

Bioethics, human rights and their  
interplay in the legal reasoning of  
ECtHR's case law on artificial  
reproductive technologies

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# Bioethics, human rights and their interplay in the legal reasoning of ECtHR's case law on artificial reproductive technologies<sup>\*</sup>

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**Summary:** **1.** Introduction: the interplay between bioethics and human rights. **2.** Examining bioethical dilemmas posed by ART through the international human rights lens. **2.1** Artificial reproduction technologies: a revolution implying serious bioethical dilemmas. **2.2** Human rights law and the identification of competing interests deserving protection. **3.** The role of international human rights courts, with a special focus on the European Court of Human Rights. **3.1** Balancing competing rights between consolidated principles and argumentative ploys **3.2** Driving consolidation of the European consensus. **4.** Concluding remarks.

## **1. Introduction: the interplay between bioethics and human rights**

The nature of the relationship between bioethics and international human rights is far from being uncontested in the scholarly debate. Rather, scholars from different academic backgrounds (lawyers and philosophers, as well as political scientists and physicians) enliven the discussion on the dynamics governing the *liaison* between the two disciplines.

According to some authors, modern bioethics and human rights share historical origins, as they both developed in response to the same events (namely, the Second World War, the Holocaust and the crimes committed by the Nazis<sup>1</sup>) and were fuelled by identical social forces<sup>2</sup>. On the

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<sup>\*</sup> Articolo sottoposto a referaggio.

<sup>1</sup> R. ANDORNO, *Human Dignity and Human Rights as a Common Ground for a Global Bioethics*, in *Journal of Medicine and Philosophy*, 34, 2009, p. 235.

<sup>2</sup> ASHCROFT mentions: “the reassertion of humanist universalism in the aftermath of the Second World War; the recognition that medicine can have dirty hands in the aftermath of a series of scandals in medical research from the Nazi era through to the Tuskegee syphilis study; acceptance that medical innovation can go disastrously wrong in the face of various drug disasters, most notably thalidomide; and social changes



other hand, other scholars believe that the two disciplines have different roots, as most bioethical principles emerged more recently than human rights standards, in particular in the last decades of the twentieth century<sup>3</sup>.

A major point of discrepancy, however, concerns the possibility of identifying a fruitful interplay between bioethics and human rights. A number of authors recognize an overlap between the two disciplines<sup>4</sup>, even forecasting the gradual subsumption of bioethics in human rights<sup>5</sup>, or - at least - envisaging reciprocal benefits in their interplay, while confirming the need to keep them separated. However, many bioethicists remain sceptical with regard to the meaning and role of human rights in bioethical debates. The same idea of rights pertaining to the human being as such appears to be precarious: “the first and perhaps most important bioethical criticism of human rights is that bioethicists tend not to find much merit in the concept of ‘human rights’ itself”<sup>6</sup>. Others consider that the “rights” discourse may even have a detrimental effect on the bioethics debate: “the idea of rights is objectionable and creates many difficulties all of which reflect the limits of the law in terms of shaping and influencing decision-making in bioethical issues”<sup>7</sup>.

Such a heterogeneous collection of opinions may be explained in part in light of the different meanings accorded to the word “bioethics”. While philosophers consider it a part of ethics, lawyers use the term to describe the normative regulation of biomedical activities. ANDORNO explains that it is possible to identify two notions of bioethics: a narrower meaning referring to “the purely ethical dimension of life sciences”, and a broader meaning including “the legal aspects of biomedical issues”<sup>8</sup>.

It appears appropriate, therefore, to keep the two domains terminologically separated. “Bioethics” indicates that part of moral philosophy applying the notions of good and bad, and

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in terms of erosion of class privileges and social deference in the context of medical care, analogous to the successes of feminism and civil rights movements in the West”. R. ASCHROFT, *The Troubled Relationship Between Bioethics and Human Rights*, in M. FREEMAN (ed.), *Law and Bioethics: Current Legal Issues Volume*, Oxford, 2008, p. 641.

<sup>3</sup> J. SANDOR, *Bioethics and Basic rights: persons, humans, and boundaries of life*, in M. ROSENFELD - A. SAJÒ (eds.), *The Oxford Handbook of Comparative constitutional Law*, Oxford, 2012, p. 1143.

<sup>4</sup> J. SANDOR, *Human rights and bioethics: competitors or allies? The role of international law in shaping the contours of a new discipline*, in *Medicine and Law*, 2008, p. 16.

<sup>5</sup> T. FAUNCE, *Bioethics and Human rights*, in H.A.M.J. ten HAVE - B. GORDIJN (eds.), *Handbook of Global Bioethics*, Dordrecht, 2014, p. 471.

<sup>6</sup> R. ASCHROFT, op. cit., p. 38.

<sup>7</sup> D. SPERLING, *Law and Bioethics: A Rights-Based Relationship and Its Troubling Implications*, in M. FREEMAN (ed.), *Law and Bioethics: Current Legal Issues Volume*, Oxford, 2008, p. 78.

<sup>8</sup> R. ANDORNO, op. cit., 2009, pp. 224-225.



right and wrong in the field of biomedicine and life sciences, while “biolaw” describes the collection of national and international norms (including human rights) on biomedicine and life sciences. The main difference between the two categories rests upon the fact that only the latter includes principles expressed in terms of rights and responsibilities<sup>9</sup>.

The need to maintain the two terrains untainted corresponds to a distinction that cannot be overcome and shows that both philosophers and lawyers are right: while ethics cannot be regulated by law, the development of a normative discourse in biomedicine has expanded the domain of international human rights law into this field.

However, as this paper will try to demonstrate using artificial reproduction technologies (ART) as a case study, bioethics and human rights are not mutually exclusive. Firstly, most bioethical dilemmas can also be framed in terms of fundamental rights pertaining to individuals. Indeed, these issues usually imply competing interests that need to be balanced: an operation inherent to the human rights discourse. Secondly, and more importantly, the two disciplines find an important point of conjunction in the legal reasoning of international human rights tribunals when dealing with bioethical issues. It is argued here that in deciding cases involving controversial bioethical issues, rather than maintaining a neutral voice, international judges make clear ethical choices.

## **2. Examining bioethical dilemmas posed by ART through the international human rights lens**

Reproductive medicine has undergone enormous advancements since 1978 when the first baby resulting from *in vitro* fertilization was born. Its constant improvement has helped - and still helps - to find solutions to medical and “social”<sup>10</sup> sterility/infertility, and to avoid the transmission of genetic diseases to offspring. Unsurprisingly, the results achieved and possible prospects raise many bioethical dilemmas.

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<sup>9</sup> Scholars have made many efforts in identifying the differences between the two normative systems. ANDORNO (op. cit., p. 224), for example, stresses: “ethics reflects the effort of our reason in discovering whether something is right or wrong and aims at promoting the fulfilment of our tendencies toward the good, at least according to the classical, or Aristotelian, view on ethics. In contrast, law has a much narrower scope than ethics, because it does not seek to make men moral, even if legal norms certainly have an indirect positive impact on the moral fulfilment of persons. The basic purpose of law is just to ensure that human relationships are governed by the principle of justice, or in other words, that the rights of each individual, as well as the common interests of society as a whole, are guaranteed”.

<sup>10</sup> Reference is to the condition of gay, lesbian or single parents.

Additionally, like any biomedical activity, ART are directly related to the most basic human rights such as the right to life and to physical integrity. For this reason, “it is perfectly sound to have recourse to the umbrella of international human rights law to ensure their protection”<sup>11</sup>. However, the reference to human rights law is not motivated solely by reasons of opportunity. Rather, the moral disputes posed by ART may be framed in terms of human rights, as they imply the need to fairly balance competing interests: an operation that is inherent to the human rights discourse.

## **2.1. Artificial reproduction technologies: a revolution implying serious bioethical dilemmas**

As MORI said, artificial reproduction technologies “are likely to change not only our way of reproducing but also our view of what human reproduction is (or should be)”<sup>12</sup>. The “unprecedented technical control that medical science now brings to the entire reproductive enterprise”<sup>13</sup> has been correctly described as a revolution with no turning back, a process that is visibly on-going<sup>14</sup> and implies many bioethical dilemmas.

Firstly, from a philosophical point of view, the separation of procreation from sexual intercourse - implicit in these technologies - represents an affront to creationism<sup>15</sup>, which still finds support among philosophers, theologians, but also policy makers and educators<sup>16</sup>. As EVANS explained well, “opposition to assisted procreation procedures is often voiced in terms of the interference

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<sup>11</sup> R. ANDORNO, *Global bioethics and Human Rights*, in *Medicine and Law*, 27, 2008, p. 9.

<sup>12</sup> M. MORI, *Is hand of policy to reproduction preferable to artificial intervention?*, in D. EVANS & N. PICKERING (eds.), *Creating the Child: The Ethics, Law, and Practice of Assisted Procreation*, The Hague, 1996, p. 99.

<sup>13</sup> J.A. ROBERTSON, *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton, 1996, p. 5.

<sup>14</sup> Newspapers have recently reported a baby boy born in Mexico resulting from “spindle transfer”, a mitochondrial replacement technique, used to avoid the transmission of disorders caused by dysfunctional mitochondria: <https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/>

<sup>15</sup> “The separation of procreation from the one-flesh relationship of husband and wife and the intrusion of multiple parties into the procreative process are contrary to the designs of creation and serve to confuse and exacerbate personal identities and family patterns”: D.P. HOLLINGER, *The Right to Have a Child: Are There Ethical Limitations?*, 2003, at: <https://cbhd.org/content/right-have-child-are-there-ethical-limitations>.

<sup>16</sup> Consider, for example, the position held by the creationist-minded members of the Texas Board of Education, who believe that public schools should avoid addressing evolution in their programmes: [http://www.huffingtonpost.com/2013/09/11/texas-creationism-textbooks\\_n\\_3902946.html](http://www.huffingtonpost.com/2013/09/11/texas-creationism-textbooks_n_3902946.html).



with natural processes which they entail. The artificiality is said to undermine the dignity of human life by moving away from traditional givenness of life to its commodification”<sup>17</sup>.

In addition, ethical concerns may arise regarding the fate of the embryos (resulting from the application of artificial reproduction technologies) that are not implanted in the maternal womb. Whether - and to what extent - it is ethically acceptable to destroy an early-stage human being is a central problem in other contemporary debates as well (i.e. abortion and post-coital contraception, embryo and stem cell research, genetic engineering, cloning, etc.). Clearly, the key issue at stake is the moral status of human embryos<sup>18</sup>.

Secondly, artificial reproduction technologies have a vital impact on the family as a key social structure. These techniques challenge the traditional model of the family, enabling “the creation of families that otherwise would not exist [and] allow[ing] for a remarkable pluralism of family structures”<sup>19</sup>, including single parents and same-sex couples. Medically assisted fertilization also increases the number of multiple births and allows the rise in the age of mothers. It even changes the way individuals make choices about reproduction; these decisions cease to be private issues (addressed in the intimate setting of a couple) in order to become shared choices involving a number of people, including “physicians, the providers of ART services, and the individuals who are involved in the process - from gamete donors to surrogates”<sup>20</sup>.

Thirdly, certain applications, *in primis* the possible use of eugenics, risk modifying the human being from being a “subject” of scientific activity, to an “object” of manipulation. While pre-implantation screening was developed to test for major genetic disorders and disabilities, sex selection (especially when based not on medical concerns, but on the parents’ preference), the

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<sup>17</sup> D. EVANS, *Creating the Child*, in D. EVANS & N. PICKERING (eds.), *Creating the Child: The Ethics, Law, and Practice of Assisted Procreation*, The Hague, 1996, p. 5.

<sup>18</sup> Comitato Nazionale di Bioetica, *Identità e statuto dell’embrione umano*, 22 giugno 1996; G.R. DUNSTAN – M.J. SELLER, *The Status of the Human Embryo: Perspectives from Moral Tradition*, London, 1988; M. MORI, *Il CNB e lo statuto dell’embrione: un’analisi critica del documento e linee di una prospettiva alternativa*, in *Bioetica*, IV, 1996, pp. 431-460; M. MORI, *Is the human embryo a person? No*, in D. EVANS (ed.), *Conceiving the Embryo. Ethics, Law and Practice in Human Embryology*, The Hague, 1996; M. MORI, *L’insolubile questione dell’identità dell’embrione. La questione: ‘se l’embrione sia o no una persona’ è l’equivalente di quella più antica: ‘se il sole giri o no attorno alla terra?’*, in *Rivista di Teologia Morale*, XXVIII, 1996, pp. 493-499; J. ALVAREZ-DÍAZ, *The status of the human embryo from a gradualistic perspective*, in *Gaceta Médica de México*, 3, 2007, pp. 267-277; J.P. LIZZA, *Potentiality and human embryos*, in *Bioethics*, 21(7), 2007, pp. 379-385; E. SGRECCIA – J. LAFFITTE, *The human embryo before implantation. Scientific aspects and bioethical considerations (Proceedings of the twelfth assembly of the Pontifical Academy for life)*, Città del Vaticano, 2007; B. STEINBOCK, *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses*, Oxford, 2011.

<sup>19</sup> M. SABATELLO, *Are the Kids All Right? A Child-Centred Approach to Assisted Reproductive Technologies*, in *Netherlands Quarterly of Human Rights*, 2013, pp. 74-75.

<sup>20</sup> *Id.*, p. 75.



creation of a “saviour sibling”<sup>21</sup> and, more generally, the possibility for parents to choose specific traits of their baby appear extremely controversial. As a matter of fact, new techniques have transformed eugenics. While, in the past, projects to improve the human species required State selection of who was permitted to procreate, artificial reproduction technologies change both the people “responsible” for and the “victims” of genetic intervention. Since parents can now know the genetic makeup of their children in advance and, therefore, nourish specific aspirations as to the characteristics of their progeny, new technologies transform parents from potential “victims” of the public authority’s impositions, to being potentially “responsible” for eugenics, at the expense of their offspring<sup>22</sup>.

Lastly, the improvement of reproductive medicine has generated a prosperous ‘baby-market’<sup>23</sup> (or ‘baby-business’<sup>24</sup>), involving many players and generating considerable profit. “While the existence of an eager clientele has naturally been a trigger to the development of this market, today [this] is an industry valued at billions of dollars annually”<sup>25</sup>. The success of these technologies, enabling sub-fertile people to realize their parental aspirations, generates demand for medically assisted reproduction, which in turn produces a market for eggs and sperm<sup>26</sup>, as well as for other services, including gestational surrogacy.

As SPAR and HARRINGTON clearly stated, medically assisted reproduction “is one of the few markets in the world in which products and services are regularly exchanged for money - often very large amounts of money - where buyers and sellers on both sides of the exchange remain loath to acknowledge that they are engaged in a commercial transaction”<sup>27</sup>. Such reticence is certainly due to the disturbing perception that this process involves the commodification of reproduction: namely, commodifying something that, in view of its nature, should not be considered for sale. Assigning a monetary value to an experience as intimate as pregnancy and

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<sup>21</sup> Selection and implantation of a human embryo capable of donating a life-saving tissue to an existing brother or sister: S. SHELDON – S. WILKINSON, *Should Selecting Saviour Siblings Be Banned?*, in *Journal of Medical Ethics*, 30, 2004, pp. 533–537.

<sup>22</sup> C. CAMPIGLIO, *Eugenetica e Diritto Internazionale*, in N. BOSCHIERO (ed.), *Ordine Internazionale e Valori Etici*, Napoli, 2004, p. 461.

<sup>23</sup> M. GOODWIN, *Baby Markets: Money and the New Politics of Creating Families*, New York, 2010.

<sup>24</sup> D.L. SPAR, *The Baby Business. How Money, Science, and Politics Drive the Commerce of Conception*, Boston, 2006.

<sup>25</sup> M. SABATELLO, op. cit., p. 77.

<sup>26</sup> A. STYHRE, - R. ARMAN, *Institutionalizing Assisted Reproductive Technologies: The Role of Science, Professionalism, and Regulatory Control*, New York, 2016, p. 15.

<sup>27</sup> D.L. SPAR – A.M. HARRINGTON, *Building a Better Baby Business*, in *Minnesota Journal of Law Science & Technology*, 10(1), 2009, p. 43.

childbirth subordinates it to market dynamics and “may lead to a degradation of things that have been previously considered to be sacred and priceless”<sup>28</sup>.

While the commodification of reproduction *per se* raises some ethical concerns, the global dimension that such a phenomenon has reached certainly amplifies the spectrum of critical issues. As a matter of fact, “reproductive tourism” (i.e. the phenomenon of patients travelling to other countries to undergo fertility treatments not available to them in their own country for a variety of reasons), especially when it involves surrogacy, is growing in developing countries. As ALLAN explained, “the underlying global inequalities between geographic regions and their residents and local inequalities among residents based on gender, class, race, and ethnic hierarchies”<sup>29</sup> make such a phenomenon possible. Moreover, these practices have an impact on inequalities, as they make “racial, cultural and social disparities more salient”<sup>30</sup>.

## **2.2. Human rights law and the identification of competing interests deserving protection**

Various rights emerge from the application of new technologies to the beginning of life, some of which are more nebulous than others, with no clear contents or boundaries. Still, all of the mentioned interests and positions deserve protection to some extent.

The two main categories at stake are children’s rights, on the one hand, and parents’ rights, on the other.

Voices opposing recourse to ART usually stress the need to protect the child rather than the future parents’ aspirations. They affirm the supremacy of the “rights of a baby” over a supposed “right to a baby” and adopt a “child-oriented” approach to reproductive technologies, visibly closer to a traditional idea of family, considering access to ART only as a remedy to couples’ infertility and not as an instrument available to everybody<sup>31</sup>.

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<sup>28</sup> C. VOIGT - J. LAING, *Journey into Parenthood: Commodification of Reproduction as a New Tourism Niche Market*, in *Journal of Travel & Tourism Marketing*, 27(3), 2010, p. 253.

<sup>29</sup> L. IKEMOTO, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services*, in *Law & Inequality*, 27, 2009, p. 277. See also A. DONCHIN, *Reproductive Tourism and the Quest for Global Gender Justice*, in *Bioethics*, 24(7), 2010 pp. 323-332.

<sup>30</sup> S. ALLAN, *Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change*, Working Paper, 2014, available at: <http://ssrn.com/abstract=2431142>, p. 3; J. RIMM, *Booming Baby Business: Regulating Commercial Surrogacy in India*, in *University of Pennsylvania Journal of International Law*, 30 (4), 2009, p. 1445.

<sup>31</sup> D. NERI, *Child or parent oriented controls of reproductive technologies*, in D. EVANS & N. PICKERING (eds.), *Creating the Child: The Ethics, Law, and Practice of Assisted Procreation*, The Hague, 1996, p. 145.



On the other hand, supporters of ART embrace a “parent-oriented” approach, based on the idea that limits to one’s procreative choices are justified only when there are sufficient reasons to believe that these choices will harm other people’s rights<sup>32</sup>. PAVONE, for example, considers that artificial reproduction techniques led to the emergence of a new category of rights including “the right to an offspring void of a serious genetic disease, the right to have access to ART and the right to adequate genetic counselling”<sup>33</sup>. Other scholars “emphasize the importance of individual freedom, specifically the autonomy of the person and the right to make private choices free from the scrutiny of the State”<sup>34</sup>, as well as the right to health, including reproductive health. In fact, international law recognizes reproductive rights: they were explicitly mentioned for the first time at the Teheran Conference in 1968, when freedom of choice in family planning was identified as a fundamental right. They gained further endorsement in the Programme of Action, adopted in 1994 at the Cairo Conference on Population and Development, and in the Platform for Action, adopted at the Beijing Conference on Women in 1995. Both documents establish reproductive freedom in relation to reproductive and sexual health<sup>35</sup> and include the prevention and treatment of infertility in health treatments for reproductive purposes<sup>36</sup>.

While these are the two main categories of rights involved, other positions may find also a place in the debate.

Firstly, the delicate condition of the embryo implies the question of whether it enjoys a right to life.

International law provides no clear guidance in this regard<sup>37</sup>. With the sole exception of Article 4.1 of the Inter-American Convention on Human Rights providing that the right to life “shall be protected by law and, in general, from the moment of conception”, human rights treaties do not extend the applicability of the right to life to foetuses or embryos. Some provisions do express

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<sup>32</sup> *Id.*, p. 146.

<sup>33</sup> I.R. PAVONE, *Medically assisted procreation and international human rights law*, in *Italian Yearbook of International Law*, 22, 2012, p. 156.

<sup>34</sup> *Ibidem*.

<sup>35</sup> “Reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems”: International Conference on Population and Development, Programme of action, Cairo, 5-13 September 1994, par. 7.2 and Fourth World Conference on Women, Platform for Action, Beijing, 4-15 September 1995, par. 94.

<sup>36</sup> Reproductive health includes “the right of men and women to have access (...) to methods of their choice for regulation of fertility which are not against the law”, Il Cairo Programme of action cit., par 7.2 and Beijing Platform for Action cit., par. 97.

<sup>37</sup> M. PETERSEN, *The Legal Status of the Human Embryo in vitro: General Human Rights Instruments*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 65, 2005, pp. 447-466.

the need to protect pre-natal life: the Preamble of the Convention on the Rights of the Child, for example, recognizes that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before* as well as after birth”<sup>38</sup>. Moreover, Article 6.5 of the International Covenant on Civil and Political Rights prohibiting the application of the death penalty against pregnant women, reveals some type of concern for the foetus’s existence<sup>39</sup>. Nevertheless, international human rights bodies have always avoided recognizing an absolute right to life to foetuses or embryos. The Inter-American Commission, for example, clearly stated that abortion is compatible with Article 4.1 of the Inter-American Convention on Human Rights<sup>40</sup>. The European Court of Human Rights, on the other hand, plainly declared that “it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention, [guaranteeing the right to life]”<sup>41</sup>. This does not exclude, however, that embryos and foetuses enjoy some kind of protection, as is confirmed by a number of documents circumscribing the use of human embryos and foetuses for scientific purposes<sup>42</sup>.

Secondly, there is a more general concern for the need to preserve human dignity as an autonomous value. Human dignity is not only “at the heart of the major human rights instruments”<sup>43</sup> underpinning each fundamental right, but also has an independent position in international biomedical law, representing to some extent “the last barrier against the alteration of some basic features of the human species that might result from practices such as reproductive cloning or germ-line interventions”<sup>44</sup>. Indeed, while any human right necessarily belongs to an existing individual, human dignity is the only value pertaining to humanity as such.

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<sup>38</sup> Convention on the Rights of the Child, New York, 1989 (emphasis added).

<sup>39</sup> International Covenant on Civil and Political Rights, New York, 1966.

<sup>40</sup> In the so-called ‘Baby-boy case’ (*White and Potter v. USA*, application n. 2141, Report n. 23/81, 6 March 1981), the Inter-American Commission declared the compatibility with the American Declaration of the Rights and Duties of Man, as well as with Article 4.1 of the American Convention on Human Rights, of the principles assessed by the US Supreme Court in *Roe v. Wade*.

<sup>41</sup> European Court of Human Rights, Grand Chamber, *Vo v. France*, 8 July 2004, par. 85.

<sup>42</sup> See Art. 18 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, Oviedo, 1998. Among non-binding documents: Parliamentary Assembly of the Council of Europe, Recommendation 1046 (1986) on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes; Recommendation 1100 (1989) on the use of human embryos and foetuses in scientific research; Resolution 1352 (2003) on human stem cell research.

<sup>43</sup> R. ANDORNO, *Human Dignity* cit., 2009, p. 228.

<sup>44</sup> *Ibidem*.



Finally, whenever recourse to ART implies the participation of other subjects (i.e. gamete donors or surrogate mothers), their fundamental rights and freedoms need to be carefully considered, evaluated and protected.

As this analysis demonstrates, the controversial bioethical profiles emerging from the application of ART can easily be translated into the human rights discourse as divisive issues posed by contending positions deserving some kind of protection. While a human rights perspective cannot *ipso facto* lead to a unanimous solution, it certainly contributes to the bioethical debate by identifying all of the interests at stake.

### **3. The role of international human rights courts, with a special focus on the European Court of Human Rights**

Since recourse to ART imposes delicate choices and presents controversial features difficult to prognosticate in the law-making phase, the role of human rights courts is central to identifying and correctly implementing clear standards for access to these techniques.

Among other international courts<sup>45</sup>, the ECtHR plays a key role in this field, as it has dealt (and is currently dealing) with a number of cases related to ART, mainly under the perspective of Article 8 of the European Convention on Human Rights (ECHR), which guarantees the right to a private and family life<sup>46</sup>.

The Court has considered the following issues: the decision to become or not to become a parent through *in vitro* fertilization<sup>47</sup>; the right of individuals to see their decision to become genetic parents respected<sup>48</sup>; access to heterologous artificial procreation<sup>49</sup>; access to preimplantation genetic diagnosis (PGD)<sup>50</sup>; and the right to donate embryos to scientific research<sup>51</sup>. Additionally, a number of controversial profiles deriving from the practice of surrogacy have been brought to

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<sup>45</sup> The Inter-American Court on Human Rights adopted a paramount decision in 2012, in the case *Artavia Murillo et al.*, recognizing that Costa Rica's ban of the reproductive health technology violated the right to personal integrity, the right to liberty, the right to privacy, as well as the right to form a family.

<sup>46</sup> Art. 8 ECHR states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>47</sup> European Court of Human Rights, Grand Chamber, *Evans v. United Kingdom*, 10 April 2007.

<sup>48</sup> European Court of Human Rights, Grand Chamber, *Dickson v. United Kingdom*, 4 December 2007.

<sup>49</sup> European Court of Human Rights, Grand Chamber, *S.H. and others v. Austria*, 3 November 2011.

<sup>50</sup> European Court of Human Rights, *Costa e Pavan v. Italy*, 28 August 2012.

<sup>51</sup> European Court of Human Rights, Grand Chamber, *Parrillo v. Italy*, 27 August 2015.

the ECtHR's attention<sup>52</sup>. It is therefore with reference to ECtHR case law that the analysis will address the role of international HR courts in ruling on new technologies applied to the beginning of life. It is outside the scope of this paper to offer a detailed examination of ECtHR case law on ART and related practices<sup>53</sup>. Rather, this analysis will now consider: 1) how the Court identifies the relevant rights and interests and finds a balance among them, referring both to the principle of the State's margin of appreciation and developing argumentative ploys; and 2) how the Court's stance may drive the consolidation of European consensus.

It will be argued that, while the Court commonly applies principles that are solidly founded in its case law, in many cases related to sensitive issues, this application is not free from inconsistencies and, moreover, it is accompanied by other argumentative manoeuvres, which allow the Court to obtain the desired results.

### **3.2. Balancing competing rights between consolidated principles and argumentative ploys**

The identification of all the rights and interests at stake is an operation implicit in any application of Article 8 ECHR, which provides that the right to respect for one's "private and family life" may be subjected to certain restrictions, as long as they are in accordance with the law, serve a legitimate aim (among those listed in paragraph 2 of the provision) and are "necessary in a democratic society". This last requirement implies a proportionality test: the Court is called to verify the balance between the severity of the restriction imposed on individual rights and the importance of the public interest invoked by the State. Especially when intricate and delicate issues (like those related to access to ART) are under consideration, the States enjoy a substantial margin of appreciation<sup>54</sup> in deciding what is "necessary in a democratic society". Indeed, the

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<sup>52</sup> European Court of Human Rights, *Mennesson v. France* and *Labassee v. France*, 26 July 2014; *D. and others v. Belgium*, 8 July 2014; *Paradiso e Campanelli v. Italy*, 25 January 2015.

<sup>53</sup> For an analysis of the European Court of Human Rights' case-law on ART and connected practices see: I.R. PAVONE, *Medically assisted procreation* cit.; V. ZNIDARSIĆ SKUBIC, *The Issue of Consent in Bio-Medically Assisted Reproduction Procedures (the Case of 'Evans v. the United Kingdom')*, *Collected Papers of Zagreb Law Faculty*, 58 (5), 2008, pp. 1141-1158; S. BIONDI, *Access to medical-assisted reproduction and PGD in Italian law: a deadly blow to an illiberal statute? Commentary to the European Court on human rights' decision Costa and Pavan v Italy*, in *Medical Law Review*, 21(3), 2013, pp. 474-486; L. POLI, *Pre-implantation genetic diagnosis under the European Court of human rights review: an opening toward a wider acceptance of the technique in Europe?*, in *Czech Yearbook of Public & Private International Law*, 4, 2013 pp. 141-169; L. POLI, *Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale*, in *Biolaw Journal*, 3 2015, pp. 7-28.

<sup>54</sup> On the margin of appreciation see: A.D. OLINGA, - C. PICHERAL, *La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour européenne des droits de l'homme*, in *Revue trimestrielle des droits de l'homme*, 24, 1995 pp. 567-604 ; H. R. HUTCHINSON, *The Margin of Appreciation Doctrine in the European Court of Human*



States are deemed to be in the best position to find an equilibrium between competing interests, sensibilities and beliefs. However, when a core right is at stake, the margin of appreciation of the States is reduced for the Court. Moreover, even when the margin of appreciation is wide, this does not mean that the solutions reached by the State are beyond the scrutiny of the ECtHR, which is called to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by its action.

These well-established principles are not the only guidelines the Court follows in its reasoning. In some decisions, in fact, the Court has developed argumentative ploys to ensure the protection of fundamental rights in the face of important public interests, even confirming a wide scope of discretion to States.

A good example of this trend is provided by the ECtHR's judgement in the case *Costa and Pavan v. Italy*, where the applicants claimed a violation of Article 8 ECHR due to their being prevented from obtaining a pre-implantation genetic diagnosis. The approach adopted by the Court regarding Article 8 ECHR is highly innovative. For the first time, the ECtHR assessed the proportionality of a single provision of law, not just *per se*, but rather in light of relevant Italian legislation on the matter. Once the Court accepted that the prohibition of PGD interfered with the applicants' private and family life<sup>55</sup> prescribed by the law and aimed at the pursuit of legitimate objectives (namely, the protection of morals and of the rights and freedoms of others<sup>56</sup>), it moved to evaluate whether the prohibition was also "necessary in a democratic society". At this point, the Court did not circumscribe its analysis to the ban's compatibility with Article 8 ECHR, rather it evaluated it in a broader legal context, considering Italian regulations of therapeutic abortion<sup>57</sup>. This assessment led the Court to determine an unlawful infringement of the right to private and family life due to the inconsistency of normative provisions affecting aspirant parents who are carriers of a hereditary disease. Specifically, it was noted that Italian law prohibits the selection and implantation of healthy embryos, but allows therapeutic abortion when the same disorders are found in the foetus through pre-natal screening<sup>58</sup>.

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*Rights*, in *International and Comparative Law Quarterly*, 48(3), 1999, pp. 638-650; S. GREER, *The margin of appreciation: interpretation and discretion under the European Convention on Human Rights*, Strasbourg, 2000; Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, 2001; G. LETSAS, *Two concept of the margin of appreciation*, in *Oxford Journal Legal Studies*, 26(4), 2006, pp. 705-732; J. CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, The Hague, 2009.

<sup>55</sup> European Court of Human Rights, *Costa e Pavan* cit., par. 58.

<sup>56</sup> *Ivi*, par 59.

<sup>57</sup> *Ivi*, par 69.

<sup>58</sup> *Ivi*, par 60 ff.



An analysis limited to the legitimacy of the prohibition of PGD would have led the Court to confirm the existence of the State's wide margin of appreciation - which covers, as constantly confirmed by ECtHR case law, both the decision to regulate (or not) a particular matter, and the concrete normative choices made<sup>59</sup> - and, therefore, to exclude a violation of Article 8 ECHR. Only a broader examination of the Italian legal system led the Court to conclude that, in the *Costa and Pavan* case, the legitimate aim (i.e., the protection of public morals and of others' rights and freedoms) could have been pursued with a lesser impact on the applicants' rights through the application of PGD.

The ECtHR's endorsement of the States' wide margin of appreciation in delicate issues can nonetheless clearly be seen in the decision. In fact, the Court deliberately avoided any clear censure of the legal choices taken under the Italian system as far as access to ART is concerned: indeed Law no. 40/2004 allows only sterile or infertile couples to use artificial fertilization techniques and only when the causes impeding procreation cannot otherwise be removed (Article 4)<sup>60</sup>.

While it is somewhat bizarre that the Court decided to ban PGD with no reference to its premise (i.e. limited access to assisted reproductive technology), the stance adopted by the judges is perfectly in line with previous case law. The Court's (partial) silence reveals its intention to validate the States' discretion in ruling on sensitive matters.

An additional feature of ECtHR case law in this field is the identification of a position deserving special protection, which leads the Court to its pronouncement, even when such a position is not directly considered in the case.

While all decisions relating to cases where surrogacy has taken place demonstrate how the Court is sound in affording protection to children, the decision taken in *Paradiso and Campanelli v. Italy* deserves special attention. In this case, the Court focused on the removal of a child born through surrogacy and his placement under guardianship by Italian authorities on the grounds that he had no biological relationship with the applicants (the intended parents) and that they were in an unlawful situation<sup>61</sup>. The applicants claimed the violation of Article 6, 8 and 14 ECHR on the

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<sup>59</sup> European Court of Human Rights, *S.H. and others cit.*, par. 53.

<sup>60</sup> Following the adoption of the Decree n. 31639 of 11 April 2008 by the Italian Ministry of Health, access to assisted procreation has been extended to couples in which the male partner suffers from a sexually transmissible disease. In both the cases, the couples must be composed of living heterosexual adults, of a potentially childbearing age, who are married or cohabitants (Article 5, Law 40/2004).

<sup>61</sup> According to the Italian authorities, they had circumvented the prohibition in Italy on using gestational surrogacy arrangements and the rules on international adoption by contacting a Russian agency in order to become parents and subsequently bringing to Italy a child whom they passed off as their child.

child's behalf, but the ECtHR ruled that they could not represent the child because of the lack of any biological tie between them and the child, and his current placement under guardianship in Italy. However, the Court held that there had been a violation of Article 8 ECHR to the detriment of the applicants: according to the judges, the public policy considerations underlying the Italian authorities' decisions could not take precedence over the best interests of the child, in spite of the lack of any biological relationship and the short period during which the applicants had cared for him. Reiterating that the removal of a child from the family setting is an extreme measure that can be justified only in the event of immediate danger to the child, the Court concluded that the conditions justifying removal had not been met in this case. Interestingly enough, then, although the Court excluded the possibility of considering the alleged violations suffered by the child, it recognized the violation against the parents, for the detrimental effect that the Italian authorities' decision had had on the baby's condition. In a way, the Court appears to protect the applicants' position as a means to guaranteeing the child's.

### **3.3. Driving consolidation of the European consensus**

The Court uses the existence of a general agreement among the Member States of the Council of Europe on certain standards and principles to define the scope of the States' margin of appreciation in any given matter. The Court considers this principle to bear "the weight of legal tradition of the entire European system. It also provides a basis for evolving rights to be incorporated into the general provisions of the Convention. Finally, it provides relatively objective guidance to the interpretation of those provisions"<sup>62</sup>. As a rule, therefore, the lack of consensus on a particular issue in Europe is the basis for the recognition of a wider margin of appreciation by the Court.

In some cases, even if just between the lines, the Court encourages the strengthening of the European consensus and calls upon the States to be responsive to such a development.

In the judgement relating to the case *S.H. v. Austria* reversing the decision upheld by the Chamber, the ECtHR Grand Chamber excluded that Austria's prohibition of the use of donor sperm or ova for *in vitro* fertilization may violate Articles 8 and 14 ECHR. The Court held that the Austrian government had a wide margin of appreciation, and considered that "there is not yet

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<sup>62</sup> T.A. O'DONNELL, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, in *Human Rights Quarterly*, 4(4), 1982, p. 480. See also E. BENVENISTI, *Margin of appreciation, consensus, and universal standards*, in *New York University Journal of International Law and Politics*, 31 (4), 1998, p. 843.



clear common ground amongst the member States”<sup>63</sup> as regards heterologous *in vitro* fertilization. However, the judges did not miss the chance to reiterate “that the Convention has always been interpreted and applied in the light of current circumstances (...). Even if it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law, needs to be kept under review by the Contracting States”<sup>64</sup>.

In other decisions, a closer reading of the reference to the European consensus reveals the Court’s intention to push its consolidation.

Once again, the *Costa and Pavan* case offers some cues. In its judgement, the Chamber made a comparative analysis of domestic legal systems to assess whether a European consensus on PGD exists<sup>65</sup>. However, the ECtHR did not limit the relevance of its assessment to identifying the scope of the margin of appreciation, but rather used the European consensus to strengthen its conclusions as to the infringement of Article 8 of the ECHR. As explained above, the Court recognized a violation of the applicants’ right to private and family life, referring to the lack of proportionality of the prohibition of PGD under the Italian legal system, in light of possible access to therapeutic abortion. Thus, its findings were in no way related to a limited scope of the respondent’s margin of appreciation on the issue. This notwithstanding, before moving to its conclusions, the Court felt the need to recall the mentioned comparative analyses results. More precisely, it stated that the PGD ban is “*une situation spécifique laquelle, d’après les éléments de droit comparé dont la Cour dispose, outre l’Italie, ne concerne que deux des trente-deux Etats ayant fait l’objet d’examen, à savoir l’Autriche et la Suisse. De plus, quant à ce dernier Etat, la Cour note qu’un projet de modification de la loi en vue de remplacer l’interdiction du D.P.I., telle qu’actuellement prévue, par une admission réglementée est actuellement en cours*”<sup>66</sup>. Not only is such remark not strictly required for its conclusions on Article 8 ECHR, but the Court’s interpretation of the comparative data also appears erroneous. The documents prepared by the Steering Committee on Bioethics and the Joint Research Centre show that, of the 30 States considered, 20 authorize PGD (including three States

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<sup>63</sup> European Court of Human Rights, *S.H. and others cit.*, par. 97.

<sup>64</sup> *Ivi*, par. 118.

<sup>65</sup> According to the surveys completed by the Council of Europe’s Steering Committee on Bioethics (“The protection of the human embryo *in vitro*, Report by the Working Party on the Protection of the Human Embryo and Fetus”, 19 June 2003, CDBI-CO-GT3 (2003) 13) and the European Commission’s Joint Research Centre (“Pre-implantation Genetic Diagnosis in Europe”, December 2007, EUR 22764 EN), the pre-implantation genetic diagnosis is not permitted in Italy, Austria and Switzerland. This technique is expressly authorized in 17 countries within the Council of Europe and applied in Turkey, Slovakia and Cyprus, despite the lack of specific internal rules on the matter.

<sup>66</sup> European Court of Human Rights, *Costa e Pavan cit.*, par. 70.



permitting screening, even in the absence of a detailed regulation), while such a practice is not allowed not only in those States explicitly banning it, but also in the other nine countries, that have not adopted rules and are not reported as *de facto* practicing PGD. In other words, it is possible to infer that the lack of a regulation on PGD in these countries would result in access to such procedures being banned. A similar interpretation of the available data should have led the Court to hold that the European consensus on the issue is not yet consolidated and that, consequently, the States have a wide margin of appreciation on how to regulate access to PGD. This of course would have not changed the Court's finding, but both the reading of the comparative data provided by the Court and the relevance accorded to them suggest that the Strasbourg judges support a legislative solution allowing pre-implantation genetic diagnosis in cases of serious genetic disorders, even regardless the need to guarantee internal coherence within national legal systems.

The analysis of ECHR case law demonstrates that principles like the margin of appreciation, the best interest of the child, and the European consensus sometimes serve to corroborate the Court's position, rather than to identify the boundaries of its discretionary power or to guide its reasoning. When this happens, the Court confirms its prominent role in ruling on new technologies, expressing a human rights-oriented position on divisive topics. Moreover, in doing so, it clearly demonstrates that it is expressing a definite ethical choice, rather than having a neutral voice with regard to the bioethical debate underpinning each case.

#### 4. Concluding Remarks

Any bioethical dilemma might trigger a human rights query, especially when it involves a request by an individual to the State. Indeed, divisive bioethical issues may easily be framed in terms of competing fundamental rights in need of a fair balance.

While a human rights-oriented approach does not necessarily provide a self-evident result, it certainly helps to classify the relevant interests at stake in negotiating a solution. The main contribution of human rights in the bioethical debate is precisely the identification of all the relevant subjects involved<sup>67</sup>. These include not only existing individuals, but also future

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<sup>67</sup> Many Scholars “see human rights discourse as a way of posing questions and setting up problems for analysis and resolution, even where they do not see human rights as a useful set of theoretical tools for that analysis or for defining solutions to moral and political problems”: D. SCHROEDER, *Human Rights and their Role in Global Bioethics*, in *Cambridge Quarterly of Healthcare Ethics*, 14 (2), 2005, p. 221; D.C. THOMASMA, *Proposing a New Agenda: Bioethics and International Human Rights*, in *Cambridge Quarterly of Healthcare Ethics*, 10(3), 2001, pp. 299-310.



generations and - to a certain extent - potential individuals, as well as various collective interests (public moral, public health, etc.). Once the competing interests at stake have been defined, any (international) judge called to decide a case will need to find a correct balance among the various rights. An operation of this kind necessarily leaves some space for discretion and, more importantly, implies an ethical approach: reasoning aimed at finding an ethical solution that conforms to a standard of what is right and good.

As DEMBOUR correctly stated, “the real work starts, rather than finishes, where the Court agrees that a particular right is engaged. For that is the point at which ethical argument is required in order to deploy concepts of balance, proportionality, margin of appreciation, and so on”<sup>68</sup>.

The legal reasoning of human rights courts represents a field where human rights law meets bioethics. Therefore, human rights courts, and the ECtHR in particular, play a prominent role in ruling on new technologies applied to the beginning of life and, in doing so, express ethical stances capable of influencing the moral debate on divisive topics.

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<sup>68</sup> M.-B. DEMBOUR, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, 2006, quoted by ASCHROFT, *op. cit.*, p. 40.