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MEDICALLY ASSISTED HUMAN REPRODUCTIVE TECHNOLOGIES (ART) AND HUMAN RIGHTS — THE EUROPEAN PERSPECTIVE

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Abstract The present article examines how the progress of science, and in particular, medically assisted human reproductive technologies (ART) have provoked a revolution in the sphere of family relations, generating a series of ethical and legal conflicts. The article focuses on the European perspective, without ignoring the international sphere, given the globalization of the phenomenon. The emerging legal issues are analyzed through the filter of international human rights, not only an important aspect to take into consideration in the context of bioethics in general, but a "passage *obligé*" given that certain concepts find their explanation and coordinates in international human rights law. It is from this perspective that the relationship between ART and human rights is presented. The applicable international and European legal instruments and principles shall be mentioned, as well as a brief comparison of national legal frameworks in Europe. The emerging bioethical and legal issues are examined in correlation with the response of the European Court of Human Rights through its case law aimed at balancing conflicting rights when faced with issues pertaining to ART. Lastly, the article presents in more detail the particular legal issues under debate in France and Italy, two European countries with specific legislation in the field.

Keywords human rights, bioethics, European Convention on Human Rights, surrogacy

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INTRODUCTION

Nowadays, technology and medicine have attained high levels of development, thus being able to propose treatments for many diseases or medical problems for humans. It is in this context that the field of human reproduction comes into the spotlight. Medically assisted reproduction has improved greatly in its safety and success rate since the first successful *in vitro* fertilization in 1978, becoming widely available. With the constant advance of scientific knowledge and capacity, doctors are able to offer couples or single women greater chances of achieving pregnancy and successful births, by utilizing a wide range of medically assisted human reproductive technologies (ART).

As a consequence, society is undeniably witnessing a "revolution in the institution of the family"[1] to the extent that, besides proposing a solution to infertility, it became possible to create family structures that otherwise would not naturally exist. However, the development and broad use of ART has not remained without criticism, not only from a medical point of view, but mostly from religious, ethical, and legal points of view. Furthermore, in the context of globalization, ART raises complex legal issues affecting fundamental human rights. In order to understand these issues, it is necessary to understand which are the various technologies concerned, what was their original purpose, and what is the present manner in which ART is (ab)used.

A. What Is ART?

Since *in vitro* fertilization was used for the first time in 1978, a number of related techniques have further developed. Taking into account aspects such as the level of involvement of biotechnological manipulations, or the number of persons involved in the process, ART includes the following: intrauterine insemination (IUI), gamete retrieval (sperm and ova), *in vitro* fertilization (IVF), third-party (heterologous) ART which further involves gamete donation and surrogacy.

Several adjacent techniques equally developed in the context of third-party ART, such as cryopreservation of gametes and embryos, pre-implantation genetic diagnosis (PGD) or further research techniques on embryos. In such a scenario, one or both of the intended parents will not have a biological link with the child born through heterologous ART.

In the situation of a woman who cannot carry a pregnancy for medical reasons, thus not being able to naturally bear a child, the couple can make recourse to a surrogate or a gestational carrier. The technique of IVF permits six types of surrogacy. Most common in the past were two types of "traditional surrogacy" where the surrogate is the biological mother and the sperm is from the intended father or a donor. The other four types are

[1] Maya Sabatello, *Are the Kids All Right?: A Child-Centered Approach to Assisted Reproductive Technologies*, 31(1) Netherlands Quarterly of Human Rights, 82 (2013).

"gestational surrogacy," where the gestational carrier is unrelated to the baby with the ova coming from the intended mother or from a donor, and the sperm from the intended father or from a donor. This last technique is radically different from any of the previous techniques[2], as it can involve the contribution of three to six individuals in the process as well as the use of all other techniques.

B. Initial Purpose and Present (Ab)use

Most ART is used to treat infertility; others are used in order to prevent serious health problems. Embryo screening or PGD, for example, is used to prevent the births of children with specific genetically transmitted diseases.[3]

But ART equally opens a door for more broad applications than just solving infertility problems, as it results in the creation of non-traditional typologies of families and in shifting boundaries from "natural parent" to "legal parent." In this manner, menopausal women or gay and lesbian couples can become "parents," or even a deceased man can become a "biological father" through post-mortem conception.[4] For gay couples that want to parent a genetically related child, surrogacy makes it possible.

The progress of research techniques on embryos, such as PGD, historically developed to address concerns related to major genetic disorders and disabilities, is increasingly being used for other purposes that can be achieved through genetic selection of offspring. Such purposes include sex selection of the future child according to personal preferences or socially determined choice, or the desire to "create" a child whose genetic tissue composition is compatible with the one of an existing sick child who needs cell/tissue donation (also known as "tissue-matching sibling" or "saviour sibling")[5].

Going even further, several research teams in the US and the UK have developed techniques and requested regulatory approval allowing for the creation of an embryo with genetic material from three different people resulting in inheritable genetic modifications (changes that would be passed on to future generations). These techniques have been referred to with several terms, including "mitochondrial manipulation," "oocyte modification," "3-person IVF," "three-parent babies," and "nuclear genome transfer" (the most technically accurate).[6]

Therefore, the "traditional" purpose of ART, conceived as a set of techniques aimed at solving infertility problems, has expanded way beyond in a way that it becomes more and

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[2] Abdelbaki Bouzidi, *La Gestation Pour Autrui* (*Surrogacy*), Justice & Cassation (Justice & Appeal), 39 (2011).

[3] Center for Genetics and Society — About Assisted Reproduction, available at http://www.geneticsandsociety. org/section.php?id=89 (last visited Apr. 20, 2016).

[4] See Sabatello, fn. 1 at 81.

[5] Id. at 88.

[6] Center for Genetics and Society — 3-Person IVF, available at http://www.geneticsandsociety.org/article.php?id=6527 (last visited Apr. 20, 2016).

more obvious that ART and medicine nowadays are far reaching, and almost any type of scenario related to human procreation becomes possible.

C. Why ART and Human Rights?

However, the context in which doctors and ART specialists work is not a medically "sterile environment," but on the contrary, "contaminated" by principles emerging from other disciplines, such as religion, ethics, and law. More precisely, where law and ethics meet, bioethics plays an important role in the context of ART.

Thus, in scenarios such as those described above, where the use of ART goes way beyond the mere imitation of natural procreation as a solution to infertility, the result is a pluralism of social and family relations. As a consequence, the possibilities brought within reach by these technologies give rise to a plethora of delicate ethical, religious, sociological, and legal issues that legislators and courts across the world have sought to address and resolve (as we shall further see in the following parts).

It is in the context of such efforts that human rights in particular, "can function as a bridge between ethics and law."[7] The insertion of human rights elements in this field contributes to promoting "principles and norms that are not negotiable and cannot be compromised,"[8] such as the integrity of the human body or the dignity of the human being. Thus, human rights play a critical role in "counter-weighting" some medical principles such as the utilitarian argumentation, according to which the results of the medical intervention are prevailing and therefore considered as ethically required.[9]

What is more, the emerging global bioethics is facing criticism in regards to its global applicability, since the principles promoted seem to only be designed for Western cultures and standards of medical care. Once again, human rights can contribute toward remedying such criticism, emphasizing the universal validity of human rights principles and as such of ethical principles.[10]

In the following parts we shall analyze the relationship between ART and human rights from the European perspective. We shall first have a look at the limited and uneven legal framework in the field (Part I) to further tackle the emerging bioethical and legal issues (Part II), and next examine the response of the European Court of Human Rights (ECtHR) when faced with issues pertaining to ART (Part III). In the last two parts we shall develop in more detail the legal issues that arise in France and Italy, two European

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[7] Margaret Sommerville, *Law, Marching with Medicine but in the Rear and Limping a Little: Ethics as "First Aid" for Law*, in Silja Vöneky, Britta Beylage-Haarmann & Anja Höfelmeier et al eds. *Ethik und Recht: die Ethisierung des Rechts* (*Ethics and Law: The Ethicalization of Law*), Springer (Heidelberg), at 78 (2013).

[8] Henk Ten Have, *Bioethics and Human Rights: Wherever the Twain shall Meet*, in Silja Vöneky, Britta Beylage-Haarmann & Anja Höfelmeier et al eds. *Ethik Und Recht: Die Ethisierung des Rechts* (*Ethics and Law: The Ethicalization of Law*), Springer (Heidelberg), at 168 (2013).

[9] Id.

[10] Id. at 168–169.

countries with specific legislation in the field, anchored in strong constitutional principles (Parts IV and V).

I. A LIMITED AND UNEVEN EUROPEAN NORMATIVE FRAMEWORK

Generally, greatly owing to the advancement of technology, the field of biomedicine, and within it, that of ART, has seen spectacular advances in the last decades. Unfortunately, the rapid progress of such technologies is not accompanied by synchronized advances in the field of bioethics and law. It remains somehow a "virgin land" that needs to be regulated and "tamed" with the help of universal principles of human rights.

A. International Conventions and Declarations Applicable at European Level

At the international level, it is mostly under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) that several international declarations dealing with wider subjects such as genetics, human genome, and bioethics have been adopted. Although not directly aimed at regulating ART, these instruments equally touch upon this field and the principles consecrated therein should be given proper consideration.

1. UNESCO — Universal Declaration on the Human Genome and Human Rights (1997). — The Universal Declaration on the Human Genome and Human Rights was adopted unanimously and by acclamation at UNESCO's 29th General Conference on November 11, 1997.[11] The declaration relates the human genome with human dignity, deals with the rights of the persons concerned by human genome research, and provides a reference legal framework for both stimulating the ethical debate and the harmonization of the law worldwide. It is one of the first international instruments to make the connection between medicine and human rights[12]. One of the most relevant principles consecrated therein is formulated in Article 4 of Chapter A titled, "Human dignity and the human genome," according to which: "The human genome in its natural state shall not give rise to financial gains."

2. UNESCO — Universal Declaration on Bioethics and Human Rights (2005). — On October 19, 2005, the General Conference of UNESCO adopted by acclamation the Universal Declaration on Bioethics and Human Rights. For the first time in the history of bioethics, Member States committed themselves and the international community to respect and apply the fundamental principles of bioethics set forth within a single text.[13] The principles it endorses are anchored in the rules that govern respect for human dignity, human rights and fundamental freedoms, thus consecrating the interrelation between

[11] For details and the text of the Declaration, see http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genome-and-human-rights/ (last visited Apr. 20, 2016).

[12] See Ten Have, fn. 8 at 164.

[13] For details and the text of the Declaration, see http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/bioethics-and-human-rights/ (last visited Apr. 20, 2016).

ethics and human rights in the specific field of bioethics.

Therefore, as it results from the text of the declaration, human rights are the "starting point and context of bioethics," "a basic principle of bioethics itself," and a "constraint and final authority for bioethics."[14] According to the very Preamble of the declaration, the principles of bioethics should be interpreted in a manner consistent with international law and in conformity with human rights law. The declaration also consecrates the principle of autonomy, but not without its corollaries, responsibility and respect for the autonomy of others (Article 5). This principle should be given proper consideration when balancing different rights and interests at stake in the process of ART and should prevent the "commodification" of the body of those involved in ART, an aspect that is unfortunately not expressly dealt with in the declaration.[15]

Although the importance of articulating international human rights and bioethics is clearly highlighted, the bearing of the declaration remains limited. It has been criticized as being idealistic in the pursued aim, but not lucid, realistic, and pragmatic enough in regards to the actions it requires and should encourage.[16]

3. UN — The Convention on the Rights of the Child (1989). — Another international instrument that presents high relevance for the issues raised by ART is the United Nations' Convention on the Rights of the Child, adopted by the General Assembly on November 20, 1989. With the exception of Somalia and the US, all signatory states ratified the Convention and are consequently bound by it.[17]

It is thus the principle of the "best interest of the child," enshrined in Article 3, that should prevail in any decision or action concerning a child. ART-born children should equally benefit from this standard of protection. Article 7 is also relevant as it provides in its pertinent part that "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents." This provision is of high importance in the context of surrogacy performed abroad and when the applicable, relevant laws come into conflict (see Part II).

B. Specific European Legal Instruments: The Council of Europe and the European Union

At the European level, given the existence of two major international organizations (the Council of Europe — CoE, and the European Union — EU), relevant legal

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[14] See Ten Have, fn. 8 at 165.

[15] Christian Byk, *La Déclaration Universelle Sur La Bioéthique Et Les Droits De l'homme: La Bioéthique, Une Utopie Civilisatrice A l'ère De La Mondialisation?* (*The Universal Declaration on Bioethics and Human Rights: Bioethics, a Civilizing Utopia in the Era of Globalization?*), 134(3) Journal du droit international (Journal of International Law), 871, 873 (2007).

[16] Id. at 869.

[17] For details and the text of the Convention, see http://www.ohchr.org/en/professionalinterest/pages/crc.aspx (last visited Apr. 20, 2016).

instruments were adopted therein. The legal instrument with the most significant value and potential worth mentioning is the Oviedo Convention, adopted within the Council of Europe.

1. CoE — Oviedo Convention on Human Rights and Biomedicine (1997). — In 1997 the Council of Ministers of the CoE adopted a framework convention laying down the main principles and general standards to be observed for the respect of human rights and human dignity in the areas of biology and medicine. Although adopted within a regional organization, the Oviedo Convention has international potential, as it is open for ratification to non-member states that participated in its elaboration.[18] Subsequently, four additional protocols were adopted dealing with: the prohibition of cloning human beings (1998); transplantation of organs and tissues of human origin (2002); biomedical research (2005), and genetic testing for health purposes (2008).

It has been affirmed that the Oviedo Convention can be considered as a "*lex specialis vis-à-vis*" the European Convention on Human Rights (ECvHR),[19] dealing with aspects related to the rapid developments of biology and medicine. Amongst the most important principles and standards consecrated in the text of the Oviedo Convention, protection of human dignity and identity stem out as the first principle (Article 1), together with the principle of protection of the integrity of human beings (Article 1), the primacy of the human being (Article 2), and the prohibition of financial gain and disposal of the human body (Article 21). The Oviedo Convention also sets out two principles concerning embryos (Articles 14 and 18). While allowing for the performing of predictive genetic tests to detect a genetic disposition or susceptibility to a disease, for health purposes and for some forms of treatment (Articles 12 and 13), it forbids the use of techniques of medically assisted procreation for the purpose of choosing a future child's sex and the creation of human embryos for research purposes. It also stipulates that, where the law allows research on embryos, it shall ensure adequate protection of the embryo.

A drawback of the Oviedo Convention, in comparison with the ECvHR, is the lack of an enforcement mechanism, providing only for the possibility for the Secretary General of the CoE to ask a contracting state to "furnish and explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention" (Article 30). Nevertheless, the Oviedo Convention's importance is not to be neglected, as the ECtHR itself does mention it as a relevant source of European legal instruments when judging cases in this field.[20]

2. The EU's Legal Framework. — If by its initial purpose, the European Union was

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[18] For details and the text of the Convention, see http://www.coe.int/en/web/bioethics/oviedo-convention (last visited Apr. 20, 2016).

[19] Aart Hendriks, *The Council of Europe and Health and Human Rights*, in Brigit Toebes, Mette Hartlev & Aart Hendriks eds. *Health and Human Rights in Europe*, Intersentia (Cambridge), at 49 (2012).

[20] For example: *Vo vs France (GC)*, no. 53924/00, Jul. 8, 2004; *Evans vs UK (GC)*, no. 6339/05, Apr. 10, 2007; *S. H. and others vs Austria (GC)*, 57813/00, Nov. 3, 2011.

born as an economic organization, primarily focused on economic integration rather than on issues such as human rights and health, however, the legislation developed within does influence the latter aspects. Additionally, with the entry into force of the European Charter on Fundamental Rights (ECFR), the EU has become increasingly engaged with the issue of human rights.[21]

The rules governing the internal market (the freedoms of movement of goods, persons, and services) have a significant impact on national health systems, presenting great interest for ART. Thus, Article 56 of Treaty on the Functioning of the European Union (TFEU),[22] which prohibits restrictions on the freedom to provide services within the EU, practically implies an enforceable right to cross-border healthcare services. When such a right and ethical issues come into question, there is a strong incentive on European patients to cross the borders in order to obtain a treatment considered as unlawful in their country of origin. Such a case was brought before the European Court of Justice (ECJ), with regard to Irish women travelling to England in order to perform abortions, considered illegal in Ireland. It was thus, in the case of *SPUC vs Grogan*[23] that the ECJ established that a controversial medical procedure had the status of a service within the meaning of the EC Treaty when performed legally in the member state in question. In other words, it established "the right to healthcare services, including those that are prohibited or otherwise not available in patient's home country."[24]

This case law opened the door for cross-border healthcare for a large spectrum of services that are morally sensitive in Europe: for example, Swedish women travel to Denmark to receive fertility treatment with anonymous donor sperm, and Danish women travel to the Czech Republic to buy ova.[25]

Although not dealing with ART in particular, a more specific legislation was adopted by the EU in regard to the protection of public health and prevention of transmission of infectious diseases by human cells and tissues used for therapeutic purposes, Directive 2004/23/EC.[26] The Directive applies to a variety of human cells, including reproductive cells, stem cells, and foetal cells, thus applicable to questions pertaining to ART within the EU member states. The Directive mentions the possibility of import/export of human tissues and cells, which could be particularly relevant in the framework of surrogacy or

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[21] Jane Rothmar Herrman & Brigit Toebes, *The European Union and Health and Human Rights*, in Brigit Toebes, Mette Hartlev & Aart Hendriks eds. *Health and Human Rights in Europe*, Intersentia (Cambridge), at 51 (2012).

[22] TFEU, Treaty on the Functioning of the European Union.

[23] ECJ, C-159/90, Oct. 4, 1991, *The Society for the Protection of Unborn Children Ireland Ltd. vs Stephen Grogan*.

[24] See Rothmar Herrman & Toebes, fn. 21 at 66.

[25] Id. at 67.

[26] Directive 2004/23/EC setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage, and distribution of human tissues and cells.

posthumous conception, for example.

Although the EU law does not specifically regulate aspects concerning ART, certain rules can be drawn from EU legislation for other fields and from the interpretation given by the ECJ in some cases. This is, for example, the question of research on embryos and the interpretation of Directive 98/44/EC on the legal protection of biotechnological inventions, as it has been dealt with in the *WARF* case[27]. In its preliminary ruling judgment, the ECJ rejected the possibility of granting a patent for an invention that necessarily involves the use and destruction of human embryos since it would be contrary to public order and morality in Europe and would infringe upon the principle of human dignity, which protects human embryos. This judgment was criticized by doctrine, as it creates "a judicial conceptualization of the human embryo in the law of the European Union [which] can be described as a well-aimed step in the wrong direction."[28] Furthermore, the main consequence of this jurisprudence is that researchers in this field will no longer conduct such research in Europe, but rather in other parts of the world where such ethical issues were not raised.

The lack of a specific, unified European legal framework in the field of ART is a consequence of the great diversity of national legislations in Europe, justified by the large margin of appreciation that states enjoy in this field.

C. Large Margin of Appreciation of States, Lack of Consensus, Gaps in National Legislation

The pluralism of approaches and legislations derives from the fact that this subject lies within the states' sovereignty, and thus they enjoy a large margin of appreciation that inevitably results in a lack of consensus. In addition, cultural and religious differences may play a substantial role in the different legal approach of the state in question.

Writing some years ago in a report for the European Commission on the general subject of the storage and use of embryos, one expert identified four different models among EU states: prohibitive, cautious regulatory, liberal regulatory, and "*laissez-faire.*"[29] The following examples shall contribute to better depict the image of the legislative puzzle in Europe on the topic.[30]

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[27] ECJ, C-34/10, Oct. 18, 2011, *Oliver Brüstle vs Greenpeace e.V*.

[28] Daniel Garcia San Jose, *European Normative Framework for Biomedical Research in Human Embryos*, Thomas Reuters Aranzadi (Cizur Menor - Navarra), at 138–139 (2013).

[29] Linda Nielsen, *Legal Consensus and Divergence in European Legislation in the Area of Human Embryology — Room for Harmonisation?*, in Donald Evans & Neil Pickering eds. *Conceiving the Embryo: Ethics, Law and Practice in Human Embryology*, Martinus Nijhoff (the Hague), at 326 (1996).

[30] The presentation of the different national regulations is not exhaustive, but only relates to the most representative provisions.

1. Germany. — Having in mind the tragic past of racism and eugenics during the Nazi regime, Germany opted for a restrictive legislation in the field of ART, governed primarily by criminal law, in the shape of the 1991 Law on the Protection of the Embryo — *Embryonenschutzgesetz*.[31]

Access to ART is allowed only to heterosexual couples, excluding unmarried women. Only sperm donation is permitted and in any one cycle of treatment, no more than three embryos may be created and these are, in principle, to be implanted at once in the uterus of the woman who provided the ova. The standard practice of other European countries of creating 8–10 embryos and freezing some for future use in the event of failure would constitute a criminal offence in Germany. Cryopreservation of embryos is therefore permitted only in exceptional circumstances (woman revokes consent, unforeseen medical event). On the question of consent, the Law refers only to the woman's consent, in the absence of which it is an offence for a doctor to implant an embryo. In Germany, an ovum is considered as a human being from the moment of fertilization, regardless of its incorporeal or extracorporeal location, and is protected at the constitutional level under the right to life and human dignity from that early stage onward. Therefore, research on embryos is permitted under very strict conditions (for instance, only on imported embryonic stem cells or only for therapeutic purposes).

In Germany, surrogacy in itself is not explicitly prohibited or punishable. However, facilitating contact of the party who is willing to adopt a child born through surrogacy or is in some other way ready to take permanent care of it (ordering parents) with a woman who is willing to serve as a surrogate is subject to sanctions. Also, surrogacy agreements are ineffectual and unenforceable.[32]

2. Italy. — Italy is another country having opted for prohibitive legislation in the field of ART, although more recently: Law no. 40/2004 regarding Rules on assisted reproduction technology (see Part V).

3. France. — France is among the countries that have a longstanding legal framework in the field, adopted in a cautious spirit, in order to fully respect *ordre publique* and morals as consecrated by the French Constitution (see Part IV).

Countries such as the UK, Spain, or Russia have opted for a liberal regulatory approach.

4. UK. — Probably one of the most permissive legislations in Europe, the specific laws in UK grant access to ART to heterosexual couples, couples of women and single

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[31] It is available at http://www.gesetze-im-internet.de/stzg/index.html (last visited Apr. 20, 2016).

[32] See European Parliament, *A Comparative Study on the Regime of Surrogacy in EU Member States*, (2013), available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI ET(2013)474403_EN.pdf (last visited Apr. 20, 2016).

women. Donation of gametes and embryos is allowed, but with the Human Fertilisation and Embryology Act of 2008 is no longer protected by anonymity, as the right of the child to know its origins has been consecrated.

The UK authorizes the creation of human embryos for research. Research is allowed for a wide range of purposes: to promote advances in the treatment of infertility; to increase knowledge about the causes of miscarriages; to develop more effective techniques of contraception; to increase knowledge about the development of embryos, or to apply knowledge in developing treatments for serious diseases.

As regards surrogacy, the UK has two pieces of legislation: firstly, the Surrogacy Arrangements Act of 1985 which clearly states that surrogacy contracts are not enforceable and criminalizes certain activities relating to commercial surrogacy such as advertizing, brokering, and profit-making by third party intermediates to a surrogacy agreement. Secondly, the Human Fertilisation and Embryology Act of 2008 allows for the transfer of legal parenthood from the surrogate mother to the intended parents if at least one of them has a genetic link to the child.[33] Thus, altruistic surrogacy can be practiced in the UK.

In February 2015, the UK House of Lords and House of Commons approved regulations that carve out an exception to the prohibition on human inheritable genetic modification in the UK. This allows the use of "3-person IVF" techniques directly into fertility clinics licensed by the Human Fertilisation and Embryology Authority. The regulations came into effect on October 29, 2015.[34]

5. Russia. — Russia is commonly described as having a permissive legal framework for surrogacy, as it explicitly allows for commercial surrogacy. The eligibility criteria is quite relaxed in the sense that other than the indication of a medical need for surrogacy, most adults are entitled to avail of the legal provisions: a genetic connection to the child is not necessary; intended parents need not be married, nor do they need to satisfy residence, domicile, or citizenship requirements. For a woman to act as a surrogate mother in Russia she must be between 20 and 35 years old, have at least one healthy child, and have a medical certificate which indicates her to be in a satisfactory state of health. The legal framework does not place limitations on the compensation that may be paid to the surrogate mother. It is possible for the intended parents to be named as the child's legal parents on the birth certificate and the surrogate mother does not have to be registered as the child's initial legal mother. In addition, there are no formal stipulations for presumptively valid surrogacy agreements.[35]

On the other hand, another category of states, the so called "*laissez-faire*" group, do not dispose of a comprehensive legal framework regulating ART, but do not prohibit it

[33] Id. at 58–60.

[34] See fn. 6.

[35] See European Parliament, fn. 32 at 53–54.

either, thus there is a "legal vacuum" allowing for an extensive practice of ART. This is the case of Romania, for example, totally lacking specific legislation in the field.

6. Romania. — On June 12, 2013, a draft law was submitted by a group of 26 members of the Parliament to the Senate regarding human medically assisted reproduction (Law 453 of 2013). On November 6, 2013, the draft law received the approval of the Legislative Council of the Senate and was subsequently adopted by the latter and forwarded to the Chamber of Deputies for debate and approval. Since then, the draft law did not make it to the agenda to be submitted for approval by the Chamber of Deputies.

Despite the total lack of a legal framework, there are several specialized medical clinics that provide ART services, having recourse to almost all practices including donation of gametes and surrogacy. Consequently, several abuses did not take long to be brought to the attention of the European Community, such as in 2005, when, following exposure of ova trafficking in Romania, the European Parliament issued an official Resolution on the Trade in Human Egg Cells and affirmed an absolute opposition to payment for ova, classifying such payments as organ trafficking.[36]

It has been argued with regard to research on human embryos that the present "variable geometry in Europe as regards regulation at national and international level […] is a reality with unknown consequences in future."[37] The same argument can be extended to other practices of ART, but some of these consequences are already emerging.

II. EMERGING ETHICAL AND LEGAL ISSUES IN THE INTERACTION BETWEEN ART AND HUMAN RIGHTS

One of the first reasons at the origin of legal issues around ART is the very concept of the beginning of life, a concept over which there is a lack of consensus at the European level. In most of the European countries, members of CoE, the law is silent or there is no consensus on the moment when an embryo becomes a human being, while only three countries consider that human life begins at conception: Germany, Malta, and Switzerland. Thus, one of the very important human rights, the right to life, is not clearly articulated in relation to ART practices.

From this point on, further legal conflicts potentially emerge between ART and human rights, mainly concerning the respect of human dignity, the integrity of the human body and of the principle of non-discrimination, as well as the difficulty of balancing different rights and interests at stake with a special focus on the rights of the (future)

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[36] Kathleen Sloan, *Abuses of Women's Human Rights in Third Party Reproduction*, available at http://www.councilforresponsiblegenetics.org/GeneWatch/GeneWatchPage.aspx?pageId=353 (last visited Apr. 20, 2016).

[37] See Garcia San Jose, fn. 28 at 122.

ART-born child.

A factor that enhances ethical and legal issues, generating clashes between the different legal systems, is the intensification of "reproductive tourism" of individuals from countries that have prohibitive legislation to those having a liberal or "*laissez-faire*" approach, equally fuelled by the great disparity of national legislations. The development of EU law towards a service market conceptualization of reproductive healthcare services, as shown above, "has acted as a generator of rights — especially for women."[38]

A. Balancing Conflicting Rights and Interests

The revolution in the institution of the family caused by ART further generates different types of relations and conflicts of rights and interests, since, in most of the scenarios, besides the parents and the (future) ART-child, there are inevitably other actors involved: the ART industry specialists, donors, and surrogates.

The rights of the most vulnerable are generally at stake. Firstly, the rights and best interests of the (future) ART-child whose rights, as a consequence of his/her ambiguous status before being actually born and of his/her inherent silence, can often be in conflict with the parents' rights and interests. In this sense, it has been extensively argued that there is a need for a more child-centred approach of legal frameworks regarding ART.[39]

Secondly, adults can also find themselves in a vulnerable position and see their rights abused in the context of the transformation of ART into a mere business, seeking profit in the detriment of the poor and uneducated, willing to sell their gametes or even offer their body for gestational purposes (the case of gestational surrogates). Unfortunately, society today is witnessing a process of "commodification of the human body and of reproduction," which clearly breaches the principles of respect for human dignity and integrity of the human body.

It is thus the duty of states to adequately regulate the conditions in which ART can be used, providing for proper protection of the rights of all the parties involved in the process in order to prevent abuses. Another question that has been raised is whether such an obligation on states equally entails an obligation to provide a right to access ART and ensure its effective implementation.

B. An Emerging Right to ART?

In view of the recent development of the ART industry and the constantly increasing demand for the use of such technologies, can we speak about the emergence of

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[38] See Rothmar Herrman & Brigit Toebes, fn. 21 at 68.

[39] See Sabatello, fn. 1; Sommerville, fn. 7.

"bio-rights" of the person?[40] Can we speak of a right to access ART that states can be obliged to secure to everyone? Firstly, considering the universal scarcity of resources, it would be excessive to expect states to undertake such a positive obligation. Secondly, it is not easy to argue that international human rights law interprets the right to found a family to be as broad as to include the right to access ART.[41]

Nevertheless, scholars have attempted to develop legal argumentations in favor of consecration of an emerging right to ART. Reproductive rights are relatively new in international law. It was not until the World Conference on Population in 1994 (Cairo Conference) that reproductive rights were clearly articulated, as these rights were considered to "rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health."[42]

Consequently, other questions arise: What type of access to ART should be granted? Under which medical, social, economic, ethical, and legal conditions? Who are the beneficiaries of ART? Should it be made available to all types of couples, married or simply living together, including gay/lesbian couples, as well as to single women and single men? Which ART practices can be used and to what extent? For gay men who want to parent a genetically related child, surrogacy may be their only hope.[43] The principle of non-discrimination should be thoroughly given consideration, especially when it comes into conflict with potential discrimination on grounds of civil status or sexual orientation.

Certain ART practices, in particular, raise complex ethical and legal issues, as they bring into question several human rights and generally involve more national legal systems.

C. Third-Party Gamete Donor — Anonymity vs the Right to Know One's Genetic Origins

ART does not only assist couples who are able to use their own biological material for IVF and implantation. It is increasingly used for couples that cannot provide their own

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[40] Gerard Memeteau, *Biomédicine et droits Fondamentaux (Biomedicine and Fundamental Rights)*, in Technique et droits humains: justice, personne humaine, propriété intellectuelle, environnement: actes du colloque organisé du 20 au 23 avril 2010, Faculté de droit de Limoges et de Poitiers/Réseau européen de recherche en droits de l'homme (Technology and human rights: justice, human being, intellectual property, environment: documents of the symposium organized between Apr. 20 and 23, 2010, Faculty of Law of Limoges and Poitiers/European network for research in human rights), Lextenso (Paris), at 139 (2011).

[41] See Sabatello, fn. 1 at 80.

[42] U.N. Population Information Network, Report of the ICPD, 1.12, U.N. Doc. A/Conf.171/13, Ch. VII (Oct. 18, 1994), available at http://www.un.org/popin/icpd/conference/offeng/poa.html (last visited Apr. 20, 2016).

[43] Barbara Stark, *Transnational Surrogacy and International Human Rights Law*, 18(2) ILSA Journal of International & Comparative Law, 11 (2012).

gametes, whether for medical reasons (infertility, sterility) or social impediments (homosexual couples). Together with the donation of their gametes, in many countries donors remain anonymous or have the possibility to agree to the disclosure of their identity in case of a future request in this sense from the ART-born child. In other countries, such as the UK, donors no longer benefit from anonymity, as the right to know one's genetic origins prevails.

It has been argued that there is an objective need to retrieve one's genetic origins, not only for medical reasons in case of a certain pathology, but also for reasons related to the social integration of that person who may encounter difficulties, and for the respect of his/her identity.[44] Arguments go as far as demanding for legal prohibition of intentionally rendering adopted or donor conceived children "genetic orphans."[45]

This legal question can be dealt with by states in a convergent manner to the solutions proposed for the situation of adopted children. By applying the principle of non-discrimination, ART-born children could claim the same rights as adopted children. Nevertheless, a legal prohibition of any disclosure of identifying or non-identifying information regarding an adopted or ART-born child's genetic origins would come into contradiction with the principle of the "best interest of the child," thus raising an issue with regard to the respect of the private life of the adopted or ART-born child.[46]

D. Genetic Selection of Offspring and Scientific Research on Human Embryos

Another subject that raises serious questions of ethics and conformity with the right for respect of human dignity, and of the principle of non-discrimination, is the practice of genetic selection of offspring and scientific research on embryos, a practice that became possible thanks to the progress of PGD.

As seen above (Part I.B), the Oviedo Convention allows for the performing of predictive genetic tests to detect a genetic disposition or susceptibility to a disease for health purposes and for some forms of treatment, but prohibits sex-selection. Performing embryos selection for sex-selection or other purposes would come into contravention with the notion of inherent dignity of the human person and would confirm the process of "commodification" of the child, viewed as a means to an end.[47]

It has been pointed out that the real question is if any genetic selection of offspring intrinsically discriminates against and contradicts the future ART-born child's rights.[48] The answer is not straight forward, since IVF and generally all ART practices imply a

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[44] See Sabatello, fn. 1 at 85.

[45] See Sommerville, fn. 7 at 83.

[46] See for a similar solution as regards restrictions for adopted children in Italy, ECtHR, *Godelli vs Italy*, no. 33783/09, Sep. 25, 2012.

[47] See Sabatello, fn. 1 at 88.

[48] Id. at 91.

selection of the embryos to be implanted. In the direction of a positive answer, it has been argued that, given that it cannot be considered that every disability negatively affects the child's best interest and right to an "open future," selection of offspring therefore contributes to erasing diversity by eliminating certain categories of individuals and to increasing stereotypes and discriminatory attitudes. In the same vein, selection of offspring even for health purposes is considered to trigger the risk of "eugenics" with respect to disabled people, incited by the ideal to create a "perfect society."[49] In another author's opinion, the creation of *in vitro* embryos is inevitably characterized by a eugenic approach, entailing an illusory right to life for the genetically imperfect or seriously disabled child, a right under the threat of a resolutory condition.[50] In the direction of a negative answer, it has even been mentioned that parents who unjustly refuse to select embryos against the risk of disabilities would violate the child's rights, or on the contrary, if parents select a female embryo for reasons such as the desire for family balancing, the argument of discrimination would not stand.[51]

However, once undesired embryos have been selected, the question remains open as regards their destiny. In some countries, they are destroyed, and in others they are cryopreserved or used for scientific research. The position of different countries as regards scientific research on embryos is clearly influenced by the different conceptions/definitions they have of human embryos and whether they consider them as human beings from a constitutional or legal point of view. The question of the moment when an embryo is considered a human being or whether it deserves legal protection still divides European countries where, in fact, this issue is most of the time left unregulated.

E. Surrogacy

So far, surrogacy is probably one of the ART practices that seems to attract most criticism and to generate an increasing number of legal and ethical conflicts in Europe because of the lack of uniform international regulations to which nations must adhere, of its quasi-generalized prohibition and the intensification of "reproductive tourism" outside Europe (in US or India) or within (Ukraine, Russia). In fact, altruistic surrogacy is allowed in seven of the CoE member states under more or less strict conditions (Albania, Georgia, Greece, Netherlands, UK, Russia, and Ukraine). It seems that in Georgia, Russia, and Ukraine, surrogacy can have a commercial character, while it is tolerated in four other countries where it is not expressly regulated (Belgium, Czech Republic, Luxembourg, and Poland).[52]

One of the bluntest criticisms levelled against surrogacy describes this practice as "a

[49] See Sommerville, fn. 7 at 88–90.

[50] See Memeteau, fn. 40 at 128.

[51] See Sabatello, fn. 1 at 91–92.

[52] See ECtHR, *Mennesson vs France*, no. 65192/11, Jun. 26, 2014, para. 41.

stark manifestation of the commodification of women's bodies. Surrogate services are advertized, surrogates are recruited, and operating agencies make large profits, […] turning impoverished women into baby producers. Surrogacy degrades a pregnancy to a service and a baby to a product (an entitlement for those with the financial means to procure one)."[53] In the context of international surrogacy, the lack of information and protections for surrogates makes such a stance particularly disturbing. Many surrogacy contracts given to women in developing countries are woefully inadequate and most of the women may not be literate. Surrogates are often not told that they will lose the right to make vital decisions concerning their body and thus submit themselves, in case of serious injury or life-threatening illness during later stages of pregnancy, to life-support equipment to protect the foetus. They may have no say if the intended parents choose an abortion. In the view of all these aspects, "it is not an exaggeration to say that when surrogacy goes wrong, it becomes akin to sexual exploitation."[54]

It has even be argued that a human right to be born from natural human biological origins should be recognized[55] and opposition to surrogacy even reflects in a movement aiming to make governments around the world put an end to surrogacy practice.[56] In contrast, supporters of surrogacy consider this practice to be a fundamental human right, consistent with the freedom of personal choice and the right to bear children, even having an empowering effect on women who are able to choose whether to participate and gain financial compensation for their valued service.[57]

Regardless of the qualification given to surrogacy, it is undeniable that transnational surrogacy results in complex and often conflicting situations regarding basic family law aspects of maternity, paternity, custody, visitation, and children's rights. Additionally, surrogacy brings into question the rule of "*mater semper certa est*," especially when the surrogate mother has no biological link with the born child, the intended mother being the genetic mother.[58] Besides the aforementioned concerns, other issues of a legal nature generally occur after the birth of a child to a foreign surrogate, amongst which questions of citizenship remain unresolved in several jurisdictions.

From the perspective of EU law, the question remains as to whether surrogacy can be considered as a "medical treatment" in the national legal order, and thus patients wishing to have recourse to it could benefit from the possibility of cross-border healthcare

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[53] See Sloan, fn. 36.

[54] Nila Bala, *The Hidden Costs of the European Court of Human Rights' Surrogacy Decision*, 40 The Yale Journal of International Law Online, 18 (2014).

[55] See Sommerville, fn. 7 at 85.

[56] See www.stopsurrogacynow.com (last visited Apr. 20, 2016).

[57] Joseph Chamie & Barry Mirkin, *Surrogacy: Human Right or Reproductive Exploitation*, Oct. 28, 2014, Yale Global Online, a publication of the MacMillan Center, available at http://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation (last visited Apr. 20, 2016).

[58] See Bouzidi, fn. 2 at 41.

services in the EU countries that practice surrogacy. As it was put in the *Grogan* case,[59] services, which are illegal or immoral, as a matter of national law, may constitute services in the sense of the treaty. The freedom of movement of patients is authorized and promoted, and consequently, national rules on rights to treatment cannot prevent citizens of the EU seeking treatment elsewhere in the EU, however unethical the treatment is in the state of origin. EU law would therefore extend to various medical services relating to human reproduction, for instance all forms of assisted reproduction which may or may not include the service of a surrogate mother.[60]

Many of the legal issues generated by situations of international surrogacy or other aspects related to ART have been brought before different national courts. Unsatisfied with the national judgments, many applicants revolved to the ECtHR, calling on the European human rights judge to strike a fair balance between the different human rights at stake.

III. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS — AN ATTEMPT TO BALANCE COMPETING RIGHTS AT STAKE

The chances for the adoption of a coherent European regulation able to offer solutions and avoid legal conflicts are fairly low. The ECtHR's case law presents an alternative approach through the application of its doctrine of balancing different human rights and interests at stake.[61] Although the ECvHR does not contain any right to health (let alone reproductive rights), nor any freedom of research, nevertheless, several issues pertaining to the different ART have been brought before the Strasbourg judges.

A. Article 2 of ECvHR — When Does Life Begin?

However, before even being able to analyze the ECtHR's case law on biomedicine and ART, the first concept that we come across is that of the right to life, consecrated in Article 2 of the ECvHR, a human right without which all other human rights cannot be conceived.

The question of the moment of beginning of life has been submitted to the Strasbourg Court and was addressed by it in 2004 in its Grand Chamber judgment *Vo vs France*.[62] Because of a mix-up with another patient with the same surname, the applicant's amniotic sack was punctured, making a therapeutic abortion necessary. She maintained that the unintentional killing of her child should have been classified as manslaughter. The Court concluded that there was no European consensus on the nature and status of the foetus, although according to some legal systems the potentiality of that being and its capacity to

[59] See fn. 23.

[60] See European Parliament, fn. 32 at 142.

[61] See Garcia San Jose, fn. 28 at 123.

[62] ECtHR, *Vo vs France (GC)*, no. 53924/00, Jul. 8, 2004.

become a person required protection in the name of human dignity, without making it a "person" with the "right to life." The Court held that there had been no violation of Article 2 (right to life) of the Convention and that it was not currently desirable or possible to rule on whether an unborn child was a person under Article 2 of the Convention. This cautious approach by the Court was not left without criticism, as it is believed to have consecrated "the relativism" of national systems of values as regards human beings and life to the rank of a legal principle.[63]

The question of beginning of life was again brought to the attention of the ECtHR, this time on the specific question of *in vitro* embryos, in the case of *Evans vs UK*,[64] which concerned the ability of a woman to use frozen embryos without her former partner's consent. The applicant, who was suffering from ovarian cancer, underwent IVF with her then partner before having her ovaries removed. Six embryos were created and cryopreserved. When the couple's relationship ended, her ex-partner withdrew his consent for the embryos to be used, not wanting to be the genetic parent of the applicant's child. National law consequently required that the embryos be destroyed. The Grand Chamber followed the same reasoning as in the *Vo* case, reiterating that the issue of when the right to life begins comes within the margin of appreciation of Contracting States, and thus it could not be concluded that the embryos created had a right to life in the sense of Article 2 of the ECvHR.

One again, the Grand Chamber's judgment was strongly criticized in the doctrine. It was considered to refer the issue to the "most absolute legislative arbitrary," and that the ECtHR's refusal "to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention"[65] unconsciously allows member states "to produce Untermenschen," upon their interests and influence.[66]

The ECtHR seems to apply both an attitude of judicial restraint and of judicial activism throughout its case law, as both sides of the same coin.[67] On the one hand, the Court manifests a judicial self-constraint by applying the doctrine of "margin of appreciation of member states" in order to respect pluralism and the principle of subsidiarity. On the other hand, the Strasbourg Court seems to be judicially active when interpreting the ECvHR as a "living instrument" in the context of today's society and respective evolution of science.

B. Article 8 of ECvHR — A Right to ART?

Yet, the Strasbourg Court did not totally exclude all questions pertaining to ART from

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[63] See Memeteau, fn. 40 at 140–141.

[64] ECtHR, *Evans vs United Kingdom (GC)*, no. 6339/05, Apr. 10, 2007.

[65] See fn. 62, para. 85.

[66] See Memeteau, fn. 40 at 129–130.

[67] Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin*, 11(1–2) Human Rights Law Journal 57, 57–88 (1990).

its area of judicial competence. On the contrary, it has developed an interesting jurisprudence under Article 8 of the Convention, the right to private and family life. This is because sexual and reproductive issues were considered to fall within the scope of Article 8 of the Convention as an expression of private and family life.

The Court was called to judge a case where the right to choose whether to become a genetic parent was at stake, and implicitly, the existence of a right to ART for the woman who wanted embryos to be implanted in her uterus despite the lack of consent of her previous partner (*Evans vs UK*). After having refrained from ruling on the question of the embryos right to life, the Court analyzed whether the woman's right to respect of her private and family life was infringed. The Grand Chamber considered that, given the lack of European consensus and the fact that the domestic rules had been clear and brought to the attention of the applicant and that the national authorities had struck a fair balance between the competing interests, there had been no violation of Article 8 of the Convention.

The Court considered the right to respect one's decision to become a genetic parent in the case of *Dickson vs United Kingdom*.[68] The case concerned a prisoner serving a sentence of a minimum of 15 years for murder, who was refused access to artificial insemination facilities to enable him to have a child with his wife, who, born in 1958, had little chance of conceiving after his release. The Court found a violation of Article 8 of the Convention, as a fair balance had not been struck between the competing public and private interests, because the authorities did not make a proportional assessment of the applicant's individual circumstances.

Therefore, access to ART not only falls within the scope of Article 8 of the Convention, but a right to access ART can be derived under certain circumstances. Although it did not find a violation of Article 8, the Court seems to confirm the inclusion of a right to access ART in its Grand Chamber judgment in a more recent case against Austria (*S. H. and others vs Austria*[69]). The case concerned two Austrian couples wishing to conceive a child through IVF. One couple needed the use of sperm from a donor, and the other a donated ova. Austrian law prohibits the use of donor sperm for IVF and ova donation in general. Firstly, the Court found that "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."[70] The Court noted that, although there was a clear trend across Europe in favor of allowing gamete donation for *in-vitro* fertilization, the emerging consensus was still under development and was not based on settled legal principles. Austrian legislators had tried, among other things, to avoid the possibility that two women could claim to be the biological mother of the same

[68] ECtHR, *Dickson vs United Kingdom (GC)*, no. 44362/04, Dec. 4, 2007.

[69] ECtHR, *S. H. and others vs Austria (GC)*, no. 57813/00, 3 Nov. 3, 2011.

[70] Id. para. 82.

child. They had approached carefully a controversial issue raising complex ethical questions and had not banned individuals from going overseas for infertility treatment unavailable in Austria. The Court concluded that there had been no violation of the right to respect for private and family life, underlying the importance of keeping legal and fast-moving scientific developments in the field of artificial procreation under review.[71]

It is somehow surprising that travel for the purpose of medically assisted reproduction received encouragement from this jurisdiction. The Court thus respects the sovereignty of the State in deciding whether to allow or prohibit certain technologies and rather applies a procedural control (it checks that the legislator identified and dealt with the ethical issues of protection of the parents and child) instead of a substantial one (assessment of the values themselves).[72]

The Strasbourg Court accepted to go further into the different details as concerns ART practices and judged on a case concerning the refusal by the national authorities to allow for the transfer of frozen embryos.[73] In July 2009, the Romanian authorities seized Ms. Knecht's embryos, which had been cryopreserved with a private clinic, because of concerns about the clinic's credentials. The applicant subsequently experienced considerable difficulties in securing a transfer by the State of the embryos to a specialized clinic so that she might use them to become a parent by means of an IVF procedure. Before the Court, Ms. Knecht complained that this resulted in a breach of her right to a private and family life. The Court found no violation of Article 8 of the Convention, since, in the particular case, the domestic courts subsequently expressly acknowledged that the applicant had suffered a breach of her rights on account of the refusal by the authorities to allow the embryo transfer, and had offered her the required redress by having the embryos transferred in a relatively short time. Therefore, the requisite steps had been taken to secure respect for the applicant's right to respect for her private life.[74] Nevertheless, this issue seems to be recurring, as another complaint on the same issue has been submitted to the Court and is currently pending.[75]

C. Which Rights for the Future ART-Born Child?

An aspect that clearly stems out of the simple reading of the main legal issues raised in the case law described herein, is the fact that the Strasbourg Court does not take under active consideration any right of the future ART-born child. It is mostly the rights of the future parents that have been analyzed with a view of granting protection under the ECvHR. However, as it results from two cases brought against France (*Mennesson vs*

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[71] ECtHR factsheet on *Reproductive Rights*, available at http://echr.coe.int/Documents/FS_Reproductive_ENG.pdf (last visited Apr. 20, 2016).

[72] See European Parliament, fn. 32 at 138.

[73] ECtHR, *Knecht vs Romania*, no. 10048/10/, Oct. 2, 2012.

[74] See fn. 71.

[75] ECtHR, *Nedescu vs Romania*, no. 70035/10, pending.

France and *Labasse vs France* — to be detailed in Part IV), the best interest of the child already born as a result of ART does represent a priority for the Strasbourg Court.

Unfortunately, certain procedural issues can obstruct the scrutiny of the best interest of the ART-born child. For example, in the case of *Paradiso and Campanelli vs Italy*[76], where the Court was considered to lack the competence *ratione personae* in order to examine the complaint under Article 8 formulated in the child's name by the intended parents, given the absence of a biological link between them and the child.

Other significant judgments were delivered by the Strasbourg Court with regard to the specific legal issues raised by the national legislation in France and Italy, as we shall see in the following two parts.

IV. THE FRENCH CAUTIOUS LEGAL FRAMEWORK

France is one of the European countries with a long-lasting legal framework in the field of ART. The first concerns in the field of bioethics and ART arose in the case law of the *Conseil d'Etat* and *Conseil Constitutionnel*. The legislator further confirmed the rules pronounced by these two supreme jurisdictions in the 1994 law and the following modified laws of 2004 and 2011. As a principle, it can be observed that the French judges and legislator followed and agreed upon the same approach. It is only in the last few years that, due to the "influence" of the ECtHR's case law, the French public administrations and French judges face a challenge in finding a balance between the law in force and the criticism of the ECtHR's judges. Therefore, the recent national case law seems to be at a turning point, heading towards conformism with the requirements of the Strasbourg judges, in order to prevent further similar findings of violations against France.

"The promontory" of the French legal framework in the field of ART is represented by the principle of human dignity, a principle from which the legislator further derived the principle of non-commodification of the human body and its elements.[77] The law allows donation of gametes, but access to ART is limited to sterile and stable heterosexual couples. In its other elements, the French legal framework is mostly restrictive for other practices: Research on embryos is mainly restricted, the divulgation of any kind of information regarding the gamete donor is prohibited, and surrogacy is forbidden.

A. A Softening Evolution of the Regulation on Research on Human Embryos

From the very beginning of the debate on bioethics in France, the question of research on human embryos occupied an emblematic position. The principle of human dignity plays an eminent role for the protection of the human embryo under French legislation in

[76] ECtHR, *Paradiso and Campanelli vs Italy*, no. 25358/12, Jan. 27, 2015, referred to the Grand Chamber.

[77] Philippe Bas, *L'enfant à la Lumière de la Bioéthique*, *Dossier: L'enfant* (*The Child in the Light of Bioethics, Case File: The Child*), Justice & Cassation (Justice & Appeal), 24 (2011).

the context of medical research on human embryos, since the latter is not perceived as a human being, it cannot avail itself of rights and liberties consecrated in the French legal system. This principle has precise significance; it prohibits the degradation and the enslavement of the human being.[78]

Consequently, the 1994 law prohibited any type of research on a living human embryo. This provision knew considerate evolution, from total prohibition to exceptional authorization of research on the human embryo if likely to bring major therapeutic progress (2004), and later on, if conducted with the aim of medical therapeutic progress (2011), and most recently, sufficient if the research is motivated by a simple medical progress (2013).[79] This last level of requirement will practically allow for the authorization of almost any research project that has some medical implication. Such a change was determined by a "bargaining attitude" of the legislator who agreed to allow for scientific research on embryos that were due to be destroyed anyway.

B. A Firm Position as to the Principle of Absolute Anonymity of Donors

French law imposes the anonymity of the gamete donors. On the occasion of the 2011 reform brought to the 2004 law, the French *Conseil d'Etat* advanced a proposal to introduce a partial change in the rule of anonymity of gamete donors. However, the legislator maintained its negative attitude towards such changes and rejected it from the changes brought to the law in 2011.[80] Moreover, in a judgment from June 2013, the French *Conseil d'Etat* confirmed the principle of absolute anonymity of the donor, after having scrutinized it from the perspective of Articles 8 and 14 of the ECvHR. The *Conseil d'Etat* made a rigorous application of the principles affirmed by the ECtHR and its legal reasoning manner. Generally, it was expected that the *Conseil d'Etat* reasons by analogy with the rules applicable in another field of anonymous procreation (anonymous births) and in conformity with the ECtHR's approach on the issue, as stated in the case of *Godelli vs Italy*,[81] thus allowing for certain limitations to this principle. However, this supreme jurisdiction considered the principle of anonymity of donors not incompatible with the provisions of the ECvHR, in particular with Article 8. Hence, the *Conseil d'Etat* seems to transform this principle into a requirement to maintain a fragile balance within

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[78] Bertrand Mathieu, *Recherche sur l'embryon: une jurisprudence en demi-teinte: à propos de la décision n° 2013-674 DC du Conseil constitutionnel du 1er août 2013* (*Research on Embryos: A Halftone Case Law: About Decision No. 2013-674 DC of the Constitutional Council of Aug. 1, 2013*), La semaine juridique: édition générale (JCP), 87(36) [The Legal Week: General Edition (JCP)), 1560 (2013).

[79] Jean-René Binet, *Recherche sur l'embryon: fin d'un symbole éthique et abandon d'une illusion thérapeutique: décision n° 2013-674 DC du Conseil constitutionnel du 1er août 2013* (*Research on Embryos: The End of an Ethical Symbol and Abandonment of a Therapeutic Illusion: Decision No. 2013-674 DC of the Constitutional Council of Aug. 1, 2013*), 87(36) La semaine juridique: édition générale (JCP) [The Legal Week: General Edition (JCP)], 1564 (2013).

[80] See Bas, fn. 77 at 25.

[81] See fn. 46.

the ART French system, making it a principle of public interest.[82]

C. A Step Further with regard to the Undesired Effects of Cross-Border Surrogacy

The practice of surrogacy attracted great attention and firm reactions in French society since the 1980's, when there was a significant growth of associations acting as "intermediaries" between infertile couples and prospective surrogate mothers. Case law in France has led to the prohibition of associations facilitating surrogacy, through the prompt attitude of the administrative bodies to ban such associations. The administrative court validated this prohibition (*Conseil d'Etat*, January 22, 1988, no 80936, Assoc. "*Les cigognes*"). The ordinary court likewise declared the nullity of such association due to the illegality of their object (Cass Civ. 1st, December 13, 1989, Assoc. "Alma Mater"). Since 1994, French law peremptorily prohibits all forms of surrogacy. In the civil field, it is sanctioned by absolute nullity, and in the criminal field, by correctional penalties. However, it is worth recalling that French criminal law does not punish offences committed outside of French territory, according to the principle of territoriality of criminal law.[83]

The absolute prohibition of all surrogacy conventions has repercussions for family law, as regards the status of the child born out of the respective convention. A subsequent adoption of the child is null and void, a sanction confirmed by the legislature, as a provision of public order.[84] Because of the rigid legal framework in France, there is a significant growth of "procreative tourism" in search of surrogates in the US, India, or Ukraine.

The case of the Mennesson couple and their two daughters born from a surrogate mother in California represents a relevant example of such a situation and the subsequent problematic legal effects. Upon their return to France, although the American birth certificates were initially validated and registered in the French civil status registry, the State later obtained their annulment. Although the intended father was the biological father of the children, he was not able to obtain a formal recognition of his status by the French authorities, and as a consequence, to pass on French citizenship to the children. However, the intended mother had no biological link with the children and thus the French authorities recognized no filiation. Other legal consequence for the children included no heritage rights in case of death of the intended parents, while for the intended mother, a divorce would imply no right of custody, visits, and certainly no parental

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[82] Sylvia Lise-Bada, *Le Principe de L'anonymat des Donneurs de Gamètes Passe le cap du Conseil d'Etat* (*The Principle of Anonymity of Gametes Donors Goes Past the Council of State*), Lettre «Actualités Droits-Libertés» du CREDOF (Letters of CREDOF "News Rights-Liberties") (2013) available at https://revdh.org/2013/07/04/principe-de-lanonymat-des-donneurs-de-gametes-passe-le-cap-du-conseil-detat/ (last visited Apr. 20, 2016).

[83] See European Parliament, fn. 32 at 105–106.

[84] See Bouzidi, fn. 2 at 40–41.

authority.[85] The Mennesson's further brought the case before the ECtHR.

In its judgment,[86] the ECtHR considered two possible grounds for finding a violation of the ECvHR, both related to Article 8. The Court first considered the parents' and children's right to respect for family life, and second, the children's right to respect for private life. While acknowledging that the lack of French citizenship posed challenges for the family, the Court did not find these challenges insurmountable; the family was still able to live together as a unit and enjoy family life as most French families do. Additionally, the Court stressed that a "wide margin of appreciation" had to be left to the countries in creating surrogacy laws in view of the difficult ethical issues involved and the lack of consensus on these matters in Europe.[87]

However, with respect to the children's right to respect for private life, the Court found that "respect for private life requires that everyone should be able to work out the details of their identity as a human being, which includes the legal parent-child relationship," and that an "essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned."[88] The Court recognized that it is conceivable that "France may wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory."[89] However, the Court ultimately granted greater weight to the interests of the children, concluding that a violation of their right to respect for private life had occurred.

After the sentencing by the Strasbourg Court, the French *Conseil d'Etat* validated a circular ordering the delivery of French citizenship certificates to children born out of an international surrogacy convention. Furthermore, a note issued by the Ministry of Justice clarified the heritage rights of the children with regard to the intended parents, despite the absence of a transcription of the foreign birth certificates.[90]

Nevertheless, the effects of the *Mennesson* judgment did not end here. On May 13, 2015, a national court (*Tribunal de Grande Instance de Nantes*) ordered the transcription into the French civil status registry of the birth certificates of three children born abroad from a surrogacy convention, in order to bring national law in conformity with the requirements of the ECtHR. On July 3, 2015, the Court of Cassation delivered its judgment on the prosecutor's appeal, performing an overturn of case law and validating

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[85] Id.

[86] See fn. 52.

[87] See ECtHR, press release, Jun. 26, 2014, available at http://hudoc.echr.coe.int/sites/eng-press/ (last visited Apr. 20, 2016).

[88] See fn. 52 para. 96.

[89] Id. para. 99.

[90] Aude Mirkovic, *GPA: la décision du tribunal de Nantes relève du déni de justice à l'égard des enfants* (*Surrogacy: The Decision of the Nantes Tribunal Comes under Denial of Justice with Regard to Children*), Le Figaro, May 15, 2015, available at http://www.lefigaro.fr/vox/societe/2015/05/15/31003-20150515ARTFIG00356-gpa-la-decision-du-tribunal-de-nantes-releve-du-deni-de-justice-a-l-egard-des-enfants.php#auteur (last visited Apr. 20, 2016).

the Nantes Court's decision. So far, the judgment gave rise to harsh criticism for it is seen as a failure of the French legal system to resist the "irresponsible case law of the European court, which, under the pretext of protecting the private life of children, ratifies this new form of human trafficking of which they are the victims."[91]

On a general note, the existing French legal framework in the field of ART was equally object to criticism, perceived as "powerless before bioethical disputes." The intervention of the legislature aimed at "framing bioethical practices contrary to human dignity and human life" is seen as belated and inefficient, as it does not simply prohibit the contested practices, but rather "prohibits, with the exception of…, or authorises, under the condition that…"[92]

V. THE ITALIAN PROHIBITIVE LEGISLATION

As opposed to the French situation, in Italy the legislature was first to take the matter in its hands and decide for a highly restrictive approach by filling-in the legal vacuum through the adoption of Law no. 40/2004 on "rules on assisted reproduction technology." The law did not go by unobserved and uncriticized, and quite soon several questions of unconstitutionality were raised before the local national courts. The Constitutional Court accomplished its rightful duty and declared several articles of the law unconstitutional. The decisions taken by the Constitutional Court, combined with the impact of the ECtHR's case law regarding Italy, generated a process of "dismantlement and voiding" of Law no. 40/2004 of its initially restrictive effects.

A. A Legal Framework Strongly Influenced by the Catholic Morals

Like in the French system, in the Italian legal system the foetus does not have the legal status of a person, and thus cannot enjoy rights in the same way. It is for this reason that the "*fil rouge*" of the law is the objective of protecting the embryo, but not in an absolute manner as it may come into competition with other rights and values to protect, such as the health of the woman involved.[93] From several provisions of the law it transpires that another essential objective is the promotion of the traditional family with biological ties between its members.[94] Therefore, access to ART and the subsequent medical techniques (such as PGD) is restricted to heterosexual couples affected by infertility or sterility, reasons such as the prevention of genetically transmitted diseases

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[91] Id.

[92] See Memeteau, fn. 40 at 122, 138.

[93] Simone Penasa, *The Italian Regulation on Assisted Reproductive Technologies Facing the European Court of Human Rights: The Case of Costa and Pavan V. Italy*, Revista de derecho y genoma humano/ Catedra Interuniversitaria, Diputacion Foral de Bizkaia de Derecho y Genoma Humano (Law and the Human Genome Review/Inter-University Chair, Provincial Government of Biscay in Law and the Human Genome), Universidad de Deusto, Universidad del Pais Vasco (Bilbao), 158 (2012).

[94] Id.

being excluded. Only prevention of sexually transmitting diseases is included in a secondary regulation (the Ministry of Health's guidelines for the regulation of ART), according to which this risk is seen as an obstacle to natural procreation, substantially, a form of infertility.

Furthermore, only homologous fertilization is allowed, thus prohibiting donation of gametes. Only a maximum of three embryos can be created and, in principle, they must all be implanted directly into the woman's uterus. Thus, no supernumerary embryos can be created, and consequently, experimentation and research on human embryos are forbidden. The only exception is provided for therapeutic and diagnostic purposes, where alternative methods are not available. Selection of embryos or gametes for eugenic purposes is forbidden, as well as any alteration of their genetic structure. Moreover, the law also prohibits cryopreservation and destruction of embryos.

In Italy, all forms of surrogacy are forbidden, whether traditional or gestational, commercial or altruistic. According to the law, not only intermediary agencies and clinics practicing surrogacy, but also the intended parents and the surrogate mother can be sentenced to 2 years' imprisonment and to the payment of a fine.

The purpose of Law no. 40/2004 was to regulate the field of medically assisted procreation and put an end to the "procreation far-west" through the identification of a normative model by which to abide in an ethically sensitive field. From a post-implementation perspective, the law seems to be oriented towards a clear restriction and punishing attitude, suggesting aversion towards having recourse to ART rather than to the more "orthodox ways of procreation." Its provisions only seem to complicate even more the already complicated situation of couples facing procreation problems. Thus, recourse to ART is seen as an extrema ratio, and only after having taken into consideration the possibility of adopting a child. Criticism against the law went as far as affirming that the real objective of the law is to preserve essentially confessional values and to enact rules against ART.[95]

B. Re-Writing of Law No. 40/2004 by the National, Constitutional and European Judges

As a consequence of its application to a concrete situation, in the past years the Italian law on ART has been undergoing a substantial re-writing process by the multilevel judicial system: ordinary national courts, the Constitutional Court and the Strasbourg Court.[96] Nowadays, most of the provisions of the law have "capitulated" before the constitutional and the European judges.

The Constitutional Court, with its decision no. 151/2009, has declared Article 14 of

[95] Paola Sanfilippo, *Dal 2004 al 2014: lo sgretolamento necessario della legge sulla procreazione medicalmente assistita* (*From 2004 to 2014: The Necessary Dismantlement of the Law on Medically Assisted Procreation*), (3–4) Diritto Penale Contemporaneo, Rivista trimestrale (Contemporary Criminal Law), 377–379 (2014).

[96] See Penasa, fn. 93 at 157.

the law, imposing the limit of a maximum three embryos that can be created and implanted contemporarily, as unconstitutional. The Constitutional Court considered this legal limitation as unreasonable and established the principle of protection of the woman's health as essential in this field.[97]

Subsequently, Article 13 of the law, prohibiting experiments and research on human embryos, was called into question, since it had been interpreted and applied in the sense of prohibiting the use of pre-implantation genetic diagnosis. The judge was called upon to rule on the issue of constitutionality of the ban on using PGD, but its approach was a cautious one, practically "deciding not to decide," invoking procedural reasons (Constitutional Court, Order no. 369/2006). Surprisingly, the Constitutional Court's order provoked the reaction of ordinary judges, who started interpreting the law from the perspective of the Constitution, thus allowing for PGD. They based their reasoning on the right to health of the woman involved, on the right of the future parents to be informed about the health of the foetus during pregnancy, and on Article 3 of the Constitution consecrating equality of rights of all citizens.[98]

This interdiction was the main issue in the case of *Costa and Pavan*, concerning an Italian married couple, both immune carriers of cystic fibrosis. Because of the high risk of transmitting the disease to the baby, they requested to be allowed to perform PGD in order to select an embryo not affected by the disease. Facing refusal, the couple filed a complaint with the ECtHR. In the case *Costa and Pavan vs Italy*,[99] the Court held that there had been a violation of Article 8 of the Convention. It noted the inconsistency in Italian law (citing the new approach of ordinary courts) that denied the couple access to embryo screening but authorized medically assisted termination of pregnancy if the foetus showed symptoms of the same disease. The Court concluded that the interference with the applicants' right to respect for their private and family life had been disproportionate. The direct effect of the ECtHR judgment was that the Tribunal of Roma ordered the competent local body to conduct the PGD, without raising the issue of unconstitutionality of the law.[100]

Article 12 of the law prohibits and criminally sanctions any form of surrogacy, but remains silent concerning the civil status and family law effects of such a practice if nevertheless performed successfully. The conflicting situations are multiplying, with more and more Italians travelling to the US, Ukraine, or Russia in order to have a child with the help of a surrogate mother. The case of a single man who benefited from a surrogacy arrangement in Colorado and became the father (both the genetic, and legal father according to Colorado rulings) of two children was dealt with by the Civil Court of first instance of Napoli in a decision of July 1, 2011. The Neapolitan judge accepted the

[97] See Sanfilippo, fn. 95 at 380.

[98] See Penasa, fn. 93 at 162–164.

[99] ECtHR, *Costa and Pavan vs Italy*, no. 54270/10, Aug. 28, 2012.

[100] See Sanfilippo, fn. 95 at 386.

man's request for the recognition of his parental status. However, the decision was not appealed and it remained an isolated case.[101]

A case similar to the *Mennesson* case was judged in 2015 by the Strasbourg Court with respect to Italy (*Paradiso and Campanelli vs Italy*).[102] The case concerned the placement in social service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into by the applicants; it subsequently transpired that the latter had no biological link with the child. The applicants complained, in particular, about the child's removal from them and about the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy. The Court held that there had been a violation of the right to respect for private and family life in regards to the couple, but rejected the complaint formulated in the name of the child because of the lack of standing of the applicants in this capacity. It considered in particular that the public-policy considerations underlying Italian authorities' decisions (the fact that the applicants had attempted to circumvent the prohibition in Italy on using surrogacy arrangements and the rules governing international adoption) could not take precedence over the best interests of the child, in spite of the absence of any biological link and the short period during which the applicants had cared for him. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Court concluded that, in the present case, the conditions justifying a removal had not been met.[103] The Court's judgment is not yet final, as the Italian Government has requested the case be referred to the Grand Chamber.

The Grand Chamber of the ECtHR has recently decided another issue related to ART practices: the contestation of the prohibition of donation of embryos for research purposes in *Parrillo vs Italy*.[104] The Grand Chamber examined the case under Article 8 of the Convention (respect for private life) considering that "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."[105] However, the Court did not find a violation of the invoked right, insofar as the state did not go beyond its margin of appreciation. In reality, the judgment reveals the extreme difficulty of finding a balance between the different positions (that also result from the separate opinions to the judgment) on the questions of the status of the human embryo, of the rights of persons who use *in vitro* fertilization techniques, and lastly, with the limits of scientific research in the field. For the Strasbourg Court, despite the human embryo not being a proper subject of rights, it does however demand a certain degree of protection in

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[101] See European Parliament, fn. 32 at 123.

[102] ECtHR, *Paradiso and Campanelli vs Italy*, no. 25358/12, Jan. 27, 2015.

[103] See fn. 71.

[104] ECtHR, *Parrillo vs Italy (GC)*, no. 46470/11, Aug. 28, 2015.

[105] Id. para. 159.

order to preserve its vital potential. Therefore, the limits imposed by Article 13 of the Italian Law no. 40/2004 to performing experiments and to the possibility of donating embryos for research purposes, can thus be justified.[106]

CONCLUSION

As seen above, it is without doubt that the evolution of ART has caused "a revolution in the institution of the family," resulting in new challenges for judges and legislators, some of them as yet unimagined.

There are different legal approaches at international, European, and national levels as the field of ART equally brings into question regional and national cultures, ethical and religious values, and legal traditions. Since a consensus in the field remains difficult to reach, it cannot be affirmed whether a legal system is better or worse than others. As we have noticed, even the ECtHR refrained from adventuring into imposing a chosen rule when facing a question lacking consensus among the Council of Europe's member states. Despite this, the Strasbourg judges are doing their best in balancing the conflicting rights at stake in the legal conflicts generated by ART while looking ahead towards a difficult task to accomplish. In this sense, there is a common voice amongst scholars demanding better safeguards as concern freedom of access to ART and a minimum protective approach as regards the future ART-born children's rights.[107]

It cannot be contested that law will always be one-step behind, as for the legislator it is a constant challenge to develop law at the same pace with the progress of science and the multiplication of diverse factual situations. Despite all that, all efforts should be aimed at avoiding the extreme case in which science is used in the search of the perfect society, a "goal" that has previously showed humanity the horrors it can create.[108]

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[106] Francesco De Santis Di Nicola, *Divieto di donazione degli embrioni alla ricerca scientifica (ed esaurimento dei ricorsi interni*) [*The Prohibition to Donate Embryos for Scientific Research (and Exhaustion of Domestic Remedies)*], 10 Giurisprudenza italiana (Italian Case Law), 2058–2060 (2015).

[107] See Sabatello, fn. 1 at 98.

[108] See Sommerville, fn. 7 at 90.