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An Overview of Ethical and Legal Considerations of Assisted Reproductive Techniques

ABSTRACT: *With the constant evolution of technology in the field of medicine, new ethical questions must be answered. In particular, medically assisted reproduction triggers bioethical disputes nowadays, despite the idea that reproduction without sexual intercourse is not newfangled. When discussing techniques such as artificial insemination, gamete donation, post-mortem fertilisation, in vitro fertilisation, and surrogacy, the traditional concepts of parenthood, genetic filiation, reproductive autonomy, and human dignity are placed under exposition. The sensitive nature of these bioethical issues is present in the diversity of the legislation in Europe and is markedly enstamped in the hesitant attitude of the European Union and the Council of Europe.*
KEYWORDS: *artificial insemination, gamete donation, surrogacy, post-mortem fertilisation, human rights, bioethics*

1. Introduction

As man is both a social and natural creature, procreation has been an instinct of humankind, and, moreover, by having children, we fulfil both biological and social desires. The need for the protection of the family is responsible for the basic increment of such notions. However, when conditions are not met to safely and naturally procreate, man searches for new horizons to reach his goal of establishing a family with a child to gain fulfilment of a wholesome family life. This disturbance can be embodied in the infertility of one or both of the individuals of the couple. Infertility[1] is a medical condition, more precisely a disease according to the World Health

1 Defined in World Health Organization (WHO). International Classification of Diseases, 11th Revision (ICD-11) Geneva: WHO 2018 as a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.

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Organization (WHO), which can affect both the male and female reproductive systems. This medical problem is not newfangled; it has affected many people through time. Thus, the man of today has come up with a solution and treatment based on the scientific knowledge available.

In modern circumstances, although the motivations behind turning to assisted reproductive techniques (ARTs) have changed, founding a family with a child has become closely related to the embodiment of personal autonomy, freedom to found a family, and reproductive freedom.

Advancements in technology have paved the way for more options and techniques vis-à-vis assisted reproduction, including in vitro fertilisation (IVF), gamete and embryo donation, and artificial insemination (AI). These techniques are designed to 'treat' infertility or other medical conditions that make reproduction risky for women (e.g., heart or eye disease, which increase sterilisation). Moreover, surrogacy provides a solution for so-called social infertility, meaning that the law makes it difficult or impossible to adopt a child for certain members of society, for example, gay couples and single men.[2]

Among ARTs, surrogacy introduces more complexities into a generally simply defined familial bond between the parent and child, as the woman who delivers the child will not be the one who will raise him or her.

2. History of Assisted Reproductive Techniques

Modern techniques in connection to assisted reproduction were introduced in the 1970s; however, the concept of reproduction without actual sexual intercourse has been prevalent since biblical times. First, the tale of Abraham and Sarah from the Old Testament Genesis describes the problem and solution of infertility in a marriage. Abraham's wife, Sarah, was unable to get pregnant; nevertheless, she wanted Abraham to secure an offspring. In her despair and determination to assure succession, she asked their servant, Hagar, to bear a child from Abraham, whereafter the delivery let Sarah be the baby's mother with all the consequences of motherhood, regardless of the lack of a biological relationship between them. In this story, not only was the concept and aim of surrogate motherhood presented but also was the understandably sensitive aftermath between the two women, who both insisted on their maternal status, manifested. This conflict eventually ended with Hagar's banishment from Abraham's community, together with her son Ishmael, after Sarah's and Abraham's son was born. In this story, the tough moral considerations of surrogacy are illustrated.

2 Soniewicka, 2019, pp. 46-47

The story is ancient, but the method is new.[3] Nowadays, surrogacy is the most discussed technique, as other ARTs do not differentiate the individual who intends to raise the child from the one who has a genetic relation to him or her at such depths. The facts regarding child delivery and biological/genetic connections are conflicting.

Medical science has worked on developing assisted reproduction methods since the 19th century. The process and history of AI, gamete donation, IVF, and surrogacy will be discussed in the following subchapter.

2.1. Artificial Insemination

One type of assisted reproduction that takes place inside a woman's body is AI, which is one of the easiest and cheapest medically feasible options. The procedure during which the sperm of a donor is injected into a female reproductive tract, when the woman is in her ovulation period, facilitates conception. This technique can use the gamete of the husband or partner of the woman (homologous AI), or a donor (heterologous AI).

A great discovery in embryology, which had an impact on the further development of ARTs, mainly AI, was introduced by Lazzaro Spallanzani, an Italian physician, and Carl Ernst Von Baer, an Estonian embryologist. Spallanzani performed AI on viviparous animals (mainly dogs) and demonstrated the necessity of spermatozoa for fertilisation. His contribution in 1779 confirms that the development of the embryo starts only if the sperm and oocyte make physical contact.[4] Baer (known as the 'father of embryology') studied the stages of animal embryo development and successfully discovered the mammalian ovum[5] in 1827, while presenting an undisputable observation of the human ovum.

A verified successful attempt can be linked to John Hunter, an English scientist, whose interest in human reproductive anatomy pushed him to perform this technique in the late 18th century, and he was the first to provide a documented report on the application of AI.[6] Various attempts were later made by American physician J. Marion Sims, credited as the 'father of modern gynaecology'. His experiments lacked empathy and humanity, as he openly used very controversial methods during his

3 Navratyil, 2012, p. 88

4 Sharma, Saxena, and Singh, 2018b, p. 12.

5 Ovum, plural ova, in human physiology, single cell released from either of the female reproductive organs, the ovaries, which is capable of developing into a new organism when fertilized (united) with a sperm cell. See more: The Editors of Encyclopaedia Britannica. 'ovum'. Encyclopaedia Britannica, 22 Nov. 2010 [Online]. Available at: https://www.britannica.com/science/ovum (Accessed 5 February 2023).

6 Wagoner, N. (2017) John Hunter (1728–1793). Embryo Project Encyclopaedia. ISSN: 1940-5030 [Online] Available at: http://embryo.asu.edu/handle/10776/11421. (Accessed: 12.12.2022)

work (e.g., using slaves as experimental subjects without their consent, treating women without respect).[7]

These revolutionary physicists have pushed the barriers of procreation since the 18th century; however, legal reactions to this new phenomenon were vague. More significant research and dialogue were initiated in the sphere of the social sciences, where different bioethical and medical committees tried to navigate the debate on the admissibility of assisted reproductive procedures.

What ethical challenges are associated with AI? First, regarding homologous AI, the following question arises: Is it acceptable to separate procreation and marital community?[8] This assumption is especially not permissible according to some churches. Concerning the Catholic Church, Pope Saint John Paul II, in his encyclical titled 'Evangelium Vitae' (The Gospel of Life) from 1992 describes why any form of assisted reproduction should be prohibited. He touches upon the area of embryo protection, which is relevant in connection to IVF and will be comprehensively elaborated upon in later chapters.

He writes as follows: '*The various techniques of artificial reproduction, which would seem to be at the service of life and which are frequently used with this intention, actually open the door to new threats against life. Apart from the fact that they are morally unacceptable, since they separate procreation from the fully human context of the conjugal act, these techniques have a high rate of failure: not just failure in relation to fertilization but with regard to the subsequent development of the embryo, which is exposed to the risk of death, generally within a very short space of time. Furthermore, the number of embryos produced is often greater than that needed for implantation in the woman's womb, and these so-called "spare embryos" are then destroyed or used for research which, under the pretext of scientific or medical progress, in fact, reduces human life to the level of simple "biological material" to be freely disposed of*'.

The issue of this separation is also relevant when the procedure is to be conducted on couples who live in a non-marital union. As alternative forms of unions besides marital ones are becoming increasingly popular, most legal systems in Europe recognise such relationships. Non-marital unions, cohabitation, and *de facto partnerships* in most legal systems are under protection and become equal to the status of marriage.[9] Nevertheless, when heterologous AI is in question, the quality, consistency, and dynamics of any form of relationship should be examined.

Although the Catholic teaching mostly forbids ART, other churches (e.g., Evangelic, Protestant) and Judaism in their critical approach do not completely condemn the existence and use of such technologies.

7 Holland, 2018, p. 1.
8 Hidegvéginé and Sáriné, 2018, p. 111.
9 Barzó, 2021, pp. 297–301.

The Community of Protestant Churches in Europe in 2017 published a collection of guidelines, namely, the 'Before I formed you in the womb…' A Guide to the Ethics of Reproductive Medicine from the Council of the Community of Protestant Churches in Europe, in which the recent comprehensive contemplations on the topic of ART and other biomedical issues connected to reproduction are presented. The paper highlights that ART, as a form of medical progress, is ethically acceptable in itself. Notably, IVF is considered a blessing from God for infertile couples who yearn to have children. Moreover, cryopreservation[10] is not rejected, as it has not been shown to endanger or damage the embryo. The document warns about the potential risk of the objectification of human life (of the in vitro embryo) and encourages paying attention to the social problems that lead to embryo 'freezing'. The attitude towards embryo and gamete donation is positive, as long as the child's right to identity is ensured in the future, although the practice of surrogacy is unacceptable.[11] Overall, the Protestant teachings focus on the protection of the right to life of the embryos but support medical techniques that do not endanger the embryos and treat infertile couples to have a child on their own.

The Jewish theological approach is even more open to the techniques of medically assisted reproduction. First, the biblical commandment to 'Be fruitful and multiply, fill the earth and subdue it'[12] encourages the spread of and access to ARTs. The main Jewish scripture, the Torah, is flexible towards assisted reproduction, as reflected through the infertility problems and solutions the tales of Sarah, Rebecca, and Rachel present. The conservative approach enables embryo research, as the foetus has no humanness until the 40th day since the date of conception. This perception, which also applies to the in vitro embryo, supports the progressive approach towards ARTs, as the usage and handling of embryos do not raise moral questions. Surrogacy is an acceptable method of infertility treatment; however, access is restricted to married heterosexual couples and single women. Thus, due to religious considerations, non-traditional families cannot participate in such treatment. Notably, though there are differences between the conservative and orthodox Jewish teachings, they are both open to ARTs.[13]

Nevertheless, the emergence of ARTs has represented a breakthrough in medical science concerning infertility treatment, and its importance has been enhanced after WHO classification. The various techniques and constant scientific innovation in the field of genetics have enabled the treatment of involuntary childlessness as well as enhanced reproductive autonomy in a socioeconomic context by extending the reproductive period or, in other words, postponing childbearing by medical means and preventive techniques.[14] Some advanced methods, such as preimplantation genetic

10 Technique of preservation of human gametes by freezing.
11 Community of Protestant Churches in Europe (EPEK-GEKE/CPCE), 2017, pp. 86–88.
12 Genesis 1:28.
13 Rabbi Mordechai Halperin, M.D., 1996, pp. 3–6.
14 Seiz, Eremenko, and Salazar, 2023, pp. 11-14.

testing, have roots in the emergence of ARTs. Although they do not directly connect to infertility treatment, they help couples with detecting hereditary conditions in the foetus, thus screening and identifying genetic abnormalities. Moreover, the research and observation conducted on the in vitro embryo contribute to the discovery of new medical techniques in assisted reproduction, as well as opportunities in stem cell therapy to treat some neurogenetic disorders.[15]

A more problematic concept is linked to heterologous AI, which introduces additional circumstances for debate. This type of ART requires, besides the couple, a third person, the donor, who provides the sperm used during AI. Given the nature of the procedure, early legal classifications of sperm donation were treated as an act of adultery. In the US Supreme Court, in the Gursky v. Gursky case, heterologous AI was rendered as adultery on the side of the wife and highlighted the problem of the illegitimacy of the child born via donor insemination. On that matter, it is necessary to address the other ethical question, which is mainly related to the data protection of a donor. Exactly what kind of, and how detailed, information about the donor shall be stored, and shall these data be accessible to the child? The right of the donor to data protection and anonymity is placed on one scale, along with the right of the child to know his or her ethnic and genetic origin.[16] Originally, there was the concern of a child being 'reduced' to be born out of wedlock, which pushed AI to be viewed as immoral and condemned to the husband's bloodline.[17] Not surprisingly, Germany was also negative towards this technique, as expressed in the reform bill of the Criminal Code in 1962, proposing to ban and impose punishment for undergoing the procedure.[18] A similar approach was characteristic to the US at the beginning; however, later on, the case law overruled the adultery consequence of heterologous

15 Rahman, M.M. and others, 2022, p. 147.

16 Regarding anonymous gamete donations the ECtHR has a wide range of case law in this matter, although The right to identity falls in the scope of Art. 8 of the Convention, the right to respect for private and family life. Although the Court has never directly addressed this right specifically as the right of donor-conceived persons. The Court has examined this issue in three dimensions, in connection with paternity, anonymous birth and anonymous donations in assisted reproduction. The case of S.H. and Others v. Austria (Application no. 57813/00, 2011) is a significant judgement in the context of gamete donation for the purpose of medically assisted reproduction. The case was significant for the notion of how the state justified the ban on anonymous sperm and egg donation for the use of some ART, as it would compromise the child's right to identity to get to know its biological origins, which is their legitimate interest. The Court in its ruling highlighted the importance of identity as follows: *„its formative implications for his or her personality'* and which *'includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents''* (§83).
Most importantly, the Court established that this right is not absolute, and found that Austria had found an appropriate and fair balance between the competing interests with its restrictive legislation on anonymous sperm and egg donation for ART.

17 Ben-Asher, 2009, p. 1889.

18 Navratyil, 2012, p. 39.

AI.[19] All these concerns were not prevalent in the UK, where not only medics but also social scientists from several spheres were more receptive to this form of ART.[20]

Evidently, even though medical science was evolving, homologous AI was reachable and regarded as a potential treatment for male infertility. It started to break certain taboos and traditions in procreation, which came to the surface. However, this technique presented a relatively cheap and effective way of assisted reproduction, which opened up the demand for 'sperm markets' and resulted in the establishment of sperm banks. For example, since the Sorensen decision, and due to the vague legislation on this matter, in the US, sperm banks have seemed to flourish. Gradually, the fertility landscape expanded as more and more sperm banks were established outside of the US in the 1960s.[21] Although there was a clear demand and need for gamete preservation, it brought in several new ethical aspects to elaborate on, such as donor anonymity, post-mortem fertilisation, who and how the gametes should be disposed of (mainly possession issues), and the possibilities of incestuous relationships. These concepts will be further discussed in later chapters.

To conclude, AI, as an ART form, was the first technique to undergo thorough ethical deliberation. First, it was deemed intolerable but gradually became viewed through a medical lens instead of a social context. Moreover, since the 1960s, with the emergence of sperm banks, the law has accepted it as a permissible form of medical ART option, although the circumstances of accessibility to this service differ from country to country.

2.2. Gamete Donation

The previously discussed ART method can be linked to the practice of gamete donation[22]. As ARTs are paramount to individuals who are infertile and have a high probability of transmitting genetic diseases or are homosexuals, donor gametes are

19 An important, shifting decision was made in California, where in the People v. Sorensen case from 1968 the court ruled, that in order to come to adultery, the two free-willed individuals' active engagement to the activity is relevant. On one hand, the physicist cannot be held accountable (as it can be a woman, too), neither the donor, as he is not physically present at the moment of procreation, thus determining adultery seems absurd.

20 It is evident from the report of the Feversham Committee from 1960, and later the Report of the Committee of Inquiry into Human Fertilisation and Embryology from 1984, that UK from the start intended to recognise and regulate the issue, rather than completely restricting it.

21 Ben-Asher, 2009, p. 1896.

22 We have to make a distinction between gamete donation for reproductive purposes and for research. In terms of assisted reproduction, more ethical questions arise, as they further complicate the family ties, and the social relation between donors and recipients. The issue of objectification of the human body and its parts, besides commercialization of the gametes, arise in both reproductive and research context.

necessary for them to attempt procreation. If we examine the issue from a purely utilitarian perspective and if there is interest, the system ought to enable access at maximum capacity. This practice certainly raises several ethical questions. Basically, who and why would anyone be interested in donating gametes? How are potential donors motivated? Should it work voluntarily or for remuneration? These are only surface-level problems that gamete donation touches upon.

More complexity[23] arises when we examine the conflicts of interest between acting subjects, donors, recipients, and even the child. Likewise, similar considerations are considered when we elaborate upon embryo donations, while not neglecting the need to discuss and establish the legal status of the embryo itself. Regardless, both gamete and embryo donation regulations involve similar problems, as the child born from these donations faces the same controversies arising from the perspectives of human rights and family law. In the following, we will analyse the ethics of payment for donation, anonymity, and post-mortem fertilisation to keep the proportionality in discussing the ethics of most ART.

First, we have to make a clear distinction between oocyte and sperm donations, as they fundamentally diverge in the applied scientific practice used during extraction, preservation and usage. Sperm donation is followed by direct insertion into the recipient woman's reproductive system, after egg donation procreation takes place outside the recipient's body, basically merging the sperm and donor oocyte in a laboratory dish (IVF), whereafter the embryo is transferred into the womb. Certainly, both sperm and oocyte donation take place in a medical setting with physician supervision; however, oocyte donation requires additional medical treatment and preparations beforehand. It is essential to undergo clinical hormonal treatment on both the donor's and recipient's sides, during which the menstrual cycles of the two women are synchronized and the uterus is prepared for the embryo transfer. Moreover, there are some differences in cryopreservation and the success rate of fertilisation. The most recent preliminary data on the utility and successful fertility rate factors between planned and medical oocyte cryopreservation suggest that both groups result in the preservation of fertility and subsequent live births in patients who return to fertilise their frozen eggs. Those who undergo cryopreservation at a younger age ought to have higher oocyte yield and birth rates.[24]

23 We mean the social, psychological and ethical consequences of the donation, such as anonymity issues, genetic screening, selection process, post-mortem fertilisation, donor-selection process, consanguinity, informed consent and risk disclosure and avoidance of incestuous relationships.

24 Walker, Lanes, and Ginsburg, 2022, pp. 1-5.

2.2.1. Compensation or Payment Issues

We will first examine the aspect of compensation for the 'donation', which is closely linked to bodily autonomy and the commercialisation of the human body and its parts. Generally, it is morally unacceptable to treat negligible human body parts as a commodity, especially according to continental jurisprudence, which is supported by the argument of the specific normative status of the human being supported by values of human dignity and integrity. However, other philosophical grounds such as libertarianism and utilitarianism theoretically enable the 'selling' of gametes, referring to contractual freedom and the right to privacy.[25] Regardless, the term donation has the connotation of an altruistic act; one can argue that certain levels of compensation shall be introduced to motivate or induce donors to engage in the process in the first place. Moreover, mainly in the case of oocyte donation, the efforts, inconvenience, and risks involved by the donor should be compensated to some extent. Some feminist critics argue that offering 'payment' in exchange for a woman's reproductive capacity opens up a pathway for potential abuse, oppression, and exploitation[26], while others see it as an embodiment of their self-expression and empowerment.[27] Before everything else, the fulfilment of ideal ethical purposes could be achieved by improving informed consent, better preparation, counselling, sufficient access to information, and involvement of independent egg-donor advocates, who overwatch the process and promote the donor's needs, which would certainly contribute to making gamete donation non-exploitative and consensual.

2.2.2. Anonymity Concerns

Additionally, an even more controversial aspect of gamete donation is seemingly donor anonymity. As previously mentioned, anonymous or non-anonymous donations intend to balance the donor's right to privacy and data protection and the child's right to identity to get to know his or her genetic origins. It can certainly affect the child negatively psychologically, morally, and socially, especially if it is revealed that he/she was born through gamete donation and is unable to trace his/her genetic

25 Soniewicka, 2019, p. 77.

26 There is a higher probability that if monetary compensation is involved, it would rather attract underclass women with disadvantageous economic backgrounds to engage in this activity. Moreover, the exploitative nature can be further enhanced, if payments are high so they may affect the quality of consent from the donor's side. If the financial compensation is of high value, individuals may engage in activities they otherwise would not do, which are risky, and harmful, thus their actions and decisions may be autonomous and voluntary.

27 Purdy, 1996, p. 38

origins.[28] Furthermore, this creates an obstacle for the child to access its genetic and medical inclinations. However, one can argue that treating the matter with non-anonymity would discourage the tendency to donate. Depending on which value, the legislator prefers to grant 'more' protection. Nevertheless, the question is delicate, because it can detrimentally affect the family life of both the donor and child if they try to get in touch with each other later, thus further fragmenting traditional family relations.[29] The distinctive treatment of oocyte or sperm donation in this aspect is relevant, as owing to the nature of oocyte donation (the required hormonal treatment and syncing of the menstrual cycle of the donor and recipient), anonymity cannot be accomplished in practice.

Based on the abovementioned consequences, a certain approach can create a substantively different legal landscape that can be preserved in Europe. In recent years, some states have started to break the tradition of anonymity and introduced contrary or found unique solutions to this matter. One of the advocates in favour of non-anonymity is Germany. Although only sperm donation is allowed, it is permissive towards the disclosure of donor identity. The legal reasoning behind this can be derived from the decision of the Constitutional Court in 1989, highlighting the right to know someone's genetic origins, derived from human dignity, to which everyone is due.[30] The privilege of the child to know its genetic origin is expressed by the Sperm Donor Registry Act[31], pursuant to which sperm banks and clinics are obliged to store the data about the donor and the mother in a central register for a minimum of 110 years and to forward information about the donor to the German Federal Institute for Drugs and Medical Devices after a child has been conceived. Additionally, the recipient is obligated to inform the attending doctors about the birth. The recipient, child, and donor data are stored under the highest data protection regulations for 100 years. Concretely, the child's right to identity can be exercised at the age of 16 or older and can seek information about its genetic data at the central registry; however, pursuant to §1600 (5) of the German Civil Code, the sperm donor is excluded from contesting paternity, meaning he cannot become a legal father. Germany has established a fairly progressive approach to the anonymity question in sperm donation, ensuring the child's right to identity while unequivocally settling familial relationships.

An example of the relative anonymity approach might be Spain, meaning that certain information about the donors and the child could be disclosed, but paying attention to confidentiality, not sharing the identity of either of them, unless there is an extraordinary situation (serious health risk to the child) in which data about the identity of the donor could be released. This non-absolute rule of anonymity is linked

28 Freeman, 2015, pp. 45–63.
29 Frankó, 2014, p. 54.
30 BVerFGE 79, 256 (1989) d
31 SaRegG – Samenspenderregistergesetz

to Law 14/2006 on human-ARTs which establishes the obligation of clinics, registries, and other facilities to maintain the confidentiality of identifiable donor data. However, pursuant to Law 41/2002 on patient autonomy, an individual is entitled to access all available data on one's own health; therefore, in cases of a child born from gamete donation, obtaining information on its genetic origin shall be reachable. Spanish regulation intended to balance the right to privacy and confidentiality of the donors, the patients undergoing ART treatment, and the child's right to identity by making it theoretically possible for the child to receive facts about its genetic origins, but only if its release is necessary to prevent harm to the health of the parties, which are rare and extraordinary circumstances. Basically, as long as the health of the parties can be preserved without disclosing the identity of the donor, it shall remain anonymous.[32]

2.2.3. Post-mortem Fertilisation

Concerns about post-mortem fertilisation have emerged, as ART practices help overcome not only medical infertility but also the so-called 'secondary' infertility. This condition is linked to current socioeconomic circumstances and trends. Although medical infertility is not age-related, there is a close correlation between ageing and infertility. In other words, the time of childbearing is extending, and so is the age of becoming a parent, as women tend to pursue their studies and careers first and establish a family afterwards.[33] Cryopreservation offers a solution for planned parenthood if certain obstacles (severe medical diagnosis, sterilisation, and other treatments which can compromise gamete production or childrearing) arise in the future. As the technique can be used as prevention if something 'irreversible' occurs, what about the cases of death of the individual whose gametes are stored in the clinic? From a biological perspective, frozen gametes and embryos enable the birth of a posthumous child, raising questions about its legal status in the family, in succession, social security entitlements, as well as the subsequent parental status of the deceased, whose gametes were preserved and used.[34] The complicated consequences of post-mortem fertilisation are mostly connected to the legal status of the parties in civil and family law contexts, as well as the intentions and will of the deceased: How shall the interests of the surviving partner, other family members, and potential offspring collide with those of the deceased?

Post-mortem fertilisation can practically arise in two forms: first, using the deceased man's sperm, which he got stored in the sperm bank during his life, and

32 Riaño-Galán, González, and Gallego, 2021, p. 337.
33 Cousineau and Domar, 2007, pp. 293–308.
34 Navratyil, 2012, p. 106.

the widow insisting on having a child from her deceased partner. The second way is to retrieve sperm from an already deceased partner, as he had not stored it beforehand.[35] However, the latter practice is not common, and most legislations forbid it. We will discuss the circumstances of the former case.

The controversial French case of Parplaix v. CECOS (1984) was the first to raise the post-mortem use of sperm for reproductive purposes. The widow insisted on access to the sperm of her spouse, Mr Parpalaix, who died 2 days after they wed. He had previously had his sperm preserved at the Centre for the Study and Conservation of Sperm upon his diagnosis of testicular cancer, as the treatment could have compromised his sperm production. The sperm bank declined the request to entrust the sperm to Mrs Parpalaix, who intended to carry out AI with it, referring to the lack of a specific declaration of intent by the deceased regarding what to do with them in the event of his death. The court ruled in favour of Mrs Parpalaix based on the absence of legislation on this matter and the testimonies from the deceased's family and his widow, which could determine the former will of the deceased to have a common child with his wife. Moreover, it could not categorise the sperm as either an object of a contract or a donated organ under French law, regardless of whether it was a unique substance carrying the destiny to create a human being. Basically, the court recognised the possibility of the existence of the living will or surviving interests of a deceased person. Even though some claim that one cannot be harmed or benefited anymore, nor would they be affected by decisions made after death, the fact that last wills are expressed makes the interests of deceased individuals ethically considerable to carry out.[36] However, some argue that post-mortem reproduction can only be justified if it serves the same values and interests as traditional reproduction. Though there is a clear distinction, as a dead person is not involved in the experience of having an offspring (no participation in gestation, rearing, nor parenting), thus this interest is '*... so attenuated that it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others*'[37]. Notwithstanding, it is also essential to determine whether the surviving partner wishes to follow the intentions of the deceased partner's post-mortem use of gametes.

National legislation enabling post-mortem fertilisation places utmost focus on the existence of a prior expressed consent of the deceased about the use of gametes for the event of death, which is in line with reproductive freedom in general. The

35 Ibid.

36 Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion Ethics Committee of the American Society for Reproductive Medicine Birmingham, Alabama – Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion – Fertility and Sterility (fertstert.org)

37 Robertson, 1994: 1027–65.

'declaration of intent' model is followed in the UK, where pursuant to Sections 39 and 40 of the Human Fertilisation and Embryology Act of 2008,[38] post-mortem fertilisation can be carried out under the condition that the man has consented to it in writing. Moreover, the Human Fertilisation and Embryology (Deceased Fathers) Act of 2003[39] enables the registration of the man as the father on the birth certificate, who prior to his death started[40] ART with his partner, and presented written consent to use his gametes after his death for reproduction purposes.

Another legislative approach that completely prohibits any form of post-mortem fertilisation practice is followed in Germany. Pursuant to § 4 sec. 1 no. 3 of the Embryo Protection Act 1990 (Embryonenschutzgesetz), it is not allowed to knowingly fertilise[41] an egg cell with a man's sperm after his death, and perpetrators of such can be criminally prosecuted to up to 3 years imprisonment or fined. The famous OLG Rostock decision of 2010 is noteworthy, as it was a cornerstone in placing modern reproductive medicine in a legal context. The factual background of the case includes a married couple who engaged in ART. Notably, the woman's fertilised eggs were cryopreserved immediately; thus, complete fusion of the gametes was not achieved yet. After the husband passed away, the widow initiated continuation of the ART; however, the clinic declined this application, referring to the Embryo Protection Act and the prohibition of post-mortem fertilisation. The case was brought before the court, which decided in favour of the widow, arguing that the Embryo Protection Act in this case was inadmissible, as the gametes of the husband were used for ART while he was still alive, and the Act specifies the prohibition of usage after death, when fertilisation happens after the man passes away. Overall, the court based its decision strictly arguing on the biological aspects of embryo development, and highlighting several times that the 'utilisation' of the sperm of the deceased had not happened after his death.

Apparently, there is no clear-cut argumentation only in favour of or against post-mortem fertilisation or sperm retrieval. It may seem adequate to perform this ART, especially for individuals who turn to it as a preventive measure (e.g., those with high-risk jobs and illnesses that reduce fertility). However, is it really in favour of the child to be born into a fatherless family, where its legal familial ties are not clear? Shall the will to create an offspring extend death? If so, who and on what grounds can evaluate

38 Available online: Human Fertilisation and Embryology Act 2008 (legislation.gov.uk)
39 Available online: Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (legislation.gov.uk)
40 Also in cases the pair resorted to donor sperm, the deceased man will be listed as father.
41 However, the Embryo Protection Act, is neglecting a clear interpretation of this term. As the development of an embryo goes through several stages (fertilisation cascade) has relevance in legal context of how we interpret fertilisation. The legislation is not clear on the categorization of a cryopreserved impregnated egg cell, whether its implantation is against the Act. For more see: The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights | Cairn.info

the intent of the deceased? Is it ethical for an external institution or court to deny a family member's request to continue their lineage on certain grounds? England clearly prefers informed consent and the expression of the will of the individual for post-mortem fertilisation, while the German example was originally prohibitive; however, it can be overridden. Regardless, several ethical concerns play a role in drafting legislation on this phenomenon; however, the circumstances of a given case strongly matter. In connection with informed consent and individual will about the usage or disposal of one's gametes, the ECtHR expressed in Evans v. United Kingdom (Application no. 6339/05) that Article 8 of the Convention incorporated the right to respect for both the decisions to become and not to become a parent. From the factual background of the case, Ms Evans and her partner underwent the extraction and fertilisation of her eggs because she was diagnosed with serious pre-cancerous tumours in both ovaries, which had to be removed. The embryos were stored for future IVF, as the pair signed a form consenting to the IVF, which allowed space for withdrawing this consent at any time before the implantation of the embryos. Although the relationship broke down, Ms Evans insisted on preserving the embryos, while the ex-partner wanted to initiate their destruction. The Court acknowledged the moral sensitivity of the case and established that there was no European consensus on the circumstances of IVF treatment where the consent of the gamete providers could become irreversible, and a wide margin of appreciation was granted to the states. The right not to become a parent and the right to a genetic offspring cannot outweigh each other. Moreover, as the legislation on the possibility of withdrawal of consent to IVF treatment was clear, the UK struck a fair balance between the competing interests, which did not constitute a violation of Article 8 of the Convention.

2.3. In Vitro Fertilization and Surrogacy

The modern IVF technique dates back to the 1970s and can be linked to the phenomenal gynaecologists of the time, namely, Patrick Steptoe and Robert Edwards. Primarily, they conducted research on the treatment of female infertility caused by flawed fallopian tubes. The practice involves, as indicated by the name 'in vitro'[42], a female and male gamete to be fertilised outside the woman's body in a petri dish[43]. These two scientists laid down a cornerstone in embryology; however, several unsuccessful attempts and research have been carried out since the 19th century. Of note, Samuel Leopold Schenk, Gregory Pincus, and Ernst Vinzenz Enzmann attempted IVF on mammals beforehand.

42 Meaning 'in glass' in Latin

43 A transparent lidded dish, similar to a test tube, serves for holding and developing cells of different kinds.

The first 'test-tube' baby, Louise Brown, was born on 25 July 1978. Steptoe and Brown supervised the parents and transferred the IVF-fertilized egg. This was the moment that triggered the ethical debate over IVF fertilization, and later on surrogacy procedures.[44]

Surrogacy involves the practice of a woman getting pregnant on behalf of another woman who is unable to do so for medical or other reasons. The procedure eventuates in giving the child to the intended parents after birth. There are different types of surrogacies based on the type of genetic material used and how the surrogate is compensated.[45] The most ideal type is undoubtedly gestational surrogacy, where the aforementioned IVF is used with the intended parents' gametes; thus, the child is genetically unrelated to the surrogate.

Surrogacy procedures, unlike the other ARTs, actively involve a third person whose 'reproductive function' is required. This notion of surrogacy is reflected by the definition of John Robertson as 'collaborative reproduction' defined as *'A third person provides a genetic or gestational factor not present in ordinary paired reproduction which allows some persons who otherwise might remain childless to produce healthy children'*.[46] Thus, the ethical considerations appear particularly in two dimensions: monetary compensation (on a contractual basis) and protection of human dignity. It is worth mentioning that surrogacy procedures of any kind involve ethical and legal challenges in connection with family law, precisely the legal parenthood of the intended parents, the surrogate, and the child, and raise concerns about the child's welfare[47] and its right to know one's genetic origins; however, these will be tangentially discussed in Chapter 4.

2.3.1. Commercialisation alongside Human Dignity?

The issue of commercialisation arises not only in connection to women who wish to become surrogates but also in children and procreation itself.

First, the core question of monetary compensation has already been mentioned in connection with gamete donations, but surrogacy in fact incorporates the offer

44 See more: In Vitro Fertilization | The Embryo Project Encyclopaedia (asu.edu)

45 In cases of traditional surrogacy the surrogate's own eggs are used, in gestational ones the intended mother's gametes. Moreover, there is a possibility to require donor gametes (male, female, or both). From the perspective of compensation we can differentiate commercial (the surrogate receives monetary compensation above the cost of the necessary medical care, examinations) or altruistic surrogacy (only the medical costs are reimbursed, the 'reproductive service' of the surrogate is not compensated).

46 Robertson, 1983, p. 28.

47 It is worth outlining, that there are several psychological studies that found no significant differences in psychological adjustment between different ART children. (See more: Patel A, Kumar P, Sharma PSVN. 'The Miracle Mothers and Marvelous Babies': Psychosocial Aspects of Surrogacy – A Narrative Review. J Hum Reprod Sci. 2020 Apr-Jun;13(2):89-99. doi: 10.4103/jhrs.JHRS_33_20. Epub 2020 Jul 9. PMID: 32792755; PMCID: PMC7394089.)

of the body of the surrogate, where, additionally, the reproductive labour is commercialised. The argument for the justified commercialisation of surrogacy could be compared to prostitution. Although in both cases, it comes to the women selling their bodies, a crucial difference is the length of the period of time the access to the body is given, and the quality or notion of the 'service'.[48] Nevertheless, the risk of harming women in surrogacy procedures is present because, in surrogacy arrangements, all parties voluntarily restrict their right to self-determination to a certain extent. In the case of the surrogate, it is embodied in undertaking several 'obligations', that is, introducing lifestyle changes that are ideal for the foetus, being alert to engaging in sexual intercourse (avoiding getting pregnant), undergoing special required medical examinations according to the wishes of the intended parents, and even getting an abortion initiated by the intended parents if any genetic abnormality of the foetus is unravelled.[49] Besides these invasive physical burdens, we also mention the emotional distress[50] that women may experience while giving away the child after birth.

Moreover, the potential exploitation of economically disadvantaged women could be generated by commercial surrogacy arrangements, as this seems to be an opportunity to earn a substantial amount of money in a relatively short time period. From another perspective, financially well-situated couples could turn to surrogacy services because the procedure is demanding and expensive. The social inequality between the 'requirer' and 'provider' amounts to unfair dependence and exploitation. In this regard, we ought to mention the phenomenon of 'surrogacy tourism', in which a couple from a state where surrogacy is prohibited or not regulated travels to another state where surrogacy is permitted or has an advantageous legal framework, that is, easy access to these services for foreigners.[51]

Based on the abovementioned arguments, surrogacy may endanger women, especially concerning their human dignity. However, would the overall abolishment

48 Soniewicka, 2019, p. 77.

49 Hidegvéginé and Sáriné, 2018, pp. 118-119.

50 The risk of emotional bonding between the child and the surrogate can be presented through the famous 'Baby M. case'. In 1986, a married couple entered into a surrogacy contract, in which the surrogate undertook the obligation to get artificially inseminated with the intended father's sperm, after birth give the child to the intended parents, and give up on her parental rights to the child for the reward of 10.000 USD. However, after handing over the child, the surrogate asked the couple to return the child for a short period of time, as it was emotionally difficult to discard from her. Upon receiving the child, she changed her mind, refused to give it back to the intended parents, fled into another state, and went into hiding. Supreme Court of New Jersey ruled that the surrogacy contract is void, is against public policy, referring to the 'mater semper certa est' principle. In the end, however, parental custody was granted to the intended parents, because it was in the best interest of the child to grow up in a more favourable environment (the intended parents were wealthy, and of high social class). The surrogate received parental rights to the child, as well as the biological father, but was not given parental custody only visiting rights.

51 Ukraine and the US are popular destinations for the intended parents, as commercial surrogacy is allowed and accessible to foreigners.

of surrogacy practices be the ultimate solution to their protection? Some argue that guaranteeing the voidability of surrogacy arrangements would solve the problem of better surrogate protection.[52] Creating a safe environment for a woman to become a surrogate, ensuring that she could change her mind, establishing safety nets, and guaranteeing the equality of the two parties to ensure that her decision regarding the pregnancy was free and was not made out of economic necessity.[53]

Usually, the legal culture and cultural value system of a certain region determine the theoretical and legal qualifications of surrogacy practices, particularly whether they are accessible on a commercial or altruistic basis. For those Western European states, which recognise surrogacy legally, it is usually feasible as long as it constitutes a selfless, moral act of the woman, who voluntarily and out of benignity offers her reproductive capacities to help infertile couples to have a child. The notions of selflessness and morality are embodied in not awaiting any monetary gain from practice because the human body and its functions cannot be considered a commodity.

For example, we could mention the UK, where the first legal introduction of surrogacy was enacted by the Surrogacy Arrangements Act of 1985. Currently, the ART of surrogacy is regulated pursuant to the Human Fertilisation and Embryology Act of 1990 and the Human Fertilisation and Embryology Act of 2008, which simultaneously cover this issue. Surrogacy arrangements are not enforceable by law and do not incorporate additional 'payments' other than the reasonable costs of the procedure. The Surrogacy Arrangements Act of 1985 clearly discourages engaging in surrogacy arrangements on a commercial basis, as an advertisement for a surrogate, or offering oneself as a surrogate. Providing surrogacy arrangements as a third party as a commercial enterprise qualifies as criminal offences.[54] The UK legislation views surrogacy and other ART procedures as technological progress; thus, legislators approach the controversial phenomenon cautiously, while not raising unnecessary legal obstacles in utilising such advancements.

Meanwhile, the US is navigating the issue on a commercial basis, as the market- and profit-oriented approach prevails, and is a great motivator in societal and economic relationships. The first modern surrogacy contract was drafted in Michigan in 1976. Surrogacy is not strictly regulated on a federal level, and state legislation can individually decide whether they permit surrogacy or not and whether altruistic or commercial surrogacy is allowed[55]. The federal legal basis of ARTs is determined by

52 Fabre, 2008, pp. 192

53 Steinbock, 1988, pp. 45–50.

54 Art. 2 – 4 of Surrogacy Arrangements Act 1985 available online: Surrogacy Arrangements Act 1985 (legislation.gov.uk)

55 Virginia, Nevada, New Hampshire, Florida and Washington D.C. states do not permit commercial surrogacy contracts, but surrogates receive big reimbursement for their services.

the Uniform Parentage Act (2000)[56], which deals primarily with the protection and welfare of children born through ART. Pursuant to this Act, states are free to decide how to regulate surrogacy contracts. If they allow surrogacy practices, the contract between the intended parents and the surrogate shall be approved by court, which also determines the legal parents of the child. However, if the state does not allow such contracts, they are considered void and the surrogate remains the legal parent of the child. Commercial surrogacy contracts are allowed pursuant to § 9 of the proposal.[57]

Notably, many different forms of surrogacy contracts are present in the US, and the dynamics of the regulations are shaped by case law, which has high relevance.

The aforementioned 'Baby M' case discussed many controversial sides of surrogacy, one of them being the payment issue for the 'womb-leasing' whether it is against public policy to draft a commercial surrogacy contract, as it involves the risk of child trafficking and undermines adoption laws.[58] Ultimately, the Supreme Court of New Jersey deemed such a contract void and not enforceable; however, this approach is not universal in the US. As an example, we shall mention the case of 'Johnson v. Calvert' (1993), where the Supreme Court of California did not oppose the element of payment and ruled the surrogacy contract valid and enforceable.[59]

Nowadays in the US, 14[60] states expressly permit surrogacy practices; however, they vary in granting additional financial gain to the surrogate.

Overall, the US preserves the standpoint of the constitutional right to procreation, meaning that procreation is a liberty interest[61]. Regardless, there is great diversity among states, as there is no uniform leading approach to navigating surrogacy contracts. The unclear and confusing policy on surrogacy procedures creates a fairly similar situation to Europe in connection to 'surrogacy tourism', as there is no obstacle for intended parents to require the service in another state if their state of domicile prohibits surrogacy contracts.

56 The Universal Parentage Act was revised in 2017, focusing on the parental rights of same-sex couples and individuals.

57 S. Dixon, 2021, pp. 32–34.

58 Wałachowska, 2019, p. 400.

59 19 Cal. Rptr. 2d 494.

60 Alabama, California, Colorado, Delaware, Florida, Illinois, Maine, Nevada, New Hampshire, Texas, Utah, Virginia, Washington.

61 The right to reproductive autonomy is safeguarded under the Fifth Amendment of the US constitution alongside with the Fourteenth Amendment. In relation to ARP, the right to privacy of both the intended parents and the surrogate incorporates that in any individual decision involving one's privacy regardless of being married or single, shall be free from any unwanted governmental intrusion into decisions, which fundamentally affect a person's life such as childrearing (Eisenstadt, 405 US at 453). However, recently the concept of the right to privacy in connection with reproductive autonomy, more precisely the right to abortion has been changed, as the Supreme Court in its ruling of in Dobbs v. Jackson Women's Health Organization (2022), overruled Roe v. Wade, a precedent of established constitutional right to abortion. The effects of this change are yet to be seen in connection to ART cases in the future.

3. Approach of the European Union and the Council of Europe on Assisted Reproductive Techniques

International organisations such as the EU and Council have been initiating discussions, presenting their standpoints on ART, naturally in line with their competencies. These international legal actors certainly have common points in their reasonings, while treating the issue through a 'human rights lens'. As ARTs touch upon many fundamental questions (e.g., determining the legal status of the embryo, the moment of the beginning of life, freedom to procreate, bodily autonomy, human dignity), both the EU and Council intend to provide measures and policies that show their inclination and disposition on the topic.

3.1. The European Union Standpoints

First, besides advocating for reaching its economic goals pursuant to the Maastricht Treaty of 1992, the EU started to navigate and create political cooperation between the member states. The EU unfolds its preferred political and legal policies in connection with the protection of European citizens, specifically their political and economic rights and their free movement. Additionally, based on the Charter of Fundamental Rights, social rights are shaped in relation to family protection, non-discrimination, the principle of human dignity, the protection of marriage, the best interests of the child, and other rights of the child.[62] It is evident that achieving unification in family law matters among the member states is fairly impossible; thus, European law is focusing on strengthening cross-border judicial cooperation and providing guidance on the rule of law in these cases. It is clear from the abovementioned dynamics that the EU overall does not provide a legally binding solution for substantive family matters, nor on the grounds of bioethical questions on ARTs.

First, regarding ARTs, the EU mostly approaches this question from the perspective of the protection of women, human dignity, and embryos.

The initial concerns about ARTs in the EU were embodied in the 'Rothley'[63] and 'Casini Reports'[64] from 1988. These reports clearly reject conducting scientific experiments on embryos, as long as they do not serve their health and healthy development. Moreover, human beings cannot be considered objects and their human dignity must

62 Sokołowski, 2019, p. 592.
63 A.2–327/88 of the European Parliament on genetic engineering.
64 A.2–372/88 on artificial insemination.

be recognised. According to these reports, the protection of the right to life shall be granted from the moment of conception.[65]

However, the problem of ARTs is approached from the perspectives of the protection of women, non-discrimination, and gender equality. As the most controversial of all is surrogacy practices, the EU has been reflecting vividly on this issue in recent years. In 2015, the European Parliament issued a report[66] in which it condemned surrogacy, as it seriously breaches the human dignity of women and contributes to their exploitation, especially of women from less-developed countries.

Presenting how bioethical approaches develop, during the voting of the Annual Report on Human Rights and Democracy in the world and the EU policy on the matter, for the year 2019, the European Parliament took an extreme change in opinion on surrogacy to the previous one. Regarding the condemnation of surrogacy, 429 members of the European Parliament voted against it, 149 voted to acknowledge its condemnation, and only 89 abstained. These ratios reflect how the European Parliament seemingly struggles with determining a clear, unified approach to surrogacy. Even more surprising was that surrogacy as a whole was left out of the Annual Report at the end, reflecting the hesitant position of the EU on such a serious matter as surrogacy, where vague ascertainments and opinions might result in insufficient human rights protection.[67]

3.2. Council of Europe Standpoints

The Council of Europe, as anticipated, has been continuously reacting to new, unprecedented challenges which have appeared alongside biomedical developments. As an initial response, the Special Expert Committee on Bioethics (CAHBI) was set up in 1985 to deliver expert advisory opinions and technical support in the field of ethics in biomedicine. The CAHBI slowly transformed into the Committee on Bioethics (DH-BIO), which functions nowadays. Besides the numerous 'sub-committees'[68] of the Council, the decision-making of the ECtHR should not be neglected in this regard. Undoubtedly, the case law of the ECtHR contributes to navigating the human rights aspect of ARTs, which generally affects the legislation of the member states.

65 Jobbágyi, 2004, pp. 82–83.

66 Annual Report of 30 November 2015 on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)).

67 Garay, 2022, p. 73.

68 Steering Committee for Human Rights (CDDH), Committee of Experts on Family Law (CJ-FA), Committee on Legal Co-operation (CDCJ), Committee on Social Affairs, Health and Sustainable Development

However, as of today, there is no generally binding legal document on the most controversial aspect of ARTs, namely, surrogacy. Although we ought to mention 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 (Oviedo Convention), which oblige the parties to grant legal instruments on a national level to fulfil the aims and measures in human rights protection in the field of biomedicine. The Oviedo Convention aims to safeguard human dignity from the misuse of biomedical scientific advances. The ethical argument presented in the convention seemingly condemns commercial surrogacy, pursuant to Article 21, stating that '*The human body and its parts shall not, as such, give rise to financial gain*'. Moreover, in connection to ARTs, it rejects MAP[69] techniques to be carried out on the human genome as well as in assisted procreation unless the sex selection of the foetus contributes to avoiding hereditary sex-related diseases.[70]

The case law of the ECtHR broadly dealt with the problem of ARTs, mainly concerning Article 8 of the Convention (right to respect for private and family life), sometimes in conjunction with Article 14 (prohibition of discrimination).

The case of S.H. and others v. Austria (Application No. 57813/00) outlined several ethical considerations related to IVF and assisted reproduction in general. The factual background of the case involved two Austrian couples who wanted to start a family and wished to conceive a child through IVF, for which one couple required the use of a sperm donor and the other pair an ova donor; however, under Austrian law at the time, ova and sperm donation for IVF was prohibited. The applicants stated that there had been a breach of Articles 8 and 14 because only some ARTs are legal in Austria, and it is discriminatory that ova donation is disallowed, while sperm donation is allowed. The court ruled that there had been *no violation* of Article 8, as it found the approach of the member state to regulate ARTs sufficient and circumspect on such a controversial issue, which raised complex ethical questions. As there was no clear consensus in European states about gamete donation for IVF, it was in the margin of appreciation of the member state to draw the line of limits, which it did while backing it up with fair arguments (e.g., risk of 'splitting' motherhood, exploitation of ova donors, etc.).[71] Moreover, the state did not take the opportunity away from couples,

69 The co-called technique of mapping and sequencing of the human genome, involves scientific research exploring the human genome at an early stage, which provides key landmarks in the genome (the DNA and chromosome structure). Genome sequencing is the process of determining the order of bases in a length of DNA. Basically, from this practice, serious ethical concerns can arise, that is, misuse of human genetic information, disproportionate usage of DNA data of donors in sequencing, manipulation.

70 Art. 12, 13, 14, 18 of the Oviedo Convention.

71 S.H. and others v. Austria, pp. 114–115.

who wished to participate in certain types of ARTs that were not allowed in Austria, to travel to other member states and access such services.[72]

The Court presented an interesting evaluation of the notion and interpretation of ARTs. Austria, through the ban on gamete donation for IVF, intended to maintain the 'natural characteristics' of childbirth and childrearing, even in medically assisted procreation. Both *in vitro* and *in vivo*[73] fertilisation are ART methods. However, according to Austria's legislation, ova donation is only permissible in cases of *in vivo* fertilisation. The Court observed that Austria only allowed gamete donation in specific cases of ART, as it tried to navigate assisted reproduction in a manner that would not upset long-established societal views on family, parenthood, and so on. In other words, by banning ova donation for IVF, the principle of *mater semper certa est* would be maintained, and there would be no distinction between the genetic mother and the mother who gave birth to the child. The Court recognised that the intention of Austria was not to disturb society with the ethically questionable possible outcomes of medical ARTs.[74] Overall, a cautious approach to regulating sensitive issues as such is within the margin of appreciation of member states.

Moreover, the Court has presented a solid interpretative narrative case concerning ART, which can be presented through cases in which the most controversial type, namely, surrogacy procedures, has been discussed. The Court tends to rely on the best interest of the child principle enshrined in Article 3 of the UN Convention on the Rights of a Child[75] concerning decision-making about the establishment of legal parenthood in cross-border surrogacy cases. First, the Mennesson v. France case[76] has

72 Ibid.

73 A method of fertilisation, where the fusion of male and female gametes happens within the body of a female. The sperm is placed into the female genital tract and the development of the embryo happens inside her body.

74 Ibid, p. 104.

75 Convention on the rights of the child (1989) Treaty no. 27531. United Nations Treaty Series.

76 The case's factual background unfolds with Mr. and Mrs. Menesson, French citizens, entering into an international surrogacy agreement in California. Although the twins born from this arrangement shared a genetic link with one of the intended parents, French authorities declined to issue French birth certificates, thus blocking the twins from obtaining French nationality. The Court's ruling centred on the factors of legal parentage and genetics, as well as the distinction between altruistic and commercial surrogacy. These deliberations underscored the imperative of upholding the child's right to identity through the recognition of parenthood with the genetic parent. In essence, an individual's identity is linked to the establishment of a legal parent-child relationship, thus its failure jeopardizes a fundamental aspect of their identity. Additionally, the Court pointed out how the principle of the child's best interests was disregarded by the French authorities, emphasizing its pivotal role in guiding public decision-making concerning children. By denying the twins French nationality, the French authorities breached their right to privacy, as their integration into French society was compromised due to this refusal. Through a children's rights-oriented approach, the Court elevated the significance of biological connection in surrogacy cases, while also asserting that the child's best interests should outweigh public policy considerations regarding surrogacy.

established that the key factors to consider in international surrogacy cases are the best interest of the child principle and the child's right to identity. This rationale was followed in the most recent K.K. and Others v. Denmark[77] case, which centred around the denial of the applicant's request to adopt twins as their stepmother, born from a commercial surrogacy arrangement concluded in Ukraine, by the Danish authorities. The intended father has been recognised as a legal parent based on the biological connection. Lastly, the Danish Supreme Court held that adoption by the applicant was not in line with the Danish Act on Adoption because the surrogate mother (in other words, the consenting party to adoption) received payment for her services, which contributed to the children becoming a commodity. The Court found by four votes to three that children's rights under Article 8 of the Convention had been violated by the non-recognition of legal parenthood between the intended mother and children, as it could potentially put them in an uncertain legal position, particularly concerning matters such as inheritance.[78]

Currently, the Council presents a similar resolution to that of the most controversial type of ART (surrogacy) as the EU. Pursuant to the 2016 Report on 'Children's Rights Related to Surrogacy' by the Committee on Social Affairs, Health and Sustainable Development, commercial surrogacy was condemned. The Report was prepared by Petra De Sutter, who advocated for raising awareness and sensitivity about the risks, which arise from commercial surrogacy arrangements, and drafting unified guidelines on altruistic surrogacy, on how to protect children's rights. She recommended the following:

'*The Parliamentary Assembly recommends that the Committee of Ministers: 1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;*

1.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH'.[79]

The Report was not accepted by the Committee based on the ratio of drafts of 83 to 77 for votes.

The Council's hesitancy prevails still over the issue of surrogacy; however, a promising advisory opinion concerning legal parenthood in cross-border surrogacy

77 K.K. and Others v. Denmark no. 25212/21, 06 March 2023.
78 Ibid, p. 101.
79 Sutter, 2016, p. 1.

was issued under Article 1 of Protocol No. 16 to the ECtHR on 10.04.2019, which offered a follow-up interpretation of the Menesson v. France case (no. 65192/11, 26 June 2014), on the topic of protection of children in cross-border surrogacy cases. The gist of the document provides balanced, child-protection-centred guidelines on this issue. Although the advisory opinion has no legally binding force, it seems to be a positive development in the interpretation and application of the law in surrogacy cases.

Overall, the responses provided in the advisory opinion undoubtedly hold significance for forthcoming cross-border surrogacy cases aimed at safeguarding the right to respect for private and family life for all parties concerned. Furthermore, landmark cases such as S.H. and others v. Austria and Mennesson v. France, coupled with the advisory opinion, present compelling arguments that establish the foundational principles guiding the ECtHR's decision-making regarding assisted reproduction, with particular regard to cross-border surrogacy cases.

4. Conclusion

The gradual challenges new, medical inventions have brought into traditionally established societal and family structures are undeniable. The concept of reproduction has reached many new horizons, which have opened up new interpretations of bioethics, thus enhancing the dynamics in the jurisprudence of the medical, civil, family, and other branches of law.

Bioethics plays a leading role in connection to ARTs, which legislators rely on when passing laws related to this issue. A bioethical perspective is necessary when balancing individual values and interests to reach an ideal outcome for every subject of law. The assumptions and interpretation of the above-discussed ART methods, namely AI, gamete donation, IVF, and surrogacy, are based on the individual value system of individuals, which is influenced by the other, irrespective of the value systems encompassed thereof. Generally, such values predominate and are manifested, which are preferred by the majority and reflected in the bioethical legal approach at the local level as well.

However, ARTs of a different nature trigger slightly distinctive ethical concerns, most of which can be linked to the protection of the human dignity of the subjects involved. However, the fundamental ethical principles of human dignity are inalienable from oneself. Even if certain decisions of an individual are within the scope of personal autonomy, no one can refrain from the protection of human dignity if it is due.

The conflict between personal, specifically reproductive autonomy, and human dignity can be found in all of the described types of ARTs. Generally, it can be concluded that American legal tendencies show a completely different perspective in

terms of legislation (especially by allowing the commercial nature of these techniques); there is diversity among the states. Furthermore, the European legal culture is quite divided on the legislation of certain ARTs, with the most controversial being surrogacy. This variability has not been bridged by either the EU or the Council as of today, which unfortunately exposes individuals to potential violations of their human rights.

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