

UNIVERSITY OF CYPRUS

European Master's Programme in Human Rights and Democratisation

A.Y. 2021/2022

# TRADITIONAL FAMILY VALUES vs. HUMAN DEVELOPMENT?

Assisted reproduction techniques and the ECtHR approach

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## **Abstract**

The emergence of new means of procreation through assisted reproductive technology (“ART”) has challenged the culturally shaped conception of the two-parent nuclear family that is biologically capable of producing a child and has confronted European states with the question of how families created through ART should be legally recognized and who should have access to these techniques.

After an analysis of the evolution of the concept of ‘family’ in European societies since the drafting of the European Convention on Human Rights (“ECHR” or “the Convention”) and its repercussions in human rights discourse, this thesis examines whether the European Court of Human Rights (“ECtHR” or “the Court”) allows for inclusive conceptualizations of ‘family’ in its interpretation of the Convention in selected cases related to the use of ART. The analysis is done from the perspective of the capability and reproductive justice approaches, which offer a holistic and feminist perspective of the realization of human rights in practice.

Empirical evidence suggests that the Court does adopt an inclusive understanding of ‘family’ and recognizes reproductive rights in the context of ART. Nonetheless, by invoking, in most cases, a wide margin of appreciation at the national level, the Court may well limit its role as a guarantor of human rights. States which adopt conservative approaches towards the regulation of ART may thus perpetuate traditional understandings of gender differences and family values at the national level, to the detriment of the rights of individuals who are unable to conceive a genetically related child by means other than ART, thereby severely compromising their individual freedoms and quality of life.

## Abbreviations

AI	Artificial Insemination
APA	Austrian Artificial Procreation Act
ART	Assisted Reproductive Technology
CEDAW	Convention on the Elimination of Discrimination and Violence Against Women
CoE	Council of Europe
DI	Donor Insemination
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESHRE	European Society of Human Reproduction and Embryology
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
IVF	<i>In Vitro</i> Fertilization
PGD	Preimplantation Diagnosis
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
US	United States

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## Introduction

### 1. Contextualization

The existence of a universal family form has for a long time been taken for granted by sociologists.<sup>1</sup> The core argument has been that the biological differences in reproduction between men and women are what makes the family a functional group that is present in every society.<sup>2</sup> Thus, the classical ‘nuclear’ family model, traditionally portrayed as a married, heterosexual couple with children living in an adequate home,<sup>3</sup> has for a long time been perceived as the ‘ideal’ family model that satisfies the societal needs.

In recent years, however, the way in which families are being formed in Europe has changed. Births outside marriage have almost doubled since 1993,<sup>4</sup> and roughly one third of all households with children are not composed of a male and female couple today.<sup>5</sup> Compared to the mid-1960s, far fewer people marry and have children; moreover, those who marry do so later in life.<sup>6</sup> Children are increasingly brought up in unmarried or single-parent households, blended families, and same-sex households, and we are witnessing fewer marriages and more divorces than ever before.<sup>7</sup> Families have also become increasingly fluid with most households changing their composition and organization over time.<sup>8</sup> As the sociologists Pahl and Spencer have argued, the trend in modern society has been to shift from already predisposed relationships of kin – “families of fate” - to “families of choice”.<sup>9</sup> For many families in Europe, the nuclear family model thus does not represent the reality anymore.<sup>10</sup>

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<sup>1</sup> Robert F. Bales and Talcot Parsons, *Family: Socialization and Interaction Process* (Oxon: Routledge, 1956); W. J. Goode, *World Revolution and Family Patterns* (New York: Free Press, 1963).

<sup>2</sup> Bronislaw Malinowski, *A Scientific Theory of Culture and Other Essays* (Chapel Hill, NC: University of North Carolina Press, 1944); Jon Bernardes, *Family Studies: An Introduction*, 1. publ. (London: Routledge, 1997), 6.

<sup>3</sup> Bernardes, *supra* note 2, 3.

<sup>4</sup> Eurostat, “Marriage and Divorce Rates”, at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage and divorce statistics#Fewer marriages.2C more divorces](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_more_divorces) (last accessed 13 July 2022).

<sup>5</sup> Eurostat, “Being Young in Europe Today: Family and Society”, at: [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Being young in Europe today - family and society](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Being_young_in_Europe_today_-_family_and_society) (last accessed 13 July 2022).

<sup>6</sup> G. Allan, S. Hawker, and G. Crow, “Family Diversity and Change in Britain and Western Europe,” *Journal of Family Issues* 22, no. 7 (October 1, 2001): 819–37.

<sup>7</sup> Kathleen Gerson and Stacy Torres, “Changing Family Patterns,” in *Emerging Trends in the Social and Behavioral Sciences*, ed. Robert A Scott and Stephan M Kosslyn, 1st ed. (Wiley, 2015), 1–15.

<sup>8</sup> *Ibid.*

<sup>9</sup> Ray Pahl and Liz Spencer, “Personal Communities: Not Simply Families of ‘Fate’ or ‘Choice,’” *Current Sociology* 52, no. 2 (March 2004): 199–221.

<sup>10</sup> Gerson & Torres, *supra* note 7, 7; Detlev Lück et al., “Family Demography and Values in Europe: Continuity and Change,” *The Palgrave Handbook of Family Sociology in Europe* (Cham: Springer International Publishing, 2021), 85–106.

The change in family patterns has been accompanied by a shift within societies from the family as to the individual subject as the focal point.<sup>11</sup> This individualization process has led to the promotion of personal identity to the detriment of status-based identity and an increased focus on individual rights.<sup>12</sup> This process has contributed to creating greater equality between men and women and releasing women in particular from traditional ascriptions and predetermined pathways regarding their partnerships, family choices and life choices more generally.<sup>13</sup>

As a review of feminist literature on the family shows, the infusion of feminist theory into family studies has greatly influenced the changes in conceptions of 'family' in society.<sup>14</sup> Feminist theory criticizes the nuclear family for being a site of oppression for women and an expression of patriarchy, or male dominance.<sup>15</sup> The feminist concept of patriarchy is rooted in a radical feminist perspective which sees the source of women's oppression in the control of women's bodies through childbirth, childcare, marriage and sexual relationships.<sup>16</sup>

An important claim within feminist discourse has been the recognition of sexual and reproductive rights of women and girls. As the feminist scholar and activist Loretta Ross argues, "[r]eproductive justice is the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women's human rights."<sup>17</sup> It encompasses (1) the right not to have a child; (2) the right to have a child; and (3) the right to parent children in safe and healthy environments.<sup>18</sup> In addition, reproductive justice demands sexual autonomy and gender freedom for every human being.<sup>19</sup>

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<sup>11</sup> Emile Durkheim, "Introduction to the Sociology of the Family," ed. Emile Durkheim and Mark Traugott, *Emile Durkheim on Institutional Analysis* (Chicago: University of Chicago Press, 1978), 205–228.

<sup>12</sup> François de Singly, "The Family of Individuals: An Overview of the Sociology of the Family in Europe, 130 Years After Durkheim's First University Course," *The Palgrave Handbook of Family Sociology in Europe* (Cham: Springer International Publishing, 2021), 15–43, 18.

<sup>13</sup> Lück et al., *supra* note 10, 96.

<sup>14</sup> See e.g. Mary Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects*, 1st ed. (Cambridge University Press, 2010); Susan Moller Okin, *Justice, Gender, and the Family*, 5. print. (New York: Basic Books, 1992); Diana Gittins, *The Family in Question*, Second Edition. (London: Bloomsbury Publishing Plc, 1993); Stephanie Coontz, *The Way We Never Were: American Families and the Nostalgia Trap*, Reprint. (New York, NY: Basic Books, 2005); Christine Delphy and Diana Leonard, *Familiar Exploitation: A New Analysis of Marriage in Contemporary Western Societies*, (Cambridge: Polity Pr, 1992); Barrie Thorne, ed., *Rethinking the Family: Some Feminist Questions* (New York: Longman, 1982); Arlene S. Skolnick and Jerome H. Skolnick, *Family in Transition*, 17. ed. (Upper Saddle River, NJ: Pearson, 2014).

<sup>15</sup> See e.g. Coontz *supra* note 14; Moller Okin, *supra* note 14.

<sup>16</sup> Thorne, Barrie, "Feminist rethinking of the family: An overview". In Thorne and Yalom, *supra* note 14, pp. 13–14.

<sup>17</sup> Loretta Ross, "Understanding Reproductive Justice: Transforming the Pro-Choice Movement," *Off Our Backs*, 2006, 14–19, 14.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*



In 1994, reproductive rights were for the first time proclaimed as human rights by the United Nations (hereinafter “UN”) Program of Action in Cairo, which encompass “the capability to reproduce and the freedom to decide if, when and how often to do so”.<sup>20</sup> Implicit in this condition is the right of individuals “to have access to safe, effective, affordable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law”.<sup>21</sup>

As medical advancements have paved the way for new possibilities of procreation through ART, the question of what constitutes a family has reached a new dimension. ART refers to any fertility-related treatment in which the eggs or embryos are being artificially manipulated.<sup>22</sup> ART poses an unprecedented challenge to the discourse on the family, as it goes against the culturally scripted idea of the two-parent nuclear family unit that is biologically capable of producing a child.<sup>23</sup> ART challenges the taken-for-granted binaries of sex and procreation, nature and culture, informal and formal labor, heterosexuality and homosexuality and human and nonhuman.<sup>24</sup> Since the creation of the first child through ART in 1973, over 8 million children have been conceived using ART<sup>25</sup> and projections suggest that by 2100, between 1.4 and 3.5 percent of the world’s population will be born through ART.<sup>26</sup>

Despite offering new and pathbreaking reproductive possibilities, ART also raises new questions of medical, social, political, legal, economic and ethical nature. In Europe, the regulation of ART varies greatly across countries.<sup>27</sup> Whereas some form of ART is legal in 44 of the 46 Council of Europe (“CoE”) member states, only 30 countries offer treatments to single women and 18 to female couples.<sup>28</sup> Surrogacy, a practice whereby a

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<sup>20</sup> United Nations, Report of the International Conference on Population and Development, U.N. Doc. A/Conf. 171/13 (18 October 1994), para. 7.2.

<sup>21</sup> Ibid.

<sup>22</sup> Meaghan Jain and Manvinder Singh, “Assisted Reproductive Technology Techniques,” in *StatPearls* (Treasure Island (FL): StatPearls Publishing, 2022).

<sup>23</sup> Ross D. Parke, *Future Families*, 1. publ. (Chichester, West Sussex: Wiley Blackwell, 2013), 115-116..

<sup>24</sup> Marcia C. Inhorn and Daphna Birenbaum-Carmeli, “Assisted Reproductive Technologies and Culture Change,” *Annual Review of Anthropology* 37, no. 1 (October 1, 2008): 177-96, 178.

<sup>25</sup> Carlos Calhaz-Jorge et al., “Survey on ART and IUI: Legislation, Regulation, Funding and Registries in European Countries: The European IVF-Monitoring Consortium (EIM) for the European Society of Human Reproduction and Embryology (ESHRE),” *Human Reproduction Open* 2020, no. 1 (2020).

<sup>26</sup> Malcolm J. Faddy, Matthew D. Gosden, and Roger G. Gosden, “A Demographic Projection of the Contribution of Assisted Reproductive Technologies to World Population Growth,” *Reproductive Biomedicine Online* 36, no. 4 (April 2018): 455-58; Inhorn, *supra* note 24.

<sup>27</sup> Calhaz-Jorge et al., *supra* note 25.

<sup>28</sup> Ibid.

third woman agrees to bear the child conceived with the means of ART, is only accepted in 15 countries.<sup>29</sup>

Who is then considered as a parent of the child created through ART? It appears that most European legal systems still choose to recognize only those individuals that have a genetic tie with the child as legal parents.<sup>30</sup> Moreover, numerous European states prohibit the use of ova donated by a third party for ART, as they fear that it could create identity issues for the child due to split motherhood, which could in turn weaken the entire structure of society.<sup>31</sup> As the legal sociologist Deflem notes, legal norms exist not as isolated entities but are shaped by cultural and social understandings of an issue.<sup>32</sup> Indeed, these state legislations on ART show that the determination of legal parentage reflects a traditional understanding of family relations to the detriment of the rights of the individuals who wish to conceive or have conceived a child through ART.

Confronted with cases on the use of ART and the legal recognition of parentage, the ECtHR faces a difficult task in defining and applying the human rights framework set out in the ECHR, over which it has the interpretative authority.<sup>33</sup> The ECHR serves as “instrument of European public order”<sup>34</sup> and has been recognized as the most effective international instrument for the protection of individual rights.<sup>35</sup> At the time of the drafting of the ECHR in 1950, the creation of a child using ART was not yet a possibility that was conceivable. Ruling on cases relating to ART thus confronts the Court with new and unprecedented questions relating to the compatibility of technological development with the ECHR and requires it to perform a balancing act between upholding individual freedoms to procreate and respecting social and cultural understandings of ‘family’.<sup>36</sup> The Court claims that it interprets the Convention “in a dynamic way, in light of the present-

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<sup>29</sup> Ibid.

<sup>30</sup> Sonia Harris-Short and Joanna Miles, *Family Law: Text, Cases, and Materials* (Oxford: Oxford University Press, 2011), 582-586.

<sup>31</sup> *S.H. and others v. Austria*, Grand Chamber Judgment, Application no. 57813/00, Council of Europe: European Court of Human Rights, 3 November 2011 (hereinafter *S.H. and others v. Austria* or *S.H. and others*), paras. 70, 73.

<sup>32</sup> Mathieu Deflem, *Sociology of Law* (Cambridge: Cambridge University Press, 2008), 6.

<sup>33</sup> Christos Giannopoulos, L'autorité de la chose interprétée des arrêts de la cour européenne des droits de l'homme, In *Revue des droits et libertés fondamentaux* (2018), at: <http://www.revuedlf.com/theses/lautorite-de-la-chose-interpretée-des-arrets-de-la-cour-europeenne-des-droits-de-lhomme/> (last accessed 13 May 2022).

<sup>34</sup> *Loizidou v. Turkey*, Application no. 15318/89, Grand Chamber Judgment, Council of Europe: European Court of Human Rights, 18 December 1996, para. 75.

<sup>35</sup> Laurence R. Helfer, “Consensus, Coherence and the European Convention on Human Rights,” *Cornell International Law Journal* 26, no. 1 (January 1, 1993): 133-165, 133.

<sup>36</sup> Linda Hart, “Anthropology of Kinship Meets Human Rights Rationality: Limits of Marriage and Family Life in the European Court of Human Rights,” *European Societies* 20, no. 5 (2018): 816-34, 819.

day conditions”.<sup>37</sup> Considering the controversy and sensitivity of the topic, it is however not clear whether the Court consistently follows this interpretation when ruling on the legality of different ART techniques and the parental ties in families formed using ART.

## 2. Objective

The objective of this thesis is to analyze whether the ECtHR is reflective of the changes in conceptions of ‘family’ in European societies since the drafting of the ECHR in 1950 and allows for a more inclusive recognition of family forms. In order to allow for a more in-depth analysis, the focus lies on the way the understanding of ‘family’ is being shaped by the ECtHR in its case law on families formed through the use of ART. Considering the challenges that derive from technological development in the framing of human rights, the objective is thus to analyze how the Court interprets the Convention and specifically the right to private and family life under Article 8 ECHR in this emerging topic of ART. It evaluates this question from a social justice viewpoint with a focus on reproductive rights, building on the assumption that in order to create a more just society, we need to give all individuals – particularly women – equal access to reproductive rights with regards to family planning.

Whereas there have been previous studies of ECtHR case law on ART from different socio-legal perspectives,<sup>38</sup> there has been no study so far that examines the Court’s approach with regards to the ‘family’ in a representative number of cases from a social justice and feminist viewpoint. This thesis aims to fill this gap.

The scope of this study is limited to cases before the ECtHR. Since the first case relating to the use of ART to create a genetically related child was brought before the Court in 2007, the timespan of the cases studied is limited to the period between 2007 and 2021.

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<sup>37</sup> The European Court of Human Rights, *The ECHR: A Living Instrument*, 2021, 3 (last accessed 13 May 2022); Anthony J. Langlois, “The Narrative Metaphysics of Human Rights,” *The International Journal of Human Rights* 9, no. 3 (September 1, 2005): 369–87.

<sup>38</sup> See e.g. Hart [1], *supra* note 36; Andrea Mulligan, “Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements,” *Medical Law Review* 26, no. 3 (August 1, 2018): 449–75; Audrey Lebreton, “The European Court of Human Rights and the Framing of Reproductive Rights,” *Droits Fondamentaux*, no. 18, (2020); Rosamund Scott, “Reproductive Health: Morals, Margins and Rights,” *Modern Law Review* 81, no. 3 (May 2018): 422–51; Clare Ryan, “Europe’s Moral Margin: Parental Aspirations and the European Court of Human Rights,” *The Columbia Journal of Transnational Law* 56, no. 3 (March 22, 2018): 467; Alice Margaria, “Parenthood and Cross-Border Surrogacy: What Is ‘New’? The ECtHR’s First Advisory Opinion,” *Medical Law Review* 28, no. 2 (May 1, 2020): 412–25.

### **3. Research Question**

The topic of ART confronts the ECtHR with the difficult task of having to account for social changes that were not conceived of at the time of the drafting of the ECHR whilst respecting social values of the CoE member states throughout its judgments. Considering the role of the Court as a guarantor of human rights in Europe, this thesis poses the following research question:

**Does the ECtHR allow for inclusive conceptualizations of ‘family’ in its interpretation of the ECHR in cases relating to the use of ART to create children, in order to follow the evolutionary dynamic of the family whilst respecting fundamental principles of the ECHR?**

### **4. Methodology**

The methodology used follows qualitative empirical research, where the case law of the European Court of Human Rights is used to create empirical evidence on how ‘family’ is being defined and protected in the European legal culture of human rights.

Using the case law of the ECtHR on the legal recognition of families created with the means of ART as an example, this thesis evaluates how this Court interprets human rights in deciding on which family forms deserve to be recognized as legal entities in societies and which types of ART should be legally recognized. The ECtHR represents an arena where different cultural understandings of what constitutes acceptable forms of family life clash.<sup>39</sup> It thus appears that its case law on ART is well-placed to illustrate the conflict of the Court in balancing between individual rights related to the family and cultural understandings of what may be included within those rights.

### **5. Theoretical Framework**

The theoretical framework of this thesis is at the intersection of two key strands of theories: the capability approach and the reproductive justice approach.

The capability approach consists of a set of ten central human capabilities which represent “the basic social minimum every human being should be entitled to and the bare minimum of what respect of human dignity requires”.<sup>40</sup> This theory allows for an

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<sup>39</sup> Hart [1], *supra* note 36, 816.

<sup>40</sup> Martha C. Nussbaum, *Women and Human Development*, Reprinted (Cambridge: Cambridge Univ. Press, 2001), 298.

analysis of the judgments from a legal-philosophical and feminist perspective. As it is grounded in the principles of social justice, it is a powerful tool for critically assessing whether a human right is sufficiently protected under the present human rights regime of the ECtHR. The reproductive justice framework looks at reproductive rights from an intersectional perspective, thus making visible that parenthood and equal access to family planning is also a question of sex, class, race and sexual orientation.<sup>41</sup>

## **6. Structure**

The first part of this thesis is dedicated to mapping the evolution of the concept of 'family' in European societies since the drafting of the ECHR and repercussions in human rights discourse. It first analyses the transition of the family from a sociological and anthropological perspective with a special focus on feminist contributions. It then introduces the capability and reproductive justice approaches and their applicability in the context of family.

The second part of this thesis discusses the approach of the Court in the legal protection of 'family' in cases of families formed through ART and evaluates whether the Court consistently adopts an approach grounded in principles of social and reproductive justice in its jurisprudence on this new and pressing topic of families formed using ART.

## **7. Limitations**

The question of ART is at the crossroads of many different subjects and fields of study. For the purpose of narrowing down this study, the focus lies on the legal, philosophical and social perspectives of the issue. Medical, ethical, economical or technological aspects of ART will only briefly be discussed.

Moreover, this analysis of family regulations within the ECtHR will only marginally cover the right to family life of same-sex couples, which is another key topic before the ECtHR worth investigating in order to understand the current stage of interpretation of the concept of 'family' by the ECtHR.<sup>42</sup>

Lastly, this study is limited to cases before the ECtHR to allow for a more in-depth analysis of the current human rights regime with regards to the treatment of individual

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<sup>41</sup> Loretta Ross and Rickie Solinger, *Reproductive Justice*, 1st ed, vol. 1 (Berkeley: University of California Press, 2017), 169.

<sup>42</sup> See e.g. *Schalk and Kopf v. Austria*, Chamber Judgment, Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010, paras. 93-95.

rights in the context of ‘family life’ in Europe. The ECtHR plays an important role in shaping human rights in European societies and has been described as one of the most influential human rights courts in the world.<sup>43</sup> Nonetheless, it shall be acknowledged that individual states and other international institutions also play a role in shaping ‘family life’ and that the European perspective only constitutes one of many with regards to the meaning of ‘family life’.

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<sup>43</sup> Rhona Smith, *International Human Rights*, 5th ed. (Oxford: Oxford University Press, 2012), 96-97.

## **Part A: The Evolution of the Concept of 'Family': Towards an Inclusive Conceptualization?**

The first part of this thesis studies the evolution of the concept of 'family' in European societies since the drafting of the ECHR and its repercussions in human rights discourse. After analyzing the transition of the family from a historical, sociological and anthropological perspective with a focus on feminist contributions, it introduces the capability and reproductive justice approaches and their applicability in the context of 'family'.

### **1. The 'Family' in Transition: Sociological, Feminist and Anthropological Perspectives**

There exists no clear, uniform definition of the family as a sociological and anthropological concept.<sup>44</sup> This is due to the fact that the structure and function of the family organization varies significantly across different parts of the world and across time.<sup>45</sup> Family patterns are not static, but change depending on the social conditions and cultural ideals in a specific timeframe and place.<sup>46</sup> In other words, the family is an institution in continuous flux.<sup>47</sup>

The family is a site where private and public spheres intersect. It represents a sphere in which individuals can live together according to their personal choices and values. The family is also the basis of the production and reproduction of society and its culture from one generation to the next, and as such part of the 'basic structure of society'.<sup>48</sup>

Families replicate values and belief systems and forge the link between individuals and society, personal identity and social role.<sup>49</sup> States therefore have a strong interest in regulating and supervising the orderly reproduction of families. States constitute the family structure through their laws by defining which groups of individuals

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<sup>44</sup> Gittins, *supra* note 14.

<sup>45</sup> United Nations, "Methods of Projecting Households and Families", *UN Manual VII* (1960), 5.

<sup>46</sup> Gerson & Torres, *supra* note 7, 3.

<sup>47</sup> *Ibid*, 16.

<sup>48</sup> John Rawls, "The Idea of Public Reason Revisited," *The University of Chicago Law Review* 64, no. 3 (1997): 765.

<sup>49</sup> Cynthia Comacchio, "History of Family - Gender, Theory, Development, Social, and Press", *JRank Articles* (2022) at: <https://family.jrank.org/pages/493/Family-History.html#ixzz7Ra4sZq6L> (last accessed 13 July 2022).

can count as families, what marriage and divorce are, what parental responsibility is, and what privileges and rights each family member should enjoy.<sup>50</sup>

Sociologists argue that the family cannot be studied in a vacuum; rather it must be studied in its social context.<sup>51</sup> The sociological perspective on the family therefore emphasizes the rules, roles, and relationships created and maintained by the larger society.<sup>52</sup> Conceptualizing the family in European society today thus requires us to clearly distinguish between the ideology of the family that is promoted by the state, and the actual way in which individuals interact.<sup>53</sup>

### **1.1. The Universal Family?**

The existence of ‘the family’ as a universal social construct was for long time taken for granted by sociologists.<sup>54</sup> The first to formulate the idea that the family is a universal human institution was the sociologist Malinowski.<sup>55</sup> In 1913, after having observed that Australian aborigines, which practiced “primitive promiscuity”, also had legal marriages and distinguished these from casual unions, he concluded that sexual promiscuity was irrelevant for deciding whether families existed.<sup>56</sup> The conjugal relationship, composed of a married couple and children,<sup>57</sup> therefore had to be a universal social grouping because it fulfilled a universal function, the nurturing of children.<sup>58</sup> Building on this assumption, he identified three universal features of families, namely a presumably nuclear collectivity of specific person that is associated with a specific place - the home - and specific bond – family love.<sup>59</sup>

The nuclear family became the most widely accepted family model throughout the first part of the twentieth century until the 1950s.<sup>60</sup> Building on anthropological studies such as Malinowski’s, sociologists from the structural-functionalist stream found the nuclear family to be the key institution for raising children to become mature adults and

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<sup>50</sup> Nussbaum [1], *supra* note 40, 262-263.

<sup>51</sup> Andrew J. Cherlin, *Public & Private Families: An Introduction*, Ninth edition (New York, NY: McGraw-Hill, 2021), 3, 20.

<sup>52</sup> *Ibid.*

<sup>53</sup> Gittins, *supra* note 14, 72; Collier, Rosaldo, Yanagiskako, “Is there a family? New anthropological views”, in Thorne & Yalom, *supra* note 14, 31.

<sup>54</sup> Bernardes, *supra* note 2.

<sup>55</sup> Thorne, *supra* note 16.

<sup>56</sup> Malinowski, *supra* note 2.

<sup>57</sup> Cherlin, *supra* note 51, 20.

<sup>58</sup> Malinowski *supra* note 2. See also Bernardes, *supra* note 2, and Collier, Rosaldo, Yanagiskako, *supra* note 53.

<sup>59</sup> Collier, Rosaldo, Yanagiskako, *supra* note 53, 32.

<sup>60</sup> Cherlin, *supra* note 51, 14.



integrate them in society.<sup>61</sup> Goode, for instance, argued that the emergence of the nuclear family was closely linked to the emergence of a worldwide market economy which required a socially and geographically mobile and autonomous labor force.<sup>62</sup> Functionalists such as Parsons and Bales argued that as the composition of families had changed from extended to nuclear, the function of the family also changed from social-institutional to emotional-supportive.<sup>63</sup> The nuclear family was therefore seen as essential to a functioning society as it socializes children, provides emotional and material support for its members, regulates sexual reproduction and contributes in building a social identity.<sup>64</sup> The nuclear family model was thus adopted as the 'ideal' type of family,<sup>65</sup> which constitutes a uniform, basic type of society.<sup>66</sup>

Within the nuclear family, the family responsibilities are primarily divided between the male, who is the full-time breadwinner, and the female, who is the caregiver (and perhaps part-time income earner) of the family.<sup>67</sup> This supposedly natural division of female and male roles in the family has been the cornerstone of the real traditional family.<sup>68</sup> Functionalists have argued that this work distribution meets the functional requirements of modern societies, with men contributing to the family's survival by performing 'instrumental' functions such as earning income, and women covering the 'expressive' functions such as caring for children and meeting the family's emotional needs.<sup>69</sup> Following this functional perspective, any change in conventional family structure and processes would threaten the stability of the family and thus that of society.

## **1.2. Post-Modernity, Feminism and the Family**

### **1.2.1. The Decline of the Nuclear Family**

The power of the conception of the nuclear family is rooted in popular understanding of the biological differences between men and women.<sup>70</sup> In the late 1960s and 1970s,

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<sup>61</sup> Bernardes, *supra* note 2, 3.

<sup>62</sup> Goode, *supra* note 1.

<sup>63</sup> Talcott Parsons, "The Normal American Family," ed. Bert Adams and Thomas Weirath, *Readings on the Sociology of the Family*, 1971, 53–66.

<sup>64</sup> Bales & Parsons, *supra* note 1.

<sup>65</sup> Goode, *supra* note 1, 7.

<sup>66</sup> Parsons, *supra* note 14, 53.

<sup>67</sup> Bernardes, *supra* note 2, 3.

<sup>68</sup> Coontz, *supra* note 14.

<sup>69</sup> Gerson & Torres, *supra* note 7, 6-7.

<sup>70</sup> Claude Lévi-Strauss, "Introduction", in André Burguière, ed., *A History of the Family. Vol.1. Remote Worlds and Ancient Worlds* (Oxford: Polity Press, 1996), 1-3.

however, social changes driven by the processes of individualization and globalization,<sup>71</sup> led to a re-evaluation of the nuclear family as a universal family model.<sup>72</sup> This era has been characterized as post-industrial or post-modern era.<sup>73</sup>

In the late 1960s, the women's liberation movement emerged, consisting of an organization of women that united in the struggle for women's rights.<sup>74</sup> The major claims of this movement were greater liberties and autonomy for women through equal access to paid work and education, gender equality policies, reproductive rights and protection against male violence.<sup>75</sup> In addition, technological advancements such as the birth control pill enabled women to have more choices over whether and when to have children.<sup>76</sup>

The social changes coupled with the technological development enabled women to become better educated and to participate more fully and at a higher level in the workforce, to delay childbearing and to found smaller families.<sup>77</sup> Divorce became more socially accepted and marrying and forming a family became less a question of social security or normative expectation for women but rather a matter of personal choice.<sup>78</sup> As family patterns began to change, the conceptualization of the nuclear family became increasingly contested.

## 1.2.2. Feminist Critiques of the Nuclear Family

### 1.2.2.1. Feminism and Sociology of the Family

Within family sociology, the conflict theory paradigm exposed the family as a site of conflicting interests, which contributes to social inequality by reinforcing economic inequality and patriarchy.<sup>79</sup> It argues that the changes in family structures reflect the shifts in power distribution and allocation of resources in society, especially with regards to gender and age.<sup>80</sup>

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<sup>71</sup> Nickie Charles, Charlotte Davies, and Christopher Harris, *Families in Transition: Social Change, Family Formation and Kin Relationships* (Bristol: Policy Press, 2008), 1.

<sup>72</sup> Elisabeth Beck-Gernsheim, *Was Kommt Nach Der Familie?*, Orig.-Ausg., vol. 1243 (München: Beck, 1998), 9.

<sup>73</sup> Judith Stacey, "Backward to a Postmodern Family", in Thorne and Yalom, *supra* note 14, 91-118.

<sup>74</sup> Kristina Schulz, ed., *The Women's Liberation Movement: Impacts and Outcomes*, Protest, Culture and Society, volume 22 (New York: Berghahn Books, 2017), 1.

<sup>75</sup> Schulz, *supra* note 25, 1-2.

<sup>76</sup> Victoria Mikesell Mather, "Evolution and Revolution in Family Law," *St. Mary's Law Journal* 25, no. 1 (June 22, 1993): 405-433, 407.

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

<sup>78</sup> *Ibid.*

<sup>79</sup> Randall Collins, "A Conflict Theory of Sexual Stratification," *Social Problems* 19, no. 1 (July 1971): 3-21.

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

The perhaps greatest contribution within family sociology has been made by feminist scholars.<sup>81</sup> Feminism identifies male oppression and power, expressed in the concepts of gender inequality and patriarchy, as the core obstacle for achieving equality between men and women.<sup>82</sup> Feminists introduce the concept of gender, which refers to the characteristics of women and men which are socially constructed,<sup>83</sup> in opposition to sex, which refers to those that are biologically determined.<sup>84</sup>

Rather than starting with the family as a unit of analysis, feminists focus on underlying structures of gender, sexuality and, later, also race and class.<sup>85</sup> They emphasize the role of society in regulating sexuality, intimacy, reproduction, and in perpetuating conceptions of motherhood and fatherhood.<sup>86</sup> Feminists expose the nuclear family as central to women's subordination and exploitation. They argue that the composition, insularity and division of labor within this family form excludes women from gaining direct access to income, status-giving work and political authority.<sup>87</sup> By promoting the ideology of the nuclear family, women are reduced to their role as mothers and wives, thus legitimizing their subordination in the economy.<sup>88</sup> Feminists see two structures of subordination:<sup>89</sup> the position of women as wives and mothers and the internalization of male and female attitudes by the children, which they then transmit to their own children, thus perpetuating male domination and female subordination.<sup>90</sup>

#### 1.2.2.2. Feminism and Anthropology

Feminist anthropologists have moreover re-evaluated Malinowski's assumption that the nuclear family is a universal ideal.<sup>91</sup> They found that previous anthropological studies of the family had themselves been subject to the bias that women were defined by nurturing, connective and reproductive roles that do not change over time.<sup>92</sup> The distinction between family members and outsiders was in fact not clear in certain native

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<sup>81</sup> Bernardes, *supra* note 2, 42.

<sup>82</sup> Kristina Schulz, ed., *The Women's Liberation Movement: Impacts and Outcomes*, Protest, Culture and Society, volume 22 (New York: Berghahn Books, 2017).

<sup>83</sup> WHO, "Gender", at: [https://www.who.int/europe/health-topics/gender#tab=tab\\_1](https://www.who.int/europe/health-topics/gender#tab=tab_1) (last accessed 13 July 2022).

<sup>84</sup> *Ibid.*

<sup>85</sup> Thorne, *supra* note 16.

<sup>86</sup> Gittins, *supra* note 14, 2.

<sup>87</sup> Thorne, *supra* note 16, 7.

<sup>88</sup> *Ibid.*

<sup>89</sup> Eleanor B. Amico, ed., *Reader's Guide to Women's Studies*, 1. publ. (Chicago [u.a.]: Dearborn, 1998), 197; Moller Okin, *supra* note 14, 3-5.

<sup>90</sup> Amico, *supra* note 89, 197.

<sup>91</sup> Collier, Rosaldo, Yanagiskako, *supra* note 53, 60-72.

<sup>92</sup> *Ibid.*, 38.

cultures, with many languages having no word for 'family'.<sup>93</sup> Moreover, they found that the mother-daughter relationship was not necessarily characterized by 'family love' in all cultures.<sup>94</sup>

Anthropologists thus prefer to use the term 'kinship', which they define as the ties which exist between the individuals through birth (descent) and through mating (marriage).<sup>95</sup> Kinship is concerned with the ways in which mating is socially organized and regulated, the ways in which parentage is assigned, attributed and recognized, relatives are classified, and groups are formed.<sup>96</sup> Using this term underlines the social construction of these ties and their variability, which depends on how they are being defined in different cultures.<sup>97</sup>

Contemporary anthropologists have moreover challenged the idea that parenthood is necessarily based on blood relationships.<sup>98</sup> Smith based this assertion on practices he had observed in Guyana and Jamaica, whereby close bonds were formed through the act of raising children, irrespectively of the genetic ties.<sup>99</sup> Similarly, Edholm found that notions of biological connection are highly variable, with some societies recognizing only the role of the father or the mother in conception and procreation.<sup>100</sup> Moreover, the family was not the only source for providing 'nurturance', as individuals also cultivated other strong bonds which entailed love and intimacy and provided them emotional support.<sup>101</sup>

As Gittins has stated, the biological base of motherhood lies in carrying and giving birth to a child.<sup>102</sup> The rest is socially constructed, although it often is attributed to biology or 'maternal instinct'.<sup>103</sup> This is not to say that most kin relationships do have a biological base; but the fact that not all of them do and that the type of base varies depending on the time and place means that it cannot be assumed that there is a universal base to kinship.

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<sup>93</sup> Ibid, 35.

<sup>94</sup> E.g. Ilsa M. Glazer Schuster, *New Women of Lusaka*, 1st ed, Explorations in World Ethnology (Palo Alto, Calif: Mayfield Pub. Co, 1979); E. Adamson Hoebel, *The Cheyennes: Indians of the Great Plains*, 2d ed, Case Studies in Cultural Anthropology (New York: Holt, Rinehart and Winston, 1978).

<sup>95</sup> Felicity Edholm, 'The Unnatural Family', in Elizabeth Whitelegg and Open University, eds., *The Changing Experience of Women* (Oxford: M. Robertson in association with the Open University, 1982), 166.

<sup>96</sup> Ibid.

<sup>97</sup> Gittins, *supra* note 14, 64.

<sup>98</sup> John Maynard Smith, *The Evolution of Sex* (Cambridge [Eng.]; New York: Cambridge University Press, 1978); David Schneider, *A Critique of the Study of Kinship* (Ann Arbor, MI: University of Michigan Press, 1984), who uses the term "social kinship".

<sup>99</sup> Ibid.

<sup>100</sup> Edholm, *supra* note 95.

<sup>101</sup> Collier, Rosaldo, Yanagiskako, *supra* note 53, 42-43.

<sup>102</sup> Gittins, *supra* note 14, 66.

<sup>103</sup> Ibid.

As Gittins puts it, “[t]o use our own ideology of motherhood and love and apply it universally to all cultures is a highly ethnocentric and narrow way of trying to understand other societies.”<sup>104</sup>

Due to the complex interplay between the biological and the social components, anthropologists found that while the nuclear family remains predominant in human societies, it only represents a certain state of equilibrium that has been chosen over another and it does not fulfil a universal need.<sup>105</sup>

### **1.3. Towards a New Conceptualization of ‘Family’**

#### **1.3.1. The Family of Choice**

The post-industrial period marked a shift in values towards more liberal attitudes regarding abortion, sexuality, reproduction and gender equality<sup>106</sup> and the detachment of the idea that parenthood was linked marriage.<sup>107</sup> Individuals and particularly women became increasingly freed from the traditional ascriptions and normative expectations related to their origin, social class, or sex and leaving them the freedom to make their own life choices.<sup>108</sup> Particularly women’s individualization was critical to family change, as it led to a process of “de-domestication of women”.<sup>109</sup> Thus, a major change in contemporary European families has been the change in power relations within families.<sup>110</sup> Both women and men are now increasingly oriented towards sharing family roles and participating in the workforce.<sup>111</sup> Moreover, children have become increasingly recognized by states as agents in their own rights.<sup>112</sup>

Another result of these social changes has been an increasing diversification in family forms and living arrangements as well as socially accepted family forms in post-industrial societies.<sup>113</sup> European societies have witnessed a decline in the number of marriages and an increasing social recognition of forms of partnership and parenthood

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<sup>104</sup> Ibid.

<sup>105</sup> Lévi-Strauss, Claude, “Introduction”, in Burguière, *supra* note 70, 6.

<sup>106</sup> Charles, *supra* note 71, 28.

<sup>107</sup> Lück et al., *supra* note 10, 101.

<sup>108</sup> Lück et al., *supra* note 10, 96, 101.

<sup>109</sup> Charles, *supra* note 71, 22.

<sup>110</sup> Manuela Du Bois-Reymond, “Negotiation strategies in modern families: What does it mean for global citizenship?”, in Judith A. Myers-Walls and Péter Somlai, *Families as Educators for Global Citizenship*, ed. Judith A. Myers-Walls, Péter Somlai, and Robert N. Rapoport, 1st ed. (Routledge, 2019), 9.

<sup>111</sup> Mary Daly, “Changing Family Life in Europe: Significance for State and Society,” *European Societies* 7, no. 3 (September 2005): 379–98, 365.

<sup>112</sup> Brannen, Julia, “Reconsidering children and childhood: Sociological and policy perspectives”, in Elizabeth Bortolaia Silva and Carol Smart, eds., *The New Family?* (London ; Thousand Oaks, Calif: Sage, 1999), 143-158.

<sup>113</sup> Lück et al., *supra* note 10; Charles *supra* note 71; Daly, *supra* note 111, 382.

outside of marriage.<sup>114</sup> Families are increasingly composed of single-parents and blended families.<sup>115</sup> In addition, homosexual couples and single women and men are increasingly choosing to become parents through adoption, surrogacy or joint parenting arrangements.<sup>116</sup> Today, heterosexual procreation represents only one of the many means of family making.<sup>117</sup> Moreover, there is an increasing trend towards the revival of extended family networks which include chosen kin as well as extended family members.<sup>118</sup>

Since the 1990s, partnerships have evolved towards so-called “pure relationships” which are liberated from tradition and social expectations and have the sole purpose of fulfilling the partner’s need for intimacy.<sup>119</sup> Pahl and Spencer have qualified these emerging new family forms as “families of choice”.<sup>120</sup> These families are becoming increasingly open to individuals which are not related biologically to the parents but which may provide a form of caregiving for the family.<sup>121</sup> Scholars have thus suggested to redefine family structures and relationships to include both “assigned” and “created” kinship systems.<sup>122</sup>

Overall, these trends indicate that the notion of ‘family’ has not lost its discursive power despite the radical social change.<sup>123</sup> Nonetheless, it appears that the family in the nuclear sense has been “de-institutionalized”.<sup>124</sup> As Charles argues, this occurs not only when the rules determined by an institution lose their legitimacy, but also when the range of social situations governed by these rules become so various that the rules no longer apply.<sup>125</sup> “De-institutionalization” means that there are few accepted ways of forming families and that socially acceptable alternatives coexist.<sup>126</sup> Combined with the increasing

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<sup>114</sup> Daly, *supra* note 111, 381-382.

<sup>115</sup> De Singly, *supra* note 12, 19; Charles *supra* note 71, I.

<sup>116</sup> Laura Benkov, “Reinventing the Family”, in Skolnick, *supra* note 14, 416-417.

<sup>117</sup> *Ibid*, 417.

<sup>118</sup> Vern L. Bengtson, “Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds,” *Journal of Marriage and Family* 63, no. 1 (February 2001): 1–16; David Brooks, “The Nuclear Family Was a Mistake,” *The Atlantic* (10 February 2020), at:

<https://global.factiva.com/en/du/article.asp?accessionno=ATLCOM0020200218eg2a00033> (last accessed 13 July 2022); Parke, *supra* note 23, 8-10.

<sup>119</sup> Anthony Giddens, *The Transformation of Intimacy* (Oxford: Wiley, 1992).

<sup>120</sup> Pahl & Spencer, *supra* note 9, 199-221.

<sup>121</sup> Parke, *supra* note 23, 13.

<sup>122</sup> Cherlin, *supra* note 51.

<sup>123</sup> Jennifer Somerville, *Feminism and the Family: Politics and Society in the UK and the USA* (London: Macmillan [u.a.], 2000), 244; Bettina Becker and Nickie Charles, “Layered Meanings: The Construction of ‘the Family’ in the Interview,” *Community, Work & Family* 9, no. 2 (May 2006): 101–22.

<sup>124</sup> Charles, *supra* note 71, 228.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*, 231.

diversity in family forms, Charles argues, families as well as people are now increasingly individuated in the sense of being distinct from each other.<sup>127</sup>

### 1.3.2. The Power of Tradition and Ideology

Scholars such as Beck-Gernsheim and Gittens have argued that the individualization process has led to a declining importance of local, 'traditional' communities, which has involved the loss of traditional security regarding, for instance, guiding norms.<sup>128</sup> This view has been challenged by scholars, who have argued that the counterposing of tradition and modernity is problematic,<sup>129</sup> considering that tradition and reflexivity coexist in different ways in contemporary society.<sup>130</sup> Adam, for instance, argues that the contemporary era could equally be conceptualized as one of re-traditionalization, "since the age of uncertainty, contingency and flux seems to bring with it a yearning for the stability of tradition."<sup>131</sup> Using this dualism thus makes it impossible to grasp the ways in which tradition and reflexivity coexist in contemporary society.<sup>132</sup>

Thompson suggests separating between the different aspects of tradition in order to see which aspects are still present in contemporary societies.<sup>133</sup> He finds that the legitimation of tradition through beliefs and patterns and its use to legitimize the exercise of power are indeed declining.<sup>134</sup> However, the "hermetic" aspect of tradition, which refers to the "background assumptions that are taken for granted [...] and transmitted inter-generationally",<sup>135</sup> is indeed still significant. In addition, he finds that tradition still plays an important role in the formation of identity, both at the individual and the collective level.<sup>136</sup>

These findings show that although some aspects of tradition are declining, others still continue to play an important role in contemporary societies. This applies especially in the context of 'family', considering that it constitutes the first instance of socialization for individuals. It would therefore be wrong to assume that the increased

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<sup>127</sup> Ibid, 228-9.

<sup>128</sup> Beck-Gernsheim, *supra* note 72; Gittens, *supra* note 14.

<sup>129</sup> Charles, *supra* note 71, 4-5.

<sup>130</sup> Barbara Adam, "Detraditionalization and the Certainty of Uncertain Futures Adam", in Paul Heelas et al., eds., *Detraditionalization: Critical Reflections on Authority and Identity* (Cambridge, Mass: Blackwell Publishers, 1996), 140.

<sup>131</sup> Ibid, 139-40.

<sup>132</sup> Ibid, 140.

<sup>133</sup> John B. Thompson, "Tradition and self in a mediated world", in Heelas et al., *supra* note 130, 89-108.

<sup>134</sup> Ibid, 92.

<sup>135</sup> Ibid, 91.

<sup>136</sup> Ibid, 93.

individualization within post-modernist societies necessarily induces individuals to discard the traditional nuclear family ideology. Indeed, this ideology is still deeply rooted in modern societies today and continues to play an important role for the formation of identity of both men and women.<sup>137</sup>

To conclude, this first part has illustrated that the nuclear family model represents only one of the many possible forms of family today and that the nuclear family has become de-institutionalized, which has led to an increasing diversity in family forms in European societies.<sup>138</sup> As these developments are embedded in national cultures and traditions, cross-country differences persist.<sup>139</sup> The family is an institution which is in constant evolution and the disparities throughout European countries reflect this.

Moreover, de-institutionalization does not mean that we have moved away from a nuclear family system.<sup>140</sup> Indeed, although the nuclear family model has taken new forms that go towards greater equality, the traditional nuclear family ideology is still deeply rooted in European societies. Surveys show that some groups still endorse the traditional family model while others firmly oppose it, and that the majority of the families is shaped by a contradictory mixture of traditional longings and new expectations, distributed differently across generations and genders.<sup>141</sup>

As Judith Stacey states in her book *Brave New Families* “[i]n the postmodern period, a truly democratic gender and kinship order, one that does not favour male authority, heterosexuality, a particular division of labour, or a singular household or parenting arrangement, becomes thinkable for the first time in history.”<sup>142</sup>

Moving forward, the second part will now examine how these changes have been addressed within human rights discourse in the capability and reproductive justice approaches.

## 2. Theoretical Framework

The two strands of theory that will be introduced in the following part of this thesis provide the underlying framework for conducting a socio-legal analysis of the ECtHR case law on ART. Both theories build on human rights, which constitute a fundamental

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<sup>137</sup> Charles, *supra* note 71, 18.

<sup>138</sup> Daly, *supra* note 111, 382-383.

<sup>139</sup> *Ibid*, 383.

<sup>140</sup> Charles, *supra* note 71, 229.

<sup>141</sup> Beck-Gernsheim, *supra* note 72, 20-21.

<sup>142</sup> Judith Stacey, *Brave New Families: Stories of Domestic Upheaval in Late-Twentieth-Century America* (Berkeley: University of California Press, 1998), 258.



element of legal philosophy by providing the ethical component to the law.<sup>143</sup> The capability and reproductive justice approaches enrich the idea of human rights by adding a more critical, holistic and moral-philosophical perspective towards their achievement in practice. By enriching the very conceptualization of human rights, these two theories render any interpretation exercise by the Court more demanding. This allows us to critically examine how successful the ECtHR is in rooting its reasonings in principles when balancing between protecting individual rights and upholding social values throughout its case law on ART.

These theoretical approaches have been chosen as they both incorporate feminist legal theory, which questions the objectivity and neutrality of the law and attempts to understand how the law treats women differently.<sup>144</sup> In addition, feminist legal theory explicates the role of reproductive and sexual regulation as a form of social control that perpetuates patriarchy.<sup>145</sup> Thus, feminist legal theory allows us to critically evaluate the ethics of the case law from the perspective of gender and other underlying sources of injustice.<sup>146</sup>

## **2.1. The Capability Approach**

### **2.1.1. Background and Application**

At the origin of the capability approach lies the idea that human development cannot be measured solely in terms of economic growth but depends on the actual ability of individuals to do certain things.<sup>147</sup> It was first elaborated by the economist and academic Amartya Sen, who was concerned with enhancing the quality of life of individuals by creating a more just and equal society.<sup>148</sup> Building on John Rawls' theory of justice which is concerned with a more just distribution of goods in societies,<sup>149</sup> Sen found that this theory does not sufficiently take concern of the fundamental diversity between human

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<sup>143</sup> Stephanie Palmer, "Feminism and the Promise of Human Rights: Possibilities and Paradoxes" in Susan James and Stephanie Palmer, eds., *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford ; Portland, Or: Hart Pub, 2002), 91.

<sup>144</sup> Susan Millns and Noel Whitty, "Public Law and Feminism" in Susan Millns and Noel Whitty, *Feminist Perspectives on Public Law* (London Sydney: Cavendish publ, 1999).

<sup>145</sup> Lisa Ikemoto, "Reproductive Rights and Justice: A Multiple Feminist Theories Account": 249-263, 254.

<sup>146</sup> Palmer, *supra* note 143, 91-92.

<sup>147</sup> Amartya Sen, "Capability and Well-being" in Martha C. Nussbaum and Amartya Sen, *The Quality of Life* (Oxford: Clarendon Press, 1993), 3.

<sup>148</sup> See Nussbaum & Sen, *supra* note 147; Amartya Sen, *The Idea of Justice* (Harvard University Press, 2009).

<sup>149</sup> John Rawls, *A Theory of Justice*, 5. printing (Harvard: The Belknap Press of Harvard University Press, 1971), 65-66.

beings.<sup>150</sup> On the basis of this criticism, Sen proposes to measure equality according to what he calls basic capabilities: the actual ability of individuals to do valuable acts or reach valuable states of being as part of a living.<sup>151</sup> The capability approach is thus concerned with both measuring life quality and promoting individual autonomy and pluralist individual life choices from an economic point of view, as well as achieving social justice and the human good from a philosophical perspective.<sup>152</sup>

An important contribution to this approach with a focus on women's capabilities in developing countries has been made by scholar Martha Nussbaum. In her book *Women and Human Development: The Capabilities Approach* (2001), she aims to provide the philosophical underpinning of capabilities.<sup>153</sup> According to Nussbaum, capabilities reflect the "basic constitutional principles that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires."<sup>154</sup> Nussbaum has listed ten central human capabilities (see annex below), which include life, bodily health, bodily integrity, emotions and affiliation.<sup>155</sup>

The capability approach centers around several concepts which are key to its application.<sup>156</sup> First, the *means*, i.e. the various available resources to which individuals have access.<sup>157</sup> Second, the *capabilities*, meaning what people are able to do; third, the *functioning*, what people actually achieve.<sup>158</sup> The translation of means into capabilities is shaped by *conversion factors*, that refer to the multiple contexts in which individuals are embedded. Personal conversion factors refer to gender, class, race/ethnicity, age and health, whereas societal conversion factors refer to social norms and movements in which the individuals are embedded.<sup>159</sup> Lastly, a key concept is *agency*, i.e. the way in which individuals perceive, interpret and respond to their social situation.<sup>160</sup> Agency means the ability to hold values and to make commitments regardless of whether they

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<sup>150</sup> Amartya Sen, "Equality of What?" (The Tanner Lecture on Human Values, Stanford: Stanford University Press, 1979), 215-216.

<sup>151</sup> Sen [1], *supra* note 147, 4; Sen [2], *supra* note 150, 218.

<sup>152</sup> Jana Javornik and Mara A. Yerkes, "Conceptualizing National Family Policies: A Capabilities Approach," in *The Palgrave Handbook of Family Policy*, ed. Rense Nieuwenhuis and Wim Van Lancker (Cham: Springer International Publishing, 2020), 141-67, 143.

<sup>153</sup> Nussbaum [1], *supra* note 40.

<sup>154</sup> *Ibid.*, 5.

<sup>155</sup> *Ibid.*, 78-80. The list of capabilities is attached in the annex below.

<sup>156</sup> Ingrid Robeyns, "The Capability Approach: A Theoretical Survey," *Journal of Human Development* 6, no. 1 (March 2005): 93-117.

<sup>157</sup> Javornik & Yerkes, *supra* note 152, 144.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

advance one's wellbeing or not, and to act accordingly in making one's own choices.<sup>161</sup> The concept of agency is essential as it emphasizes the active participation of individuals in contributing to their own well-being. By focusing on the individual agency, the capability approach thus allows for the inclusion of the norms and values which shape the individual choices whilst taking into account the diversity of situations on the basis of which individuals make these choices. The capability approach thus allows for the application of universalist principles of justice whilst being sensitive to the local particularities that influence individual life choices.<sup>162</sup>

Nussbaum distinguishes between basic capabilities, which are innate from birth; internal capabilities, which are states developed in interaction with the social, economic, familial and political environment; and combined capabilities, which are internal capabilities combined with external conditions.<sup>163</sup> Combined capabilities entail a substantial freedom to choose from functioning combinations.<sup>164</sup> This requires that the state create an appropriate political, economic and social environment in which individuals are actually able to exercise their capabilities.<sup>165</sup>

### 2.1.2. Capabilities and the Family

Regarding the 'family', all capabilities are in a way at stake: life, health, bodily integrity, dignity, the opportunity to form meaningful relationships with other people, to participate in politics, and even the ability to think for oneself and form a part of life.<sup>166</sup> With regards to 'family life', this includes "the capability to freely choose the people one wishes to be emotionally attached to."<sup>167</sup> Moreover, "supporting this capability means supporting forms of human association that can be shown to be crucial to one's development."<sup>168</sup>

Nussbaum argues that the shape of the family institution influences the way both men and women are able to access these capabilities.<sup>169</sup> Because children are usually

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<sup>161</sup> United Nations Development Programme, "Special Report on Human Security" (New York, 2022), 6.

<sup>162</sup> Jocelyn Dejong, "Capabilities, Reproductive Health and Well-Being," *Journal of Development Studies* 42, no. 7 (October 2006): 1158-79, 1163.

<sup>163</sup> Nussbaum [1], *supra* note 40, 84-85.

<sup>164</sup> Martha Nussbaum, *Creating Capabilities: The Human Development Approach*, 1. paperback ed (Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 2013), 20-21.

<sup>165</sup> Nussbaum [1], *supra* note 40, 84-85. Dejong, *supra* note 162, 1159.

<sup>166</sup> *Ibid.*, 245.

<sup>167</sup> Martha Nussbaum, "Human Rights and Human Capabilities," *Harvard Human Rights Journal*, 20 (2007): 23.

<sup>168</sup> *Ibid.*

<sup>169</sup> Nussbaum [1], *supra* note 40, 245.

born into a family, the family has a profound influence on the capabilities from the start.<sup>170</sup> Thus, it has a particularly important moral standing and principles of justice ought to apply most especially in the family if the goal is to promote justice for all citizens.<sup>171</sup> Nussbaum identifies three defects in contemporary political approaches to the family: They treat the family as existing “by nature” and fail to recognize the role of society in constructing family institutions; they treat the family as belonging to the private sphere without recognizing the role of custom and laws in shaping the family institutions; they treat women’s tendency to give love and care as existing “by nature”.<sup>172</sup>

Embedding the capabilities into the legal structure that constitutes and regulates the family would thus require states to adopt a rights-based approach with regards to reproductive decisions and family planning.<sup>173</sup> This would mean a paradigm shift, from a focus on the family as a unit to a focus on the individual as a human being in its own right and as an active agent.<sup>174</sup> With regard to the family structure, Nussbaum argues that this would require states to reconsider what groups are protected and on which basis and not to take traditional groupings as given.<sup>175</sup>

### 2.1.3. Capabilities and Feminist Liberal Theory

Human rights have previously been criticized for not being sufficiently concerned with issues relating to sex-based inequality; understanding human rights in terms of capabilities allows for the greater inclusion of feminist thought, as it emphasizes the special problems women face because of sex in more or less every nation in the world.<sup>176</sup> The capability approach thus emphasizes that equality between men and women necessitates positive state action to improve women’s bargaining position within the family and society more generally.<sup>177</sup>

For liberal feminists such as Nussbaum, individual autonomy is the means to achieve gender equality.<sup>178</sup> Reproductive decisions are central to this autonomy as they implicate the personal identity, the body and the ability of individuals to participate in

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid, 252.

<sup>173</sup> Claudine Sauvain-Dugerdil et al., “‘Shaping the Family’: Individual’s Capabilities to Exercise Reproductive Rights Seen through a Qualitative Survey,” *African Population Studies* 28, no. 2 (September 2, 2014): 872.

<sup>174</sup> Nussbaum [1], *supra* note 40, 246.

<sup>175</sup> Ibid, 277-278.

<sup>176</sup> Ibid, 5.

<sup>177</sup> Ibid, 284.

<sup>178</sup> Ikemoto, *supra* note 145, 256.

the economic and political life.<sup>179</sup> Considering that within the nuclear family ideology, women are being reduced to their childbearing role, their lack of control over reproductive decisions limits their quality of life and ultimately restricts them in the participation in the development process.<sup>180</sup> Situating reproductive decisions in the context of the capability approach thus means that states need to create the conditions for women to be able to choose if and when to reproduce.

The capability approach thus provides the enriched underlying values which will guide the analysis of the ECtHR case law in the second part of this thesis. It enables us to look at human rights from a feminist perspective that is universalist and committed to equality, autonomy and rights, whilst taking into account the beliefs, preferences and the social contexts that shape individual decisions with regards to reproductive decisions and family planning.<sup>181</sup> Moreover, its emphasis on the fact that individuals live different experiences depending on the contexts in which they are embedded - the conversion factors - allows us to use this framework for critically analyzing whether the ECtHR judgments contain or indirectly foster biases that lead to the deprivation of capabilities.

## **2.2. The Reproductive Justice Approach**

In addition to the capability approach, the case law analysis will be completed by the reproductive justice approach. This will allow for a more complete account of the interaction between the theory, the law, and the larger social forces that influence family planning and reproductive decisions in the context of ART.

The demand for reproductive justice was originally developed in the 1990s by feminists of color who felt their concerns were not represented in predominantly white mainstream feminism. They criticized the one-sided focus on the claim for abortion rights and emphasized the right to decide not only against but also in favor of having children.<sup>182</sup>

Reproductive justice aims to achieve the “complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.” It builds on the claim that women’s oppression occurs to a large extent also through the control over their bodies,

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<sup>179</sup> Ibid.

<sup>180</sup> Dejong, *supra* note 162, 1160.

<sup>181</sup> Milene Consenso Tonetto, “Feminist Reformulations of Human Rights,” *Human Affairs* 29, no. 3 (July 26, 2019): 311–27, 325.

<sup>182</sup> Ross & Solinger, *supra* note 41, 54-57.

sexuality, labor and reproduction.<sup>183</sup> As Loretta Ross argues, “[m]otherhood is deeply politicized, both as a means to control women and a means by which women seek to gain control over their lives.”<sup>184</sup> The reproductive justice movement criticizes the fact that parenthood is being treated as a class privilege in contemporary societies, as it remains closely tied to the norm of the white, heteronormative achiever.<sup>185</sup> Building on this criticism, reproductive justice thus demands that the state not unduly interfere with women’s reproductive decision making and insists that the state has a positive obligation to help create the conditions under which women are able to exercise this right.<sup>186</sup> In this sense, it rests on claims for positive and negative human rights.<sup>187</sup> The main goal of reproductive justice is thus to create a safe and dignified environment in which persons who reproduce and become parents have equal access to the necessary resources to become a parent.<sup>188</sup>

At the center of the reproductive justice approach is the achievement of reproductive rights,<sup>189</sup> which were first recognized in the Teheran Conference on Human Rights in 1968<sup>190</sup> and clearly articulated during the World Conference on Population in 1994 in Cairo.<sup>191</sup> These rights imply “the recognition of the basic right for 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“, which refers to “a state of complete physical, mental and social well-being [...] in all matters relating to the reproductive system and to its functions and processes.”<sup>192</sup>

An important dimension of the reproductive justice approach is its emphasis on the concept of intersectionality, which it applies to reproductive politics in order to achieve human rights.<sup>193</sup> Intersectionality is the acknowledgement of the fact that societal

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<sup>183</sup> Ross, *supra* note 17, 14.

<sup>184</sup> Ross & Solinger, *supra* note 41, 168.

<sup>185</sup> Ross & Solinger, *supra* note 41; Rosa-Luxemburg Stiftung Rosa-Luxemburg Stiftung, “Commentary on Reproductive Justice” (30 November 2021), at: <https://global.factiva.com/en/du/article.asp?accessionno=ATLCOM0020200218eg2a00033> (last accessed 13 July 2022).

<sup>186</sup> Ross & Solinger, *supra* note 41, 169.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, 9.

<sup>189</sup> *Ibid.*

<sup>190</sup> United Nations, Final Act of the International Conference on Human Rights, UN Doc. A/Conf. 32/41 (Tehran, 13 May 1968), 3.

<sup>191</sup> UN Report of the International Conference on Population and Development, *supra* note 20, para. 1.12.

<sup>192</sup> *Ibid.*, para. 7.2.

<sup>193</sup> Ross & Solinger, *supra* note 41, 79.

oppressions due to race, class, gender and sexual preferences do not act independently of one another but are interrelated.<sup>194</sup> It emphasizes that hierarchies, axes of differentiation, axes of oppression and social structures intersect with one another, modify each other and are inseparable from one another.<sup>195</sup>

The concept of intersectionality emphasizes that the claim for social justice requires a more comprehensive understanding of oppression and an acknowledgement that women do not share the same experiences across contexts.<sup>196</sup> Using this concept thus allows for a more holistic approach towards gender justice that accounts not for gender alone but also for race, age, class and other identities,<sup>197</sup> and that takes account of the intersections, complexities and dynamic processes of individual experiences.<sup>198</sup>

The reproductive justice approach thus complements the capability approach by emphasizing the need to take into account the interrelatedness between different causes of oppression within societies. It will be used to provide for a more comprehensive analysis of the ECtHR case law by asking whether the approach of the ECtHR takes into account the different experiences of each individual, and particularly women, in accessing reproductive rights.

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<sup>194</sup> Ibid, 74.

<sup>195</sup> Wendy Sigle-Rushton, "Intersectionality," ed. Mary Evans and Carolyn Williams, *Gender: The Key Concepts*. Routledge Key Guides (Abingdon: Routledge, 2013), 1–9, 3.

<sup>196</sup> John Jison, "Revisiting Susan Moller Okin's Justice, Gender, and the Family (1989): Intersectionality, Social Ethos, and Critical Praxis of Gender Justice," *Kritike* 15, no. 2 (2021): 111–25, 122.

<sup>197</sup> Jison, *supra* note 196, 118–122.

<sup>198</sup> Ibid, 123.

## **Part B: The Protection of the Right to Private and Family Life in the Context of Assisted Reproductive Technology: Empirical Case Study**

Having outlined the major social changes with regards to conceptualizations of ‘family’ in European societies since the drafting of the ECHR and examined key concepts of the capability and reproductive justice approaches and their applicability with regards to the ‘family’, the following part of this thesis will study the approach of the ECtHR in the context of families created using ART.

The first section examines the relevant legislation and concepts that regulate the Court’s interpretation in its case law on families formed through ART. The second section will consist of a doctrinal analysis of the selected cases, which aims to frame the current stage of interpretation of the ECHR in the context of ART. Thus, the first question posed is to which extent the right to use ART as a reproductive right is protected under the Convention. The second question relates to the Court’s interpretation of the meaning of ‘family life’ under the Convention.

The third part of this analysis evaluates the Court’s jurisprudence from a socio-legal perspective, using the theoretical framework which draws on the capability and reproductive justice approaches. It analyses how inclusive the Court is throughout its reasonings, and whether we can find underlying values in its interpretation of the Convention and the outcomes of its judgments with regards to who is entitled to make use of ART to form a family and which types of family models are protected under the Convention in the context of ART.

Both parts complement each other and aim to evaluate how the understanding of ‘family’ is being shaped by the ECtHR in these cases and to which extent the Court is reflective of the changes in conceptions of ‘family’ in European societies and allows for a more inclusive recognition of family forms.

### **1. Relevant Legislation and Concepts**

This section aims to clarify the relevant legislation and concepts that will be used throughout the case study. It first maps the function of the Court in the European human rights context and examines its role with regards to the protection of human rights in Europe. It then moves to defining assisted reproduction techniques and to situating these techniques in the European context with a focus on the possibilities and risks that the use of ART entails from a perspective of human rights.



## 1.1. The ECtHR and the ECHR

### 1.1.1. Key Concepts and Functioning

The ECtHR has a key role in upholding human rights within the European realm. As a part of the Council of Europe, its jurisdiction extends over the 46 current member states as of 2022<sup>199</sup> which have all ratified the ECHR.<sup>200</sup>

The Convention gives binding effect to the rights set out in the Universal Declaration of Human Rights (hereinafter “UDHR”), which constitute “the foundation of justice and peace in the world”.<sup>201</sup> Although the ECHR draws on the UDHR, the rights protected are not identical with the UDHR and its focus lies on civil and political rights rather than on the wider catalogue of the UDHR.<sup>202</sup> The ECHR thus articulates an ‘abstract constitutional identity’ which aims to frame the limits in terms of human rights to the exercise of power in European legal democracies which are committed to the rule of law.<sup>203</sup> Its abstract framing allows for a broad scope of interpretation of the Convention at a national level.<sup>204</sup>

The Convention differs significantly from other international instruments as it allows for individual applications to the Court with regards to potential human rights violations under the condition of the exhaustion of domestic remedies.<sup>205</sup> This allows for an effective monitoring mechanism for human rights violations at the European level.

The ECtHR is divided into Sections in which Chambers examine and rule over cases which have been presented to it by states or individual applications.<sup>206</sup> A case may be referred to the Grand Chamber upon the request of one of the parties following a Chamber judgment.<sup>207</sup> The interpretation of the Convention by the ECtHR is guided by principles of interpretation, notably the principle of proportionality, which implies the need to strike a fair balance between the interests at stake.<sup>208</sup> Other key principles of

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<sup>199</sup> CoE, “46 Member States”, at: <https://www.coe.int/en/web/portal/46-members-states> (last accessed 13 July 2022).

<sup>200</sup> Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (New York, NY: Oxford University Press, 2017), 4-5.

<sup>201</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14 (4 November 1950) (hereinafter “ECHR”), Preamble.

<sup>202</sup> Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge Studies in European Law and Policy (Cambridge, UK ; New York: Cambridge University Press, 2006), 56.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Law in Context (Cambridge ; New York: Cambridge University Press, 2006), 22-23.

<sup>206</sup> Rainey, Wicks & Ovey, *supra* note 200, 18-19.

<sup>207</sup> Article 43 ECHR.

<sup>208</sup> Dembour, *supra* note 205, 22.

interpretation are the margin of appreciation doctrine and the closely related principle of subsidiarity,<sup>209</sup> which have been endorsed into the preamble of the ECHR in 2013.<sup>210</sup>

The principle of subsidiarity provides that the primary responsibility in the enforcement of the ECHR lies with the states and that the Court only intervenes if the states fail to comply with their obligations.<sup>211</sup> Thus, the Court will intervene only when the domestic remedies are exhausted.<sup>212</sup> The margin of appreciation refers to the discretion that the member states have with regards to the application and implementation of the Convention depending on the circumstances of the case and the rights at stake.<sup>213</sup> Considering that human rights constitute universal standards and are therefore framed at a general level, the scope of the interpretation of national authorities is generally broad.<sup>214</sup> However, the enjoyment of certain rights will require a narrow margin of appreciation, meaning that the ECtHR will only tolerate minimal interference with this right and require a high degree of justification for such interference.<sup>215</sup> Conversely, a broad margin of appreciation means that states have a broader scope for interference with this right and for ways to justify this interference.<sup>216</sup>

The interpretation of the Convention by the Court is in addition guided by the principle of effectiveness, which is concerned with enforcing the rights in practice and not only on a theoretical level by assessing concretely the position of the individual.<sup>217</sup> Lastly, the principle of evolutive interpretation emphasizes the evolving character of the ECHR and the fact that it must be able to adapt to new realities rather than upholding static standards.<sup>218</sup>

### 1.1.2. The Best Interest of the Child

The ECtHR is in addition bound by the fundamental principle of the “best interest of the child”, which is enshrined in Article 3 (1) of the UN Convention of the Rights of the Child and provides that “[i]n all actions concerning children, whether undertaken by public or

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<sup>209</sup> Preamble of the ECHR; William Schabas, *The European Convention on Human Rights: A Commentary*, First edition, Oxford Commentaries on International Law (Oxford, United Kingdom: Oxford University Press, 2015), 74-83.

<sup>210</sup> Council of Europe: Parliamentary Assembly, *Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms* (24 June 2013).

<sup>211</sup> *Ibid.*, para. 8.

<sup>212</sup> Article 35 (1) ECHR.

<sup>213</sup> Draft Protocol No. 15, *supra* note 228, para. 9; Schabas, *supra* note 209, 81.

<sup>214</sup> Greer, *supra* note 202, 56.

<sup>215</sup> Mulligan, *supra* note 38, 5-6.

<sup>216</sup> *Ibid.*

<sup>217</sup> Dembour, *supra* note 205, 21.

<sup>218</sup> *Ibid.*

private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>219</sup> In its General Comment, the UN Committee on the Rights of the Child specifies that this principle applies to “all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have day-to-day responsibility for realizing children’s rights.”<sup>220</sup>

The “best interest of the child” principle guides the Court’s interpretation and the compliance with this principle is a primary obligation of the Member States. This principle is relevant also with regards to the capability approach as it addresses important claims regarding the agency of the children and places their well-being at the center of any decision-making.

### 1.1.3. The Protection of the Family as a Fundamental Right under the ECHR

#### 1.1.3.1. Articles 8 and 12 ECHR

In the Convention, the ‘family’ is considered in two articles, Articles 8 and 12 ECHR. Article 12 protects the right to marry and the right to found a family.<sup>221</sup> The Court has taken the view that this article must be seen in the context of the 1950s as marriage in the traditional sense, thus not including same-sex relationships.<sup>222</sup> The applicability of Article 12 is moreover limited to married couples, and the Court has generally adopted a narrow definition of the right to become a parent with regards to Article 12, for instance by rejecting the argument that it protects the right to adopt a child.<sup>223</sup> Due to these limitations, the jurisprudence of the Court on Article 12 has been rather limited.<sup>224</sup> Because Article 8 encompasses many of the claims with regards to family life, the rights of individuals who formed or are planning to form a family through ART are claimed rather under Article 8 than Article 12.<sup>225</sup> In this thesis, the focus will therefore lie on Article 8 ECHR.

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<sup>219</sup> UN General Assembly, *Convention on the Rights of the Child*, United Nations (20 November 1989), Article 3 (1).

<sup>220</sup> UN Committee on the Rights of the Child, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, CRC/C/GC/7/Rev.1.

<sup>221</sup> Article 12 ECHR.

<sup>222</sup> *Schalk & Kopf v. Austria*, para. 55.

<sup>223</sup> Mulligan, *supra* note 38, 3-4; E.g. *Di Lazzaro v. Italy*, Application no. 31924/96, Council of Europe: European Court of Human Rights, 10 July 1997.

<sup>224</sup> UK Human Rights Blog, “Article 12”, at: <https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-12/> (last accessed 13 July 2022).

<sup>225</sup> Mulligan, *supra* note 38, 3.

Article 8 has been described as one of the most open-ended articles of the Convention.<sup>226</sup> Article 8 (1) of the Convention states that “everyone has the right to respect for his private and family life, his home and his correspondence”.<sup>227</sup> Based on this wording, the ECtHR distinguishes between the “right to respect for private life” and the “right to respect for family life”. The right to respect for home and correspondence are also covered by Article 8 but rarely invoked before the Court.<sup>228</sup>

As we have seen above, there is no universal definition of ‘family’, and the concept is difficult to define as its meaning differs across countries and contexts. In the Convention, there is no reference being made to ‘family’ *per se*, but to ‘family life’. The essential ingredient of ‘family life’ according to the Court is “the right to live together so that family relationships may develop normally”.<sup>229</sup> The Court does not define ‘family’ as such but rather considers ‘family life’ as an autonomous concept which needs to be assessed with regards to the *de facto* existence of close family ties.<sup>230</sup> This includes relationships between married and, under certain conditions, unmarried couples as well as the relationships with their children by blood. It may under certain conditions also include other ties, as will be shown below in the way the Court defines ‘family life’ in the context of ART.

Both the right to family life and the right to private life are closely linked and their distinction is not always clear. The case law can be divided into those cases that are primarily concerned with ‘private life’ and those that are primarily concerned with ‘family life’.<sup>231</sup> Where the Court does not establish the existence of ‘family life’, it may therefore still apply Article 8 under the head of ‘private life’.<sup>232</sup> In addition, the Court may sometimes bypass this distinction by characterizing an interest as ‘private and family life’

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<sup>226</sup> Rainey, Wicks & Ovey, *supra* note 200, 241

<sup>227</sup> Article 8(1) ECHR.

<sup>228</sup> Linda Hart, “What Law Has Joined: Family Relations and Categories of Kinship in the European Court of Human Rights,” *The Palgrave Handbook of Family Sociology in Europe* (Cham: Springer International Publishing, 2021), 69–84, 72.

<sup>229</sup> *Marckx v. Belgium*, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979 (hereinafter *Marckx v. Belgium*), para. 31.

<sup>230</sup> Council of Europe: European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life* (31 August 2020) at: [https://www.echr.coe.int/Documents/Guide\\_Art\\_8\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf) (last accessed 13 July 2022). See also *Marckx v. Belgium*, para. 31; *Paradiso and Campanelli v. Italy*, Grand Chamber Judgment, Application no. 25358/12, Council of Europe: European Court of Human Rights, 24 January 2017 (hereinafter *Paradiso and Campanelli v. Italy* or *Paradiso*), para. 140.

<sup>231</sup> Rainey, Wicks & Ovey, *supra* note 200, 399.

<sup>232</sup> ECtHR Guide on Article 8, *supra* note 230, para. 300.

– making it appear as a “catch-all category”.<sup>233</sup> The protection of Article 8 taken as a whole potentially gives rise to broader protection than its individual elements.<sup>234</sup>

The right to private life is a broad term and as such incapable of an exhaustive definition.<sup>235</sup> It encompasses multiple aspects of the physical and social identity of individuals, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and the outside world.<sup>236</sup>

Article 8 has the main object of protecting individuals against arbitrary interference by the public authorities.<sup>237</sup> In addition to this negative obligation, it may include positive state obligations which are inherent in the effective respect of the right to respect for private and family life.<sup>238</sup> There is indeed a paradox in the protection of the right to respect for private and family life under the ECtHR which needs to be stressed. In international law, cases usually relate to an individual which is pitted against the state; in family relations, however, the rights of an individual to other individuals are under scrutiny.<sup>239</sup> Feminist legal theorists such as Nedelsky have notably emphasized the need for the law to draw further attention to the relational dimension of human experience and have advocated for a shift in emphasis moving relationships “from the periphery to the center of legal and political thought”.<sup>240</sup>

### 1.1.3.2. Limitations of Article 8 ECHR

According to Article 8 (2), Article 8 (1) is a conditional right which can be curtailed “in accordance with the law” and “if necessary in a democratic society” for the sake of “national security, public safety, the protection of health or morals, or for the protection of the rights and freedoms of others”.<sup>241</sup> These restrictions, or so-called limitation clauses, are at the core of the ECtHR case law and it is based on these clauses that the Court

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<sup>233</sup> Frédéric Sudre, “Rapport introductif ; la “construction” par le juge européen du droit au respect de la vie familiale”, in Frédéric Sudre, *Le Droit Au Respect de La Vie Privée Au Sens de La Convention Européenne Des Droits de l'homme: Actes Du Colloque Des 26 et 27 Novembre 2004*, Droit et Justice 62 (Bruxelles: Nemesis : Bruylant, 2005), 27.

<sup>234</sup> Rainey, Wicks & Ovey, *supra* note 200, 399.

<sup>235</sup> ECtHR Guide on Article 8, *supra* note 230, para. 73.

<sup>236</sup> *Pretty v. United Kingdom*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, para. 61.

<sup>237</sup> *Evans v. United Kingdom*, Grand Chamber Judgment, Application no. 6339/05, Council of Europe: European Court of Human Rights, 10 April 2007 (hereinafter *Evans v. UK* or *Evans*), para. 71.

<sup>238</sup> ECtHR Guide on Article 8, *supra* note 230, para. 8.

<sup>239</sup> Hart [1], *supra* note 36, 818.

<sup>240</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011), 2-3.

<sup>241</sup> ECtHR Guide on Article 8, *supra* note 230, para. 71.

decides whether there has been a breach of the article invoked. Within its rulings, the Court thus conducts a proportionality test to assess whether the restriction of the right invoked was proportionate. This test provides a mechanism by which Courts balances state actions against claims of individual rights.<sup>242</sup>

A restriction is “in accordance with the law” if it has a legal basis in the domestic law and if this law is accessible to the person concerned and foreseeable with regards to its effects.<sup>243</sup> In the following case studies, the relevant legitimate aims are the “protection of health or morals” and of “the rights and freedom of others”. What counts as moral remains undefined by the Court and is left to the states to determine.<sup>244</sup> Lastly, a key criterion for assessing the proportionality of a restriction is that it has to be “necessary in a democratic society”. For this purpose, the Court has clarified that there needs to be a pressing social need behind the interference.<sup>245</sup> These conditions are the basis on which the Court determines the scope of the margin of appreciation afforded to the states, which will be discussed in further detail below. In the context of ART, a wide margin of appreciation will often apply where there are no common European standards or where sensitive moral or ethical issues are involved.<sup>246</sup> The margin of appreciation may however vary over time, notably when the Court finds an emerging trend in CoE countries to establish common standards on the issue at stake.<sup>247</sup>

#### 1.1.4. Other Rights Intersecting with the Right to Respect for Private and Family Life

##### 1.1.4.1. Article 2 ECHR

A fundamental right which intersects with the right to respect for private and family life under Article 8 is Article 2 ECHR. Article 2 provides that everyone’s right to life should be protected by the law.<sup>248</sup> In the context of ART, an important question which has been raised is whether the embryo is entitled to the right to life and should therefore enjoy a human rights protection under the Convention.

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<sup>242</sup> Ryan, *supra* note 38, 471.

<sup>243</sup> ECtHR Guide on Article 8, *supra* note 230, para. 16.

<sup>244</sup> Ryan, *supra* note 38, 470.

<sup>245</sup> ECtHR Guide on Article 8, *supra* note 230, para. 29; *Paradiso and Campanelli v. Italy*, para. 181.

<sup>246</sup> Rory O’Connell and Sjef Gevers, “Fixed Points in a Changing Age? The Council of Europe, Human Rights, and the Regulation of New Health Technologies,” in *European Law and New Health Technologies*, ed. Mark L Flear et al. (Oxford University Press, 2013), 46–69, 54.

<sup>247</sup> *Ibid.*

<sup>248</sup> Article 2 ECHR.

#### 1.1.4.2. Article 14 ECHR

Article 14 ECHR protects the freedom from discrimination with regards to the enjoyment of human rights on the basis of “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”<sup>249</sup> Article 14 is complementary to other rights enshrined in the Convention; thus, a claim on the basis of Article 14 ECHR needs to be made in conjunction with another right of the Convention.<sup>250</sup>

Within Article 14, a necessary distinction to be made is the one between formal and substantive equality. Formal equality refers to the same treatment of persons which are alike.<sup>251</sup> Substantive equality, on the other hand, means that persons whose situations are significantly different also need to be treated differently; in other words, substantive equality requires states to ensure that those who do not share the same opportunities as others are being given these opportunities.<sup>252</sup> Fredman argues that substantive equality is necessary in order to redress disadvantage, address stigma and stereotyping, facilitate participation and accommodate difference.<sup>253</sup> Agency, or the importance of choice, plays an important role therein and should be included in these dimensions of substantive equality.<sup>254</sup>

#### 1.1.5. The Oviedo Convention

The ECHR does not refer to the use of ART in order to benefit from technology. The right to share in scientific advancement and its benefits and to the protection of the moral and material interests resulting from any scientific production, which are both enshrined in the UDHR,<sup>255</sup> also do not constitute a part of the ECHR framework.

The Convention on Human Rights and Biomedicine (hereinafter “Oviedo Convention”) is the first and only Convention to address human rights issues in the biomedical field and the only legally binding instrument on the protection of human rights in this field.<sup>256</sup> The Convention was drafted with the aim to set “common general

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<sup>249</sup> Article 14 ECHR.

<sup>250</sup> ECtHR Guide on Article 8, *supra* note 230, para. 3.

<sup>251</sup> Sandra Fredman, “Gender Equality and the European Convention on Human Rights,” *International Human Rights of Women (Singapore: Springer Singapore, 2019): 121–37*, 126.

<sup>252</sup> *Ibid.*, 128-129.

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*, 130.

<sup>255</sup> Article 27 UDHR.

<sup>256</sup> Roberto Andorno, “The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law,” *Journal of International Biotechnology Law* 2, no. 4 (January 26, 2005), 133.

standards for the protection of the human person in the context of the development of the biomedical sciences”.<sup>257</sup> Thus, it aims to provide a framework of principles to prevent practices that would infringe on human rights and human dignity.<sup>258</sup> The Convention entered into force in 1999<sup>259</sup> and has been ratified by 29 CoE Member States as of 2022.<sup>260</sup>

With regards to ART, articles of relevance include Article 2, which protects the primacy of human beings over any economic efficiency or scientific progress;<sup>261</sup> Articles 5 and 6, which refer to the need of informed consent prior to any biomedical intervention;<sup>262</sup> Article 10, which deals with the right to know and not to know one’s health information;<sup>263</sup> Articles 12 to 14 which contain the prohibition of genetic discrimination, the prohibition to intervene in the human genome unless for preventive, diagnostic or therapeutic purposes and the prohibition of using ART for the purpose of choosing the child’s sex;<sup>264</sup> Article 18, which protects the status of the embryo in the context of embryo research;<sup>265</sup> and Article 21, which prohibits financial gain in the use of the human body.<sup>266</sup> These limitations and prohibitions in the Oviedo Convention thus frame the concepts of human dignity and autonomy in the bioethical context.<sup>267</sup> This framing is essential considering that no reference is made to human dignity in the ECHR.<sup>268</sup>

The Oviedo Convention in itself does not provide for an enforcement or monitoring mechanism other than the possibility for the Secretary General of the CoE to request a report on how it implements the Convention.<sup>269</sup> It allows, however, for the possibility for states and the Committee on Bioethics, a subordinate body of the Steering

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<sup>257</sup> 17th Conference of European Ministers of Justice, Resolution No. 3 on bioethics (Istanbul, 5-7 June 1990).

<sup>258</sup> Andorno, *supra* note 256, 134.

<sup>259</sup> CoE, “The Oviedo Convention and its Protocols” (2022), at: <https://www.coe.int/en/web/bioethics/oviedo-convention> (last accessed 13 July 2022).

<sup>260</sup> CoE, “Chart of signatures and ratifications of Treaty 164” (2022), at: <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=164> (last accessed 13 July 2022).

<sup>261</sup> Article 2 Oviedo Convention.

<sup>262</sup> Articles 5 and 5 Oviedo Convention.

<sup>263</sup> Article 10 Oviedo Convention.

<sup>264</sup> Articles 12, 13 and 14 Oviedo Convention.

<sup>265</sup> Article 18 Oviedo Convention.

<sup>266</sup> Article 21 Oviedo Convention.

<sup>267</sup> O’Connell and Gevers, *supra* note 246, 65.

<sup>268</sup> See Preamble, Articles 1, 22, and 23 UDHR.

<sup>269</sup> Article 30 Oviedo Convention.



Committee for Human Rights,<sup>270</sup> to ask the Court to issue an advisory opinion on the legal questions concerning the implementation of the Oviedo Convention.<sup>271</sup>

The legal status of the Oviedo Convention differs from the ECHR in the sense that this Convention in itself does not give individuals a right to bring proceedings before the ECtHR.<sup>272</sup> However, where rights of the ECHR may have been violated and the case also relates to rights protected under the Oviedo Convention, it may be taken into account by the ECtHR in its judgments.<sup>273</sup> In the cases studied, the Oviedo Convention has been referenced by the Court in *Evans v. France, S.H. and Others v. Austria, Costa and Pavan v. Italy* and *Paradiso and Campanelli v. Italy*,<sup>274</sup> either to introduce the legislative frames or to refer to reports of the Committee on Bioethics. The Oviedo Convention may thus be used by the ECtHR to complement its judgments and to frame the limits of biomedicine in the bioethical context in cases of a possible breach of a right protected under the ECHR.

Having outlined the key concepts and functioning of the ECtHR and the ECHR and other relevant legislative instruments in the biomedical field, the following part will define the different ART techniques and their legality throughout Europe and outline the core human rights concerns with regards to ART.

## 1.2. Assisted Reproductive Technology

Involuntary childlessness, or infertility, is a condition which affects a considerable number of individuals across the world. In Europe alone, 25 million citizens face infertility.<sup>275</sup> Worldwide, one in six couples is affected by infertility.<sup>276</sup> Ever since the creation of the first baby through the first successful *in vitro* fertilization in 1978, ART has thus increasingly been used of to avoid involuntary childlessness and has become a standard medical practice within Europe today.<sup>277</sup>

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<sup>270</sup> CoE: Committee on Bioethics (DH-BIO), *Information document concerning the DH-BIO* (13 December 2017), at: <https://rm.coe.int/inf-2017-5-e-info-doc-dh-bio/168077c578> (last accessed 13 July 2022).

<sup>271</sup> Article 29 Oviedo Convention.

<sup>272</sup> CoE, *Explanatory Report to the Oviedo Convention* (4 June 1997), at: <https://rm.coe.int/16800ccde5> (last accessed 13 July 2022), para. 165.

<sup>273</sup> *Ibid.*, para. 164-165.

<sup>274</sup> CoE: ECtHR, *Research Report: Bioethics and the case-law of the Court* (2016), at: [https://echr.coe.int/Documents/Research\\_report\\_bioethics\\_ENG.pdf](https://echr.coe.int/Documents/Research_report_bioethics_ENG.pdf) (last accessed 13 July 2022).

<sup>275</sup> Fertility Europe, "Atlas of fertility treatment policies in Europe" (10 December 2021), <https://fertilityeurope.eu/european-atlas-of-fertility-treatment-policies/> (last accessed 13 July 2022).

<sup>276</sup> *Ibid.*

<sup>277</sup> Patrick Präg and Melinda Mills, "Assisted reproductive technology in Europe: usage and regulation in the context of cross-border reproductive care", in Michaela Kreyenfeld, *Childlessness in Europe: Contexts, Causes, and Consequences* (New York, NY: Springer Berlin Heidelberg, 2018), 289; Benkov, *supra* note 116, 415-423.

### 1.2.1. Techniques of Assisted Reproductive Technology

The most commonly used techniques within ART are artificial insemination (“AI”), *in vitro* fertilization (“IVF”) using either the eggs and/or sperm of the intended parent or parents or donated eggs or sperm, and surrogacy.<sup>278</sup>

AI refers to the placing of semen into a woman’s vagina, cervix or uterus by means other than sexual intercourse, with the fertilization occurring inside the woman’s reproductive tract.<sup>279</sup> IVF refers to a technique whereby a ripe egg is being taken from the woman’s ovary and fertilized with sperm in a dish, or *in vitro*, and then replaced into the woman’s womb. Within IVF, it has today become possible to use eggs and/or sperm donated by third-parties which are fertilized *in vitro* and then transferred to the woman who gives birth to the child.<sup>280</sup> As a result, there may not necessarily be a genetic link between the woman who gives birth and the child conceived *in vitro*.

Surrogacy describes a practice whereby a woman gestates a pregnancy on behalf of another person or couple (the intended parents), based on an agreement that she will hand this child over after its birth.<sup>281</sup> Traditional surrogacy refers to cases where the surrogate mother uses her own eggs (either through natural sexual intercourse or through insemination), whereas gestational surrogacy refers to cases where the intended parent or parents use their own gametes or those of a donor for IVF and the embryo created is then transferred to the surrogate mother.<sup>282</sup> In cases of gestational surrogacy, the surrogate mother is therefore not genetically related to the child. In these cases, the legal parentage is obtained by the intended parents following the birth of the child (or sometimes before) via a paternity judgment, parental order or similar document stipulating their legal parentage, usually from the local court at the place of birth.<sup>283</sup>

### 1.2.2. Issues at Stake

#### 1.2.2.1. Parenthood

As mentioned above, ART touches upon many topics and fields of research and raises a considerable number of new questions. From a legal point of view, a key question relates

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<sup>278</sup> Inhorn, *supra* note 24, 178-182; Harris-Short & Miles, *supra* note 30, 245-246.

<sup>279</sup> *Ibid.*

<sup>280</sup> Harris-Short & Miles, *supra* note 30, 246.

<sup>281</sup> Mulligan, *supra* note 38, 2; Harris-Short & Miles, *supra* note 30, 246.

<sup>282</sup> Vasanti Jadvā, “Surrogacy: issues, concerns and complexities”, in Susan Golombok, ed., *Regulating Reproductive Donation* (Cambridge, United Kingdom; New York: Cambridge University Press, 2016): 126-139, 126.

<sup>283</sup> Chris Thomale, “State of Play of Cross-Border Surrogacy Arrangements – Is There a Case for Regulatory Intervention by the EU?,” *Journal of Private International Law* 13, no. 2 (May 4, 2017): 463-73, 466.

to the determination of legal parentage. Indeed, parenthood may not only be established on the basis of a genetic link, but also on the basis of a gestational link between the surrogate or intended mother and the child she gives birth to, and a social link between the child and the individual who raises it without there being necessarily any genetic connection.<sup>284</sup>

Families which have been created through ART disrupt the culturally established idea of the nuclear family as they uncouple biological and social aspects of family formation and distinguish between procreative aspects of parenting and social aspects of parenting.<sup>285</sup> Moreover, they challenge the social expectation and norm that individuals – both men and women – should be capable of reproducing naturally.<sup>286</sup> Lastly, they deviate from the traditional idea that the married couple should be the proper social unit for procreation and childrearing.<sup>287</sup>

Generally, when ART is being used by different-sex couples which choose to procreate with ART using their own genetic material, the determination of parenthood is not subject to debate.<sup>288</sup> Questions arise however when the intended parent or parents wish to procreate using donated gametes and/or surrogate mothers, thus challenging the traditional family form and its intrinsic prerequisite for all family members to have a genetic tie.<sup>289</sup>

#### *1.2.2.2. Medical, Ethical and Economic Concerns*

The use of ART moreover presents new challenges of an ethical, medical, and economic nature. These challenges include the risk of failure of the ART procedure which may have grave impacts on the health of the embryo and/or the gestational mother and the fear of selective gene selection (eugenics) which may lead to the manipulation of genetic material.<sup>290</sup> Surrogacy raises particularly sensitive questions as it involves a third-party within the reproduction process. It touches upon fundamental human rights questions, including what constitutes personhood and human dignity and what should be the

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<sup>284</sup> Harris-Short & Miles, *supra* note 30, 597-602.

<sup>285</sup> Parke, *supra* note 23, 115-116.

<sup>286</sup> *Ibid.*

<sup>287</sup> *Ibid.*

<sup>288</sup> Hart [2], *supra* note 228, 79.

<sup>289</sup> *Ibid.*, 79.

<sup>290</sup> Laura Londra, Edward Wallach, and Yulian Zhao, "Assisted Reproduction: Ethical and Legal Issues," *Seminars in Fetal and Neonatal Medicine* 19, no. 5 (October 2014): 264-71; Stephen Wilkinson, *Choosing Tomorrow's Children: The Ethics of Selective Reproduction*, 1. publ. in paperback, Issues in Biomedical Ethics (Oxford: Clarendon Press, 2012).

perimeters of choice and individual autonomy.<sup>291</sup> The practice of commercial surrogacy is especially controversial, as it touches upon human rights norms relating to the commercialization of the human body, the sale of children, the rights of women to employment, the rights of children to grow up in a family environment and the preservation of the “best interest of the child” more generally.<sup>292</sup> In Europe, governments have expressed concern that it creates a risk of the surrogate mother and the child being exposed to exploitation and abuse.<sup>293</sup> They fear that the legalization of commercial surrogacy would pressure women into using their body to bear a child with whom they will be obliged to sever all ties, thus not being able to exercise their natural status as mother.<sup>294</sup> Moreover, they are concerned that the commercialization of surrogacy would impede the children’s rights to know about their origins, as children born through surrogacy would have difficulties in accessing information about their biological parentage.<sup>295</sup>

From an ethical point of view, a key question to be raised is therefore the compatibility of the use of ART with the fundamental value of human dignity. Dignity and human rights have a contested relationship, and it may be argued that dignity may be best conceived of as an ethical value which might serve as a legitimate reason to restrict the development of new health technologies or to limit the exercise of a right.<sup>296</sup>

As stated above, the concept of human dignity is not mentioned in the ECHR. The only instrument of the CoE that addresses the issue of human dignity in the biomedical context is the Oviedo Convention; however, considering that it has only been ratified by 29 of the 46 member states, it cannot be said to reflect a European consensus on the meaning of dignity in the biomedical context.<sup>297</sup> As we will see below, the concept of human dignity is increasingly being woven into the ECtHR judgments and separate opinions, which indicates its emergence as a value in the ECtHR case law.<sup>298</sup>

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<sup>291</sup> Yasmine Ergas, “Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy,” *Emory International Law Review* 2013 (November 18, 2012), 57.

<sup>292</sup> *Ibid.*

<sup>293</sup> See e.g. *Valdís Fjölvisdóttir and Others v. Iceland*, Chamber Judgment, Application no. 71552/17, Council of Europe: European Court of Human Rights, 18 May 2021 (hereinafter *Valdís Fjölvisdóttir and Others v. Iceland* or *Valdís Fjölvisdóttir and Others*), para. 51.

<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> O’Connell and Gevers, *supra* note 246, 64.

<sup>297</sup> *Ibid.*, 65.

<sup>298</sup> *Ibid.*, 66.

### 1.2.3. Legality and Practice throughout Europe

Today, ART is controlled by legislation in almost every European country.<sup>299</sup> However, substantial differences exist between the countries as to what types of ART are permitted. A survey conducted in 2020 by the European Society of Human Reproduction and Embryology (“ESHRE”) has shown that out of the 43 countries surveyed, 11 countries including France, Italy, Poland, Switzerland and Turkey allow access to ART only to heterosexual couples with a diagnosis of infertility.<sup>300</sup> Treatment of single women and female couples is prohibited in many European states.<sup>301</sup> Whereas donor sperm and IVF for AI is allowed in nearly every European country, egg donation is banned in Germany, Norway, Switzerland and Turkey.<sup>302</sup>

As stated above, surrogacy is prohibited in many European countries including Italy, Spain, Germany and France.<sup>303</sup> In the 15 European countries in which it is not prohibited, it is either allowed or tolerated in the absence of any specific legislation.<sup>304</sup> Moreover, in countries in which surrogacy is legally regulated, the legislation differs on whether only traditional surrogacy is allowed, whether the mother can be compensated, whether only heterosexual couples or also single individuals and homosexual couples can access treatment, and whether it is reserved only to nationals or also accessible to foreigners.<sup>305</sup>

The authors of the ESHRE survey suggest that these differences in regulation of ART are due to social, cultural or religious factors, especially with regards to third-party donations of egg or sperm and surrogacy.<sup>306</sup> The belief regarding the moral status of a fertilized egg hereby plays an important role, as scholars have found that ART is more commonly being used in countries where the belief that the eggs acquire the moral status of human beings directly after fertilization is less widespread.<sup>307</sup> With regards to the practice of surrogacy, these differences in legislation can be traced back to ethical and

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<sup>299</sup> ESHRE, “Europe moves towards complete statutory regulation of assisted reproduction” (6 February 2020), at: <https://www.eshre.eu/Press-Room/Press-releases-2020/ART-in-Europe> (last accessed 13 July 2022).

<sup>300</sup> *Ibid.*

<sup>301</sup> Hart [2], *supra* note 228, 79.

<sup>302</sup> ESHRE Press Release, *supra* note 299.

<sup>303</sup> Alice Cuddy, “Where in Europe is surrogacy legal?”, Euronews (13 September 2018), at: <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> (last accessed 13 July 2022).

<sup>304</sup> Calhaz-Jorge et al., *supra* note 25.

<sup>305</sup> Cuddy, *supra* note 303; Jasmin Passet-Wittig and Martin Bujard, “Medically Assisted Reproduction in Developed Countries: Overview and Societal Challenges,” in *Research Handbook on the Sociology of the Family*, by Norbert Schneider and Michaela Kreyenfeld (Edward Elgar Publishing, 2021), 417–38, 422; Hart [2], *supra* note 228, 79.

<sup>306</sup> ESHRE Press Release, *supra* note 299.

<sup>307</sup> Präg & Mills, *supra* note 277, 293.

political choices at the state level relating to the understanding of human dignity in the biomedical context. States which ban this practice take the view that gestational surrogacy is incompatible with the human dignity of the surrogate mother and the child conceived, as they are not treated as ends in themselves but as means to satisfy the intended parents' desire to have a genetically related child.<sup>308</sup> In Western and Northern Europe, we can observe a clear trend to prohibit remunerated commercial surrogacy.<sup>309</sup> As a result, many treatments and services related to surrogacy are being carried out abroad in countries such as the United States or Russia in which commercial surrogacy is legal and many states which do not legalize this practice are confronted with the question on how to recognize the parent-child relationship created legally abroad before their national legislations.<sup>310</sup>

## 2. Case Law: Doctrinal Analysis

Having outlined the relevant concepts and legislations and situated the practice of ART in the European context, in the following part, we focus on a doctrinal analysis of the selected cases which have been brought before the Court in the period between 2007 and 2021. Within this analysis, a key point to be kept in mind is that the ECHR was drafted at a time when creating a family using ART was not a possibility that was conceived of and that the ECHR itself therefore does not provide any guidance as to the interpretation of the Convention in this context. This doctrinal analysis first evaluates the cases where the Court had to establish whether the right to conceive with ART, and thus to become a parent in the genetic sense was protected within the human rights framework and to which extent. It then analyzes the cases where the Court had to rule over families which have already been formed via cross-border surrogacy. Six cases will be discussed, which each highlight different aspects of the Court's treatment of the concept of 'family' in the context of ART: *Evans v. United Kingdom* (2007), *S.H. and Others v. Austria* (2011), *Costa and Pavan v. Italy* (2012),<sup>311</sup> *Mennesson v. France* (2014),<sup>312</sup> *Paradiso and Campanelli v. Italy* (2015), and *Valdís Fjölnisdóttir and Others v. Iceland* (2021). These cases have been

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<sup>308</sup> Thomale, *supra* note 283, 66. See also *Paradiso and Campanelli v. Italy*, Joint Concurring Opinion, para. 7.

<sup>309</sup> Hart [2], *supra* note 228, 80.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Costa and Pavan v. Italy*, Chamber Judgment, Application no. 54270/10, Council of Europe: European Court of Human Rights, 28 August 2012 (hereinafter *Costa and Pavan v. Italy* or *Costa and Pavan*).

<sup>312</sup> *Mennesson and others v. France*, Chamber Judgment, Application no. 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014 (hereinafter *Mennesson and others v. France* or *Mennesson*).

selected as they have each contributed to the Court's jurisprudence in the field of ART by setting new precedents regarding the Court's understanding of the framing of reproductive rights and of the concept of 'family' under Article 8 ECHR. For clarification purposes, the table in the annex provides an overview of these cases and their main focus.

## **2.1. The Recognition of Reproductive Rights**

A key question before the Court has been whether the applicability of Article 8 gives rise to reproductive rights as defined above. The cases which will be presented have been highly relevant for the determination of reproductive rights in the context of ART, as they lay down new rules regarding the scope of 'family life' and enrich the concept of private life in a bioethical context. The cases presented relate to the question of access to reproductive treatment and not to the regulation of surrogacy, which will be elaborated further below.

### **2.1.1. *Evans v. UK* (2007): The Right to Become and Not to Become a Parent in the Genetic Sense**

The Court generally locates rights relating to parenthood within the protection of Article 8 and has found that in most instances, the right to become a parent protects both private and family life.<sup>313</sup>

In the case of *Evans v. UK* (2007), the Court had to rule whether Article 8 included the right to become a parent in the genetic sense. The applicant had her eggs extracted for the purpose of *in vitro* fertilization as her ovaries were affected by a tumor.<sup>314</sup> Following the extraction of her eggs, she underwent surgery to remove her ovaries; the eggs that had been extracted for the IVF treatment were thus her last chance to have a genetically related child.<sup>315</sup> Six embryos were created using the sperm of her partner through *in vitro* fertilization and frozen for storage.<sup>316</sup> Following the end of their relationship, her partner withdrew his consent to use these embryos.<sup>317</sup>

After the High Court of Justice in the UK dismissed her case, the applicant sought appeal to the ECtHR, complaining that the consent provision she had signed with her

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<sup>313</sup> Mulligan, *supra* note 38, 4.

<sup>314</sup> *Evans v. UK*, paras. 13-23.

<sup>315</sup> *Ibid*, para. 8.

<sup>316</sup> *Ibid*, paras. 13-23.

<sup>317</sup> *Ibid*.

former partner prevented her from using the embryos and thus from ever having a child to whom she is genetically related.<sup>318</sup> She invoked Articles 2 and 8 ECHR, arguing that the right to life of the embryo had been violated,<sup>319</sup> as well as her right to found a family with genetically related children, which violated her right to respect for both private and family life under Article 8.<sup>320</sup> In addition, she invoked her right to non-discrimination under Article 14 in conjunction with Article 8, reasoning that a woman who was able to conceive without assistance would not be subject to control over how the embryos developed from the moment of fertilization.<sup>321</sup>

The case was first ruled by the Chamber and later referred to the Grand Chamber upon request by the applicant.<sup>322</sup> In its judgment, the Grand Chamber of the Court found that the embryo was not entitled to the right to life.<sup>323</sup> With regards to Article 8, it recognized that the right to decide whether to become a genetic parent and to realize this right by accessing fertility treatment fell within the scope of the right to respect for private life, this right being broadly interpreted to incorporate aspects of personal liberty and freedom.<sup>324</sup> This marks a significant change, considering that reproductive rights which have only been included in the human rights framework in 1994 and are not mentioned in the ECHR.

As a result, the restrictions on accessing ART imposed by the Italian government engaged Article 8 and the right to respect for the decision to become a parent. The Court did not specify whether it referred to private or family life, but its reasoning indicates that it considered the issue to be a matter of private life.<sup>325</sup> According to the Court, in the present case, the applicability of Article 8 gave rise to positive obligations involving the adoption of measures to secure the respect for private and family life, even if it concerned the sphere of the relationship between the individuals themselves.<sup>326</sup>

The Court in addition recognized that to the applicant's former partner's right not to have a child also fell under the respect for private life,<sup>327</sup> and found that the rights of

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<sup>318</sup> Ibid, para. 72.

<sup>319</sup> Ibid, para. 53.

<sup>320</sup> Ibid, para. 57.

<sup>321</sup> Ibid, para. 93.

<sup>322</sup> Ibid, para. 7.

<sup>323</sup> Ibid, paras. 53-56.

<sup>324</sup> Ibid, para. 71.

<sup>325</sup> Ibid, para. 75.

<sup>326</sup> Ibid.

<sup>327</sup> Ibid, para. 71.



the two private individuals were entirely irreconcilable with the each other.<sup>328</sup> Ultimately, the Court ruled that the applicants' right to found a family therefore did not outweigh the right of her former partner not to become a genetic parent, especially considering the lack of consensus in Europe on this matter.<sup>329</sup>

### 2.1.2. *S.H. and Others v. Austria* (2011): The Right to Access Medically Assisted Reproduction

In recent years, the Court has taken a more expansive approach with regards to the right to become a parent in cases related to ART. In the case of *S.H. and Others v. Austria* (2011), the Court had to examine whether different limits set for the use of donated eggs and donated sperm in ART in Austria were compatible with the ECHR. The applicants, two married couples, suffered from infertility and could only conceive children using IVF with donated sperm in one case and donated ova in the other.<sup>330</sup> According to the Austrian Artificial Procreation Act ("APA"), artificial insemination *in vivo* with the use of donor sperm was allowed, but sperm and ova donation for IVF was prohibited.<sup>331</sup> The use of IVF was however permitted using the ova and sperm of the spouses themselves.<sup>332</sup>

After an unsuccessful case before the Austrian Constitutional Court, the two couples brought the case before the ECtHR claiming that their right to respect for private and family life under Article 8 had been violated and that the difference in treatment compared to couples who wanted to use ART but did not need to use ova or sperm donation amounted to a discrimination and thus a violation of Article 14 ECHR in combination with Article 8.<sup>333</sup> The case was first brought before the Chamber of the ECHR and later reinvestigated by the Grand Chamber on request of the Austrian government.<sup>334</sup> The Chamber found a violation of Article 14 in combination with 8, reasoning that the right of a couple to conceive a child and to make use of medically assisted reproduction was a choice which was to be considered as an expression of private and family life.<sup>335</sup> The fact that both techniques – sperm and ova donation for *in vivo* fertilization and IVF

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<sup>328</sup> Ibid, para. 73.

<sup>329</sup> Ibid, para. 90.

<sup>330</sup> *S.H. and others v. Austria*, para. 14.

<sup>331</sup> Fortpflanzungsmedizingesetz [Artificial Procreation Act], Bundesgesetzblatt No. 275/1992, para. 3(1) - 3(3) (Austria).

<sup>332</sup> *S.H. and others v. Austria*, para. 19.

<sup>333</sup> *S.H. and others v. Austria*, para. 119. See also *S.H. and Others v. Austria*, Chamber Judgment, Application No. 57813/00, Council of Europe: European Court of Human Rights, 1 April 2010, paras. 40, 95.

<sup>334</sup> *S.H. and others v. Austria*, paras. 4-5.

<sup>335</sup> Ibid, para. 60.

without donated gametes – were allowed under the APA led to a difference in treatment of the couple which was discriminatory.<sup>336</sup>

This judgment was reversed by the Grand Chamber, which found no violation of Article 8 and established that “when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework of which it forms a part must be taken into consideration and the prohibition must be seen in this wider context.”<sup>337</sup> This reasoning of the Grand Chamber will be analyzed in further detail below in the context of the margin of appreciation doctrine and the principle of *mutatis mutandis*. Despite its differing outcome, the Grand Chamber judgment upheld the Chamber’s finding that the right to conceive a child and to make use of medically assisted reproduction for this purpose was protected by the right to respect for private and family life.<sup>338</sup>

This decision significantly extends the applicability of Article 8 as the Grand Chamber not only confirmed the position it held in *Evans* but went even further in confirming that this includes the right to conceive a child and to make use of ART for this purpose. Thus, the right to respect for private and family life now also encompasses the right to access ART.<sup>339</sup>

### 2.1.3. *Costa and Pavan v. Italy* (2012): The Right to Use ART to Found a Healthy Family

In the case of *Costa and Pavan v. Italy* (2012), the Court had to deal with the question whether Article 8 encompassed the right to access ART treatment and preimplantation diagnosis (“PGD”) in order to found a healthy family. The applicants were a couple from Italy which were healthy carriers of cystic fibrosis, a genetic disease.<sup>340</sup> Their first daughter had been born with the disease, and the couple wished to use ART and PGD to conceive a healthy child.<sup>341</sup> However, PGD is prohibited in Italy, and ART is allowed only for infertile couples.<sup>342</sup>

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<sup>336</sup> Ibid, paras. 92-94.

<sup>337</sup> Ibid, para. 112.

<sup>338</sup> Ibid, para. 82.

<sup>339</sup> Jens M. Scherpe, “Medically Assisted Procreation: This Margin Needs to Be Appreciated,” *The Cambridge Law Journal* 71, no. 2 (July 2012): 276–79, 277.

<sup>340</sup> *Costa and Pavan v. Italy*, para. 8.

<sup>341</sup> Ibid, para. 10.

<sup>342</sup> Ibid.

The Court restated its findings from *Evans, S.H. and Others* and other relevant cases regarding the scope of “private life”,<sup>343</sup> and found that in the present case, the applicants’ desire to conceive a child unaffected by this genetic disease and to use ART and PGD to this end engaged Article 8.<sup>344</sup> Ultimately, it ruled that the measures of the Italian state had not been proportionate and that by denying the couple access to ART, there had been a breach of Article 8.<sup>345</sup>

Overall, these cases show that the Court does not only protect ‘family life’ but also the right to family planning and thus to become a genetic parent. However, Article 8 as such does not guarantee the right to found a family or the right to adopt.<sup>346</sup> As the Court has stated, the right to respect for family life does not safeguard the mere desire to found a family and it presupposes the existence of a family or at the least the potential relationship between the individuals which conceived through ART and the children.<sup>347</sup> Although Article 8 gives rise to positive state obligations, these are limited to situations where a state must take action to secure respect for the rights at stake or to protect an individual from interference by other individuals.<sup>348</sup> Consequently, the duty to respect for private and family life under Article 8 does not give rise to a right to access to infertility treatment through ART.

## **2.2. The Meaning of ‘Family’**

Moving forward, the following part deals with cases in which the children have already been conceived through the practice of surrogacy carried out abroad and where the Court had to determine under which conditions it establishes the existence of ‘family life’ according to Article 8 ECHR. These cases pose new questions to the Court as they present new family constellations in which the definition and delimitation of the concept of ‘family’ needs to be newly assessed.

### **2.2.1 *Mennesson v. France* (2014): The Recognition of *De Facto* Family Ties**

In its ruling on *X, Y and Z v. the United Kingdom* (1997), the Court determined that in order to decide whether a relationship amounts to ‘family life’, it will consider a number of

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<sup>343</sup> Ibid, para. 55

<sup>344</sup> Ibid, para. 57.

<sup>345</sup> Ibid, para. 71.

<sup>346</sup> See e.g. *Valdís Fjölnisdóttir and Others v. Iceland*, para. 50; ECtHR Guide on Article 8, *supra* note 230, para. 299.

<sup>347</sup> ECtHR Guide on Article 8, *supra* note 230, para. 299; *Marckx v. Belgium*, para. 31,

<sup>348</sup> Rainey, Wicks & Ovey, *supra* note 200, 374.

factors, “including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.”<sup>349</sup>

A key case in which the Court established its conception of ‘family’ in cases related to ART and surrogacy more specifically is the case of *Menesson v. France* (2014). It concerns a French couple who conceived twins through surrogacy carried out in the United States (“US”) as the wife was infertile.<sup>350</sup> The twins were conceived using the eggs of a third-party donor and the sperm cells of the intended father.<sup>351</sup> They were born on US soil in 2000 and consequently obtained the US citizenship.<sup>352</sup> The birth certificates which were issued recognized the intended father as “genetic father” and the intended mother as “legal mother”.<sup>353</sup> No reference was made to the third-party donor. When the couple arrived in France and the public prosecutor asked to annul the registration of the birth certificates, the couple brought their case to the French Supreme Court, the Cour de Cassation, who saw no breach of the couple’s right to family life.<sup>354</sup>

The couple then appealed to the ECtHR on the grounds of a violation of Article 8 with regards to the private and family life of the couple and both children. The Court found that Article 8 was applicable with regards to family life which had to be assessed with regards to the existence of *de facto* family ties.<sup>355</sup> The Court found that the intended parents lived together with the twins in a way that formed family life.<sup>356</sup> This means that even in the absence of a genetic link between the mother and the conceived twins, the Court’s notion of ‘family life’ is not conditional upon a merely legal and formal relationship, but is assessed on the basis of the real existence of family ties. Ultimately, the Court found no violation of the family’s right to family life, as the applicants had not demonstrated that the inability to obtain recognition of legal parentage under the French law had prevented them from enjoying their right to respect for family life in France.<sup>357</sup>

Nonetheless, the Court found a violation of the children’s right to private life, which implies that everyone must be able to establish “the substance of his or her

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<sup>349</sup> *X, Y and Z v. The United Kingdom*, Application No. 75/1995/581/667, Council of Europe: European Court of Human Rights, 22 April 1997, para 36.

<sup>350</sup> *Menesson and others v. France*, para. 7-8.

<sup>351</sup> *Ibid*, para. 8.

<sup>352</sup> *Ibid*, para. 10.

<sup>353</sup> *Ibid*, paras. 9-10.

<sup>354</sup> *Ibid*, para. 27.

<sup>355</sup> *Ibid*, para. 45.

<sup>356</sup> *Ibid*, paras. 45, 49.

<sup>357</sup> *Ibid*, para. 92.

identity, including the legal parent-child relationship”.<sup>358</sup> It referred to previous judgments, in which it had stressed the importance of biological parentage as a component of identity.<sup>359</sup> The Court found that the children were confronted with legal uncertainty because of the non-recognition of their *de facto* bond of affiliation, and that this contradiction between legal and social identity undermined the children’s identity within French society.<sup>360</sup> Moreover, the non-recognition had an impact on the children’s right of inheritance.<sup>361</sup> The Court found that the fact that there existed a biological tie between the father and the twins added a new dimension to the question.<sup>362</sup> Having regard to the serious consequences on the identity and respect for private life of the children, it concluded that the non-recognition of the biological tie that existed between the intended father and the twins before the law was against the best interest of the children, and that there had therefore been a violation of the children’s rights under Article 8 with respect to their private life.<sup>363</sup>

### 2.2.2. *Paradiso and Campanelli v. Italy* (2017): Limitations and Uncertainty of Parentage

The Court also evaluated the existence of family life in the case of *Paradiso and Campanelli v. Italy* (2017). The two applicants of this case were a married couple who had conceived a child through surrogacy arrangements in Russia, as surrogacy was prohibited in Italy. Two embryos were conceived through *in vitro* fertilization using the supposed semen of Mr. Campanelli and a donated egg and placed into the womb of a surrogate mother.<sup>364</sup> One child was born and registered as Mrs. Paradiso and Mr. Campanelli’s child in Moscow in February 2011 and taken to Italy by Mrs. Paradiso in April 2011.<sup>365</sup> Upon the child’s arrival, it was removed from the parents’ custody and placed with a guardian<sup>366</sup> because the Italian authorities did not recognize the Russian birth certificate.<sup>367</sup> Following the couple’s request for the recognition of the birth certificate, the Italian prosecutor opened

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<sup>358</sup> Ibid, para. 99

<sup>359</sup> *Jaggi v. Switzerland*, Application no. 58757/00, Council of Europe: European Court of Human Rights, 13 July 2006, para. 37.

<sup>360</sup> *Menesson and others v. France*, paras. 96-97.

<sup>361</sup> Ibid, para, 98.

<sup>362</sup> Ibid, para. 100.

<sup>363</sup> Ibid, paras. 100-101.

<sup>364</sup> *Paradiso and Campinelli v. Italy*, para. 11.

<sup>365</sup> Ibid, para. 14.

<sup>366</sup> Ibid, para. 23.

<sup>367</sup> Ibid, paras. 32-33.

criminal proceedings for misrepresentation of civil status, use of falsified documents and breach of the international adoption rules in Italy.<sup>368</sup>

In order to assess the existence of family life, the Italian Court ordered a DNA test which showed that Mr. Campinelli had no genetic link to the child.<sup>369</sup> The applicants sought explanation from the Russian clinic, which found that there had indeed been an error in the creation of the embryo and that the child had in fact not been conceived with the semen of Mr. Campinelli.<sup>370</sup> Subsequently, the recognition of the Russian birth certificate was refused by the Italian registry office and the prosecutor asked to give the child a new identity and to issue a new birth certificate.<sup>371</sup> The child was first placed in a children's home and then in a new family under strict anonymity.<sup>372</sup>

The applicants complained to the ECtHR, alleging a violation of their and the child's right to respect for private and family life due to the impossibility to recognize the birth certificate and the removal of the child from their custody.<sup>373</sup> The Chamber found that the applicants had no standing to act on the child's behalf and did not recognize any legal relationship strictly speaking between the applicants and the child.<sup>374</sup> However, it recognized the existence of a *de facto* family tie, restating that the existence of family life was not limited to marriage-based relationships and had to be assessed with regards to the existence close personal ties.<sup>375</sup> These could indeed be established "where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy."<sup>376</sup> Considering that the applicants had shared with the child the first important stages of his young life and had acted as parents towards him, the Chamber recognized the existence of such close personal ties.<sup>377</sup> After weighing the private interests of the applicants and the best interest of the child against the public interest,<sup>378</sup> the Chamber found that the Italian government had failed to strike a fair balance between the general interest and the private interests at stake and thus violated Article 8 ECHR.<sup>379</sup>

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<sup>368</sup> Ibid, para. 21.

<sup>369</sup> Ibid, para. 30.

<sup>370</sup> Ibid, para. 31.

<sup>371</sup> Ibid, paras. 32-33.

<sup>372</sup> Ibid, para. 36.

<sup>373</sup> Ibid, para. 95.

<sup>374</sup> Ibid, paras. 86, 98.

<sup>375</sup> Ibid, 140.

<sup>376</sup> Ibid.

<sup>377</sup> Ibid, para. 98.

<sup>378</sup> Ibid, para. 101.

<sup>379</sup> Ibid.

This judgment was later reversed by the Grand Chamber, who established new criteria for establishing the existence of ‘family life’. The Grand Chamber confirmed the Chamber’s finding that a *de facto* family tie could exist in the absence of a biological or recognized legal tie but found that a genuine personal tie had to be established.<sup>380</sup> It found the combination of three factors to be decisive in this case for establishing that *de facto* family life had *not* been met: the absence of a genetic link, the short duration of the relationship between the applicants and the child and the fact that the conduct had been contrary to Italian law.<sup>381</sup> It stated that Mr. Campinello’s belief that he was the biological father could not compensate for the short duration of only eight months that he had spent with the child.<sup>382</sup> The applicants moreover could not contest the termination of their relationship with the child by the removal of Italian authorities as they had themselves created this situation of legal uncertainty by coming to settle in Italy where the procedure of surrogacy was prohibited.<sup>383</sup> Therefore, Article 8 ECHR had not been violated with regards to respect for family life. However, the Grand Chamber found that the desire of the applicants to become parents and Mr. Campanelli’s intent to demonstrate a genetic link with the child evoked the notion of private life.<sup>384</sup> Thus, despite ruling out the existence of ‘family life’, it recognized the importance of the emotional bonds between the applicants and the child.<sup>385</sup> Ultimately, however, it ruled that the public interests at stake weighed more heavily, and thus did not find a violation of Article 8.<sup>386</sup>

### 2.2.3. *Valdís Fjölnisdóttir and Others v. Iceland* (2021): Same-sex Couples as Family

Following its judgment in *Paradiso*, the Court had to clarify its position with regards to establishing ‘family life’ in cases where no intended parent was genetically related to the child in the recent case of *Valdís Fjölnisdóttir and Others v. Iceland* (2021). The applicants were a same-sex, married couple from Iceland, which had conceived a child in the US via a surrogate mother using donated gametes,<sup>387</sup> as surrogacy was illegal in Iceland.<sup>388</sup> Upon its birth, the couple brought the child to Iceland requesting the recognition of the birth

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<sup>380</sup> Ibid, paras. 148, 151.

<sup>381</sup> Ibid, paras. 151-158.

<sup>382</sup> Ibid, para. 155.

<sup>383</sup> Ibid, para. 156.

<sup>384</sup> Ibid, paras. 161-164.

<sup>385</sup> Ibid, paras. 149, 150, 151, 157.

<sup>386</sup> Ibid, paras. 215-216

<sup>387</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, para. 5.

<sup>388</sup> Section 5 of Act no. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research (Iceland).

certificate, which was denied by the Icelandic authorities with the reasoning that surrogacy was prohibited in Iceland.<sup>389</sup> The child was then placed under their custody through a temporary foster care arrangement.<sup>390</sup>

Following an unsuccessful complaint before the District Court and the Supreme Court in Iceland, the case was brought before the ECtHR. The applicants complained that the authorities' refusal to register the child as their son in the national register had interfered with their private and family life.<sup>391</sup> They argued that their relationship to the child was not sufficiently protected by the foster care arrangement, notably because the child did not benefit from inheritance rights.<sup>392</sup> Moreover, they found a breach of Article 14 in conjunction with Article 8, as other intended parents which had conceived through cross-border surrogacy arrangements had previously been registered as parents of their children.<sup>393</sup>

The Icelandic government responded to this claim by arguing that 'family life' was not involved in the present case and that it should be granted a wide margin of appreciation in cases relating to surrogacy and ART, particularly in cases where there is no genetic link between the applicants and the child and where the individuals circumvented the national law by performing the surrogacy abroad.<sup>394</sup> The Court however was not convinced by these arguments and restated the criteria set out in the case of *Paradiso* for establishing 'family life' when there is no genetic link.<sup>395</sup> In the present case, it ruled that because the couple had established a long and uninterrupted relationship with the child from its birth, the quality of the ties amounted to *de facto* family ties.<sup>396</sup> This was further reinforced by the foster care arrangements adopted by the Icelandic authorities.<sup>397</sup> Thus, it concluded that despite the lacking genetic link and the fact that the couple had created legal uncertainty by conceiving abroad, Article 8 was applicable in 'family life'.<sup>398</sup>

### 2.3. Breach of Article 14 in Conjunction With Article 8

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<sup>389</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, para. 7.

<sup>390</sup> *Ibid*, paras. 8, 12.

<sup>391</sup> *Ibid*, para. 19.

<sup>392</sup> *Ibid*, para. 47.

<sup>393</sup> *Ibid*, para. 36.

<sup>394</sup> *Ibid*, para. 50.

<sup>395</sup> *Ibid*, para. 59.

<sup>396</sup> *Ibid*, paras. 59-62.

<sup>397</sup> *Ibid*, para. 62.

<sup>398</sup> *Ibid*.



In *Evans and S.H. and Others*, the Grand Chambers did not examine a breach of Article 14 in conjunction with Article 8, as it had already been examined under Article 8.<sup>399</sup> In *Valdís Fjölnisdóttir and Others*, the Chamber also rejected a possible breach of Article 14 in conjunction with Article 8 on the ground that its examination of the cases in which the Icelandic government had recognized a parent-child relationship in cases of surrogacy did not disclose the appearance of a violation.<sup>400</sup> In the other cases, the Court also did not investigate any possible breach of Article 14 in conjunction with Article 8.

#### **2.4. The Margin of Appreciation**

As we have seen, the Court's approach in these cases has generally been to accept that the right to respect for private and family life is engaged. However, the actual operation of these rights is subject to considerable limitation by the European states.<sup>401</sup> The margin of appreciation doctrine has indeed been central to the Court's ultimate conclusions in most cases related to ART.<sup>402</sup> ART challenges traditional values and opposes collective interests to the enjoyment of individual rights, and it is for just this reason that the margin of appreciation is of central importance in the Court's reasonings.

Under Article 8 (2), a restriction of the right to respect for private and family life is permissible if it is in accordance with the law, pursues a legitimate aim and is necessary in a democratic society.<sup>403</sup> When assessing the state's margin of appreciation, the Court considers a number of factors, which it has reiterated notably in the *Evans* judgment. Accordingly, the margin will be restricted where "a particularly important facet of an individual's existence or identity is at stake".<sup>404</sup> Where there is no consensus within the CoE member states "either as to the relative importance of the interest at stake or as to the means of protecting it, particularly where the case raises sensitive ethical and moral issues", the Court will grant a wider margin.<sup>405</sup> Lastly, the margin will be wider where states have to balance between competing private and public interests or Convention rights.<sup>406</sup>

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<sup>399</sup> *Evans v. UK*, paras. 94-95; *S.H. and others v. Austria*, para. 120.

<sup>400</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, para. 79.

<sup>401</sup> Mulligan, *supra* note 38, 5.

<sup>402</sup> *Ibid.*, 6.

<sup>403</sup> *Paradiso and Campanelli v. Italy*, para. 167.

<sup>404</sup> *Evans v. UK*, para. 77.

<sup>405</sup> *Ibid.*

<sup>406</sup> *Ibid.*

In the *Evans* judgement, the Chamber and Grand Chamber held that the scope of the positive obligation inherent in securing respect for private life even between individuals was thus subject to a margin of appreciation.<sup>407</sup> A first argument for allowing for a wide margin of appreciation brought by the Court was the lack of consensus on IVF in Europe.<sup>408</sup> This became visible as certain states had enacted legislation to control IVF and others had left it to medical practice and guidelines.<sup>409</sup> Moreover, both Chambers considered that the IVF treatment “gave rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments”.<sup>410</sup> For this reason also, the margin of appreciation had to be wide.

Subsequently, in the case of *S.H. and Others*, the Court found that “there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilization, which reflects a European consensus.” However, this consensus was not based on “settled and long-standing principles established in the law of the member States” but reflected rather “a stage of development within a particularly dynamic field of law”.<sup>411</sup> As a result, the Court established that in cases of IVF using donor gametes, the margin of appreciation could not be decisively narrowed.<sup>412</sup> It therefore upheld the APA, thus ruling that not all forms of ART must be allowed in all Member States. Nonetheless, the Court acknowledged that rapid advances in science could create a consensus amongst European states to allow gamete donation for IVF in the future.<sup>413</sup> In this case, the Court established the principle of *mutatis mutandis*, according to which it will carefully examine the arguments that guide the legislative process on ART in the relevant state in order to determine whether the restriction was proportionate and a fair balance has been struck between the competing interests of the state and the individuals.<sup>414</sup>

In *Costa and Pavan*, the Court ruled differently. This case differs from the other cases in the sense that the applicants not only found that the ban on their recourse to PGD and ART was a breach of Article 8, but that this ban was disproportionate considering that the Italian law did allow them to abort the fetus if it is affected by the disease of cystic

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<sup>407</sup> Ibid., para. 75.

<sup>408</sup> Ibid., para. 59.

<sup>409</sup> Ibid., paras. 39, 79.

<sup>410</sup> Ibid., 59, 81.

<sup>411</sup> *S.H. and others v. Austria*, para. 96.

<sup>412</sup> Ibid.

<sup>413</sup> Ibid, paras. 112–118.

<sup>414</sup> Ibid, paras. 96-97.

fibrosis.<sup>415</sup> Despite the wide margin of appreciation which the Court reiterated,<sup>416</sup> the Court found that under the principle of *mutatis mutandis*, it was in a position to review also the Italian legislation on PGD and ART.<sup>417</sup> Consequently, it ruled that in light of the inconsistency in Italian legislation, the interference with the applicants' rights was disproportionate and that there had been a violation of Article 8.<sup>418</sup>

In *Mennesson*, the Court found that the lack of consensus in Europe on the lawfulness of surrogacy arrangements and the legal recognition of children conceived through surrogacy abroad left a wide margin of appreciation with regards to authorizing surrogacy and establishing legal parentage.<sup>419</sup> However, in the present case it re-evaluated this principle in light of the best interest of the child principle and found that the margin had to be reduced as it considered parentage to be a key aspect of the identity of the children conceived.<sup>420</sup>

Subsequently to this trial, the Court was asked to determine the limits of the margin of appreciation doctrine in its *Advisory Opinion* in the case of *Mennesson*. The French Cour de Cassation asked the Court whether Article 8 required the national authorities to recognize the legal relationship between the mother who conceived the child and the child born through surrogacy lawfully established abroad.<sup>421</sup> The Court found that the issues at stake with regards to the legal recognition of parentage go even beyond the child's right to identity and that this supports the argument that the margin has to be narrowed.<sup>422</sup> Consequently, governments have a duty to provide a possibility for the recognition of the legal parent-child relationship even with the mother which does not have a genetic tie with the children but established abroad as the "legal mother".<sup>423</sup> The means of recognition were however left within the margin of appreciation of the states and include other adequate means than the recognition of the birth certificate but with the same legal outcome, such as adoption.<sup>424</sup>

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<sup>415</sup> *Costa and Pavan v. Italy*, para. 60.

<sup>416</sup> *Ibid*, para. 67.

<sup>417</sup> *Ibid*, para. 68.

<sup>418</sup> *Ibid*, paras. 69, 71.

<sup>419</sup> *Mennesson and others v. France*, paras. 78-79

<sup>420</sup> *Ibid*, paras. 77-81.

<sup>421</sup> *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 by the French Court of Cassation, Council of Europe: European Court of Human Rights, 10 April 2019 (hereinafter *Mennesson Advisory Opinion*), para. 9.

<sup>422</sup> *Ibid*, para. 45.

<sup>423</sup> *Ibid*, para. 46.

<sup>424</sup> *Ibid*, para. 53.

In *Valdís Fjölnisdóttir and Others*, the Court did not restrict the broad margin in the context of surrogacy<sup>425</sup> and found that Iceland had not overstepped the margin considering that the enjoyment of ‘family life’ was not restricted by the non-recognition of the birth certificate.<sup>426</sup> Consequently, the Court found no violation of Article 8.<sup>427</sup>

In *Paradiso and Campinelli*, the applicants claimed that the margin should be narrowed in light of the principle of the child’s best interest.<sup>428</sup> The Court, however, did not follow this reasoning, arguing that questions relating to the child’s identity and recognition of genetic descent were not at stake considering the fact that the applicants did not represent the child before the Court as there were no biological ties.<sup>429</sup>

To conclude this doctrinal analysis, it can be said that generally, the role played by the ECtHR in regulating ART directly is rather limited. By offering a wide margin of appreciation in most cases relating to ART, the Court follows rather than leads the development in the field of ART. Nonetheless, the application of the principle *of mutatis mutandis* allows the Court to evaluate the development of domestic legislation on ART and thus to follow the developments in the field of ART despite a wide margin of appreciation. In *S.H. and Others*, it has thus clarified that it is taking note of the evolving dynamic of IVF and of the fact that the margin might be reduced in the future.

While Court’s approach reflects a wide understanding of ‘family life’, it differs greatly in cases where the family is still in the phase of planning and in cases where family life has already been established. Indeed, once born, the child’s best interest dominate over other considerations regarding the legality of its conception and birth in cases in which the Court establishes the existence of ‘family life’.<sup>430</sup> Conversely, in cases in which the family is still in the phase of planning, the Court leaves a wide margin of appreciation for states to regulate the access to ART at a national level.

This doctrinal analysis shows that the Court’s view of the margin of appreciation is key to the outcome of its judgments. It appears that the Court allows states a high degree of interpretation as to the regulation and limitation of the right to respect for private and family life. Thus, it seems that the Court places a high importance on its

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<sup>425</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, paras. 69-70.

<sup>426</sup> *Ibid*, para. 75.

<sup>427</sup> *Ibid*, para. 76.

<sup>428</sup> *Paradiso and Campanelli v. Italy*, para. 192.

<sup>429</sup> *Ibid*, para. 195.

<sup>430</sup> Rainey, Wicks & Ovey, *supra* note 200, 375.

institutional role and is cautious in enforcing on states any practical obligation with regards to recognizing forms of ART, and particularly parent-child relationships of families formed through surrogacy.<sup>431</sup> While it recognizes, for instance, that states have a duty to recognize the parent-child relationship in cases of surrogacy, it does not define the means by which to do so. Moreover, whereas it recognizes that IVF is a practice which is being increasingly used throughout Europe, it does not in turn narrow the margin of appreciation to states due to the sensitive moral and ethical issues at stake.<sup>432</sup> However, the *Costa and Pavan* case clearly shows that despite allowing for a wide state discretion in the regulation of ART, the Court does infer positive obligations from Article 8 on states when they do recognize such rights.<sup>433</sup>

### **3. Case Law: Socio-Legal Analysis**

Following this doctrinal analysis, these cases will now be studied from a socio-legal perspective, incorporating the principles rooted in the capability and reproductive justice approaches elaborated above. This analysis aims to determine whether the Court is succeeding in grounding its reasonings in fundamental human rights principles when dealing with the evolving nature of the 'family' in the field of ART.

Within a socio-legal approach, the law (here, the case law) is analyzed in the context of the social situation to which it applies; the focus lies on analyzing the role the law plays in the creation, maintenance and change of the social situation.<sup>434</sup> The theoretical framework used for the purpose this analysis, which draws on the capability and reproductive justice approaches, enriches the meaning of human rights in the context of ART and renders the interpretation exercise of the Court more demanding. Thus, in view of the capability approach, the question at hand is whether throughout the case law, the ECtHR is taking an approach which focuses on the individual as an active agent in its own right and enables it to reach the reproductive capabilities and the family life it is entitled to. This question is completed by the reproductive justice approach by asking to which extent the ECtHR engages in framing reproductive rights and the right to

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<sup>431</sup> Mulligan, *supra* note 38, 8.

<sup>432</sup> *S.H. and others v. Austria*, para. 96-97.

<sup>433</sup> Lebret, *supra* note 38, 15.

<sup>434</sup> David Schiff, "Socio-Legal Theory: Social Structure and Law," *The Modern Law Review* 39, no. 3 (May 1976): 287–310, 287.

reproductive health as part of the human rights framework throughout its interpretation of the ECHR in these cases.

### 3.1. *De Facto* Protection of ‘Family Life’?

As we have seen above, the Court recognizes *de facto* family ties in assessing whether the relationships in the chosen cases amount to ‘family life’. This indicates that the Court is moving towards acknowledging modern patterns of family life and including emotional dependencies between the parties.<sup>435</sup> In *Valdís Fjölnisdóttir and Others*, the complaint of the violation of ‘family life’ was considered from the point of view of the stability of the mutual enjoyment of the parent-child relationship, a fundamental element of ‘family life’.<sup>436</sup> Within this reasoning, the Court thus based its decision on the actual enjoyment of family life and is not limiting its understanding to traditional conceptions of family. The recognition of ‘family life’ of same-sex couples has been vital for the positive development of the Court’s jurisprudence, as it illustrates the evolutive approach of the Court in recognizing more diverse forms of family. In effect, this shows that the Court respects individual choices to form a family that does not conform to the traditional nuclear family model and does not take traditional (heterosexual) groupings as given.

In *Mennesson*, the Court established the obligation for states to recognize the legal parent-child relationship between the children conceived through surrogacy abroad, thus also placing a high importance in recognizing the genetic tie between the father and the children. Also in its *Advisory Opinion on Mennesson*, the Court placed a high importance in establishing a mechanism to recognize the relationship between the mother who conceived through ART and her children, despite there being no genetic tie.<sup>437</sup> In this sense, the recognition of the child’s best interest as being of paramount importance plays a key role in the Court’s approach towards recognizing the legal relationship of the individuals in these new family forms.

Yet, when comparing this case to the *Valdís Fjölnisdóttir and Others* case, it seems that the Court’s approach has been somewhat inconsistent. If the Court also recognized the existence of ‘family life’ in this case, then why did it not follow its reasoning articulated in the *Mennesson Advisory Opinion* and require the Icelandic government to recognize the

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<sup>435</sup> Helen Stalford, “Concepts of Family under EU Law - Lessons from the ECHR,” *International Journal of Law, Policy and the Family* 16, no. 3 (December 1, 2002): 410–34, 413.

<sup>436</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, Concurring Opinion of Judge Lemmens, para. 3.

<sup>437</sup> *Mennesson Advisory Opinion*, para. 54.

birth certificate? This case differs from the *Mennesson* case as there is no genetic link between any of the applicants and the child. Still, while the applicants clearly stated the risks which the non-recognition of the legal relationship would entail,<sup>438</sup> these risks were not considered by the Court in its reasoning. It is questionable whether the foster care arrangement is an adequate protection of the child's rights, as the non-recognition of the birth certificate effectively leaves the child parentless before the Icelandic law. In its reasoning, the Court also did not mention the child's best interest and thus did not engage with this fundamental principle. It may seem that, through its silence, the Court followed the Icelandic District Court's reasoning that "[t]he child's best interests, although of paramount importance, could not override the fundamental legal principles of parentage."<sup>439</sup>

Another criticism in this regard is the Court's view in both the *Mennesson* and the *Valdís Fjölfnisdóttir and Others* cases that the family life of the applicants was not interrupted by the non-recognition of the birth certificate.<sup>440</sup> In *Mennesson*, the Court observed that all family members "are in a position to live [...] together in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation."<sup>441</sup> The Court thus analyzed the case from the perspective of the negative obligation of the French government not to interfere in the family life of the *Mennesson* family, rather than from the perspective of the positive obligation of the government to legally acknowledge and protect these relationships.<sup>442</sup> In effect, the Court's ruling thus acknowledged that there is 'family life', but imposed no obligation to protect it.<sup>443</sup>

The Court has stated that in light of the child's best interest, it will narrow the margin of appreciation when the case relates to key aspects of the identity, considering that everyone must be able to establish "the substance of his or her identity, including the legal parent-child relationship."<sup>444</sup> It has gone even further in the *Mennesson Advisory Opinion* by stating that the legal recognition of parentage goes beyond the child's right to

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<sup>438</sup> *Valdís Fjölfnisdóttir and Others v. Iceland*, para. 47.

<sup>439</sup> *Valdís Fjölfnisdóttir and Others v. Iceland*, para. 21.

<sup>440</sup> *Valdís Fjölfnisdóttir and Others v. Iceland*, para. 71; *Mennesson and others v. France*, paras. 92-94.

<sup>441</sup> *Mennesson and others v. France*, para. 92.

<sup>442</sup> Liesbet Plumy, "Mennesson v. France and Labassee v. France: Surrogate motherhood across borders", *Strasbourg Observers* (July 16, 2014), at: <https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/> (last accessed 13 July 2022).

<sup>443</sup> Pierre Murat, "Filiation et vie familiale" in Sudre, *supra* note 233, 177.

<sup>444</sup> *Mennesson and others v. France*, para. 99.

identity and encompasses “other essential aspects of the children’s private life where the matter concerns the environment in which they live and develop and the persons responsible for meeting their needs and ensuring their welfare.”<sup>445</sup>

However, it seems that the Court is very cautious in its approach, as the outcome of the *Advisory Opinion* has only been to prescribe access to an effective procedural mechanism to establish a legal parent-child relationship.<sup>446</sup> The Court did state that this relationship should be assessed on the basis of the child’s best interest and in light of the circumstances of the case, but for instance did not establish which countervailing reasons might speak against the establishment of such a relationship. In addition, it did not require this relationship to be recognized *ab initio* but rather once the mother-child relationship has become a practical reality.<sup>447</sup> As a result, the entry of the foreign birth certificate is not seen as the only form of recognition by the Court.

Recognition through adoption is thus a valid alternative for states, but this procedure places an extra burden on the parents which have already placed a great effort in conceiving the child. Also, it does not protect the parent-child relationship directly after the child’s birth, a period during which the child is the most vulnerable. As the ECtHR judge Lemmens notes, adoption is not always a solution for all the difficulties which the child may be experiencing.<sup>448</sup> Indeed, practical problems with regards to the enjoyment and protection of ‘family life’ arise when only one of the two intended parents is permitted to adopt the child.<sup>449</sup>

In light of the child’s best interest, it should be questioned whether this extra burden ought to be placed on the parents which have already placed a great effort in conceiving the child. The *Valdís Fjölnisdóttir and Others* case moreover shows that foster care arrangements may be considered a sufficient protection of the legal parent-child relationship by the Court. Yet, these arrangements do not give rise to the same rights as legal parentage does. By leaving the decision to the states to decide the way in which they will implement the *Menesson Advisory Opinion*, it may be questioned to what extent these families will in fact be protected under national law.

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<sup>445</sup> *Menesson Advisory Opinion*, para. 45.

<sup>446</sup> Laurens Lavrysen, “The mountain gave birth to a mouse: the first Advisory Opinion under Protocol no. 16”, *Strasbourg Observers*, (April 24, 2019), at: <https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/> (last accessed 13 July 2022).

<sup>447</sup> *Menesson Advisory Opinion*, para 52.

<sup>448</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, Concurring Opinion of Judge Lemmens, para. 4.

<sup>449</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, para. 74.



Another reflection regarding the *de facto* legal protection of families formed through ART relates to the *Paradiso* case. Whereas in this case, the Court did not establish the existence of ‘family life’, it recognized the importance of the emotional bonds between the applicants and the child (see above). In its reasoning, however, the Court did not further investigate whether it may be in the best interest of the child to stay with its parents and analyzed the domestic proceedings from the perspective of the illegality of the procedure of surrogacy in Italy.<sup>450</sup> This is concerning, considering that the separation of the child from its parents was also contrary to the advice from a psychologist consulted during the domestic proceedings, who stated that it “would have devastating consequences for the child” and that “he would go through a depressive phase on account of a sense of abandonment and the loss of the key persons in his life.”<sup>451</sup> By reasoning on the grounds that there existed no ‘family life’ in this case, the Court thus placed the states’ interest to create legal certainty higher than deciding on the basis of what may have been in the child’s best interest in this case.

Lastly, the Court’s argument that the uncertainty of parentage leads to an absence of ‘family life’ gives the impression that the Court distinguishes between legitimate and illegitimate families and labels this family illegitimate.<sup>452</sup> This is problematic considering that the Court’s well-established jurisprudence does not distinguish between legitimate and illegitimate family life.<sup>453</sup> Especially with regards to surrogacy, this risks rendering the recognition of *de facto* family ties obsolete, as families which have been created through cross-border surrogacy in effect do not enjoy the same protection under the Convention because they have created a situation of legal uncertainty.

Overall, these findings show that the social norm still plays a key role in the determination of the scope of protection of ‘family life’ under the ECHR by the Court.

### **3.2. The “Danger” of Split Motherhood**

As stated above, an important question with regards to ART is the question of parenthood and motherhood specifically. It appears that the Court itself acknowledges different

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<sup>450</sup> *Paradiso and Campanelli v. Italy*, Joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, para. 12.

<sup>451</sup> *Paradiso and Campanelli v. Italy*, para. 34

<sup>452</sup> Marianna Iliadou, “Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*,” *Medical Law Review* 27, no. 1 (February 1, 2019): 144–54, 150.

<sup>453</sup> *Marckx v. Belgium; Kroon and Others v. Netherlands*, Application no. 18535/91, Council of Europe: European Court of Human Rights, 27 October 1994.

dimensions of parenting, which is implicit in its reasoning from the *Evans* case that the applicant's claim relates to her right to become a genetic mother and not to becoming "a mother in a social, legal, or even physical sense".<sup>454</sup>

The Court has been confronted with questions of motherhood in cases relating to surrogacy and third-party donors. In *S.H. and Others*, the Austrian government as well as the German and Italian governments, which entered the case as third-party interveners, expressed the concern that allowing for the practice of IVF with donated gametes "raised the question of unusual family relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of 'carrying the child', and perhaps also a social aspect."<sup>455</sup> The German government argued that "[s]plitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child and would run counter to the established principle of unambiguousness of motherhood which represented a fundamental and basic social consensus."<sup>456</sup> Similarly, the Italian government argued that "[m]edically assisted procreation [...] involves serious risks. Gamete donation might lead to pressure on women on moderate incomes and encourage trafficking of ova. Scientific studies also showed that there was a link between *in vitro* fertilization treatment and premature births. Lastly, to call maternal filiation into question by splitting motherhood would lead to a weakening of the entire structure of society."<sup>457</sup>

The statements of the Austrian, Italian and German governments on the symbolic part of the 'family' in these societies provide examples of the cultural understandings of 'family life' in the European legal culture of human rights.<sup>458</sup> The arguments used show a gendered understanding of the role of the mother in the child's development.<sup>459</sup>

It appears that the concerns regarding split motherhood expressed by the governments were largely projected, as they were not backed up by empirical knowledge.<sup>460</sup> In addition, while the concerns regarding the protection for vulnerable persons such as surrogate mothers were articulated, these concerns were not central in the argumentation for the prohibition on third-party donation. The majority of the

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<sup>454</sup> *Evans v. UK*, para. 72; Sanni Nieminen, *Assisted Reproductive Technology and Medically Assisted Reproduction in the Context of the European Convention on Human Rights*, Umea University (Spring 2018), 45.

<sup>455</sup> *S.H. and others v. Austria*, para. 67.

<sup>456</sup> *Ibid*, para. 70.

<sup>457</sup> *Ibid*, para. 73.

<sup>458</sup> Hart [1], *supra* note 36, 832.

<sup>459</sup> Nieminen, *supra* note 454, 47.

<sup>460</sup> Hart [1], *supra* note 36, 828.

arguments relied on symbolic images of motherhood and speculated risks to the structure of society if this practice were to be permitted.<sup>461</sup>

The Court did not fully agree with the governments' concern regarding split motherhood, noting that "unusual family relations in a broad sense, which do not follow the typical parent-child relationship based on a direct biological link, are not unknown in the legal order of the Contracting States".<sup>462</sup> However, it stated that it could not overlook the fact that "the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and has added a new aspect to this issue."<sup>463</sup>

The ECtHR did take note of the risks of "the exploitation of women in vulnerable situations or limiting potential health risks for ovum donors and preventing the creation of atypical family relations because of split motherhood".<sup>464</sup> However, ultimately, it boiled the issue down to gamete donation being a "controversial issue in Austrian society"<sup>465</sup> giving rise to "complex questions of a social and ethical nature on which there was not yet a consensus in society".<sup>466</sup>

As a result, it appears that the Court relies on the arguments provided by the governments, which illustrate gendered understandings of motherhood and are hardly backed up by scientific facts. Thus, whereas the Court itself may not make strong distinctions between different dimensions of motherhood, it allows the states to do so.<sup>467</sup> By leaving a wide margin of appreciation to the states, the Court thus allows for traditional conceptions of motherhood to be upheld at the domestic level.

The argument that supporting traditional conceptions of motherhood is necessary for preserving the well-being of the child and the functioning of society more generally is to be questioned in light of the fact that extensive scientific research has been done in recent years on the well-being of children born from donated gametes, and that the findings indicate that their well-being is not impaired by the fact of having a gestational and a social mother.<sup>468</sup> In consideration of these findings, it would seem vital that states

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<sup>461</sup> Ibid, 831.

<sup>462</sup> *S.H. and others v. Austria*, para. 105.

<sup>463</sup> Ibid.

<sup>464</sup> Ibid, para. 113.

<sup>465</sup> Ibid.

<sup>466</sup> Ibid.

<sup>467</sup> Nieminen, *supra* note 454, 47.

<sup>468</sup> Susan Golombok et al., "Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment," *Journal of Child Psychology and Psychiatry* 54, no. 6 (June 2013): 653-60; Jadva, *supra* note 282, 126-137.

themselves engage more closely with scientific or at least empirically based ethical arguments regarding their concerns of split motherhood.<sup>469</sup>

### 3.3. Family Planning and Equality

Having evaluated the Court's approach regarding the protection of 'family life' and the concern of split motherhood within this socio-legal analysis, the following part will analyze the Court's approach from the view of equality. Concretely, it will ask whether throughout the Court's reasonings, principles of equality with regards to family planning are being upheld.

#### 3.3.1. Hierarchization of Family Relations

To start, a first observation which can be made is that despite recognizing different forms of families, the Court's approach leads to a *de facto* hierarchy between family relations. In *Paradiso*, for instance, the Court placed a great importance on the genetic tie between the intended parents and the child. It did indeed take other factors into consideration for establishing the existence of 'family life', but ultimately found that it could not be established as there had been no genetic tie between the intended father and the child conceived. The question arises whether the Court would have ruled in the same way if the Russian clinic had not made a mistake in the creation of the embryo and used the wrong donor's sperm.

Also in *Valdís Fjölnisdóttir and Others*, it may be questioned whether the Court hierarchizes between family relations. The Court indeed dismissed the applicants' alleged complaint of a violation of Article 14 in combination with 8 regarding a difference in treatment in comparison to a family created through surrogacy in which there existed a genetic tie between the intended father and the children conceived.<sup>470</sup> In this case, the children had been granted the Icelandic citizenship and recognized as the children of the intended father, and subsequently also of the mother, by the domestic law.<sup>471</sup> It appears that both cases clearly resembled each other, with a major difference being the lacking genetic tie in the *Valdís Fjölnisdóttir and Others* case. By dismissing this complaint on the ground that it was "manifestly ill-founded"<sup>472</sup>, it appears that the Court did not consider

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<sup>469</sup> Hart [1], *supra* note 36, 832.

<sup>470</sup> *Valdís Fjölnisdóttir and Others v. Iceland*, para. 36.

<sup>471</sup> *Ibid.*

<sup>472</sup> *Ibid.*, para. 79.

both families formed through ART to be a similar group which was subject to a similar treatment. As a result, it seems that the Court hierarchizes between those who can provide their genetic material and those who cannot.<sup>473</sup>

This is especially problematic in view of the agency of the applicants in the present case. For homosexual couples specifically, conceiving through surrogacy may be the only option to have a child that is genetically related to them. In addition, it may be more difficult for these couples to conceive through surrogacy using their own gametes due to their same sex. In view of creating substantive equality, it would seem that for these couples, the respect for their individual rights would entail that they be given access to the same rights as (heterosexual) couples which can conceive naturally and/or using their own gametes. By dismissing the applicants' claim, the Court did not engage more closely with the question whether there had been a potentially discriminatory treatment and did not present possible arguments that may have justified this different treatment under the ECHR.

### 3.3.2. Different Treatment of Donation of Ova and Sperm

Another difference in treatment which can be observed relates to the donation of ova and sperm for IVF treatments. In *S.H. and Others*, the Chamber found a discrimination in the cases of both couples, of which the first needed ovum donation and the second needed sperm donation in order to conceive using IVF (see above).<sup>474</sup> The Grand Chamber reasoned differently and found that the prohibition of both ova and sperm donation was compatible with Article 8.<sup>475</sup> Despite finding no violation in both cases, the Court reasoned differently with regards to the prohibition of ova donation and sperm donation under the APA. For the prohibition of ova donation, it took into account the Austrian governments' arguments regarding the risks related to surrogacy and the alleged danger of split motherhood,<sup>476</sup> as well as the fact that the use of third-party donors was a controversial issue in Austrian society on which there was not yet a consensus in society (see above).<sup>477</sup>

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<sup>473</sup> Marianna Iliadou, "Valdís Fjölfnisdóttir and others v. Iceland: Cross-border surrogacy and foster care. What about the best interests of the child?", *Strasbourg Observers* (June 20, 2021), at: <https://strasbourgobservers.com/2021/06/30/valdis-fjolnisdottir-and-others-v-iceland-cross-border-surrogacy-and-foster-care-what-about-the-best-interests-of-the-child/> (last accessed 13 July 2022).

<sup>474</sup> *S.H. and others v. Austria*, paras. 54-55.

<sup>475</sup> *Ibid*, paras. 113-114.

<sup>476</sup> *Ibid*, paras. 100-101.

<sup>477</sup> *Ibid*, para. 113.

With regards to the prohibition sperm donation for IVF, the Court reasoned by placing this prohibition into the wider context of the legislative framework regarding ART in Austria,<sup>478</sup> under which sperm donation for *in vivo* fertilization was permitted. It followed the reasoning of the Austrian government, according to which the difference in legislation was justified, as sperm donation for *in vivo* fertilization “was such an easily applicable procreation method” which “compared with others [...] could not be monitored effectively” and “had also already been in use for a long time.”<sup>479</sup> The Court thus did not consider any potential risks related to sperm donation for IVF in its reasoning. As a result, the social acceptance and different medical procedure for sperm donation *in vivo* was considered a valid reason for allowing this practice by the Court,<sup>480</sup> and the prohibition of gamete donation for IVF was consequently not deemed to be inconsistent.

This is problematic considering that the underlying reasons for the difference in legislation in the APA reflect stereotypes with regards to women’s sexuality, namely that women’s sexuality is something vulnerable which needs to be protected and that ova donation consequently requires a higher level of protection and regulation.<sup>481</sup> By reasoning both prohibitions of gamete donation differently, the Grand Chamber did not further subject the Austrian government’s reasoning to a thorough human rights scrutiny and thus indirectly upheld the hierarchies between female and male gametes at the domestic level, which contribute to an unequal treatment between women and men.<sup>482</sup>

### 3.3.3. Equality in Access to ART

The question of equality also needs to be posed with regards to access to ART for family planning. As we have seen above, in the case of *Costa and Pavan*, the Court recognized that the right to use medically assisted procreation in order to attempt to have a child unaffected by a disease and to use different techniques of ART to this end is protected under Article 8.<sup>483</sup> Thus, it seems that with regards to health concerns, the Court shows an increased willingness to limit the margin of appreciation also in ethically controversial

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<sup>478</sup> Ibid, paras. 111-112.

<sup>479</sup> Ibid, paras. 68, 114.

<sup>480</sup> See also Nieminen, *supra* note 454, 53.

<sup>481</sup> Alexandra Timmer, “Missed chance at condemning paternalism: *S.H. and others v. Austria*, Part two”, *Strasbourg Observers* (April 26, 2010), at: <https://strasbourgobservers.com/2010/04/26/missed-chance-at-condemning-paternalism-s-h-and-others-v-austria-part-two/> (last accessed 13 July 2022).

<sup>482</sup> Ibid.

<sup>483</sup> *Costa and Pavan v. Italy*, para. 57.

areas.<sup>484</sup> It shall be noted, however, that the Court did not engage with the alleged violation of Article 14 in combination with 8 and found that the fact that under Italian law, ART was available only to sterile and infertile couples and to couples in which the man was the carrier of a sexually transmissible viral disease was “certainly ‘in accordance with the law’ and can be regarded as pursuing the legitimate aims of protecting morals and the rights and freedoms of others.”<sup>485</sup> The violation of the Convention resulted rather from the lack of consistency within the Italian law.<sup>486</sup>

Following the principle of *mutatis mutandis*, the Court nonetheless engaged with the arguments presented by the Italian government, which were to “protect the health of ‘the child’ and the woman, the dignity and freedom of conscience of the medical professions and the interest in precluding a risk of eugenic selection.”<sup>487</sup> It stated that “it fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the fetus turns out to be affected by the disease, having regard in particular to the consequences of this both for the fetus [...] and for the parents, in particular the woman.”<sup>488</sup> As a result, it seems that in this reasoning, the Court did place a high importance on the well-being of the woman and the child she wished to conceive. This judgment thus constitutes an important step with regards to the recognition of a true right to a genetically healthy child, at least in cases in which the Court finds an inconsistency in the domestic legislation.<sup>489</sup> This marks a major progress in establishing substantive equality, as the woman which was a healthy carrier of cystic fibrosis was not in the same position as a woman who did not carry this disease, and therefore required a different treatment with regards to access to ART.

However, in cases in which the Court does not find an inconsistency in the domestic law, it seems that it places the values of the states higher than the right to access ART. In *S.H. and Others*, the Court observed that “there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation.”<sup>490</sup> By

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<sup>484</sup> Gregor Puppink, “The Case of *Costa and Pavan v. Italy* and the Convergence between Human Rights and Biotechnologies. Commentary on the ECHR Ruling in *Costa and Pavan v. Italy*, No. 54270/10, 28th August 2012,” *Quaderni Di Diritto Mercato Tecnologia - N°3, Anno III* (July 1, 2013).

<sup>485</sup> *Costa and Pavan v. Italy*, para. 58.

<sup>486</sup> *Ibid*, para. 60.

<sup>487</sup> *Ibid*, para. 61.

<sup>488</sup> *Ibid*, para. 62.

<sup>489</sup> Puppink, *supra* note 478.

<sup>490</sup> *S.H. and others v. Austria*, para. 114

suggesting this possibility, no due account was taken of the practical difficulties or the costs involved in travelling abroad to conceive with ART.<sup>491</sup> The intended parents' ability to make the autonomous decision to conceive abroad is indeed to a large extent determined by the material conditions of their life, including their social position. By suggesting the possibility to travel abroad, the possibility to create a family using ART is thus left as an option available only to those who have the means to pay for such treatment abroad. An approach rooted in principles of equality and social justice would require that individuals who cannot conceive naturally be given the possibility to access treatment regardless of their financial situation. In effect, by leaving a large margin of appreciation in this case, the access to ART becomes a right accessible only to those who can afford it.

Moreover, what can be observed from the Court's ruling is that whereas it acknowledges the Austrian governments' concerns with regards to the use of IVF and the need to take into account the well-being of the child and the health of the mother,<sup>492</sup> it does not elaborate on these concerns when suggesting that the intended couples may travel abroad.<sup>493</sup> This leads to an inconsistency in the Court's understanding of the rights at stake regarding the use of IVF, considering that these risks do not simply disappear when crossing the border to conceive abroad.<sup>494</sup>

### 3.3.4. Protection of the Right to Reproductive Health

The last point which deserves to be addressed with regards to equality in family planning is the scope of reproductive health and the use of ART in this regard. As we have seen, reproductive rights – including the right to reproductive health – have been endorsed into the human rights framework in 1994 and are included in multiple human rights, including the right to enjoy the highest attainable standard of mental and physical health.<sup>495</sup> The right to reproductive health is not explicitly protected under the ECHR and is also not mentioned by the Oviedo Convention.<sup>496</sup> However, as we have seen above, reproductive rights may be recognized by the ECtHR as a part of Article 8 ECHR under specific conditions.

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<sup>491</sup> *S.H. and others v. Austria*, Joint Dissenting Opinion, para. 13.

<sup>492</sup> *S.H. and others v. Austria*, para. 113.

<sup>493</sup> *S.H. and others v. Austria*, para. 82; *S.H. and others v. Austria*, Joint Dissenting Opinion, para. 13.

<sup>494</sup> *S.H. and others v. Austria*, Joint Dissenting Opinion, para. 13.

<sup>495</sup> Article 12 (1) ICESCR.

<sup>496</sup> O'Connell and Gevers, *supra* note 246, 61.



A first observation which can be made from the case of *S.H. and Others* is that the Court considers the use of medically assisted reproduction to be a choice and not a need.<sup>497</sup> As judge De Gaetano puts it in his separate (concurring) opinion, “neither Article 8 nor Article 12 can be construed as granting a right to conceive a child at any cost. The ‘desire’ for a child cannot [...] become an absolute goal which overrides the dignity of every human life.”<sup>498</sup>

In this respect, it is important to note that also the right to enjoy the benefits of scientific progress is enshrined in the human rights framework.<sup>499</sup> For individuals who cannot conceive through natural means, the denial of access to IVF using donor insemination constitutes rather a denial of access to available treatment which they would need to conceive genetically related children.<sup>500</sup> Treating the access to ART as a choice is also problematic considering that an important dimension of the psychological impact of infertility concerns the inability to choose to have a child in the absence of a successful treatment through ART.<sup>501</sup> In other words, the ability to make this choice is a core feature of a good life and thus constitutes a fundamental need for individuals who cannot conceive through natural means of procreation.<sup>502</sup> By considering the use of donated gametes to be a choice, the Court therefore does not properly recognize that infertility poses a major barrier to reproductive health which potentially gives rise to treatment needs, for which choices should be available.<sup>503</sup>

A further dimension to the enjoyment of the right to reproductive health is added by the fact that women and men do not share the same biological needs because of their sex. The Committee on the Elimination of Discrimination and Violence Against Women states that it is required and necessary to address “the health rights of women from the perspective of women’s needs and interests” in view of “distinctive features and factors that differ for women in comparison to men, such as (a) biological factors [...] such as [...] their reproductive function”.<sup>504</sup> Throughout its case law, it seems that the Court does not take due account of women’s specific needs in the context of reproduction.

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<sup>497</sup> *S.H. and others v. Austria*, para. 82.

<sup>498</sup> *S.H. and others v. Austria*, Separate Opinion of Judge De Gaetano, para. 2.

<sup>499</sup> Article 15(1) (b) ICESCR.

<sup>500</sup> See also *S.H. and others v. Austria*, Joint Dissenting Opinion, para. 9.

<sup>501</sup> *S.H. and others v. Austria*, Joint Dissenting Opinion, para. 9; Scott, *supra* note 38, 445.

<sup>502</sup> Scott, *supra* note 38, 445.

<sup>503</sup> *Ibid.*

<sup>504</sup> UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 24: Article 12 of the Convention* (1999), A/54/38/Rev.1, para. 12; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women* (18 December 1979), United Nations, Article 12 (1).

The case of *Evans* provides an example, as it confronted the Court with the question whether the applicant's right to have a child that is genetically related to her outweighed her former partner's right not to have a child that is genetically related to him (see above). The Court reasoned the case by looking at the legal issues and the necessity to balance between the autonomy of the applicant and the autonomy of her former partner.<sup>505</sup> This approach may be questioned in light of the fact that the removal of her ovaries would prevent the applicant from ever having a genetically related child. As four of the Grand Chamber judges noted in their Joint Dissenting Opinion, "no balance is possible in the circumstances of the present case since the decision upholding J.'s choice not to become a parent involves an absolute and final elimination of the applicant's decision. Rendering empty or meaningless a decision of one of the two parties cannot be considered as balancing the interests."<sup>506</sup>

Despite recognizing the applicant's autonomy and her right to become a genetic parent, the Court thus did not take due account of the context in which the applicant's autonomy was exercised and the consequences the withdrawal of consent to use the embryo by her partner had on the applicant's enjoyment of her right to reproductive health. By doing so, the Court refused to treat the applicant's and her former partner's reproductive choices differently and thus did not take account of the fact that the applicant's needs were different than her former partner's needs due to her limited reproductive choices.<sup>507</sup>

#### **4. Assessment**

Having analyzed the Court's rulings within this socio-legal analysis, what can be generally observed is that these rulings illustrate a somewhat contradictory approach of the ECtHR throughout its jurisprudence on ART. Indeed, whereas the Court supports a broad conception of 'family' and the right to use ART for the purpose of creating a genetically related child, it tends to leave a wide margin of appreciation to the states, with the result being that in most cases, the Court does not find any violation of the right to respect for private and family life or of the right to non-discrimination in combination with this right. Especially in cases relating to surrogacy, it seems that the Court's reasoning to grant a

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<sup>505</sup> Lebret, *supra* note 38, 27-28.

<sup>506</sup> *Evans v. UK*, Joint Dissenting Opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para. 7.

<sup>507</sup> Lebret, *supra* note 38, 27-28.

wide margin of appreciation reflects an externalization of the sensitivity of the topic and a will to preserve its relationship with the national authorities.<sup>508</sup>

As these cases show, the social context of ART plays an important role in the Court's understanding and interpretation of the ECHR. By placing a large importance on the context, however, the Court is indirectly upholding social values promoted by the Member States. For instance, although the Court itself may not have a gendered understanding of 'family life', it allows these understandings to persist at the domestic level. Also when it comes to the regulation of techniques of ART at the domestic level, the fact that the Court does not find any inconsistency in the differing regulation of the donation of female or male gametes allows for a gendered practice of ART to exist at the domestic level (see *S.H. and Others*).

The case of *Costa and Pavan* poses an exception to the Court's tendency to grant a wide margin of appreciation, which is explained by the lack of consistency in the domestic law. It is also important to acknowledge that the Court does recognize that possible developments on the legal regulation of ART may change the social context and that there is an emerging consensus throughout Europe to allow gamete donation for IVF.<sup>509</sup> This in turn might influence the Court's reasonings in cases relating to ART in the future.<sup>510</sup>

By leaving a wide margin of appreciation to the states in most cases, the Court does not position itself on the question to what extent ART is compatible with the human rights framework. The Court's reasonings rather illustrate the contradictory opinions of the judges on the matter of ART. This can be seen by the fact that in some cases, the decision of the Chamber finding a violation of the applicants' rights was later reversed by the Grand Chamber, which reasoned against a violation of the ECHR on the ground of the margin of appreciation doctrine. A closer look at the Separate Opinions of the individual judges within these reasonings clearly shows the differing views with regards to the legal regulation of ART and illustrate the different understandings of what the respect for fundamental human rights principles in the context of ART requires.

It seems that the controversy of the topic of ART requires for a cautious approach by the Court, especially considering the impact which allowing or prohibiting certain practices of ART may have in European societies. However, this should not prevent the

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<sup>508</sup> Margaria, *supra* note 38, 421.

<sup>509</sup> *S.H. and others v. Austria*, para. 96.

<sup>510</sup> *Ibid*, para. 117.

Court from exercising its function as a guarantor of human rights, in particular when examining the question whether a fair balance between the competing interests has been struck by the domestic authorities (see principle of *mutatis mutandis*).<sup>511</sup> By invoking a wide margin of appreciation, the Court does not subject the families formed through surrogacy and the practice of IVF to a thorough human rights scrutiny.<sup>512</sup>

As the judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele put it in their Joint Dissenting Opinion, “[t]he Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review.”<sup>513</sup> Some have named it the “Age of Subsidiarity”;<sup>514</sup> indeed, it appears that the Court is increasingly limiting its role as a human rights guarantor in Europe by leaving a wide margin of appreciation to the Member States, thus not positioning itself on the question what the respect for the fundamental human principles requires in the sensitive topic of ART.

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<sup>511</sup> *Evans v. UK*, Joint Dissenting Opinion, para. 12.

<sup>512</sup> Ryan, *supra* note 38, 491.

<sup>513</sup> *Ibid.*

<sup>514</sup> See e.g. Róbert Spano, “Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity,” *Human Rights Law Review* 14, no. 3 (September 1, 2014): 487–502.

## **Conclusion**

The core question raised in this thesis has been whether the ECtHR allows for inclusive conceptualizations of 'family' in its interpretation of the ECHR in order to follow the evolutionary dynamic of the family whilst respecting fundamental principles of the ECHR. The analysis focused on cases relating to ART, which have been brought before the Court in the period between 2007 and 2021.

The first part of this thesis was dedicated to tracing back the evolution of the concept of 'family' in European societies since the drafting of the ECHR and to situating the 'family' in the context of the capability and reproductive justice approaches, which enrich the idea of human rights by providing a more holistic and moral-philosophical perspective to their achievement in practice. The findings of this first part show that the nuclear family model has today become de-institutionalized and that family models have diversified, allowing for new conceptualizations of 'family' based on individual choices of family planning. Moreover, an analysis of the relevant feminist literature has shown that the propagation of one particular family ideology leads to the perpetuation of social injustices and that assuming one identical family form denies fundamental differences in terms of class, gender, ethnicity and race. The capability and reproductive justice approaches which have been studied in the first part of this thesis show that in the context of 'family', an approach rooted in these enriched values requires that states adopt a rights-based approach to reproductive rights and family planning which focuses on the individual as an active agent in its own right. This entails that individuals who wish to reproduce through ART have equal rights with regards to the use of ART, regardless of whether they conform to the social norm of the nuclear family model or not.

The second part of this thesis dealt with the scope of protection of the right to respect for private and family life in the ECtHR jurisprudence on cases relating to ART. The doctrinal analysis of the case law has shown that throughout its jurisprudence, the Court acknowledges that Article 8 includes the right to conceive a child and to make use of ART for this purpose and has adopted an inclusive definition of 'family life', which encompasses also the social and legal dimensions of parenting. Thus, it can be concluded that the Court adopts an inclusive conceptualization of 'family' in its interpretation of the ECHR and goes towards recognizing the importance of reproductive rights as human rights under the ECHR framework. This marks an important step, considering that the focus of the Convention originally lies in civil and political rights and that creating a family

using ART was not a reality that was conceivable at the time of the drafting of the Convention. Moreover, this shows that the Court is placing an effort in following the dynamic and fast-changing environment of changing family forms.

The socio-legal analysis has shown that the social norm still plays a major role in the determination of the scope of protection of 'family life' under the ECHR and that families which do not conform to the social norm of the nuclear family model in effect do not enjoy the same protection under the ECHR. Moreover, by leaving a wide margin of appreciation to the states, the Court allows for gendered understandings of conceptions of motherhood to persist at the domestic level. With regards to equality in family planning, the decision of the Court to grant a wide margin of appreciation leads to hierarchies being created between different techniques of ART, which contribute to perpetuating stereotypes regarding women's sexuality. The Court's understanding of the right to access ART is also limited, as it does not include any positive state obligation and remains a right which is accessible only to those who can afford it. By treating the access to ART as a choice, the Court further does not take into account the fact that for individuals who cannot conceive naturally, the right to reproductive health may give rise to needs for which ART treatment should be available. Lastly, the Court does not take consideration of the fact that the right to reproductive health may entail a different treatment of women and men due to the differing needs regarding the enjoyment of their reproductive rights in its judgments. Overall, what can be concluded from this socio-legal analysis is that despite adopting an inclusive understanding of 'family', the Court, through its approach, indirectly contributes to biases being upheld at the national level which are shaped by traditional understandings of gender differences and family values.

What this study has also shown is that in effect, the enjoyment of fundamental rights under the ECHR is to a great extent determined by the margin of appreciation granted to the states, which the Court considers to be a wide one in most cases studied. By invoking a wide margin of appreciation, however, the Court does not subject the cases to a thorough human rights scrutiny and leaves the space open for societies which support more conservative ideals to take a conservative stand on the regulation of ART.

In this regard, it is important to note that infertility affects 25 million individuals in Europe alone and that ART may provide a solution to treat infertility and to allow also individuals who do not conform to the nuclear family model to found a family with a genetically related child. The deprivation of health opportunities through ART deeply

affects these individuals' quality of life and their agency, thus affecting their human dignity.<sup>515</sup> Moreover, these individuals may already experience an unequal treatment based on intersecting axes of oppression due to their nonconformity with the social norm of the nuclear family. Whereas the Court is not in a position to change the national legislations on ART, its importance lies in its role as a guarantor of human rights for each and every person in Europe. As such, the Court has the duty to protect individual rights, also when this may go against the will of the majority or the social norm.

In order to guarantee the individual rights of each person in Europe, the Court's role moreover lies in creating a common understanding of human rights and helping Member States to stay in this common understanding. And in this respect, principles and norms play an important guiding role. In the cases studied, the main reasons for granting a wide margin of appreciation have been the lack of consensus between the Member States and the sensitive ethical and moral issues raised by different techniques of ART. As we have seen, ART indeed poses unprecedented questions relating to the compatibility of this technological development with the ECHR, especially with regards to the topic of surrogacy. In this sense, it may be argued that for now, the question of what respect for human rights requires in the context of ART may be better addressed at the domestic level until a common understanding is reached by Member States. Considering the important place of the 'family' in societies, it may further be questioned to what extent it should be the Court's role to place values in its judgments. The Court's cautious approach may therefore be best suited for the time-being, as invoking a wide margin of appreciation allows it to entrench particular moral views on ART without rendering judgments on these topics in the merits.<sup>516</sup> Further research needs to be done, still, on the role of the margin of appreciation doctrine in shaping the Court's interpretation of the ECHR in cases relating to ART.<sup>517</sup>

Whereas the sensitivity of the topic may require for a cautious approach by the Court, it should also be kept in mind that the margin of appreciation can vary over time, notably when the Court finds an emerging consensus amongst Member States.<sup>518</sup> Today, ART is becoming increasingly used as a means of reproduction, and certain techniques of

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<sup>515</sup> Rosalind Dixon and Martha C. Nussbaum, "Abortion, Dignity, and a Capabilities Approach," *Feminist Constitutionalism* (Cambridge University Press, 2012), 64–82, 68.

<sup>516</sup> Ryan, *supra* note 38, 491.

<sup>517</sup> See also Gabrielle Wadlig, *The Margin of Appreciation and Medically Assisted Reproduction*, University of Graz (February 2014).

<sup>518</sup> O'Connell and Gevers, *supra* note 246, 54.

ART which were less commonly used in the past such as IVF are becoming more widely accepted in societies. It thus appears that at least with regards to some techniques such as IVF and AI, there is an emerging consensus in Europe on their legalization.

Moreover, despite there being no common understanding at the European level of what the respect for human dignity requires in the context of ART and surrogacy in particular, the Oviedo Convention, which has been signed by a considerable number of CoE Member States, already provides for a framing of the meaning of human dignity in the biomedical context. Whereas some of the principles it contains have already been included in more general terms in the ECHR, the Oviedo Convention is the first multilateral treaty specifically addressing biomedical human rights issues and as such may provide a basis for determining to which extent different techniques of ART may be compatible with human rights and human dignity under the ECHR in future rulings. Further research needs to be done, however, especially with regards to the question what respect for human dignity requires in the context of ART.

In light of the respect for the principle of the “best interest of the child”, any decisions relating to ART should have the aim of providing for a safe and dignified environment that fosters the child’s health and well-being. In cases in which surrogacy has already been legally performed abroad, it may therefore be argued that an approach rooted in this fundamental principle requires that the legal parent-child relationship in these cases be adequately protected. The Court’s recent *Advisory Opinion on Mennesson* marks a first step towards stronger protection of the parent-child relationship at the European level, and it may be argued that in light of the controversy of the topic of surrogacy, leaving the means by which to recognize this relationship to the Member States may present a groundbreaking way ahead for the Court. With this *Advisory Opinion*, the Court may therefore have managed to advance its interpretation of the Convention as a ‘living instrument’. It remains to be seen to what extent the Court will take into consideration the health of the (future) child in its reasonings on the question of family planning with ART, particularly when deciding on the state discretion on which types of ART should be permitted and accessible.

Future developments in the social acceptance and regulation of ART in European societies will be crucial in shaping the Court’s jurisprudence on the scope of protection of the right to respect for private and family life. It is to be hoped that at least with regards to techniques of ART that are becoming more widely accepted in European societies, the



Court will increasingly engage in a closer human rights scrutiny and not limit its role by leaving a wide margin of appreciation to the Member States. Ultimately, this will be necessary in order to allow for more inclusive conceptualizations of 'family' to be protected at the European level and to enable individuals who suffer from not being able to conceive through natural means of procreation to found a family based on their individual choices of family planning and to have a child that is genetically related to them.

## Bibliography and Sources

### Literature:

- Allan, G., S. Hawker, and G. Crow. "Family Diversity and Change in Britain and Western Europe." *Journal of Family Issues* 22, no. 7 (October 1, 2001): 819–37.
- Amico, Eleanor B., ed. *Reader's Guide to Women's Studies*. 1. publ. Chicago: Dearborn, 1998.
- Andorno, Roberto. "The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law." *Journal of International Biotechnology Law* 2, no. 4 (January 26, 2005).
- Bales, Robert F., and Talcot Parsons. *Family: Socialization and Interaction Process*. Oxon: Routledge, 1956.
- Becker, Bettina, and Nickie Charles. "Layered Meanings: The Construction of 'the Family' in the Interview." *Community, Work & Family* 9, no. 2 (May 2006): 101–22.
- Beck-Gernsheim, Elisabeth. *Was Kommt Nach Der Familie?* Orig.-Ausg. Vol. 1243. München: Beck, 1998.
- Beechey, Veronica. "On Patriarchy." *Feminist Review* 3, no. 1 (November 1979): 66–82.
- Bengtson, Vern L. "Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds." *Journal of Marriage and Family* 63, no. 1 (February 2001): 1–16.
- Bernardes, Jon. *Family Studies: An Introduction*. 1. publ. London: Routledge, 1997.
- Brooks, David. "The Nuclear Family Was a Mistake." *The Atlantic*, February 10, 2020, <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/> (last accessed 13 July 2022).
- Burquière, André, ed. *A History of the Family. Vol.1. Remote Worlds and Ancient Worlds*. Oxford: Polity Press, 1996.
- Calhaz-Jorge, Carlos, C. H. De Geyter, M. S. Kupka, C. Wyns, E. Mocanu, T. Motrenko, G. Scaravelli, J. Smeenk, S. Vidakovic, and V. Goossens. "Survey on ART and IUI: Legislation, Regulation, Funding and Registries in European Countries: The European IVF-Monitoring Consortium (EIM) for the European Society of Human Reproduction and Embryology (ESHRE)." *Human Reproduction Open*, no. 1 (2020).
- Charles, Nickie, Charlotte Aull Davies, and Christopher C. Harris. *Families in Transition: Social Change, Family Formation and Kin Relationships*. Bristol: Policy Press, 2008.

- Cherlin, Andrew J. *Public & Private Families: An Introduction*. Ninth edition. New York, NY: McGraw-Hill, 2021.
- Collins, Randall. "A Conflict Theory of Sexual Stratification." *Social Problems* 19, no. 1 (July 1971): 3–21.
- Comacchio, Cynthia. "History of Family - Gender, Theory, Development, Social, and Press," *JRank Articles*, 2022, <https://family.jrank.org/pages/493/Family-History.html#ixzz7Ra4sZq6L> (last accessed 13 July 2022).
- Coontz, Stephanie. *The Way We Never Were: American Families and the Nostalgia Trap*. Nachdr. New York, NY: Basic Books, 2005.
- Cuddy, Alice. "Where in Europe Is Surrogacy Legal?" *Euronews*, 2018, <https://www.euronews.com/2018/09/13/where-in-europe-is-surrogacy-legal> (last accessed 13 July 2022).
- Daly, Mary. "Changing Family Life in Europe: Significance for State and Society." *European Societies* 7, no. 3 (September 2005): 379–98.
- Deflem, Mathieu. *Sociology of Law*. Cambridge: Cambridge University Press, 2008.
- Dejong, Jocelyn. "Capabilities, Reproductive Health and Well-Being." *Journal of Development Studies* 42, no. 7 (October 2006): 1158–79.
- Delphy, Christine, and Diana Leonard. *Familiar Exploitation: A New Analysis of Marriage in Contemporary Western Societies*. Cambridge: Polity Press, 1992.
- Dembour, Marie-Bénédicte. *Who Believes in Human Rights? Reflections on the European Convention*. Law in Context. Cambridge; New York: Cambridge University Press, 2006.
- Dixon, Rosalind, and Martha C. Nussbaum. "Abortion, Dignity, and a Capabilities Approach," 64–82. *Feminist Constitutionalism*. Cambridge University Press, 2012.
- Durkheim, Emile. "Introduction to the Sociology of the Family." edited by Emile Durkheim and Mark Traugott, 205–28. *Emile Durkheim on Institutional Analysis*. Chicago: University of Chicago Press, 1978.
- Ergas, Yasmine. "Babies without Borders: Human Rights, Human Dignity and the Regulation of International Commercial Surrogacy." *Emory International Law Review*, November 18, 2012.

- Faddy, Malcolm J., Matthew D. Gosden, and Roger G. Gosden. "A Demographic Projection of the Contribution of Assisted Reproductive Technologies to World Population Growth." *Reproductive Biomedicine Online* 36, no. 4 (April 2018): 455–58.
- Fredman, Sandra. "Gender Equality and the European Convention on Human Rights," 121–37. *International Human Rights of Women*. Singapore: Springer Singapore, 2019.
- Gerson, Kathleen, and Stacy Torres. "Changing Family Patterns." In *Emerging Trends in the Social and Behavioral Sciences*, edited by Robert A Scott and Stephan M Kosslyn, 1st ed., 1–15. Oxford: Wiley, 2015.
- Giddens, Anthony. *The Transformation of Intimacy*. Oxford: Wiley, 1992.
- Gittins, Diana. *The Family in Question*. Second Edition. London: Bloomsbury Publishing, 1993.
- Golombok, Susan, ed. *Regulating Reproductive Donation*. Cambridge, United Kingdom; New York: Cambridge University Press, 2016.
- Golombok, Susan, Lucy Blake, Polly Casey, Gabriela Roman, and Vasanti Jadva. "Children Born through Reproductive Donation: A Longitudinal Study of Psychological Adjustment." *Journal of Child Psychology and Psychiatry* 54, no. 6 (June 2013): 653–60.
- Goode, W. J. *World Revolution and Family Patterns*. New York: Free Press, 1963.
- Greer, Steven. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge Studies in European Law and Policy. Cambridge, UK; New York: Cambridge University Press, 2006.
- Harris-Short, Sonia, and Joanna Miles. *Family Law: Text, Cases, and Materials*. Oxford: Oxford University Press, 2011.
- Hart, Linda. "Anthropology of Kinship Meets Human Rights Rationality: Limits of Marriage and Family Life in the European Court of Human Rights." *European Societies* 20, no. 5 (2018): 816–34.
- . "What Law Has Joined: Family Relations and Categories of Kinship in the European Court of Human Rights," 69–84. *The Palgrave Handbook of Family Sociology in Europe*. Cham: Springer International Publishing, 2021.
- Heelas, Paul, Scott Lash, Paul Morris, and Centre for the Study of Cultural Values at Lancaster University, eds. *Detraditionalization: Critical Reflections on Authority and Identity*. Cambridge, Mass: Blackwell Publishers, 1996.

- Helfer, Laurence R. "Consensus, Coherence and the European Convention on Human Rights." *Cornell International Law Journal* 26, no. 1 (January 1, 1993): 133.
- Hoebel, E. Adamson. *The Cheyennes: Indians of the Great Plains*. 2d ed. Case Studies in Cultural Anthropology. New York: Holt, Rinehart and Winston, 1978.
- Iliadou, Marianna. "Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*." *Medical Law Review* 27, no. 1 (February 1, 2019): 144–54.
- . "Valdís Fjölvisdóttir and Others v. Iceland: Cross-Border Surrogacy and Foster Care. What about the Best Interests of the Child?," *Strasbourg Observers*, June 20, 2021, <https://strasbourgobservers.com/2021/06/30/valdis-fjolnisdottir-and-others-v-iceland-cross-border-surrogacy-and-foster-care-what-about-the-best-interests-of-the-child/> (last accessed 13 July 2022).
- Inhorn, Marcia C., and Daphna Birenbaum-Carmeli. "Assisted Reproductive Technologies and Culture Change." *Annual Review of Anthropology* 37, no. 1 (October 1, 2008): 177–96.
- Jain, Meaghan, and Manvinder Singh. "Assisted Reproductive Technology (ART) Techniques." In *StatPearls*. Treasure Island (FL): StatPearls Publishing, 2022, <http://www.ncbi.nlm.nih.gov/books/NBK576409/> (last accessed 13 July 2022).
- James, Susan, and Stephanie Palmer, eds. *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*. Oxford; Portland: Hart Publishing, 2002.
- Javornik, Jana, and Mara A. Yerkes. "Conceptualizing National Family Policies: A Capabilities Approach." In *The Palgrave Handbook of Family Policy*, edited by Rense Nieuwenhuis and Wim Van Lancker, 141–67. Cham: Springer International Publishing, 2020.
- Jison, John. "Revisiting Susan Moller Okin's Justice, Gender, and the Family (1989): Intersectionality, Social Ethos, and Critical Praxis of Gender Justice." *Kritike* 15, no. 2 (2021): 111–25.
- Kreyenfeld, Michaela. *Childlessness in Europe: Contexts, Causes, and Consequences*. New York, NY: Springer Berlin Heidelberg, 2018.
- Lavrysen, Laurens. "The Mountain Gave Birth to a Mouse: The First Advisory Opinion under Protocol No. 16," *Strasbourg Observers*, April 24, 2019, <https://strasbourgobservers.com/2019/04/24/the-mountain-gave-birth-to-a-mouse-the-first-advisory-opinion-under-protocol-no-16/> (last accessed 13 July 2022).
- Lebret, Audrey. "The European Court of Human Rights and the Framing of Reproductive Rights," *Droits Fondamentaux*, no. 18 (2020).

- Londra, Laura, Edward Wallach, and Yulian Zhao. "Assisted Reproduction: Ethical and Legal Issues." *Seminars in Fetal and Neonatal Medicine* 19, no. 5 (October 2014): 264–71.
- Lück, Detlev, Kerstin Ruckdeschel, Anna Dechant, and Norbert F. Schneider. "Family Demography and Values in Europe: Continuity and Change," 85–106. *The Palgrave Handbook of Family Sociology in Europe*. Cham: Springer International Publishing, 2021.
- Malinowski, Bronislaw. *A Scientific Theory of Culture and Other Essays*. Chapel Hill, NC: University of North Carolina Press, 1944.
- Margaria, Alice. "Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion." *Medical Law Review* 28, no. 2 (May 1, 2020): 412–25.
- Mather, Victoria Mikesell. "Evolution and Revolution in Family Law." *St. Mary's Law Journal* 25, no. 1 (June 22, 1993): 405.
- Maynard Smith, John. *The Evolution of Sex*. Cambridge; New York: Cambridge University Press, 1978.
- Millns, Susan, and Noel Whitty. *Feminist Perspectives on Public Law*. London Sydney: Cavendish publishing, 1999.
- Mulligan, Andrea. "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements." *Medical Law Review* 26, no. 3 (August 1, 2018): 449–75.
- Myers-Walls, Judith A., and Péter Somlai. *Families as Educators for Global Citizenship*. Edited by Judith A. Myers-Walls, Péter Somlai, and Robert N. Rapoport. 1st ed. Routledge, 2019.
- Nedelsky, Jennifer. *Law's Relations: A Relational Theory of Self, Autonomy, and Law*. New York: Oxford University Press, 2011.
- Nussbaum, Martha C. *Creating Capabilities: The Human Development Approach*. 1. paperback ed. Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 2013.
- . "Human Rights and Human Capabilities," *Harvard Human Rights Journal*, vol. 20: 21.
- . *Women and Human Development*. Cambridge: Cambridge University Press, 2001.
- Nussbaum, Martha C., and Amartya Sen. *The Quality of Life*. Oxford: Clarendon Press, 1993.
- O'Connell, R, and S Gevers. "Fixed Points in a Changing Age? The Council of Europe, Human Rights, and the Regulation of New Health Technologies." In *European Law*

*and New Health Technologies*, edited by Mark L Flear, Anne-Maree Farrell, Tamara K Hervey, and Thérèse Murphy, 46–69. Oxford University Press, 2013.

Okin, Susan Moller. *Justice, Gender, and the Family*. 5. print. New York: Basic Books, 1992.

Pahl, Ray, and Liz Spencer. “Personal Communities: Not Simply Families of ‘Fate’ or ‘Choice.’” *Current Sociology* 52, no. 2 (March 2004): 199–221.

Parke, Ross D. *Future Families*. 1. publ. Chichester, West Sussex: Wiley Blackwell, 2013.

Parsons, Talcott. “The Normal American Family.” edited by Bert Adams and Thomas Weirath, 53–66. *Readings on the Sociology of the Family*, 1971.

Passet-Wittig, Jasmin, and Martin Bujard. “Medically Assisted Reproduction in Developed Countries: Overview and Societal Challenges.” In *Research Handbook on the Sociology of the Family*, by Norbert Schneider and Michaela Kreyenfeld, 417–38. Edward Elgar Publishing, 2021.

Pluym, Liesbet. “Mennesson v. France and Labassee v. France: Surrogate Motherhood across Borders,” *Strasbourg Observers*, July 16, 2014, <https://strasbourgobservers.com/2014/07/16/mennesson-v-france-and-labassee-v-france-surrogate-motherhood-across-borders/> (last accessed 13 July 2022).

Puppinck, Gregor. “The Case of Costa and Pavan v. Italy and the Convergence between Human Rights and Biotechnologies. Commentary on the ECHR Ruling in Costa and Pavan v. Italy, No. 54270/10, 28th August 2012.” *Quaderni Di Diritto Mercato Tecnologia - N°3, Anno III*, July 1, 2013.

Rainey, Bernadette, Elizabeth Wicks, and Clare Ovey. *Jacobs, White & Ovey: The European Convention on Human Rights*. New York, NY: Oxford University Press, 2017.

Rawls, John. *A Theory of Justice*. 5. printing. Harvard: The Belknap Press of Harvard University Press, 1971.

———. “The Idea of Public Reason Revisited.” *The University of Chicago Law Review* 64, no. 3 (1997): 765.

Robeyns, Ingrid. “The Capability Approach: A Theoretical Survey.” *Journal of Human Development* 6, no. 1 (March 2005): 93–117.

Ross, Loretta. “Understanding Reproductive Justice: Transforming the Pro-Choice Movement.” *Off Our Backs*, 2006, <https://www.jstor.org/stable/20838711> (last accessed 13 July 2022).

Ross, Loretta, and Rickie Solinger. *Reproductive Justice*. 1st ed. Vol. 1. Berkeley: University of California Press, 2017.

- Ryan, Clare. "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights." *The Columbia Journal of Transnational Law* 56, no. 3 (March 22, 2018): 467.
- Sauvain-Dugerdil, Claudine, Thomas Antwi Bosiakoh, Samba Diarra, Anouk Piraud, Samba Diop, John Anarfi, and Samuel Agyei-Mensah. "Shaping the Family': Individual's Capabilities to Exercise Reproductive Rights Seen through a Qualitative Survey." *African Population Studies* 28, no. 2 (September 2, 2014): 872.
- Schabas, William. *The European Convention on Human Rights: A Commentary*. First edition. Oxford Commentaries on International Law. Oxford, United Kingdom: Oxford University Press, 2015.
- Scherpe, Jens M. "Medically Assisted Procreation: This Margin Needs to Be Appreciated." *The Cambridge Law Journal* 71, no. 2 (July 2012): 276–79.
- Schiff, David. "Socio-Legal Theory: Social Structure and Law." *The Modern Law Review* 39, no. 3 (May 1976): 287–310.
- Schneider, David. *A Critique of the Study of Kinship*. Ann Arbor, MI: University of Michigan Press, 1984.
- Schulz, Kristina, ed. *The Women's Liberation Movement: Impacts and Outcomes*. Protest, Culture and Society, vol. 22. New York: Berghahn Books, 2017.
- Schuster, Ilsa M. Glazer. *New Women of Lusaka*. 1st ed. Explorations in World Ethnology. Palo Alto, Calif: Mayfield Pub. Co, 1979.
- Scott, Rosamund. "Reproductive Health: Morals, Margins and Rights." *Modern Law Review* 81, no. 3 (May 2018): 422–51.
- Sen, Amartya. "Equality of What?" Tanner Lectures on Human Values, vol. 1. Stanford: Stanford University Press, 1979.
- . *The Idea of Justice*. Harvard University Press, 2009.
- Sigle-Rushton, Wendy. "Intersectionality." edited by Mary Evans and Carolyn Williams, 1–9. *Gender: The Key Concepts*. Routledge Key Guides. Abingdon: Routledge, 2013.
- Silva, Elizabeth Bortolaia, and Carol Smart, eds. *The New Family?* London; Thousand Oaks, California: Sage, 1999.
- Singly, François de. "The Family of Individuals: An Overview of the Sociology of the Family in Europe, 130 Years After Durkheim's First University Course," 15–43. *The Palgrave Handbook of Family Sociology in Europe*. Cham: Springer International Publishing, 2021.



- Skolnick, Arlene S., and Jerome H. Skolnick. *Family in Transition*. 17. ed. Upper Saddle River, NJ: Pearson, 2014.
- Smith, Rhona. *International Human Rights*. 5th ed. Oxford: Oxford University Press, 2012.
- Somerville, Jennifer. *Feminism and the Family: Politics and Society in the UK and the USA*. London: Macmillan, 2000.
- Spano, Róbert. "Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity." *Human Rights Law Review* 14, no. 3 (September 1, 2014): 487–502.
- Stacey, Judith. *Brave New Families: Stories of Domestic Upheaval in Late-Twentieth-Century America*. Berkeley: University of California Press, 1998.
- Stalford, Helen. "Concepts of Family under EU Law - Lessons from the ECHR." *International Journal of Law, Policy and the Family* 16, no. 3 (December 1, 2002): 410–34.
- Sudre, Frédéric, Université de Montpellier I, and Commission pour l'étude des Communautés européennes (France), eds. *Le Droit Au Respect de La Vie Privée Au Sens de La Convention Européenne Des Droits de l'homme: Actes Du Colloque Des 26 et 27 Novembre 2004*. Droit et Justice 62. Bruxelles: Bruylant, 2005.
- Thomale, Chris. "State of Play of Cross-Border Surrogacy Arrangements – Is There a Case for Regulatory Intervention by the EU?" *Journal of Private International Law* 13, no. 2 (May 4, 2017): 463–73.
- Thorne, Barrie, ed. *Rethinking the Family: Some Feminist Questions*. New York: Longman, 1982.
- Timmer, Alexandra. "Missed Chance at Condemning Paternalism: S.H. and Others v. Austria, Part Two," *Strasbourg Observers*, April 26, 2010, <https://strasbourgobservers.com/2010/04/26/missed-chance-at-condemning-paternalism-s-h-and-others-v-austria-part-two/> (last accessed 13 July 2022).
- Tonetto, Milene Consenso. "Feminist Reformulations of Human Rights." *Human Affairs* 29, no. 3 (July 26, 2019): 311–27.
- Whitelegg, Elizabeth, and Open University, eds. *The Changing Experience of Women*. Oxford: M. Robertson in association with the Open University, 1982.
- Wilkinson, Stephen. *Choosing Tomorrow's Children: The Ethics of Selective Reproduction*. 1. publ. in paperback. Issues in Biomedical Ethics. Oxford: Clarendon Press, 2012.

Wollstonecraft, Mary. *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects*. 1st ed. Cambridge University Press, 2010.

### **Theses:**

Gabrielle Wadlig, *The margin of appreciation and medically assisted reproduction*, University of Graz, February 2014, <https://unipub.uni-graz.at/obvugrhs/download/pdf/240012?originalFilename=true> (last accessed 13 July 2022).

Orsolya-Zsuzsanna Csortán, *Surrogacy arrangements and best interest of the child*, Umea University, Spring 2020, <http://umu.diva-portal.org/smash/get/diva2:1457025/FULLTEXT01.pdf> (last accessed 13 July 2022).

Sanni Nieminen, *Assisted reproductive technology and medically assisted reproduction in the context of the European Convention on Human Rights*, Umea University, Spring 2018, <http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1268847&dswid=8891> (last accessed 13 July 2022).

### **Legislation:**

Austria, *Fortpflanzungsmedizingesetz* [Artificial Procreation Act], Bundesgesetzblatt no. 275/1992, 1992.

Council of Europe, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, 4 April 1997.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950.

Council of Europe: Parliamentary Assembly, *Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 June 2013.

Iceland, *Act no. 55/1996 on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research*, 1996

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations.

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations.

## Official Documents and Reports:

Council of Europe, 17th Conference of European Ministers of Justice, *Resolution No. 3 on bioethics*, Istanbul, 5-7 June 1990.

Council of Europe, *Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, European Treaty Series No. 164, 4 June 1997, <https://rm.coe.int/16800ccde5> (last accessed 13 July 2022).

Council of Europe: Committee on Bioethics (DH-BIO), *Information document concerning the DH-BIO, DH-BIO/INF (2017) 5*, 13 December 2017, <https://rm.coe.int/inf-2017-5-e-info-doc-dh-bio/168077c578> (last accessed 13 July 2022).

Council of Europe: European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life*, 31 August 2020.

Council of Europe: European Court of Human Rights, *Research Report: Bioethics and the case-law of the Court*, 2016, [https://echr.coe.int/Documents/Research\\_report\\_bioethics\\_ENG.pdf](https://echr.coe.int/Documents/Research_report_bioethics_ENG.pdf) (last accessed 13 July 2022).

UN Committee on the Elimination of Discrimination Against Women, *CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev.1.

UN Committee on the Rights of the Child, *General comment No. 7: Implementing Child Rights in Early Childhood*, 2005, CRC/C/GC/7/Rev.1.

UNDP (United Nations Development Programme), *Special Report on Human Security, 2022*, <https://hdr.undp.org/system/files/documents//srhs2022pdf.pdf> (last accessed 13 July 2022).

United Nations, *Final Act of the International Conference on Human Rights*, UN Doc. A/Conf. 32/41, Tehran, 13 May 1968.

United Nations, *Report of the International Conference on Population and Development*, UN Doc. A/Conf. 171/13, Cairo, 18 October 1994.

## Online Sources:

CoE, "Chart of signatures and ratifications of Treaty 164", 2022, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=164> (last accessed 13 July 2022).

CoE, “46 Member States”, 2022, <https://www.coe.int/en/web/portal/46-members-states> (last accessed 13 July 2022).

CoE, “The Oviedo Convention and its Protocols”, 2022, <https://www.coe.int/en/web/bioethics/oviedo-convention> (last accessed 13 July 2022).

ESHRE, “Europe moves towards complete statutory regulation of assisted reproduction”, (6 February 2020), <https://www.eshre.eu/Press-Room/Press-releases-2020/ART-in-Europe> (last accessed 13 July 2022).

Eurostat, “Being Young in Europe Today: Family and Society”, July 2020, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Being young in Europe today - family and society](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Being_young_in_Europe_today_-_family_and_society) (last accessed 13 July 2022).

Eurostat, “Marriage and Divorce Rates”, May 2022, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage and divorce statistics#Fewer marriages.2C more divorces](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics#Fewer_marriages.2C_more_divorces) (last accessed 13 July 2022).

Fertility Europe, “Atlas of fertility treatment policies in Europe”, 10 December 2021, <https://fertilityeurope.eu/european-atlas-of-fertility-treatment-policies/> (last accessed 13 July 2022).

WHO, “Gender”, 2022, <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions> (last accessed 13 July 2022).

Rosa-Luxemburg Stiftung Rosa-Luxemburg Stiftung, “Commentary on Reproductive Justice”, 30 November 2021, <https://www.rosalux.de/news/id/45455/reproduktive-gerechtigkeit> (last accessed 13 July 2022).

The European Court of Human Rights, “The ECHR: A Living Instrument”, 2021, [https://www.echr.coe.int/Documents/Convention\\_Instrument\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_Instrument_ENG.pdf) (last accessed 13 July 2022).

UK Human Rights Blog, “Article 12”, 2022, <https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-12/> (last accessed 13 July 2022).

## Cases:

*Marckx v. Belgium*, Application no. 6833/74, Council of Europe: European Court of Human Rights, 13 June 1979.

*Kroon and Others v. Netherlands*, Application no. 18535/91, Council of Europe: European Court of Human Rights, 27 October 1994.

*Loizidou v. Turkey*, Grand Chamber Judgment, Application no. 15318/89, Council of Europe: European Court of Human Rights, 18 December 1996.

*X, Y and Z v. The United Kingdom*, Application No. 75/1995/581/667, Council of Europe: European Court of Human Rights, 22 April 1997.

*Di Lazzaro v. Italy*, Application no. 31924/96, Council of Europe: European Court of Human Rights, 10 July 1997.

*Pretty v. United Kingdom*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002.

*Jäggi v. Switzerland*, Application no. 58757/00, Council of Europe: European Court of Human Rights, 13 July 2006.

*Evans v. The United Kingdom*, Grand Chamber Judgment, Application no. 6339/05, Council of Europe: European Court of Human Rights, 10 April 2007.

*Dickson v. The United Kingdom*, Grand Chamber Judgment, Application no. 44362/04, Council of Europe: European Court of Human Rights, 4 December 2007.

*S.H. and Others v. Austria*, Chamber Judgment, Application No. 57813/00, Council of Europe: European Court of Human Rights, 1 April 2010.

*Schalk and Kopf v. Austria*, Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010.

*A, B and C v. Ireland*, Grand Chamber Judgment, Application no. 25579/05, Council of Europe: European Court of Human Rights, 16 December 2010.

*S.H. and others v. Austria*, Grand Chamber Judgment, Application no. 57813/00, Council of Europe: European Court of Human Rights, 3 November 2011.

*Costa and Pavan v. Italy*, Chamber Judgment, Application no. 54270/10, Council of Europe: European Court of Human Rights, 28 August 2012.

*Labassee v. France*, Application no. 65941/11, Council of Europe: European Court of Human Rights, 26 June 2014.

*Mennesson and others v. France*, Application no. 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014.

*Paradiso and Campanelli v. Italy*, Grand Chamber Judgment, Application no. 25358/12, Council of Europe: European Court of Human Rights, 24 January 2017.

*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 by the French Court of Cassation, Council of Europe: European Court of Human Rights, 10 April 2019.

*Valdís Fjölnisdóttir and Others v. Iceland*, Chamber Judgment, Application no. 71552/17, Council of Europe: European Court of Human Rights, 18 May 2021.

## Annexes

### The Central Human Capabilities

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and to reason—and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain.

5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

#### 7. *Affiliation*.

A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)

B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-

discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion national origin.

8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. *Play*. Being able to laugh, to play, to enjoy recreational activities.

10. *Control over One's Environment*.

A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation and protections of free speech and association.

B. Material. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.<sup>519</sup>

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<sup>519</sup> Nussbaum, "Human Rights and Human Capabilities", *supra* note 187.



## Overview of the Six Cases Studied

Case	Issue at Stake	Main Question Before the ECtHR
<i>Evans v. United Kingdom</i> (2007)	Use of eggs created in consent with former partner by the applicant after their separation and his withdrawal of consent	Does Article 8 ECHR include the right to become a parent in the genetic sense?
<i>S.H. and Others v. Austria</i> (2011)	Use of different techniques of ART which are prohibited under Austrian law	Does Article 8 ECHR include the right to access medically assisted reproduction?
<i>Costa and Pavan v. Italy</i> (2012)	Use of techniques of ART which are prohibited under Italian law to create a healthy child	Does Article 8 ECHR encompass the right to access ART treatment and preimplantation diagnosis ("PGD") in order to found a healthy family?
<i>Mennesson v. France</i> (2014)	Recognition of birth certificate of children conceived through surrogacy abroad	To which extent and under which conditions does Article 8 ECHR protect families created through surrogacy abroad?
<i>Paradiso and Campanelli v. Italy</i> (2015)	Ibid.	Ibid.
<i>Valdís Fjölnisdóttir and Others v. Iceland</i> (2021)	Ibid.	Ibid.

## **Council of Europe: ECtHR Cases on ART<sup>520</sup>**

### **Medically Assisted Procreation:**

*Evans v. The United Kingdom*, Grand Chamber, Application no. 6339/05, 10 April 2007

*Dickson v. The United Kingdom*, Grand Chamber, Application no. 44362/04, 4 December 2007

*S.H. and others v. Austria*, Grand Chamber, Application no. 57813/00, 3 November 2011

*Costa and Pavan v. Italy*, Chamber, Application no. 54270/10, 28 August 2012

*Knecht v. Romania*, Chamber, Application no. 10048/10, 2 October 2012

*Nedescu v. Romania*, Chamber, Application no. 70035/10, 16 January 2018

*Charron and Merle-Montet v. France*, Chamber, Application no. 22612/15, 16 January 2018 (decision on the admissibility)

*Petithory Lanzmann v. France*, Chamber, Application no. 23038/19, 12 November 2019 (decision on the admissibility)

*Lia v. Malta*, Chamber, Application No. 8709/20, 5 May 2022

### Pending applications:

*Gauvin-Fournis v. France*, Chamber, Application no. 21424/16

*Silliau v. France*, Chamber, Application no. 45728/17

*Dalleau v. France*, Chamber, Application no. 57307/18

*Baret v. France*, Chamber, Application no. 22296/20

### **Embryo donation and scientific research:**

*Parrillo v. Italy*, Grand Chamber, Application no. 46470/11, 27 August 2015

### **Surrogacy:**

*Mennesson and others v. France*, Chamber, Application no. 65192/11, 26 June 2014

*Labassee v. France*, Chamber, Application no. 65941/11, 26 June 2014

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<sup>520</sup> See CoE, *Research Report: Bioethics and the case-law of the Court*, *supra* note 274.

*Foulon and Bouvet v. France*, Chamber , Application nos. 9063/14 and 10410/14, 21 July 2016

*Laborie v. France*, Chamber, Application no. 44024/13, 19 January 2017

*D. and Others v. Belgium*, Chamber, Application no. 29176/13, 8 July 2014

*Paradiso and Campanelli v. Italy*, Grand Chamber Judgment, Application no. 25358/12, 24 January 2017

*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*, requested by the French Cour de Cassation, Grand Chamber, Request No. P16-2018-001, 10 April 2019

*C and E v. France*, Chamber, Application nos. 1462/18 and 17348/18) 19 November 2019 (decision on the admissibility)

*D v. France*, Application no. 11288/18, Chamber, 16 July 2020

*Valdís Fjölfnisdóttir and Others v. Iceland*, 18 May 2021

*S.-H. v. Poland*, Chamber, Application nos. 56846/15 and 56849/15 16 November 2021 (decision on the admissibility)

*A.L. v. France*, Chamber, Application no. 13344/20. 7 April 2022

*A.M. v. Norway*, Chamber, Application no. 30254/18, 24 March 2022