the passage of time.[268] Commendably, it rejected the respondent's contentions that the delays were caused by the complexities of the case and that the burden was on the individual litigant to use the tools available to expedite proceedings.[269] There are, however, important arguments in the applicant's submissions that deserved greater attention. One of the reasons for the father's lack of success in domestic proceedings was the authorities' reliance on the nullity of surrogacy contracts. The applicant appropriately denounced the inconsistency of this approach with (a) the recognition of natural affiliation in foreign surrogacy cases, (b) the determination in criminal proceedings that he was the father and (c) the courts' treatment of the social parents' conduct (purchasing a baby for EUR 15,000) as less objectionable than his entering a surrogacy agreement to have a biological child.[270] For future cases, it would have been desirable for the Court to address these submissions and unequivocally clarify that the biological link between the commissioning father and the child must be protected in all surrogacy cases, whether foreign or domestic, lawful or unlawful. Indeed, if the domestic surrogacy contract is null, the law should allocate paternity according to biology, recognising the commissioning

[265] See *Keegan* v. *Ireland*, [55]: 'Where a child is placed with alternative carers he or she may in the course of time establish with them new bonds which it might not be in his or her interests to disturb or interrupt by reversing a previous decision as to care. Such a state of affairs not only jeopardised the proper development of the [father's] ties with the child but also set in motion a process which was likely to prove to be irreversible, thereby putting the [father] at a significant disadvantage in his contest with the prospective adopters for the custody of the child.'

[266] *A.L.* v. *France*, [13].

[267] Ibid., [68]–[69], [73].

[268] Ibid., [58]–[60].

[269] Ibid., [68]–[69].

[270] Ibid., [38]–[39].

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father as a legal parent not by virtue of the contract but based on genetic reality.[271] By focusing on the procedural breach of Article 8 (excessive length of proceedings), the Court missed the opportunity to advance the understanding of substantive obligations. In cases where the surrogate sells the baby to another couple, there is no public policy rationale for allowing an unmitigated illegal situation to prevail over biological ties, corroborated by intended family life; Article 8 should require the swift return of the child to the biological parent.

Different considerations may apply when the surrogate is the genetic mother and wishes to raise the baby herself. Although *A.L.* v. *France* was a case of traditional surrogacy, the mother did not intend to act as a social parent and there was no conflict of rights between two genetic parents. Even where the surrogate reconsiders and wishes to keep the child, regardless of whether or not she is requested to surrender the baby (based on contract, estoppel or other doctrines), the biological father's rights should encompass at least the recognition of affiliation and contact with the child. In fact, but for the surrogacy agreement, the father would not have impregnated the surrogate; moreover, he never agreed to act as a sperm donor for her and her husband. Arguably, the residence dispute should also be resolved in favour of the father; having to choose between two genetic parents with equal rights, the private agreement should tip the balance to the father's advantage. There should be, *a fortiori*, little hesitation as to the recognition of the genetic father when the surrogate reneguing on the agreement is not a genetic parent herself.

This was the factual matrix before the Court in *H.* v. *The United Kingdom*,[272] a case regarding a failed gestational surrogacy arrangement in a jurisdiction permitting surrogacy. The application was brought by a surrogate-born child whose birth certificate indicated as parents the genetically unrelated surrogate and her husband. Following the breakdown of the surrogacy

[271] The applicant relied on *Mandet* v. *France*, App. No. 30955/12, 14 January 2016 and *Ostace* v. *Romania*, App. No. 12547/06, 25 February 2014 to assert the right to biological truth in disputed paternity cases, but these precedents do not establish an absolute priority thereof. *Mandet* viewed as within the domestic courts' discretion the decision that the child's best interests were better served by establishing his real paternity than preserving the legal relationship with the mother's husband (*Mandet* v. *France*, [59]), in circumstances where parental responsibility remained with the mother and the family unit constituted by the mother, her husband and the son continued its life undisturbed (ibid., [58]). In *Ostace*, a bar on the disavowal of paternity failed to strike a fair balance in circumstances where all the parties (the man, his now adult son and his mother) supported establishing biological truth, but was otherwise accepted as safeguarding the stability of family relations and the child's interests (*Ostace* v. *Romania*, [42]–[45]).

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

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arrangement, and given the veto right of the surrogate and her husband under domestic law as regards the issuing of parental orders to the intended parents, a court had placed the child with the commissioning couple, who also received shared parental responsibility; the surrogate and her husband continued to be the legal parents and could exercise limited parental responsibility and contact.[273] The case was essentially an identity case: the applicant complained that the registration of the surrogate's husband as the father on her birth certificate (instead of her genetic father), not open to legal challenge, breached her right to respect for her private life.[274]

Disappointingly, the Court was satisfied that the child 'ha[d] not been wholly deprived of a legal relationship with' the genetic father, in that she resided with him, had taken his surname and he was able to make parenting decisions.[275] The low threshold for the right to establish one's identity is astounding: 'After all, there is nothing preventing A and B from telling her about the circumstances of her birth and her national and cultural heritage.'[276] The Court seemingly equated knowledge of biological truth and the ability to oppose it to the world. In parentage cases (e.g. *Kroon* v. *The Netherlands*),[277] the parties' knowledge of the biological truth does not exonerate the State of its responsibility to permit them to align legal status with biological and social reality.[278] The Court also placed weight on the absence of 'practical or material disadvantages' for the child,[279] an approach emphatically abandoned in *K.K.* v. *Denmark* a few months later insofar as inconsistent with identity rights.[280] In particular, it accepted that any inheritance difficulties could be overridden by way of testamentary disposition,[281] a remedy which *K.K.* deemed unsatisfactory because other children were automatic

[273] See ibid., [4]–[9].
[274] See ibid., [32].
[275] Ibid., [46].
[276] Ibid., [47].
[277] *Kroon* v. *The Netherlands*, App. No. 18535/91, 27 October 1994.
[278] The Court's considerations in *Kroon* v. *The Netherlands*, [40], apply, *mutatis mutandis*, to private life: '"Respect" for "family life" requires that *biological and social reality prevail over a legal presumption* which … flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone' (emphasis added). The English rule in *H.* did not benefit the child or the parents, and very marginally benefitted the surrogate and her husband, insofar as their parental status was largely notional.
[279] *H.* v. *The United Kingdom*, [47].
[280] *K.K. and Others* v. *Denmark*, App. No. 25212/21, 6 December 2022. See Chapter 3, Section 3.3.1.
[281] *H.* v. *The United Kingdom*, [47].

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beneficiaries on intestacy.[282] In *H.*, the Court also minimised the possible interference arising 'from whatever degree of legal uncertainty might flow from the automatic recognition of [the surrogate's husband]' and considered it 'very limited indeed'.[283] Moreover, the observation that 'to date the Court has not held that the intended parents must immediately and automatically be recognised as such in law'[284] does not justify the lack of *any* legal avenue for the father or the child to establish their parentage if the gestational surrogate and/or her husband opposed it. This decision suggests that the Court remains deferential in the face of anomalies affecting surrogate-born children in purely domestic situations, possibly to avoid interfering with the domestic regulation of surrogacy, a contested field.

A key factual difference between *Mennesson* v. *France*/*K.K.* v. *Denmark* and *H.* v. *The United Kingdom* was the lack of competing parent figures in the former two.[285] In the latter, the gestational surrogate's husband was by default the legal father, a status he could only lose voluntarily, although he had no genetic ties to the child and the indirect legal (marital) bond to the surrogate was too remote to offset the father's genetic and intentional parenthood. Even accepting the initial presumption of paternity in favour of the husband of the woman who gives birth to the child, a statutory rule treating that presumption as irrebuttable – whereas even the fatherhood of the *genetic* mother's husband can be contested in paternity proceedings[286] – is a disproportionate interference with the child's and the genetic father's rights as well as amounting to discrimination against the child on grounds of conception.

Although the claim was not brought on behalf of the father, it is difficult to reconcile the Court's stance in *H.* v. *The United Kingdom* with the finding in *A.L.* v. *France*, decided only a month earlier, that the natural father's rights in a failed *illegal* surrogacy arrangement are entitled to protection in the form of expeditious paternity proceedings. *A fortiori* a genetic father who complied with the law should receive protection. The inflexible application of a legal

[282] Although in *K.K.* v. *Denmark* there is no express analysis of the discriminatory nature of the law, there is an implied reference to the different (less advantageous) treatment received on account of the circumstances of conception, departing from the normalcy of family relationships.

[283] *H.* v. *The United Kingdom*, [48].

[284] Ibid., [56].

[285] See ibid., [53], distinguishing *H.* from *Mennesson*: 'By the time the children arrived in France, it was clear that their intended parents (one of whom was the biological father) were the only persons who had, and who wished to exercise, parental responsibility.'

[286] Section 55A Family Law Act 1986 allows the putative father to petition the court for a declaration of parentage displacing the *pater est* presumption operating in favour of the husband of the woman who gives birth to the child.

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regime running counter to both genetic and social reality, in that it offers no avenue to establish affiliation between the child and the genetic and moral author of conception, fails to strike a fair balance between competing rights. By contrast with foreign lawful surrogacy and illegal domestic surrogacy cases, where the commissioning father's rights may be outweighed by his conduct contrary to domestic law, the full force of Article 8 rights should be upheld when surrogacy was a legal reproductive route under domestic law. Indeed, ECHR case law on natural fathers' rights shows that they are entitled to the protection of their private and family life with the child when conception was planned and the father played an active role in raising the child.[287] There is no reason to treat the natural father who procreates through lawful recourse to surrogacy differently, only to benefit a man who did not intend to become a father and does not have biological links with the child.

H. v. *The United Kingdom* also sits uncomfortably with the *Mennesson/Labassee/Foulon and Bouvet/Laborie* line of jurisprudence, namely with the principle that the surrogate-born child's identity rights require the establishment of legal affiliation with the genetic commissioning father. It is equally at odds with *K.K.* v. *Denmark*, where the child's identity rights were also found to require the recognition of legal affiliation, and no lesser measures, between the child and the *non-genetic* intended parent; this was so even if the practical impact of non-recognition was minimal, given the legal mechanisms safeguarding the stability of the family unit.

Furthermore, the adverse consequences for the child would have deserved a less cavalier approach in *H.* v. *The United Kingdom*. One cannot underestimate the confusion for the child of being brought up by a couple she views as her parents (one of them indeed a biological parent), while the law treats as parents another couple with whom she has infrequent contact and who are not biologically related to her. This situation could not be said to serve the child's best interests. The certainty and clarity of who the law treats as a parent, invoked by the respondent as a legitimate aim,[288] in practice is negated by the unnecessary complexity of different layers of parenthood and the confusing dissociation between genetic/social fatherhood and legal fatherhood. The aim of 'ensuring that donors of gametes used in the process of assisted procreation were not treated as legal parents'[289] is certainly irrelevant, insofar as commissioning parents embarking upon surrogacy are not acting as donors. The third aim invoked, 'ensuring that surrogacy arrangements, while lawful, were not

[287] See Draghici, 'Unplanned Fatherhood Is Not Sperm Donation', 127–132.
[288] See *H.* v. *The United Kingdom*, [49].
[289] See ibid.

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enforceable in domestic law',[290] is in itself questionable, because it fails to protect both the individuals who enter such arrangements in good faith and the resulting children. If surrogacy is lawful, that is, not viewed as morally objectionable, the uncertainty of the fate of one's genetic material and parenthood plans, left at the will of third parties, is problematic. Particularly iniquitous is the veto right given to the surrogate's husband, a party who does not have any contribution to either conception or gestation.

Since 'there remains no consensus among the Contracting States when it comes to the acceptance of surrogacy arrangements', the Court endorsed the objectives presented by the respondent as pursuing the legitimate aim of protecting the rights and freedoms of others.[291] As regards the necessity and proportionality of the interference, the Court recited its general principles on the lack of consensus on delicate ethical matters and the conflict between rights widening the margin of appreciation, and on identity issues restricting it.[292] The Court's conclusion misses the crux of the complaint, which did not question the lack of automatic recognition of the child's relationship with the genetic father or the rule attributing fatherhood to the surrogate's husband at birth, but challenged the absolute impossibility of recognition of the father's parenthood if the surrogate or her husband oppose it:

> In light of the potential for considerable uncertainty regarding the parentage of a child born by way of assisted reproduction, borne out by the facts of the case at hand, in the Court's view the decision of the respondent State to create a clear rule governing parenthood in cases of assisted reproduction from the moment of the child's birth fell within the wide margin of appreciation enjoyed by the State when deciding such matters.[293]

As in *D. v. France*, the Court read down *Mennesson* to accommodate its conclusion that the UK's surrogacy regime was ECHR-complaint:

> To date the Court has not held that the intended parents must immediately and automatically be recognised as such in law … where a child is born through a surrogacy arrangement and the intended father is also the

[290] Ibid.
[291] Ibid.
[292] Ibid., [51]–[52].
[293] Ibid., [54]. The Court refers to the fact that both commissioning fathers' gametes had been used to impregnate the surrogate and consequently paternity could not have been known with certainty at the time of birth. Given the widespread use of DNA tests, and the numerous cases of natural intercourse where paternity is uncertain before birth, the overmagnification of this detail gives the impression that the Court is grasping at straws in an attempt to rule in favour of the respondent.

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> biological father, Article 8 of the Convention only requires that domestic law provide a possibility of recognition of the legal relationship between him and the child. … In *Mennesson*, for example, the Court recognised that other formal means of recognition of parentage may satisfy Article 8 of the Convention.[294]

Even applying the Court's reasoning, no 'possibility of recognition', through any 'formal means of recognition of parentage', was available to the genetic father, as the surrogate and/or her husband's lack of consent was an insurmountable bar. This rigid regime reserved to surrogacy cases stands in contrast with natural conception cases, in which fatherhood can be reallocated by a court based on DNA or other evidence. The Court's reading appears in part influenced by the applicant's submission that there should be 'a "normative presumption" in favour of recognising the biological father on the birth certificate',[295] which was interpreted by the Court as a presumption at birth (i.e. automatic registration), instead of a presumption that the birth certificate ought to reflect – possibly at the end of a court process, not necessarily *ab initio* – genetic fatherhood.

The *H.* v. *The United Kingdom* ruling, albeit excessively deferential in its acceptance of indirect means of securing family ties instead of legal affiliation, does not detract from the pivotal role of genetic links between the child and (one of) the intended parent(s) in activating ECHR protection. This is further demonstrated, *a contrario*, by the different treatment of surrogacy agreements in which neither member of the couple was genetically related to the child. In *Paradiso and Campanelli* v. *Italy*, where neither parent had biological ties with the child (due to the foreign clinic's error or fraud), the Grand Chamber found that 'family life' did not exist, the intended parents had no standing to apply on behalf of the child, and the interference with the adults' 'private life' was justified.[296] This suggests that intentional parenthood, even where corroborated by (incipient) effective social parenthood, does not entitle the couple to legal recognition as parents, notwithstanding the legal affiliation established abroad.

In *Valdís Fjölnisdóttir and Others* v. *Iceland*, the Court accepted that a married same-sex female couple and the child conceived through surrogacy in the United States, unrelated to either but placed in their foster care in Iceland (where the prohibition on surrogacy meant that the couple could not be registered as his legal parents), had developed bonds amounting to 'family

[294] Ibid, [56].
[295] Ibid., [57].
[296] *Paradiso and Campanelli* v. *Italy* [GC], discussed in Chapter 3, Section 3.3.2.

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life' during the course of long-term effective care (four years at the time of the final domestic judgment).[297] The Court distinguished that situation from *Paradiso and Campanelli* v. *Italy*, where, despite the existence of a 'parental project' and 'the quality of emotional bonds', the brevity of the relationship between the intended parents and the child (eight months) and the uncertainty of legal ties meant that the criteria for 'family life' had not been met.[298] However, by contrast with cases where a genetic link existed between one commissioning parent and the child born through foreign surrogacy (e.g. *Mennesson*), *Valdís Fjölnisdóttir* indicated that respect for family life can be ensured through routes other than legal affiliation when the child is not biologically related to the couple, such as a foster care arrangement. This reinforces, by contrast, the notion that biological parenthood, which is central to a person's identity, requires special measures of protection, in particular the prompt legal recognition of the parent–child relationship.

It could be thought that the raison d'être of surrogacy is to allow a person to have a biologically related child in circumstances where their partner's infertility (or the absence of a partner) threatens their procreative future. Where neither of the commissioning parents is related to the child, conception via double gamete donation and surrogacy has less to do with the aspiration to reproduce and more to do with the desire to fulfil a parental role. The extent to which Article 8 protects the position of non-biological intended parents is discussed in Chapter 3.

2.5 CONCLUDING REMARKS

Albeit reined in by the margin of appreciation doctrine, the judicial reinterpretation of the rights enshrined in the ECHR in light of scientific advances has progressively expanded reproductive freedom. Case law developments have propelled a new cluster of reproductive rights centred around geneticism: first, the right to respect for the decision to become a genetic parent, even when a person can acquire the status of legal parent to an unrelated (e.g. adoptive) child (*Evans* v. *The United Kingdom*), and the right to make use of the available ARTs in order to conceive a child, such choice being an expression of private and family life (*Dickson* v. *The United Kingdom*, *S.H.* v. *Austria*, *Knecht* v. *Romania*, *Nedescu* v. *Romania*, *Pejřilová* v. *The Czech Republic*, *Lia* v. *Malta*); second, the right to use embryos created with one's

[297] *Valdís Fjölnisdóttir and Others* v. *Iceland*, App. No. 71552/17, 18 May 2021, [59], discussed in Chapter 3, Section 3.3.2.
[298] *Valdís Fjölnisdóttir and Others* v. *Iceland*, [59].

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gametes for the purposes of reproduction, subject to the equal rights of the other gamete provider and public policy interests (e.g. ensuring that clinics only operate with appropriate credentials); third, the gamete providers' right to decide the fate of embryos no longer intended for a pregnancy, subject to competing interests, such as the protection of embryos or deceased partners' self-determination rights (albeit not parenthood-oriented, it reinforces the right to exercise control over one's genetic material); fourth, the right of surrogacy-born children to the recognition of legal ties with the genetic intended parent. Thus, the indiscriminate refusal of assisted insemination facilities for prisoners and unreasonable delays in gaining access to one's frozen embryos for treatment amount to breaches of Article 8. In inter-American jurisprudence, the right to make use of ART (specifically IVF) is also linked to the acceptance of infertility as disability, requiring special measures of protection (*Artavia Murillo* v. *Costa Rica*). The right to make use of ART in order to become a genetic parent has been cemented by the relative success of other geneticism-based claims, such as the right to exercise control over one's own genetic material, inter alia over embryos created with one's gametes, albeit limited by the free will of the other gamete provider or the State's interest in protecting human embryos (*Parrillo* v. *Italy*).

Alice Margaria has noted the incremental shift from the recognition of the right to respect for the decision to become a parent as subsumed under 'private life' in *Evans* to its protection under both the 'family' and 'private life' limbs of Article 8 in *Dickson* and *S.H.*[299] One might conjecture that what attracted the application of the 'family life' limb was the presence of married couples; indeed, reiterations of the principle can be found in *Knecht*, *Pejřilová* and *Lia*, all cases involving married couples. Although the right to 'found a family' under Article 12 has fallen in desuetude in Strasbourg practice after *E.L.H. and P.B.H.* v. *The United Kingdom*, apparently the historical association in this provision between marriage and procreation has transferred to the analysis of (planned) 'family life' under Article 8.

Despite these achievements, the ECtHR's emphasis on State discretion in the sensitive field of bioethics continues to inhibit the further development of procreative rights. The Court has been reluctant to require States to permit certain medically assisted procreation techniques in pursuit of parenthood aspirations: techniques involving third-party contributions, in particular ova donation and heterologous IVF (*S.H.* v. *Austria*) and posthumous reproduction, for example, fertilisation with the deceased husband's frozen gametes

[299] See Alice Margaria, *The Construction of Fatherhood. The Jurisprudence of the European Court of Human Rights* (Cambridge: Cambridge University Press, 2019) 52.

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(*Pejřilová* v. *The Czech Republic*). While a claim to the legalisation of surrogacy has not been entertained, the case law on the recognition of legal effects to overseas treatment indicates that ECHR States are entitled to view it as contrary to public policy (*Mennesson* v. *France*). Although the refusal to allow access to certain assisted reproduction methods has been qualified as an active interference with Article 8 rights, it was nevertheless found within the States' margin of appreciation.

This deferral to State regulation of ART does not recognise that the effective enjoyment of the right to exercise the choice of becoming a genetic parent may require access to third-party–assisted reproduction, for example, where the use of donor gametes and/or surrogacy is the only means to conceive a child genetically related to (at least a member of) the couple. To that extent, gamete donation should be permitted in order to reconcile genetic parenthood and the free choice of partner; the refusal to treat aspiring parents with donated ova/sperm places them in an unenviable position of having to sacrifice either their family life with an infertile partner or the pursuit of biological parenthood. There is limited acknowledgement of infertility as a disability rights issue in ECHR case law, and Article 14 should play a more prominent role. The refusal to permit access to certain forms of ART, albeit evenly applied, affects reproductively challenged couples significantly more. Scott recommended that the ECtHR should 'develop its understanding of reproductive interests under Article 8 with reference to the concept of reproductive health' and recognise that 'those with fertility problems cannot choose to reproduce without some form of medical assistance'.[300] It would be desirable for the ECtHR to borrow from the jurisprudence of its inter-American counterpart, who established an unequivocal link between reproductive health and autonomous choice and the discriminatory nature of bars on ART, which fail to acknowledge infertility as a disability (*Artavia Murillo* v. *Costa Rica*).[301]

Surrogacy remains the most disputed route to securing a biologically related child. By contrast with access to gamete donation (initially upheld by the Chamber judgment in *S.H. and Others* v. *Austria*), there is no indication that Article 8 might be interpreted as requiring States to allow individuals/couples to resort to surrogacy. However, notable advances have been made towards the protection of family life built on overseas surrogacy arrangements. The surrogate-born child's right to respect for private life requires the recognition of parentage, which is an important facet of a person's identity. Although this

[300] Scott, 'Reproductive Health', 443.

[301] Albeit established in relation to homologous IVF in *Artavia Murillo* v. *Costa Rica*, these considerations are also relevant in the context of third-party reproduction.

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indirectly benefits the genetic commissioning parent, on a principled level, it is not unproblematic that the Court has only upheld the child's rights in foreign surrogacy cases.

The ECtHR's position is rather questionable in its ambiguous treatment of genetic intended mothers. It did not require the immediate recognition of maternal affiliation through the transcription of the foreign birth certificate, viewing step-parent adoption as equally appropriate (*D.* v. *France*), by contrast with the (at least initial) approach to genetic intended fathers (*Mennesson/Labassee/Foulon*), later read down to merely require some possibility of recognition (*D.* v. *France*) and not even necessarily through the rectification of the birth certificate (*H.* v. *The United Kingdom*). The failure to recognise a genetic parent *ab initio* runs counter to well-established Article 8 principles: (1) the law must allow the reality of biological ties corroborated by de facto ties to prevail over rigid presumptions of parenthood (*Kroon* v. *The Netherlands*); (2) hurdles to the recognition of affiliation, such as the requirement that a biological mother adopt her own child to create legal ties, leave the child temporarily in a legal limbo and prevent the development of normal family life (*Marckx* v. *Belgium*); (3) the 'right to know one's parentage' is an integral part of the notion of 'private life'.[302] Even making allowance for the concerns raised by commercial surrogacy, human rights law should promote respect for biological parenthood (with the sole exception of parents uninterested in fulfilling a parental role). Mulligan has argued that

> for the Court to extend its analysis [in *Mennesson*] to genetic mothers would require the Court to stray into the complex territory of defining whether a genetic or gestational mother has a greater right to be recognised as a child's mother, a question that it might understandably not wish to address, and one which certainly engages sensitive ethical issues which generally tend towards a wide margin of appreciation.[303]

However, the rights of the genetic and the gestational mother are not in conflict in overseas surrogacy cases, in that the surrogate is not interested in asserting parenthood and that the legal transfer of parenthood has been completed under the relevant law. Upholding the genetic mother's parental status would not require States to choose between competing private rights, nor to revisit their legal definition of motherhood.

[302] See *Mikulić* v. *Croatia*, App. No. 53176/99, 7 February 2002, [54]; *Jäggi* v. *Switzerland*, [37].
[303] 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 469–470.

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The regulation of fatherhood following domestic *lawful* surrogacy agreements has also attracted unwarranted deference (*H.* v. *The United Kingdom*). While the objective of ensuring legal certainty as to a person's maternal and paternal affiliation is laudable, a rigid scheme, always identifying the surrogate mother and her husband as the legal parents if they are unwilling to surrender the child, ought to have been found disproportionate and outside the margin of appreciation, insofar as it does not allow courts to make the decision that promotes the best interests of the child. Whenever a child's identity is at stake, the margin is narrower and calls for a closer scrutiny, even in the absence of European consensus. When the surrogate and her husband are not genetically related to the child and a court has determined that the child's welfare is promoted by being raised by the intended parents, that court should also have the authority to transfer legal fatherhood to the genetic commissioning father, in the way it is already able to do in disputed paternity proceedings involving children born through natural intercourse. The aim of clear allocation of parenthood is not seen by the legislator as frustrated by declarations of parentage or adoption orders; the rigidity of the law in connection with surrogacy-born children is therefore inconsistent. The disproportionate veto power given to the surrogate's husband in relation to the genetic father's parental status, despite the former's lack of genetic or other ties with the child, and considering the child's identity rights, does not strike a fair balance between competing interests. Moreover, a child born via surrogacy in a country such as the UK is arguably discriminated against on the ground of conception when compared to children born via natural intercourse; the latter's identity rights are protected by legal avenues for establishing their true parentage and enjoying the rights flowing from legal affiliation with the genetic parent.

The ECtHR's apparent concern to preserve States' prerogative to regulate ART has led to the endorsement of further questionable domestic balancing acts. A notable example was the UK's IVF scheme, which gave absolute protection to male gamete providers' right not to become a parent, at the expense of the woman's right to become a parent, even in circumstances where the joint frozen embryos were the woman's last surviving procreative material and she had relied on the man's reassurances of continued consent when choosing to fertilise her oocytes with his sperm. The Court ought to recognise a positive duty for States to protect a person's ability to become a genetic parent against third-party interference (including misrepresentations and breach of promise). It should also voice the need to acknowledge the different reproductive burdens of men and women when striking a balance, in that ova extraction is much more invasive and requires medical facilities, and

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ova cryopreservation has much lower chances of success when compared to embryo or sperm cryopreservation, hence the different impact on women of belated withdrawal of consent to the preservation and use of shared embryos.

The Court will soon have an opportunity to revisit its approach to posthumous reproduction, specifically the widow's right to make use of her late spouse's stored gametes or joint embryos for the purposes of ART. The new cases pending before the Court (*Dalleau* v. *France*; *Caballero* v. *France*) feature clear evidence of the deceased's anticipatory decision to become a parent. Subject to child welfare considerations, the ECtHR ought to require States to accommodate the deceased's advance directives and the surviving spouse's decision to continue the reproductive project. The judgments issued to date, while invoking the free will of the deceased, could have requested States to prioritise the rights of the surviving spouse – at least by affording an opportunity to demonstrate the deceased's support for posthumous insemination in a court – through a process analogous to existing ones for inferring the wishes of patients in permanent vegetative state or for the retrospective assessment of a request for assistance in dying. Even in the absence of incontrovertible evidence as to the wishes of the deceased, a law preventing a woman from using embryos created with her own genetic material when her spouse dies unexpectedly should be viewed as an excessive interference. The position of the parent of the deceased (*Petithory Lanzmann* v. *France*) should also be revisited: in particular, the legal standing as next of kin to defend the deceased child's reproductive wishes and their own right either to become a biological grandparent by using the deceased child's frozen embryos or to donate them to an infertile couple – especially when this coincides with the deceased's wishes and the alternative is the destruction of the embryos. Naturally, this should remain subject to a case-by-case determination.

In the future, the Court may also hear economic claims related to ART. Although the Court has preferred to examine the refusal to allow ART as an interference (affecting a negative obligation), the issue of provision of treatment free of charge may require the demonstration of a positive obligation. Concerns have been expressed in the literature over the cost to supply fertility treatment services if States were found to have any such obligation as a matter of human rights. It was suggested that the provision of food, housing and healthcare needs can be seen as a more legitimate imposition on the public.[304] This concern over the burden on public finances, if a right to subsidised ART in the furtherance of parenthood aspirations were to be

[304] Deech and Smajdor, *From IVF to Immortality*, 139.

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recognised, overlooks the burden already imposed on taxpayers by the duty to provide financial support for any number of children a person chooses to have naturally, as well as the costs associated with children in State care, which stem in part from irresponsible natural reproduction (i.e. reproduction regardless of the couple's interest or ability to support their children). Although the focus of public assistance to low-income and unemployed parents is on the well-being of *existing* children, many children would not be brought into existence but for welfare policies providing the wrong incentive to procreate. Indeed, the stimulus effects of welfare generosity on reproductive behaviour are well documented.[305] Indirect discrimination can arise if the State respects the wish to procreate – at the public's expense – of people who can procreate naturally (regardless of whether they have ever contributed to the public purse), while the wish of those who need State support to *conceive*, but are capable and willing to bring up their children without State assistance (and are possibly long-term tax payers), is not respected. Filtering the desire to be a parent based on the amount of public funding required to become pregnant, but not the amount required to raise a child (which is greater), creates an unethical double standard. Moreover, if, in countries offering taxpayer-supported healthcare, the public cost of antenatal care for mothers during pregnancies is not invoked to limit the number of children a person can have if they can procreate naturally, the costs for the national healthcare system to assist reproductively challenged couples to procreate should not prevent the development of the right.

If the practice of surrogacy becomes more widespread, further questions will be facing Strasbourg judges as regards the appropriate regulation of competing rights, notably the conflict between the surrogate mother's rights and those of the commissioning parents. From that perspective, the single most contentious issue, resolved differently by different jurisdictions, is whether or not the surrogate should be permitted to renege on the arrangement and refuse to surrender the child.[306] Arguably, at least in gestational surrogacy cases in which the commissioning mother's ova were used to create

[305] See, e.g., Robert Moffitt, 'The Effect of Welfare on Marriage and Fertility', in Robert Moffitt (ed.), *Welfare, the Family, and Reproductive Behaviour: Research Perspectives* (Washington, DC: The National Academies Press, 1998), 50-97; Alma Cohen, Rajeev Dehejia and Dmitri Romanov, 'Financial Incentives and Fertility' (2013) 95(1) *Review of Economics and Statistics* 1–20. A law removing children from parents who do not work to support them might generate a different incentive structure.

[306] For examples of English cases where the surrogate wished to keep the baby, see A v. C [1985] FLR 445, *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421, recalled in Douglas, *Law, Fertility and Reproduction*, 154.

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the embryo implanted in the surrogate, genetic and intentional parenthood and good-faith private agreements should trump the surrogate's rights. The latter merely rely on the assumption of pregnancy risks; the provision of the environment for the development of the foetus; giving birth; and historical attachment to viewing the woman who gave birth as the mother. Indeed, the commissioning mother never agreed to act as an egg donor for the surrogate, and her private and family life would be disproportionately curtailed by the opposite solution. In traditional surrogacy cases, the father's Article 8 rights should prevail on the surrogate's rights when deciding the child's residence; they both have an equal biological link, but the child would not have been born but for the agreement that the child would be a part of the father's family. A law permitting a radical change in the commissioning couple's circumstances (from a joint child to the father co-parenting with the surrogate and the commissioning mother assuming a step-parent role), only to accommodate the surrogate's refusal to honour freely agreed arrangements, should be seen as disproportionate. Indeed, it also breaches the commissioning father's right *not* to procreate with a person he has not chosen for those purposes. In a distant future, the Strasbourg Court may have to address similar dilemmas, left for now to domestic legislatures.

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