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THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FRAMING OF REPRODUCTIVE RIGHTS

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Abstract

This article researches the basis of the concept of reproductive rights in the case law of the European Court of Human Rights (ECtHR). After a systematic and transversal presentation the ECtHR's jurisprudence on reproductive issues, the article argues that the ECtHR does not capture the specificity of reproductive rights, especially the gender perspective and the importance of reproductive health. Faced with arguments of prioritization of certain rights, the ECtHR repeatedly applies the European Convention on Human Rights to domestic rights as if they were neutral and often avoids addressing claims related to discrimination. Besides, while reproductive health is at the core of reproductive rights, the ECtHR's case law shows self-restraint unless there is a very serious threat on the women's health. This contrasts with international standards on the right to health. Without considering those essentialist and realistic characteristics of reproductive issues, the ECtHR fails to develop a European concept of reproductive rights. The last parts of the article presents the political constraints that plague on the ECtHR, which may explain the minimalist jurisprudence in this area. However, those constraints do not justify all the inconsistencies in the ECtHR's use of the European consensus and the margin of appreciation doctrine in the field of reproductive rights.

Keywords: European Court of Human Rights- European law- minimalism- political constraints -Private and Family Life- Reproductive rights-

The European Court of Human Rights and the framing of Reproductive Rights[1]

In 1994, the Programme of Action of the International Conference on Population and Development, held in Cairo, stated reproductive rights rested "*on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health* […]"[2]. Since then, the notion reappeared regularly on the international scene, but not necessarily in the same terms in European states[3].

European instruments do not specifically refer to reproductive rights. While the Oviedo Convention on Human Rights and Biomedicine of 1997[4] is supplemented by several Protocols on specific issues such as organ transplantation or genetic testing, there is no Additional Protocol on reproductive technologies. Besides, the Protocol on genetic testing explicitly excludes from its scope of application genetic tests on embryos and fetuses,[5] and the Additional Protocol concerning transplantation of organs and tissues of human origin states that it does not apply to "reproductive organs and tissue"[6] or to "embryonic or foetal organs and tissues"[7].

However, European Human Rights instruments such as the Oviedo Convention apply in the reproductive context. They can limit the use of new

1 This paper is part of the project Reconceptualising Reproductive Rights funded by Independent Research Fund Denmark (grant #8019-00002B), and conducted at Copenhagen University. I would like to thank Helen Yu for her very useful comments on the draft of the article, and Janne Rothmar who leads the overall project.

2 International Conference on Population and Development, Programme of Action, § 7.3.

3 *SEE* LAURIE MARGUET, *LES LOIS SUR L'AVORTEMENT (1975-2013) : UNE AUTONOMIE PROCRÉATIVE EN TROMPE-L'ŒIL ?*, 5 REV. D.H. (2014), ESPECIALLY FOOTNOTE 33,[HTTPS://JOURNALS.OPENEDITION.ORG/REVDH/731](LAST ACCESSED JAN. 7, 2020). *SEE* ALSO ARLETTE GAUTIER, *LES DROITS REPRODUCTIFS, UNE NOUVELLE GÉNÉRATION DE DROIT ?*, 15 AUTREPART 167 (2000).

4 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, 1997.

5 Additional Protocol to the Convention on Human Rights and Biomedicine concerning Genetic Testing for Health Purposes, Art 2 (a).

6 Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, Strasbourg, 2002, Art 2(3) (a).

7 *Id.* Art 2(3) (b).

reproductive techniques. For instance, the Oviedo Convention prohibits the use of medically assisted procreation techniques for choosing a child's sex[8]. Besides, the Charter of Fundamental Rights of the European Union protects the right of integrity with a specific provision related to medicine and biology. This provision prohibits eugenic practices, "making the human body and its parts as such a source of financial gain", and "the reproductive cloning of human beings"[9]. On the other hand, the general provisions of those legal instruments extend to the reproductive context. In that respect, the Council of Europe Social Charter's provision on health certainly applies to the area of reproduction[10]. Importantly, the European Convention of Human rights (*ECHR*) has been invoked several times in cases related to reproductive issues. The *ECHR* is the core legal instrument of the Council of Europe, adopted in 1950 and binding on the 47 States of the regional organization. The *ECHR* was described as the "instrument of European public order" by the European Court of Human Rights (ECtHR)[11], with the consequence that its interpretation and application to reproductive cases is essential to get a better sense of the concept of reproductive rights at the European level and to provide guidance to the member states. The ECtHR has interpretative authority of the *ECHR*[12].

This article aims to describe in a systematic way how the ECtHR deals with reproductive issues and to find out if it designs a concept of reproductive rights as a specific category of rights.

There are almost as many definitions of the terms "concept" or "category" as authors[13]. For the sake of this paper, the inquiry for a concept of reproductive rights requires the gathering of reproductive issues around a

[8] Convention on Human Rights and Biomedicine, *supra*, note 4, Art. 14.
[9] Art. 3 § 2 The EU Charter protects the right to integrity in a chapter on "dignity". Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C.364/3), Art. 3(2). The Oviedo Convention contains the same prohibition of financial gain when it comes to the disposal of a part of the human body in its Chapter VII. *See.* Art. 21 and 22.
[10] European Social Charter, ETS n°35, 1961, and Revised European Social Charter (ETS n°163), 1996, art 11 on "the right to protection of health."
[11] Loizidou v. Turkey, App. No 15318/89, ECtHR (Preliminary Objection) (1995), at 75.
[12] CHRISTOS GIANNOPOULOS, L'AUTORITÉ DE LA CHOSE INTERPRÉTÉE DES ARRÊTS DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME (2019).
[13] For a discussion on the « concept », « notion » and « category », *see* especially VÉRONIQUE CHAMPEIL-DESPLATS, MÉTHODOLOGIES DU DROIT ET DES SCIENCES DU DROIT (2014), at 320-325.

stable legal characterization and interpretation, relying on certain specific characteristics singularizing themselves from other human rights issues. Such characteristics can be essentialist and realistic.

Following the Cairo Conference, the article adopts a broad definition of reproductive issues, going beyond the claim of the right to use new reproductive technologies. It involves the individual or couple's decision to reproduce or not, immediately or potentially, as well as the conditions under which they procreate and give birth. Concretely, the liberty not to procreate includes cases on contraception and abortion. The liberty to procreate could call to consider cases related to assisted reproduction, surrogacy, uterus transplantation, and sterilization. Finally, the conditions of procreation and giving birth involve pre-natal diagnosis and home-birth authorizations. Many of these issues made their way to the ECtHR and were therefore considered for this paper[14].

The research on reproductive rights as a category requires a transversal analysis of current case law, and look for common elements and obstacles to the development of a European conceptualization of reproductive rights by the ECtHR[15].

Our study shows that reproductive cases are the archetypal cases of deference to the national authorities. In the current state of jurisprudence, this deference limits the chances to shape a European concept of reproductive rights. There are, however, some teachings that are coming out of the study. **Part I** aims to describe and systematize the legal characterization of reproductive issues by the ECtHR, through a review of the recurring inputs of the European jurisprudence on those different issues to the framing of reproductive rights. **Part II** argues that the ECtHR does not capture all the dimensions of the interests at stake in reproductive cases, and this failure to deal with what makes those rights specific appears as an impediment to defining the concept of reproductive rights. **Part III** examines the political

[14] The article does not deal with the European cases related to sexual freedom that were not connected to reproduction.
[15] For a study on the ECtHR's jurisprudence by specific reproductive issues with a focus on women's rights *see* also Liiri Oja and Alicia Ely Yamin, *Woman in the European Human Rights System: How Is the Reproductive Rights Jurisprudence of the European ECtHR of Human Rights Constructing Narratives of Women's Citizenship*, 32 COLUM. J. GENDER & L. 62 (2016).

constraints the ECtHR is confronted with when deciding on controversial issues. Faced with this reality in the particular field of reproduction, the ECtHR developed several interpretative tools, which **Part IV** elaborates on. Those tools allow the ECtHR, with more or less success, to assume its role of applying the "instrument of European public order" while avoiding losing its legitimacy on other grounds such as judicial activism. This global approach of the ECtHR's case law on reproductive issues will lead to conclusions on both the ECtHR's interpretation of fundamental rights and the framing of reproductive rights as such in **Part V**.

I. The usual framing of reproductive interests by the ECtHR

Any research on the framing of reproductive rights requires an understanding and analysis of how the ECtHR characterizes reproductive interests, and which obligations it infers from the *ECHR* in this regard. Although not exclusively, it is commonly under the scope of Article 8, related to the respect for private and family life, that the ECtHR analyzes reproductive cases. Section A describes the ECtHR's different legal characterizations under Article 8. Section B develops the recurrent obligations identified by the ECtHR, namely the requirement of clarity and effectiveness of legal reproductive rights.

A. The characterization of reproductive issues under Article 8 of the *ECHR*

All cases brought to the ECtHR on reproductive issues alleged breach of Article 8, which is certainly the provision that the ECtHR interpreted the most constructively[16]. In the reproductive area, the ECtHR characterizes the applicants' interests as either "private life", "family life", or "private and family life" (1). Private life encompasses several components, some of them being at the "core" of privacy (2). Those distinctions are clarified below.

1. Distinctions within the "right to private and family life"

Reproductive issues concern both private and family life. Like in other areas, the ECtHR sometimes bypasses the characterization of an interest as "private" life, or, alternatively, "family" life, making the respect for "private and family life" appearing as a catchall category[17]. For instance, the ECtHR referred to the respect for private and family life as a unique concept in the cases related to the sterilization of Roma women without informed consent[18],

[16] FRÉDÉRIC SUDRE, LE DROIT AU RESPECT DE LA VIE PRIVÉE AU SENS DE LA CONVENTION EUROPÉENNE (2005).
[17] Frédéric Sudre described it as a "concept-gigogne" in Frédéric Sudre, *Rapport introductif : la « construction » par le juge européen du droit au respect de la vie familiale*, in F. SUDRE (DIR.), LE DROIT AU RESPECT DE LA VIE FAMILIALE AU SENS DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME (2002), at 27.
[18] K.H. and others v. Slovakia, Eur. Ct. H.R. (2009), at 54-58, N.B. v. Slovakia, Eur. Ct. H.R. (2012), at 92-99; In V.C. v. Slovakia, 2011-V Eur. Ct. H.R. 381, the ECtHR explained that the principles governing the respect of private life were also governing family life, the notion encompassing *de facto* families (at 142), before using the concept of "private and family life"

as well as three cases on the access to artificial insemination facilities and preimplantation diagnosis[19]. In other scenarios, pragmatism led the ECtHR to focus on private life as a specific interest because applicants and the government did not disagree on this basis[20]. However, and most likely, the ECtHR qualifies reproductive issues as "private life." The ECtHR characterized the applicants' interests as such in abortion cases,[21] in cases related to the circumstances of giving birth, whether at home[22] or at the hospital[23], and in two cases related to the disposal of embryos: *Evans v. the United Kingdom* and *Parrillo v. Italy*. In *Evans*, a couple decided conjointly to cryopreserve their embryos in order to proceed to a future implantation, because Ms Evans needed to go through an operation that would leave her unable to naturally procreate. However, the couple broke up and her former partner withdrew his consent. Ms Evans opposed the destruction of the embryos because the implantation of the embryos represented her last chance to be a genetic parent[24]. Unlike in *Evans*, the applicant's partner in the case *Parrillo v. Italy* had died and the applicant had no wish to proceed with a pregnancy but wanted instead her embryos to be given for research[25]. In the absence of any link to family life, the consideration of "private life" was not surprising.

Unlike the jurisprudence on abortion, assisted reproduction, and the circumstances surrounding birth, which dealt with the access (denied or mandated) to reproductive services or technologies, the European cases on surrogacy only concerned the effects of a surrogacy already performed

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and finding a violation of Article 8 on this basis (at 143-155). *See* also I.G. and others v. Slovakia, Eur. Ct. HR. (2012).

[19] The ECtHR analysed alleged violations of Article 8 on the basis of private and family life in Dickson v. the United Kingdom, 2007-V Eur. Ct. H.R. 99, S.H. v. Austria, 2011-V Eur. Ct. H.R. 295; and Costa v. Italy, Eur. Ct. H.R. (2012).

[20] *See* for example Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353.

[21] A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185, P. & S. v. Poland, Eur. Ct. H.R (2012), at 112; R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209, at 179 and following; Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219 at 105.

[22] Ternovszky v. Hungary, Eur. Ct. H.R. (2010), at 22 ; Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016) at 162- 163; *Pojatina v. Croatia*, Eur. Ct. H.R. (2018), at 44.

[23] In Konovalova v. Russia, Eur. Ct. H.R. (2014), the ECtHR found that the presence of medical students when the applicant gave birth and without her express consent was an illegitimate interference in her right to private life.

[24] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353. In cases related to the disposal of frozen embryos at a clinic under criminal investigation *see* Nedescu v. Romania; Eur. Ct. H.R. (2018), at 70. Knecht v. Romania, Eur. Ct. H.R. (2012) at 54.

[25] Parrillo v. Italy, Eur. Ct. H.R. (2015).

abroad. Yet, most of the cases are relevant for the determination of reproductive rights because they contribute to the definition of family life and enrich the concept of private life in a bioethical context. In the cases *Mennesson*[26], *Labassee*[27], *Foulon* and *Bouvet*[28], and *Laborie*[29], the intended parents who had recourse to gestational surrogacy abroad were able to come back to France and live as respective families in the country for years. The intended father was the biological father. The issue was the establishment of legal parenthood in the intended parents' countries. In those cases, the ECtHR found an interference with the "family life" of all four applicants (couple and children), and with the "private life" of the children[30]. Together with a subsequent advisory opinion of the ECtHR on "*Mennesson* 2"[31], those cases demonstrate that, even outside the legal relationship, the notion of family is non-reducible to biology. However, the ECtHR only identified a violation of the children's private life[32]. Conversely, in *Paradiso v. Italy*, the child was born from anonymous donations of ova and sperm in Russia, and from a Russian gestational remunerated woman[33]. Unlike in the French cases, the Italian government had separated the child from the parents and the issue was whether the permanent removal of the child was an interference in the applicants' right to private and family life[34]. There was no biological tie and the child neither was an applicant, nor represented in the procedure. After the Russian authorities issued a birth certificate stating the applicants were the parents, the latter decided to bring the child with them in Italy, where the procedure was illegal. In this case, the ECtHR refused to consider the existence of family life after only six months of cohabitation, and given the uncertainty of the ties from a legal perspective due to the illegal action of the

[26] Mennesson v. France, Eur. Ct. H.R. (2014).
[27] Labassee v. France, Eur. Ct. H.R. (2014).
[28] Foulon and Bouvet v. France, Eur. Ct. H.R. (2016).
[29] Laborie v. France, Eur. Ct. H.R. (2017).
[30] In Labbassee v. France, Eur. Ct. H.R. (2014) at 50. Mennesson v. France, Eur. Ct. H.R. (2014) at 49. Foulon and Bouvet v. France, Eur. Ct. H.R. (2016) and Laborie v. France, Eur. Ct. H.R. (2017) recalled its findings in the prior cases.
[31] Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Cour de cassation, *P16-2018-001,* Eur. Ct. H.R. (2019).
[32] Mennesson v. France, Eur. Ct. H.R. (2014) at 102, Labassee v. France, Eur. Ct. H.R. (2014) at 81, Foulon and Bouvet v. France, Eur. Ct. H.R. (2016) at 58, Laborie v. France, Eur. Ct. H.R. (2017) at 32.
[33] Paradiso v. Italy, Eur. Ct. H.R. (2015).
[34] *Id.* at 133.

intended parents[35]. Instead, the ECtHR found that the plan to conceive a child was under the scope of private life. *Paradiso* was the occasion for concurring judges to develop on the distinction between private and family life, contesting what they saw as an over-inclusive definition of family life. For them, neither "interpersonal ties", nor "emotional bonds" constituted *per se* family life.[36] Instead, they offered a more traditional and socially rooted reading of "family" as a "unit which has obtained legal or social recognition in the specific State".[37]

2. Distinctions within private life

The ECtHR had the occasion to apply the different components of privacy to reproductive issues: personal autonomy and self-determination on the one hand, the right to moral and physical integrity on the other hand.

When the ECtHR applies the right to self-determination in reproductive cases, it protects the ability "*to make essential choice affecting one's reproductive life*[38]". This autonomy applies both to the decisions not to procreate and to procreate. In *Evans v. the United Kingdom*, related to the use of own embryos for procreation, the ECtHR framed the issue in the following terms:

> *'private life', which is a broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world […], incorporates the right to respect for both the decisions to become and not to become a parent*[39].

A few months after *Evans*, the Grand Chamber had to deal with the refusal of artificial insemination to a couple in detention in *Dickson v. the United Kingdom*[40]. The woman would have been 51 years old if she waited until after

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[35] *Id.* at 156-157.
[36] *Id.* Joint concurring opinion of judges De Gaetano, Pinto de Albuquerque, Wojtyczeck and Dedov, at 2.
[37] *Id.* at 3.
[38] Simone Bateman, *When Reproductive Freedom Encounters Medical Responsibility: Changing Conceptions of Reproductive Choice*, in Effy Vayena, Patrick J. Rowe, P. David Griffin. Current practices and controversies in assisted reproduction: Report of a WHO meeting on "Medical, Ethical and Social Aspects of Assisted Reproduction", World Health Organization (2002), at 321, https://halshs.archives-ouvertes.fr/halshs-00276715 (accessed Jan. 7 2020).
[39] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, at 71.
[40] Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.

the man's release. The ECtHR accepted as legitimate some of the government's justifications for interference in Article 8, including the need to keep public confidence in the prison system, to see the restriction as a consequence of detention, and because allowing such procedure would inevitably lead the child to face the absence of one of his parents[41]. However, the ECtHR found that the absence of consideration of individual interests, especially in this situation where one of the applicants would be free and could take care of the child, was disproportionate and violated Article 8[42]. The ECtHR extended the protection of autonomy concerning the circumstances surrounding childbirth, affirming in *Ternovszky v. Hungary* that they "*incontestably form part of one's private life*"[43]. *Ternovsky* recognized the right of women to opt out from a highly medicalized procedure to reconnect with more natural childbirth.

The ECtHR affirms the reproductive choice paradigm, at least when the interests of the woman and the fetus are perceived as aligned. Indeed, although the ECtHR considers that abortion falls within the scope of the woman's private life, this privacy interest is shared with the fetus[44] and the soon to be born in home-birth cases[45].

Besides acknowledging this reproductive autonomy in general, the ECtHR considers that certain reproductive issues fall within the core of privacy interests. To reach that status, the issue must concern one of the most "intimate aspects" of private life, and/ or an important facet of an individual's existence or identity according to the ECtHR[46]. Where such an intimate

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41 *Id.*
42 *Id.* at 82.
43 Ternovszky v. Hungary, Eur. Ct. H.R. (2010) at 22.
44 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219 at 106.
45 In Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), the Grand Chamber reminds that it belongs to national authorities to make a balance between competing interests (of the woman on one hand, of the State on the other to protect the health of the woman and the fetus) at 176 and does not exclude a conflict between the interests of the woman and those of the unborn (at 185). On this, *see* the dissenting opinion of judges Sajó, Karakaş, Nicolaou, Laffranque and Keller, insisting on the absence of conflict of interests between the mother and the unborn (at 7).
46 *See* cases concerning sexual liberty, starting by Dudgeon v. The United Kingdom, Eur. Ct. H.R. (1981), related to homosexual relationships in the private space. In this case, the ECtHR stated that "The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8", at 52. *See* also KA and AD v. Belgium, Eur. Ct. H.R. 2005, especially at 83-84 concerning sadomasochist practices. Concerning the rights of transsexuals *see* Goodwin Eur. Ct. H.R. (2002), at 90,

aspect is concerned, the core of privacy is threatened, which justifies the narrowing of the states' margin of appreciation[47]. The ECtHR identified such intimate interest in *Nedescu v. Romania*, related to the access to embryos after the use of assisted procreation for a joint parental project[48]. However, the ECtHR usually prioritizes another factor to determine the scope of the state margin of appreciation: the absence of European consensus. Since these two factors are not in fact alternative, the ECtHR's prioritization of the latter appears opportunistic. Hence, the characterization of an interest as intimate lacks of consistency. In *Evans* for instance, while the ECtHR stated that an issue concerning an important facet of one's existence reduced the margin, it immediately concluded that there was no consensus on the interests at stake, justifying a wide state discretion. Besides, the ECtHR's finding that the "*decision to become a parent in the genetic sense*" was a "*more limited issue*" than the right to respect for the decision to become a parent or not[49] suggested that the latter was at the heart of privacy, hence deserving a strict scrutiny. In that sense, the ECtHR differentiated the parental project from the use of embryos for research in *Parrillo*. In this abovementioned case and unlike in *Evans*, the intended father had not withdrawn his consent but had died in a bomb attack in Iraq while he was reporting on the war. Hence, Madam Parrillo abandoned her procreative project and wanted her embryos to be used for research. The Grand Chamber excluded it from the core of privacy, stating that:

> *while it is of course important, the right invoked by the applicant to donate embryos to scientific research is not one of the core rights attracting the protection of Article 8 of the Convention, as it does not concern a particularly important aspect of the applicant's existence and identity*[50].

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where the ECtHR affirmed that "*Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings*". The ECtHR quoted Dudgeon and recalled in Pretty v. The United Kingdom that "the margin of appreciation has been found to be narrow as regards interferences in the intimate area of an individual's sexual life" but refused to extend it to assisted suicide: Pretty v. The United Kingdom, Eur. Ct. H.R. (2002) at 71.

[47] In *Dudgeon*, the ECtHR imposed the depenalization of homosexual relationships between consenting adults.

[48] Nedescu v. Romania, Eur. Ct. H.R. (2018), at 70.

[49] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353 at 72.

[50] Parrillo v. Italy, Eur. Ct. H.R. (2015), at 174.

However, the ECtHR did not apply such characterization in abortion cases[51], although it involves the decision not to become a parent. Such a qualification does not appear either in home-birth cases[52]. The same holds true of three other cases related to the use of assisted reproduction technology (ART). The ECtHR does not refer to the most intimate aspects in *Costa and Pavan v. Italy* related to the access to ART and preimplantation genetic diagnosi[53], nor in *Dickson v. The United Kingdom* on the access to artificial insemination in prison[54]. Despite the arguments of the applicants and separate judges in *SH and others v. Austria*, in which the access to assisted reproduction was restricted because of the legal prohibition on the use of sperm for IVF and ova donation in general, the ECtHR focused on the factor of absence of consensus as in *Evans* or *A, B and C*[55]. Those cases show the malleability of the ECtHR's characterization of privacy interests.

Besides the protection of autonomy and self-determination, the ECtHR enshrines in the right to private life the protection of physical and moral integrity, from which it infers positive obligations. The ECtHR referred to this component of private life in cases related to abortion for health reasons, whether because it was refused to a woman warned that her severe myopia could worsen if she carried her pregnancy to term[56] or concerning the denial of genetic tests to detect genetic abnormality[57]. It takes the form of the informed consent requirement before a medical intervention on the body.

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51 Although it was among the arguments of the applicant in A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185 but the ECtHR focused instead on the factor of "acute sensitivity of the moral and ethical issues" (at 233). In this regard, *see* the concurring opinion of Judge Lopez Guerra, joined by Judge Casadevall, at 3. It was not mentioned either in Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, nor in R.R. v. Poland, Eur. Ct. H.R. (2011).

52 The ECtHR made no mention of it in Pojatina v. Croatia, Eur. Ct. H.R. (2018), in Ternovszky v. Hungary, Eur. Ct. H.R. (2010); nor in Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), although it was in the arguments of different participants in the case: In *Dubská*, an earlier composition of the ECtHR, the Chamber, even stated about home-birth that it represented a « particularly intimate aspect » *see* Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2014), at 75 ; *see* also the common dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller at 7, according to which "Childbirth represents one of the most intimate aspects of a woman's life."

53 Costa and Pavan v. Italy, Eur.Ct. H.R. (2012).

54 Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.

55 S.H. v. Austria, 2011-V Eur. Ct. H.R. 295. See the applicants' arguments (at 57) and the joint dissenting opinion of judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, at 7.

56 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, at 107.

57 R.R. v. Poland, Eur. Ct. H.R. (2011) at 91.

Proceeding with sterilizations without informed consent[58], failure to inform a patient of the risks of a medical procedure or to include her in the decision process[59] violate Article 8. When those interferences meet some level of severity, they can also constitute a violation of Article 3 of the *ECHR*, prohibiting inhuman and degrading treatment[60].

Although reproductive issues fall within the scope of several rights of the *ECHR*, they are frequently analyzed under the right of respect for private and family life. Section A showed that the interpretation of this right allowed the integration of almost all aspects of reproductive rights. Section B will show that besides their characterization as private and/or family life, the ECtHR usually bases its scrutiny of reproductive issues under Article 8 on the verification of the consistency and effectiveness of domestic rights, rather than on the requirement of substantive obligations.

[58] *See* forced sterilization case K.H. and others v. Slovakia (2009) 49 EHHR 50, related to the exercise of the right of effective access to information concerning their health and reproductive status, at 44 (The ECtHR found a violation of Article 8).

[59] In *Csoma v. Romania*, Eur. Ct. H.R. (2013), a woman decided together with her doctor that her pregnancy should be terminated after the fetus was diagnosed with hydrocephalus. Following the treatments she received in order to induce abortion, there were complications and doctors needed to remove her uterus and excise her ovaries in order to save her life. The applicants relied on Articles 2, 6 and 13 of the *ECHR*. Not surprisingly, the ECtHR decided to rather examine the application under Article 8 (at 28). Judges found a violation of the applicant's private life because the doctors did not involve her in the process and did not inform her on the risks of the medical procedure. The fact that she was a nurse did not affect the obligation to provide her with the relevant information.

[60] *See.* R.R v. Poland, Eur. Ct. H.R. (2011).

B. An analysis recurrently oriented on the consistency and effectiveness of domestic rights

Unlike other articles such as Article 3 related to the prohibition of torture, inhuman and degrading treatment and Article 4 prohibiting slavery and forced labor, Article 8 para.1 is not an absolute right, and Article 8 para. 2 enumerates some possible limitations, providing that the interference must be "in accordance with the law" and is "necessary in a democratic society". In the case law related to reproduction, the scrutiny usually takes the form of the requirement of clarity of the law according to which the interference was made and, more frequently, the effectiveness of legal rights.

First, in reproductive cases like in other cases related to bioethics[61], the ECtHR found violations of the *ECHR* based on the principle of legality. This principle requires the clarity and foreseeability of the interference in domestic rights. By finding a lack of clarity of the legislation permitting an interference, the ECtHR avoids *de facto* an analysis of the proportionality of such interference. In the medically-assisted procreation case *Nedescu v. Romania*, related to the retrieval of a couple's stored embryos, the ECtHR found a violation of Article 8 on that ground. As in the earlier case of *Knecht v. Romania*, the applicants had a parental project and stored their embryos in a clinic. Because criminal proceedings were initiated against the clinic, the applicants were not able to retrieve their embryos. In *Nedescu*, judicial authorities ordered administrative authorities to retrieve the embryos, but they did not do it. Hence, the ECtHR observed that the interference was not provided by the law and did not go any further in its scrutiny, finding a violation of Article 8. Similarly, in the home birth case *Ternovszky v. Hungary*, the ECtHR found a violation of the *ECHR* by the fact that "*the matter of health professionals assisting home births is surrounded by legal uncertainty prone to arbitrariness*[62]." European States should take into account the requirement of clarity since legislations are regularly unclear on bioethical issues. Legislative ambiguities regularly result from a compromise between conflicting and

[61] Such as organ transplantation for instance see Petrova v. Latvia, Eur. Ct. H.R. (2014) and Elberte v. Latvia, Eur. Ct. H.R. (2015).
[62] At 26.

sometimes irreconcilable social views[63]. The requirement of clarity applies to the conditions and limits under which a right to conscientious objection, if legal in the country, can be exercised[64].

Second, when the ECtHR finds that an interference in Article 8 is in accordance with the law, it subsequently analyses if it was "necessary in a democratic society" for objectives enumerated by Article 8 para. 2. In its scrutiny, the ECtHR pays particular attention to the effectiveness of reproductive rights.

A common feature of ECtHR's reproductive cases is to infer from domestic rights conventional procedural obligations. Concretely, the ECtHR recognizes the states' discretion to grant or not certain reproductive rights in their legislations, but if they do grant such domestic rights, the ECtHR infers from Article 8 some positive obligations ensuring their consistency and effectiveness. The medically assisted procreation case *Costa and Pavan v. Italy* provides an example[65]. A couple of healthy carriers of cystic fibrosis wanted to avoid the transmission of the disease to a child. To that end, they were seeking the help of medically assisted procreation and genetic screening. Because Italian law denied them access to genetic screening, their only way to have a child unaffected by the disease was to initiate a pregnancy and terminate it on medical grounds whenever prenatal diagnosis showed that the fetus was affected. The ECtHR found that the interference was in accordance with the law but the Italian legislation lacked consistency because the applicants had no other choice then to start a pregnancy by natural means and then terminate it, if the prenatal diagnosis showed that the fetus was unhealthy[66]. This absence of consistency led the ECtHR to conclude that the interference was disproportionate, thus in violation of Article 8[67].

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[63] *See infra.*

[64] The ECtHR, as well as the European Commission in the past, dealt several times with conscientious objection in the context of the military service. For a recent case, *see* for instance Adyan and others v. Armenia, Eur.Ct. H.R. (2017). In R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209, the ECtHR stated that "[s]tates are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation", at 206.

[65] Costa and Pavan v. Italy, Eur.Ct. H.R. (2012).

[66] *Id.*

[67] *Id.*

Abortion cases are particularly emblematic of that kind of scrutiny. They concern abortion for therapeutic reasons or as the result of a rape. In the case *A, B and C*, one of the three applicants was in remission from a rare form of cancer and complained under Article 8 about the absence of any legislation implementing the right to a legal abortion that she was entitled to according to Article 40.3.3 of the Irish Constitution. The ECtHR noted the "*substantial uncertainty*" of the legal framework, which increased the risks of criminal convictions and observed that both the medical procedure and the judicial proceedings were not effective and accessible means to determine whether an abortion would be legal on the ground of a risk to life[68]. It concluded that this uncertainty "*has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman's life and the reality of its practical implementation*"[69], to which the authorities made no specific effort to remedy. The absence of effectiveness of rights recognized under Irish laws determinantly supported the finding of a violation of Article 8. Likewise, in *R.R. v. Poland*, the ECtHR was confronted with "*a particular combination of a general right of access to information about one's health with the right to decide on the continuation of pregnancy*"[70]. The applicant was pregnant and thought the child to be affected by a severe genetic abnormality (Edwards or Turner syndrome) and wanted to abort. Doctors refused to perform the genetic tests she argued she was entitled to and discouraged her from aborting. After interminable procedures, the Turner syndrome was confirmed and abortion was refused because it was legally too late. Her daughter was born with the syndrome. The ECtHR found a violation of Article 8 because while the legislation permitted abortion in case of fetal malformation, there was no adequate legal and procedural framework allowing the applicant to get appropriate and full information on the fetus' health[71]. The timely access to prenatal genetic testing was a condition of effectiveness of a legal right. Finally, in *P and S v. Poland*, a 14-year old girl became pregnant because of a rape. Polish law recognized a right to abortion if pregnancy was the result of a criminal act. Despite this legislation, the victim and her legal representative, her mother,

[68] A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, at 263.
[69] *Id.* at 264.
[70] R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209.
[71] *Id.*

needed to go through a very long procedure, and endured the procrastination of medical staff who refused to proceed with the abortion, keeping her away from her mother, making her see a priest and keeping her against her will. The ECtHR found that the authorities gave misleading and contradictory information to the applicants. Because the legislation permitted abortion, it was a condition of the applicant's autonomy to be provided with the relevant reliable information and procedure in order to exercise her legal right[72].

Part I provided a first step in the analysis of the ECtHR's framing of reproductive issues, by describing how reproductive issues integrate the scope of protection of the *ECHR*. They generally and commonly fall within the scope of the respect of private and family life, the interpretative potential of which could provide a suitable basis for the development of a European concept of reproductive rights. The ECtHR usually ensured their protection through the requirement of effectiveness of legal rights, rather than endorsing a substantive approach[73].

Part II will now argue that beyond this procedural requirement under Article 8, the ECtHR's approach fails to grasp the specificity of reproductive rights as a possible category. This specificity comes from their transversality, and the particular situation of women in their legal history. Failing to address these inherent and contextual characteristics of reproductive rights, the ECtHR does not conceptualize those rights as a distinct category.

[72] P. & S. v. Poland, Eur. Ct. H.R (2012).
[73] *See* Part IV for a critical appreciation of the ECtHR's methods and interpretative tools.

II. The failure to grasp the specificity of reproductive rights

Apart from the incorporation of reproductive issues within the scope of the *ECHR*, the search for a concept requires to analyze if the ECtHR recognizes inherent characteristics to those rights, differentiating reproductive rights from other rights. Yet, the ECtHR rarely congregates reproductive cases that are not on the same subject matter. Although the ECtHR regularly refers to other reproductive cases, and adopted a broad formulation of the right of respect to the decision to become or not to become a parent[74], it usually makes those references among other cases not necessarily connected to reproductive issues[75]. Apart from describing the scope of autonomy, or illustrating the interaction between the margin of appreciation and ethical and moral issues, substantive references are rare. While the ECtHR sometimes refer to international instruments that gather different reproductive issues, it does not engage itself in such an integrative approach, giving rise to a fragmentation of its decisions. This is currently a first limitation to the ECtHR's design of a concept of reproductive rights.

Moreover, a more precise look at the ECtHR's interpretation of reproductive issues indicates an absence of inclusion of the special circumstances associated with reproductive rights. Those circumstances come from the transversality of reproductive rights and the history of their affirmation on the international scene. The Cairo programme was built on the need to emancipate women from their husbands but also from the public authorities'

[74] According to Andrea Mulligan, the evolution of this rhetoric In *Evans* (and later in *SH*) shows "a significant step in the ECtHR's fusion of the abortion jurisprudence with its assisted reproduction jurisprudence": *Reproductive rights under article 8: the right to respect for the decision to become or not to become a parent*, E.H.R.L.R. 2014, 4, 378-387. However, it is arguable that the first reference to such broad right in the context of *Evans* was simply announcing a balance between conflicting autonomies (between the right to become a parent of the intended mother and the right not to become a parent of the intended father).

[75] The ECtHR also referred in the same paragraph to *Dudgeon* and *Laskey* related the self-determination and sexual liberty (homosexuality, sadomasochism) and *Pretty* on end of life. In *A, B and C* for instance, the ECtHR refers to *Evans* to illustrate the scope of autonomy, and among other cases like *Goodwin v. UK* (Absence of legal recognition of change of sex) or *Fretté v. France* (adoption by a single homosexual man). The same is true in *SH*.

guardianship[76]. It acknowledged both the vulnerability of women and their empowerment[77]. By recognizing that women have the ability to control their sexual lives and wishes to or not to procreate, reproductive rights involve a strong egalitarian dimension. Besides, the rise of reproductive technologies questions the role of law to promote equality or compensate for inequality between individuals or couples regarding reproduction. As a broad concept, the right to "private life" could be the source of recognition of this dimension of reproductive rights. Yet, the ECtHR's jurisprudence shows a tendency to endorse a narrow and neutral view of rights, through the autonomy paradigm (A). Moreover, reproductive rights are inseparable from reproductive health. Although the *ECHR* does not enumerate the right to health, its content overlaps with several conventional rights. Here again, however, apart from rare cases, the ECtHR insufficiently considers reproductive issues as a matter of reproductive health. This is regrettable since the right to health is widely endorsed in international and European law, which should be the occasion for the ECtHR to adopt a stronger position on the states' obligations in this regard (B). The ECtHR insufficiently integrates those facets of reproductive rights in its reasoning, which demonstrates a failure to capture key aspects in order to conceptualize reproductive rights in a meaningful manner. This lack of contextualization of rights is even more surprising that the ECtHR had legal basis and social support to integrate them in its decisions without facing criticism of judicial activism.

[76] For a historical approach *see* especially Arlette Gautier, *supra*, note 3. *See* also SONIA CORREÂ, POPULATION AND REPRODUCTIVE RIGHTS. FEMINIST PERSPECTIVES FROM THE SOUTH (1994).
[77] On gender stereotyping *see* especially REBECCA J. COOK AND SIMONE CUSAK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES (2009).

A. Reproductive autonomy: the ECtHR and the imaginary of neutral rights

Reproductive rights are at the core of conflicting representations on life, technology and reproduction. Such representations reflect "social imaginaries" influencing the framing of reproductive rights. Paul Ricoeur defined ideology and utopia as two modalities of social imaginaries, both being complementary to each other[78]. He wrote, "*if ideology preserves and retains reality, utopia essentially questions it*"[79]. In the particular field of technologies, Sheila Jasanoff defined sociotechnical imaginaries as "*collectively held, institutionally stabilized, and publicly performed visions of desirable futures, animated by shared understandings of forms of social life and social order attainable through, and supportive of, advances in science and technology*". A reading of human rights cases in light of such imaginaries has been encouraged in particular by Thérèse Murphy and Gearóid Ó Cuinn, because of the reflexivity they bring on human rights beyond the technicalities of the legal method[80]. In our study, it means going beyond a formal reading of the ECtHR's argumentation and the *ratio decidendi*, to include its silences to some arguments formulated by applicants, defendant governments, but also by third-party interventions or judges in separate opinions. This paragraph borrows from this Science-Technology-Society studies (STS) approach, without limiting it to the representation of technology itself. The aim is to contextualize the ECtHR's decisions by putting rights in their different ideological contexts. This approach shows that although several imaginaries surrounding reproductive rights emanate from the parties, consisting in a prioritization of rights (1), the ECtHR applies conventional requirements to domestic rights it envisions as neutral rights (2). This indicates that the ECtHR does not address the specificity of "reproductive rights", hence failing to conceptualize them.

1. *The parties' imaginaries of pre-empting rights*

[78] Paul Ricœur, *L'idéologie et l'utopie : deux expressions de l'imaginaire social, i*n 2 AUTRES TEMPS. LES CAHIERS DU CHRISTIANISME SOCIAL 53 (1984).
[79] *Id.* at 61. Personal translation.
[80] The authors experimented a STS approach to human rights, by looking for the framing of health technologies, biocitizenship and the law itself in two reproductive cases: Evans and SH. Thérèse Murphy and Gearóid Ó Cuinn, *Taking Technology Seriously: STS as a Human Rights Method*, in M.L FLEAR, A-M FARRELL, T.K. HERVEY AND T. MURPHY, EUROPEAN LAW AND NEW HEALTH TECHNOLOGIES, pp.285-308, p.289.

While the Vienna Declaration of 1993 characterized human rights as "*universal, indivisible and interdependent and interrelated*[81]." one of the arguments before the ECtHR is **the prioritization of rights**, outside the distinction between derogable and non-derogable rights. Parties frame this argument in terms of both the relationship between the woman and the fetus (abortion cases) and the relationship between the woman and the man in medically assisted reproduction cases.

In regards to abortion, the argument of prioritization in favor of woman's rights stems from the partly dissenting opinion of six judges in the case *A. B. and C v. Ireland*. Three women living in Ireland had to go to the United Kingdom to have an abortion. Apart from the specific case of the third applicant, who feared for her health and the health of the fetus, and was entitled to a legal abortion, the two other applicants had to travel because the Irish legislation criminalized abortion. The first applicant, a former alcoholic, took the decision to abort to avoid jeopardizing her chances to reunite with her four children who were in foster care. The second applicant did not want to be a single parent. The ECtHR found no breach of the first and the second applicants' right to private and family life. The dissenting judges argued that the rights of the woman and the rights or interests of the fetus were of unequal force. They entrenched this reasoning in social norms and shared collective imaginaries in Europe:

> *there is an undeniably strong consensus among European States […] to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus*[82].

Besides, they interestingly argued that participation in social life would be key to determine this prioritization. This argument could help frame a concept

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[81] VIENNA DECLARATION AND PROGRAMME OF ACTION, ADOPTED BY THE WORLD CONFERENCE ON HUMAN RIGHTS IN VIENNA ON 25 JUNE 1993, AT 5.

[82] A, B and C v. Ireland, 2010-VI Eur. Ct. H.R. 185, Joint partly dissenting opinion of Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi, at 2.

but would raise some ethical issues concerning incapacitated persons or persons unable to express themselves. However, the social participation argument as a driver for balance in favor of the woman cannot be used when the concurrent right is a right of a natural person (*personne juridique*), also participating in social life. For instance, the argument would have been irrelevant in the context of the abovementioned *Evans* case, where the woman's autonomy conflicted with the man's autonomy. Yet, another team of dissenting judges in *Evans* provided another justification for prioritization, based on the substance of the right. They argued jointly for giving more weight to the right to become a genetically related parent than to the decision not to become a parent, taking into account Ms Evans' "extreme" situation[83]. This argument invites consideration about reproductive rights from the woman's perspective.

Conversely, but always through the prioritization prism, some arguments seem to minimize or literally ignore the rights of women. For instance, the government reduced the choice of home-birth to a question of "personal comfort"[84]. This characterization of reproductive services as a question of comfort as opposed to more important rights regularly comes back in the arguments of third parties or, sometimes, separate judges. Unlike the feminist argument, it advocates for a prioritization of the right to life. The case *Tysiac v. Poland,* related to abortion because of a high risk of losing sight, provides a good example. Regardless of the fact that the fetus was not born and therefore had no legal personality, one of the third-parties insisted on the right to life "*formed the supreme value in the hierarchy of human rights'*"[85]. In that same case, the dissenting judge Borrego Borrego completely disregarded the autonomy argument and considered that the ECtHR gave too much credit to the "*fears*" of the applicant[86].

The dissenting judge De Gaetano probably formulated one of the most autonomy-denying arguments when he challenged the application of Article

[83] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, Joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, at 11.
[84] Pojatina v. Croatia, Eur. Ct. H.R. (2018), at 40.
[85] Association of catholic families in Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219
[86] Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219. Dissenting opinion of Judge Borrego Borrego, at 9.

8 in the context of abortion[87]. In *P and S* regarding the abortion by a 14 years-old girl who became pregnant as a result of a rape, judge De Gaetano strongly opposed the applicability of the right to private life of the pregnant teenager's mother, finding that her autonomy was irrelevant against the right to life. Nonetheless, the scope of the judge's dissent is not limited to the issue of legal representation of a pregnant minor. His indifference to the potential alignments between the mother and her pregnant daughter's autonomies is demonstrated when he states that "*[f]undamental rights cannot be gauged by the yardstick of convenience or, worse, selfish interest*"[88], clearly negating the relevance of women's autonomy as such[89].

The disregard of the applicants' autonomy frequently goes hand in hand with the imaginary of fear and precaution, relying on scientific uncertainties that the law should be taking into account. In their joint dissenting opinion in the *Dickson* case, related to a couple's access to IVF in the context of detention, five judges focused on the woman's age to point out the "*very low chances of a positive outcome of IVF of women over 45,*" from which they inferred a broader state margin of appreciation[90]. According to this view, the woman's autonomy gives way to the scientific argument.

The automatic characterization made by conservative judges in cases where applicants request for abortion as "selfish" is the reason why some feminist scholars argue that the right to privacy is likely to be unsuccessful for women who go to Court defending their right to abortion[91]. However, unlike in the United States system, reluctant to accept "positive rights" in general and conceiving privacy mainly as a "right to be let alone", private life is the source of positive state obligations (including substantive) in the European system. Rather than the legal basis of Article 8, the problem seems to be the scope of the margin of appreciation the ECtHR recognizes to states[92].

[87] R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209 and P. & S. v. Poland, Eur. Ct. H.R (2012).
[88] P. & S. v. Poland, Eur. Ct. H.R (2012), dissenting opinion of Judge De Gaetano.
[89] The ECtHR did not disregard this issue.
[90] Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.
[91] Liiri Oja and Alicia Ely Yamin, *supra*, at 74.
[92] *See infra.*

Confronted with those conflicting imaginaries, the ECtHR recurrently adopts a neutral approach.

2. The ECtHR's recurrent imaginary of neutral legal rights

Faced with those different imaginaries surrounding reproduction, the ECtHR seems to have adopted two different approaches. The first approach followed applications by an intended father who contested the ability of the potential mother to have an abortion without him being consulted. In such context, the ECtHR endorsed a prioritization of the woman's rights over the man's rights. In the decisions *W.P v. the United Kingdom*[93], *H v. Norway*[94] and *Boso v. Italy*[95], the ECtHR found the men's applications inadmissible. In *W.P. v. the United Kingdom* in 1980, a man opposed his wife's wish to abort and requested an injunction to prevent the abortion. In front of the former European Commission on Human Rights, he argued that the UK legislation denied among other things[96] the right of the "father of the foetus" "to object" to abortion, and/or "to be consulted" and/or informed. Concerning the permission of the abortion, the Commission found the applicant's request manifestly ill-founded, since the interference in his "private life" was justified by the necessary protection of the rights of another person, i.e. the woman's "wish" and "in order to avert the risk of injury to her physical or mental health"[97]. Concerning his potential right to be consulted, the Commission stated that any right of this sort under Article 8 "*must first of all take into account the right of the pregnant woman, being the person primarily concerned in the pregnancy and its continuation or termination*"[98]. Here again, the Commission found the request inadmissible on a material basis observing that "*having regard to the right of the pregnant woman, [it] does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural*

[93] Decision (inadmissibility) W.P. v. The United Kingdom, Eur. Comm. H.R. (1980), n° 8416/.78. Sometimes presented as X. v. The United Kingdom, n°8416/79 (following a mistake in the registration), or referred as the Paton case in reference of the internal case (Paton v. British Pregnancy Advisory Service Trustees [1979]).
[94] Decision (inadmissibility) H. v. Norway, Eur. Comm. H.R. (1992), n°17004/90.
[95] Decision (inadmissibility) Boso v. Italy, Eur. Ct. H.R. (2002).
[96] On the argument concerning the rights of the fetus *see* Part III B).
[97] Decision (inadmissibility) W.P. v. The United Kingdom, Eur. Comm. H.R. (1980), n° 8416/.78, at 26.
[98] *Id.* at 27.

rights as claimed by the applicant"[99]. The ECtHR reaffirmed the decision in its decisions *H. v. Norway* of 1992 and *Boso v. Italy* of 2002, where it also found inadmissible the applications by men who contested the performance of an abortion by their life partner/wife without being able to express their refusal, in accordance respectively with the Norwegian and Italian legislations[100]. In those decisions, the ECtHR recognized the intended father as a victim in the sense of the *ECHR*[101]. Yet, the women's pregnancy excluded the analysis on the merits of a potential balance of interests with the rights of the man. According to the ECtHR, "*any interpretation of a potential father's rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination*[102]." By concluding to the manifestly ill-founded character of the applications, the ECtHR did take into account the special concern of women in abortion context and gave more weight to their rights.

However, the ECtHR adopted more recently a second approach, rejecting hierarchy and/or proceeding as if it was dealing with neutral technologies and neutral legal rights. Those cases either concerned the interplay between the rights of the woman and the rights of the unborn, or between the rights of the woman and the rights of the man outside the specific context of pregnancy and abortion. Those last cases concerned ART. The following developments explore both situations, before arguing that the ECtHR could have acknowledged the context in which reproductive issues play in order to get their full dimension without embracing a prioritization. This section argues that the ECtHR failed to recognize the specificity of reproductive rights, which is the particular burden reproduction places on women.

The first observation is that even if the ECtHR rejects prioritization, it embraces a rhetoric of reproductive responsibility towards the fetus or the child rather than to anchor the woman's right in a right to self-determination

[99] *Id.*
[100] H. v. Norway, Eur. Comm. H.R (1992) (it was also related to article 9 on freedom of religion. The Commission used the same formula as in W.P. v The United Kingdom at 4). Decision (inadmissibility) Boso v. Italy, Eur. Ct. H.R. (2002).
[101] Decision (inadmissibility) W.P. v. the United Kingdom, 8416/78 Eur. Comm'n H.R, at 2; Decision (inadmissibility) H. v. Norway, Eur. Comm. H.R (1992) at 1 (concerning application of article 2). Boso v. Italy, Eur. Ct. H.R. (2002), at 1.
[102] Decision (inadmissibility) Boso v. Italy, Eur. Ct. H.R. (2002), at 2.

derived from Article 8. By doing so, the ECtHR fails to consider women's reproductive vulnerability and capability, which is a characteristic of reproductive rights. This observation works particularly for abortion but also concerning the protection of the health of the fetus, and later, the interests of the child. Concerning abortion, the *A, B and C* case is relevant to mention here since two applicants were asking, in substance, for a right to abortion[103]. The ECtHR does not adhere to the imaginaries of the parties or separate opinion judges described above. In *A. B and C*, the Grand Chamber avoided the affirmation of a prioritization by stating that "*the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected*[104]." This line of reasoning is recurrent, since it was already used in *WP v. the United Kingdom*[105], *Bruggemann and Scheuten v. Federal Republic of Germany*[106], *Boso v. Italy*[107], *Vo v. France*[108], and *Tysiac*[109], and later confirmed in *RR v. Poland* in 2011[110]. Such statement in the context of the analysis of the rights of the woman and the fetus indicates that the ECtHR adopts a rhetoric of women's responsibility towards the fetus[111]. As Stéphanie Hennette-Vauchez explained, the ECtHR adopts 1/ a dualist reading and 2/ an antagonist reading of abortion[112]. We can find a trace of that guilt rhetoric when the ECtHR suggests in *Tysiac* the responsibility of the woman who got pregnant despite knowing the high risks of losing her eyesight. Relying on those circumstances, the ECtHR affirmed that "*the resultant anguish and distress and the subsequent devastating effect of the loss of*

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103 Contrasting with *Tysiac* in which the main issue was on abortion for health reasons. See infra.
104 A, B & C v. Ir, 2010-VI Eur. Ct. H.R. 185, at 237.
105 Decision (inadmissibility) W.P. v. the United Kingdom, 8416/78 Eur. Comm'n H.R, at 19: The Commission uses a slightly different formula: « the « life » of the fœtus is intimately connected with…. The life of the pregnant of woman ».
106 Bruggemann and Scheuten v. Federal Republic of Germany, 6959/75 Eur. Comm'n H.R. (1981), at 59.
107 Boso v. Italy, Eur. Ct. H.R. (2002), at 2.
108 Vo v. France, 2004-VIII Eur. Ct. H.R. at 76, 80 and 82.
109 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219 at 106.
110 Concerning the woman's health, R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209 at 197.
111 On responsibility *see* Sally Sheldon, *Reproductive Choice: Men's Freedom and Women's Responsibility?,* in FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE (J.R. Spencer and Antje du Bois-Pedain ed., 2006).
112 STÉPHANIE HENNETTE-VAUCHEZ, *VADEMECUM À L'USAGE DE LA COUR EUROPÉENNE DES DROITS DE L'HOMME- LA THÉORIE FÉMINISTE DU DROIT AU SECOURS D'UNE JURIDICTION MENACÉE DE « SPLENDIDE ISOLEMENT »*, DALLOZ 1360 (2011).

her eyesight on her life and that of her family could not be overstated[113]." This rhetoric of responsibility also emerges from the home-birth cases where the issue of medical assistance for home-birth takes root in general interest rather than on self-determination[114]. In *Dubská*, the dissenting judges contested the broad margin of appreciation identified by the Grand Chamber and argued that there should be a presumption of coincidence of the interests of the woman and the child[115]. In addition, the absence of recognition by the ECtHR of a woman's conventional right to preserve her anonymity towards a child suggests also an implied responsibility towards children[116].

To summarize, while a potential father's rights need to yield to the rights of the pregnant woman, the ECtHR's apparent refusal to prioritize rights when it comes to the relationship between the woman and the fetus/child transfers the responsibility to the woman to deal with the encounter of rights. Under an imaginary of neutrality lies a rhetoric of responsibility weighing on women.

The second point is that even when the ECtHR recognizes as such the women's autonomy, such as with the right to become a genetic parent, it seems often blind to the context in which this autonomy is exercised.

In *Evans*, concerning the fate of cryopreserved embryos, the ECtHR resolved the case by looking at the legal issues as a balance between the autonomy of the woman and the autonomy of the man. Despite the consequences for the woman arising from the withdrawing of her former partner's consent, the ECtHR did not give more weight to her autonomy. By doing so, the ECtHR

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113 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, at 65.

114 *See* Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), at 182. Jean-Pierre Marguénaud, *Quand la Cour de Strasbourg hésite à jouer le rôle d'une Cour européenne des droits de la Femme : la question de l'accouchement sous X*, RTD Civ. 375 (2003), *see* also Tatiana Grundler, *Les droits des enfants contre les droits des femmes,* in 3 REV. D.H. (2013), https://journals.openedition.org/revdh/197 (last accessed Jan. 7, 2020).

115 Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), Joint opinion of Judges Aajo, Karakas, Nicolaou, Laffranque and Keller.

116 This is what one can infer from the cases *Odièvre v. France* - Odièvre v. France, 2003-III Eur. Ct. H.R.), and *Godelli v. Italy,* related to the access to information on their origin by children abandoned at birth, although the cases we not decided based on reproductive rights. For instance, the facts in *Odièvre* required the ECtHR to assess this right, which entered in conflict with a woman's interest to stay anonym. The French legislation allowed the children to get several information concerning their origins but their biological mother's identity could only be revealed if the latter had agreed to. The ECtHR found that there was no disproportion and therefore no violation of the *ECHR*. Interestingly, the ECtHR did not consider the woman's right as a subjective right derived from Article 8, but rather qualified it as a concurring interest.

refused to enshrine a hierarchy between reproductive choices of the woman or the man. This marks a contrast from the *W.P.*, *H.* and *Boso* decisions in the abortion context. The *Evans* decision refers to a case from the Supreme ECtHR of Massachusetts, where the woman and the man had made an agreement as regard to the fate of their frozen embryos in case they would split up, agreeing they would go to the woman. The judge had refused to allow the enforcement of the agreement, because "*forced procreation is not an area amenable to judicial enforcement*"[117]. In *Evans*, the ECtHR adopted the same reasoning as the US Court because *"freedom of personal choice in matters of marriage and family life" should prevail*[118]*."* Protecting consensual parenting does not lack of consistency, and from the perspective of autonomy, it is unclear why the right to be a genetic parent should prevail over the right not to be[119]. However, by reducing the issues to manifestation of reproductive autonomies, the ECtHR disregards the context in which they are exercised. It analyzes the case through the imaginary of neutral rights[120]. Before the freezing of the embryos, Nathalie Evans asked the clinic if it would be possible to freeze her unfertilized eggs, and the clinic answered that they did not perform such procedures that had lower chances of success[121]. Her partner reassured her at that time, ensuring her she did not have to think about freezing her eggs since they were not going to split up[122]. Considering those, together with the fact she needed to go through ovarian removal for medical reasons in the first place, one can wonder if Ms Evans' claim could be reducible to an expression of her reproductive choice. This rather looks like Ms Evans had no other choice. As Thérèse Murphy asked concerning PGD,

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117 In *A.Z. v. B.Z.* (2000 431 Mass. 150, 725 N.E.2d 1051), cited in Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, at 46.

118 *Id.*

119 *See* also Diane Roman, *L'assistance médicale à la procréation, nouveau droit de l'homme?*, 5 RDSS 810 (2007), n° 5, pp. 810; on the contrary *see* Jean-Pierre Marguénaud, *obs. CEDH, 10 avr. 2007, Evans c/Royaume-Uni*, RTD CIV. 2007 295.

120 Despite the ECtHR's "great sympathy for the applicant," Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, at 90.

121 *Id.* at 15.

122 *Id.* He formulated that promise in front of witnesses in the doctor's office but it was not legally binding according to the judge. The first trial judge in the UK, Mr. Wall, had made an interesting point asking if Evans was one of those cases were the legal rights could be overridden on moral grounds and it concluded it was not. On that *see* Mary Warnock, *The limits of rights-based discourse*, in FREEDOM AND RESPONSIBILITY IN REPRODUCTIVE CHOICE, especially at 8-9 (JR Spence and Du Bois-Pedain ed. 2006).

> *How, […], would the European Court of Human Rights respond to ethnographic evidence that reproductive responsibility, rather than reproductive choice, can weigh heavily on would-be parents, leading some […] to say they felt they had "no choice" but to use PGD? [ ] These would-be parents seem to be reporting obligations, not options*[123].

The second case was *SH and others v. Austria* of 2011[124]. The applicants were two women of two married couples unable to naturally procreate and for whom IVF was not accessible. In the case of one of the couples, the man was infertile and the woman needed a sperm donation in order to proceed with IVF. In regards to the second couple, the woman needed an ovum donation, which would be fertilized by her husband's sperm. In both cases, the legislation did not authorize them access to IVF. Yet, the Austrian legislation authorized IVF for couples using their own gametes on one hand, and *in vivo* fertilization using sperm donation on the other hand. The applicants claimed that those legal prohibitions violated Article 8, and Article 14 conjointly with Article 8 (Article 14 prohibiting discrimination). While the Chamber had concluded there was a violation of those last provisions in conjunction[125]. the Grand Chamber considered that Austria had struck a fair balance that did not exceed its margin of appreciation and found no breach of the Convention.

The ECtHR could have contextualized autonomy by observing the reproductive vulnerability of applicants. The concept of vulnerability allows for some broader considerations of the applicant's situation and takes into account the empowerment of individuals. The ECtHR afforded a more suitable protection to persons belonging to groups that suffer from ostracisation, like detainees or vulnerable ethnic groups or incapacitated persons. In the reproductive area, the cases involving the unwanted sterilization of Roma women showed the importance of a contextualized autonomy in the analysis of the respect of private and family life. While *K.H. and others v. Slovakia* only focused on the issue of effective access to

[123] Thérèse Murphy, *Judging Bioethics and Human Rights*, in 71 NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE 80-81 (Molly K. Land and Jay D. Aronson eds, 2018).
[124] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295.
[125] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295, at 44-46, referring to S.H. v. Austria, Eur. Ct. H.R. (2010).

information[126]. the ECtHR went beyond the scrutiny of informed consent to involve the special situation of Roma women in the case *V.C. v. Slovakia.*[127] The ECtHR acknowledged their vulnerability as members of ethnic groups targeted by unwanted sterilizations, and confirmed this characterization in later cases[128]. This approach provides a more accurate definition of the state's obligations regarding reproductive rights. Apart from that context of ostracisation of certain ethnic groups, the ECtHR acknowledged the vulnerability of women facing severe treatments in breach of Article 3. *In P and S* for instance, the ECtHR deplored the failure to consider the "great vulnerability" of the young woman, pregnant because of a rape, and found a violation of Article 3[129]. That is not surprising since the applicant demonstrated several elements of vulnerability: she was a minor, and was a victim of a rape. Besides, *RR v. Poland* marked a step in the abortion context, since the ECtHR acknowledged the "great vulnerability" of the applicant when it analyzed compliance with Article 3, because "*Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation*[130]*."* Moreover, the ECtHR specified that it "*cannot overlook [the] general national context*" in its analysis of compliance with Article 8. Yet, the ECtHR still crowded out the right to abortion.

As Liiri Oja and Alicia Ely Yamin persuasively stated, the ECtHR "*fails to name and explore the inherent damage done to woman by this "normative motherhood narrative" which is why "abortion is never construed in terms of access to a service only needed by women and fundamental to controlling their bodies and lives*[131]*.*"

Apart from vulnerability associated with belonging to a minority or a disadvantaged group, the ECtHR recognizes contextual vulnerability. When it comes to reproductive choices, the ECtHR could take into consideration the context in which women make reproductive choices. This context is inseparable from the history of reproductive rights. Yet, the ECtHR's gender-

126 K.H. and others v. Slovakia, in particular at 44.
127 V.C. v. Slovakia, 2011-V Eur. Ct. H.R. 381, at 145 et suivants.
128 N.B. v. Slovakia, Eur. Ct. H.R. (2012), at 96-97; I.G. and others v. Slovakia, Eur. Ct. H.R. (2012) at 143-146.
129 P. & S. v. Poland, Eur. Ct. H.R (2012), at 162-169.
130 R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209, at 159.
131 Liiri Oja and Alicia Ely Yamin, *supra*, at 74.

blind approach is not new, and Judge Tulkens for instance already expressed her regrets in this regard[132].

In addition, the ECtHR often avoids scrutinizing the egalitarian dimension of rights under Articles 14 and 8 combined. The ECtHR frequently refuses to analyze a violation of Article 14 combined with another provision of the *ECHR* and this is not an exclusive aspect of reproductive issues. However, this avoidance is unfortunate since it would enable a discussion on the issue of infertility in *Evans* for example. Nathalie Evans, the applicant, claimed that treating her differently than a fertile woman or a man was discriminatory. The Grand Chamber did not find a separate question based on Article 8 and 14 combined[133]. Similarly in *SH and others*, the Grand Chamber did not find necessary to proceed to the analysis, although the Chamber had found a violation on that basis[134]. As Thérèse Murphy observed, the ECtHR in *SH* analyzed the risks of permitting IVF with an egg donor, and later just applies it to the other couple, i.e. with sperm donor, without making an analogy or differentiating the context[135].

To summarize, the ECtHR, by generally rejecting an imaginary of preempting rights, adopts a vision of neutral domestic rights in many instances. This also corresponds to an imaginary and allows a further propagating of political visions of women's responsibility in reproduction. One cannot predict what the ECtHR would have concluded in *Evans*, *SH* or other cases, but its current position reduces the likeliness of building a concept of reproductive rights.

Another dimension of reproductive rights lies in the important dimension of reproductive health. Here again though, the ECtHR insufficiently addresses reproductive issues as reproductive health to develop the concept of reproductive rights.

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[132] Françoise Tulkens, *Droits de l'homme, droits des femmes- Les requérantes devant la Cour européenne des droits de l'homme*, in HUMAN RIGHTS- STRASBOURG VIEWS/DROITS DE L'HOMME-REGARDS DE STRASBOURG, (Caflish et al. (ed) 2007) 423.
[133] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, at 93-96.
[134] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295 at 120.
[135] Thérèse Murphy, *Judging Bioethics and Human Rights*, *supra* note 123, at 79.

B. Reproductive health: the ECtHR's pusillanimous approach

States usually justify their interference in women's reproductive rights because of the need to protect women's health. Indeed, Article 8 para. 2 allows necessary interference in the right to private and family life in order to protect, among other things, "health or morals". For example, some states had restricted and/or discouraged home-birth because it is more dangerous than giving birth at the hospital. In *Ternovszky* and *Dubská,* the governments' aim was to protect the women and children's health[136].

The protection of health is not only a state interest justifying the limitation of women's right to private life. It also integrates the scope of protection of Article 8. The *ECHR* does not contain a right to health as such, but the ECtHR incorporated the protection of health in its jurisprudence on the right to life (Article 2),[137] the prohibition of inhuman and degrading treatment (Article 3)[138]. and the respect to private and family life (Article 8)[139]. Besides, several instruments of the Council of Europe, especially the European Social Charter[140]. protect the right to health. Reproductive issues have a narrow link with the promotion of health and the ECtHR protected women's health by requiring states, inter alia, to provide adequate information on their health

[136] Ternovszky v. Hungary, Eur. Ct. H.R. (2010), at 17 ; Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. at 171; *see* also Pojatina v. Croatia, Eur. Ct. H.R. (2018), at 57.
[137] *See* in particular Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania, Eur. Ct. H.R. (2014), concerning the death of a mentally disabled young man of Roma ethnicity, also HIV-positive, following numerous failures to act of State authorities.
[138] *See* for instance Jalloh v. Germany, Eur. Ct. H.R. (2006); Bogumil v. Portugal, Eur. Ct. H.R. (2008) where the ECtHR found that the surgery performed on the applicant who had swallowed drugs for therapeutic rather than for the collection of evidence in a criminal investigation was not an inhuman or degrading treatment.
[139] *See* for instance K.H. and others v. Slovakia, Eur. Ct. H.R. (2009), concerning the access of eight Roma women to their medical files. The applicants suspected that they had been sterilized without their consent. *See* also concerning the public disclosure of medical information: Panteleyenko v. Ukraine, Eur. Ct. H.R. (2006) concerning the disclosure of psychiatric information concerning the applicants during a public hearing. See also L.L. v. France, Eur. Ct. H.R. (2006), Avilkina and others v. Russia, Eur. Ct. H.R. 1589/09 related to the disclosure of the medical files of Jehovah witnesses who refused blood transfusions. The ECtHR found violations of Art. 8 in all those cases. There are also cases where the ECtHR found violations of Art. 8 and other articles, such as a violation of Art. 8 in combination with Art. 14, *see* for instance Kiyutin v. Russia, Eur. Ct. H.R. (2011).
[140] Revised European Social Charter, ETS No.163, 3 May 1996, article 11 « the right to protection of health ».

status, as the abovementioned jurisprudence on sterilization and abortion for therapeutic reasons illustrate[141].

Notwithstanding the progression of the jurisprudence, reproductive cases reveal an under consideration of reproductive health. As previously said, the cases are decided under the narrow angle of autonomy and informed consent, and more often based on procedural obligations rather than on a substantive conventional right. While in 1980, the former European Commission had admitted that abortion was compatible with Article 2 para 1 in order to protect the health and life of the mother in *W.P. v the UK*, one could have expected from the following cases the identification of a firm substantive obligation to ensure the right to abort for therapeutic reasons. In *Tysiac* for instance, the applicant was seeking abortion for therapeutic reasons because of the risk of losing sight. She raised issues regarding both Articles 8 and 3 of the *ECHR*. In its analysis of Article 8, the ECtHR went on to state that "*the Convention does not guarantee as such a right to any specific level of medical care*[142]." Although the ECtHR subsequently confirmed that Article 8 protected a right to physical and psychological integrity, it inferred a violation of the article from the absence of effective access to an abortion within the legally permitted timeframe[143]. The protection it offered was of a procedural nature. For the optimistic readers of *Tysiac* as promoting reproductive health, the ECtHR clarified in *A, B and C* that there was no right to abortion[144]. In this last case, this was only the specific situation of the third applicant who had a rare form of cancer and feared for her life that led the ECtHR to find a violation of Article 8. Yet, it was still through the prism of the effectiveness of a constitutional right to abortion that the ECtHR reached that conclusion. Despite the particular circumstances in *P and S v. Poland*, the ECtHR similarly found a violation of Article 8 because of the ineffectiveness of a lawful abortion. Concerning home-birth, the Dubská case provides another example of the lack of consideration for reproductive health. The ECtHR accepts a paternalistic argument in order to protect the unborn/newborn and the

[141] *See* or example K.H. and others v. Slovakia, Eur. Ct. H.R. (2009) or Csoma v. Romania, Eur. Ct. H.R. (2013), cited *supra.*
[142] Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, at 107.
[143] *Id.* at 120-130.
[144] A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185, at 214.

mother but does not consider the prior unpleasant experience one of the applicants had at the hospital[145]. Once more, reproductive health rather than the sole reproductive "wish"[146] could be a more adapted grid of analysis of reproductive issues. In *Evans*, the ECtHR does not insert in its analysis the impact on the applicant's physical and mental health due to her incapacity to have genetic children, as a direct consequence of the facts[147]. A narrow understanding of private life might be inadequate to address infertility issues that are increasingly making their way to Strasbourg.

Furthermore, the ECtHR only recognized a violation of Article 3 when circumstances were of particular severity. It did not consider the severity of abortion procedures for example. In *Tysiac*, the ECtHR found a violation of Article 8 after having excluded a violation of Article 3 because the applicant knew the consequences of the pregnancy on her eyesight. It followed that "*[t]he resultant anguish and distress*" she felt "*could not be overstated*"[148]. This is only in regard to Article 8 that the ECtHR accepted, in a negative formula, "*that her fears cannot be said to have been irrational*"[149] and found a breach of the *ECHR*. This looks like a poor consolation for the applicant in contrast to the dynamic interpretation the ECtHR will adopt of a "degrading treatment" some years after[150]. In *Bouyid v. Belgium*, the Grand Chamber will rely on the vulnerability of the applicants in particular because of the context (police custody) rather than on the objective level of intensity of the act (a slap) to identify a degrading treatment. In that case, the disrespectful attitude of the victim was irrelevant[151]. Although the ECtHR acknowledged Ms Tysiac's vulnerability[152], her fears for her health and the loss of her eyesight would deserve a more thorough assessment among the factors establishing a violation of Article 3. Besides, her knowledge of the risks should not have excluded any breach of

145 Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016) at 9.
146 *Id.* at 185 (and several other mentions).
147 Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, developments on the alleged violation of article 8, at 83-92. On reproductive health in Europe, *see* Janne Rothmar Hermann, *Reproductive health*, in HEALTH AND HUMAN RIGHTS IN EUROPE (Brigit Toebes et al. eds 2012), at 145.
148 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, at 65
149 *Id.* at 119.
150 Bouyid v. Belgium, Eur. Ct. H.R. (2015).
151 Another aspect was that one of the applicants was minor at the material time. Bouyid v. Belgium, Eur. Ct. H.R. (2015).
152 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, at 127.

Article 3. A few years later, in *A, B and C*, the ECtHR rejected all applicants' complaints on the basis of Article 3, finding that their necessary performance of an abortion abroad, even for the third applicant, who feared for her life, did not contribute to reach the minimum standard of severity. This position clearly contrasts with the subsequent decision of the Human Rights Committee, which stated in 2016 that "*the fact that a particular conduct or action is legal under domestic law does not mean that it cannot infringe article 7 of the Covenant* [related to the prohibition of cruel, inhuman and degrading treatment]. *By virtue of the existing legislative framework, the State party subjected the author to conditions of intense physical and mental suffering*[153]*.*"

Although a violation of Article 3 was found in *R.R. v. Poland*, the ECtHR case law remains below the Human Rights committee conclusions, by not directly addressing the restrictions on abortion for health reasons. In *R.R.*, the ECtHR sanctioned the health professionals' resistance to the law on abortion based on the fetus' health. The applicant was carrying a child thought to suffer from a genetic abnormality, but she was not able to access genetic tests in order to determine if she could have a legal abortion because of the medical team's procrastination. The ECtHR found a degrading treatment based on the great vulnerability of the woman, the "shabbily" treatment by the doctors, the humiliation inflicted because of this procrastination, and the confusion and inappropriateness of the information provided by the authorities.

The jurisprudence of the ECtHR on reproductive health is quite demure in comparison with the standards of international law, which some third parties reminded[154]. The ECtHR does not take the opportunity to adopt a dynamic interpretation of the *ECHR* and to assert that the right to private life implies substantive obligations concerning reproductive health. When the right to

[153] Amanda Jane Mellet v. Ireland, Communication No. 2324/2013, Human Rights Committee, UN Doc. CCPR/C/116/D/2324/2013 (2016), at 7.4.
[154] *See* for instance in *R.R. v. Poland*, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights from § 122.

health is threatened, it should not give way to states' ethical or moral sensitivities[155].

If the *ECHR* does not contain social and economic rights, the ECtHR has departed from a purely literal interpretation of the text to take into account the economic and social impacts of conventional rights[156]. It is worth noting that all Contracting states ratified the UN *International Covenant on Economic, Social and Cultural rights* (ICESC), which recognizes a right to health. The UN Committee on economic, social and cultural rights adopted a General Comment defining the right to health, which could provide the ECtHR elements of interpretation[157].

The disregard of the context of reproductive rights, the ignorance of the discrimination aspect, and the absence of connection with the right to health appear as a failure or unwillingness of the ECtHR to conceptualize reproductive rights. Besides, this looks like a missed opportunity because these aspects of reproductive issues were not the most controversial aspects. Indeed, the closer an issue comes to what the ECtHR names the "ethical and moral" aspects of a right, the more likely the ECtHR will face legal, political and social constraints when interpreting the *ECHR*. A presentation of those constraints allows understanding – at least in part- the gaps and inconsistences of its jurisprudence in the reproductive field.

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155 The ECtHR will hear a case against Ireland on the alleged use of symphysiotomy (as alternative to caesarean) without the applicant's informed consent (O'Sullivan v. Ireland, communicated case, req. 61836/17.) The applicant argues that the hospital failed to take reasonable care for her health and safety in breach of article 3.

156 DANIELE RUGGIU, HUMAN RIGHTS AND EMERGING TECHNOLOGIES ANALYSIS AND PERSPECTIVES IN EUROPE 313-314 (2018).

157 Article 12. Comm. Econ., Soc. and Cultural Rights, CESCR General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11, UN Doc. E/C.12/2000/4 (2000). For a recent comment on the ICESC, *see* ÉMMANUEL DECAUX AND OLIVIER DE SCHUTTER, LE PACTE INTERNATIONAL RELATIF AUX DROITS ÉCONOMIQUES, SOCIAUX ET CULTURELS- COMMENTAIRE ARTICLE PAR ARTICLE (Économica 2019).

III. The political constraints on the ECtHR for building a concept of reproductive rights

Several legal and political constraints (A) play on the ECtHR and explain its reluctance to endorse a specific definition of life, in particular pre-natal life (B).

A. The principle of subsidiarity and the ECtHR's quest of social legitimacy

In the Handyside case of 1976, the ECtHR stated that "*the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights*"[158]. The principle of subsidiarity derived from the idea that state authorities are better placed to balance rights in the national context, which the ECtHR formulated as of 1968 in the Belgian Linguistics case:

> *it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention*[159].

This principle recognizes the states' autonomy and the fact that the *ECHR* does not impose uniformity[160]. From an institutional perspective, it means there is a dual level of human rights protection. The *ECHR* articulates these two levels of protection by requiring on one hand States to secure conventional rights[161], and, on the other hand and for applications by individuals, the exhaustion of domestic remedies prior to an application to the ECtHR[162]. The national authorities are trusted to ensure the protection of human rights in the national context and closer to the individuals, while

[158] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976), at 48.
[159] Belgian Linguistic Case, IHRL 6 (ECHR 1968) at 10.
[160] FRÉDÉRIC SUDRE, DROIT EUROPÉEN ET INTERNATIONAL DES DROITS DE L'HOMME 209 (PUF ed. 2011).
[161] *ECHR*, Article 1 to "everyone within their jurisdiction."
[162] *ECHR,* Article 35.

the ECtHR only has jurisdiction if an applicant's claim is unsuccessful in the State.

Member States expressed their attachment to the principle of subsidiarity in various declarations concerning the future of the ECtHR until the Brussels Declaration of 2015[163]. At the Interlaken Conference in 2010, they called for "a strengthening of the principle of subsidiarity[164]", later described as a "fundamental principle" in the Brighton Declaration of 2012[165], as well as a transversal principle in the Izmir Declaration of 2011[166], In 2013, the contracting states adopted Amending Protocol 15 that inserted the principle of subsidiarity -together with the margin of appreciation doctrine- in the preamble of the *ECHR*[167]. Finally, the adoption of Protocol 16 was the occasion to reaffirm in the preamble that "*the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity*[168]*.*"

Since the *ECHR* was adopted in 1950, contemporary reproductive issues require the ECtHR to interpret the *ECHR* to identify unenumerated rights. In order to do so, the ECtHR could rely on protocols, conventions adopted by the Council of Europe, and instruments closely related to the topic concerned. Most likely, though, the ECtHR relies on the states' legislations and their potential evolution. The ECtHR recognizes a margin of appreciation to the States as a consequence of the principle of subsidiarity. The margin of appreciation is higher when it comes to "ethical and moral issues". The ECtHR recurrently uses that formula without defining it.

The participation of a few states as third-parties in some reproductive cases illustrate the sensitivity of the issues raised and the exercise of some sort of

163 High-level Conference on the "Implementation of the European Convention on Human Rights, our shared responsibility", Brussels Declaration, 27 March 2015.
164 High Level Conference on the Future of the European ECtHR of Human Rights, Interlaken Declaration, 19 February 2010, at 2.
165 High Level Conference on the Future of the European ECtHR of Human Rights, Brighton Declaration, at 3.
166 Izmir Declaration, 27 April 2011, at 5.
167 It will enter into force when Bosnia and Herzegovina and Italy, the two last states which did not ratify it, will do so, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=AVK4OeAy (last accessed Jan. 7, 2020).
168 Council of Europe, Protocol n°16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 2 October 2013, Eur. TS 214, Preamble.

political pressure on the ECtHR in order not to overstep. In *SH and others v. Austria* for example, Germany and Italy were third parties and Germany argued to protect the child's welfare by ensuring the unambiguous identity of the mother[169]. The ECtHR needs to reconcile this constitutive constraint with its *raison d'être* which is the protection of human rights in Europe. Together with those legal constraints, the respect of the institution of the Court and the execution of its judgements also depends on social constraints, i.e. the perceptions of legitimacy of the ECtHR according to state actors. In their empirical study on the social legitimacy of the ECtHR, Çalı, Koch and Bruch summarized the *"fair compromise"* as follow

> *What domestic actors think they lose by according legitimacy to the European Court of Human Rights must be balanced by what they perceive they will gain[170]. […] The more actors perceive competition rather than cooperation between domestic and international institutions, the more onerous it becomes to maintain the legitimacy of international institutions in domestic contexts[171].*

They distinguished between constitutive legitimacy (political objectives beginning with the protection of human rights and legality) and performance-based legitimacy (normative on one hand and technical on the other hand). The normative performance basis of legitimacy depends on the degree of intrusion in sovereignty and on the success of human rights protection. Of course, in areas such as reproductive issues, touching on the rights on the body, the intrusion in sovereignty is a sensitive argument. The authors classified it into three subcategories: expansion, intervention, and objectivity. "*Objectivity is lost when the Court is perceived as displacing or overriding a decision of domestic authorities based on political considerations*[172]*."* The argument of intrusion in sovereignty explains the principle of subsidiarity and the margin of appreciation doctrine. Its reconciliation with the constitutive legitimacy of the Court, namely the improvement of human rights protection that the ECtHR

[169] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295 at 70.
[170] Başak Çali, Anne Koch, and Nicola Bruch, *The Legitimacy of the European ECtHR of Human Rights: A Grounded Interpretivist Analysis of the European ECtHR of Human Rights*, 35 HUMAN RIGHTS QUARTERLY 955, at 957.
[171] *Id.* at 958.
[172] *Id.* at 966.

regularly serves through a dynamic interpretation of the *ECHR*, seems complex.

The authors present the composition of the ECtHR as an element of "technical performance" of the ECtHR[173]. In our cases, it is directly linked to the normative performance (i.e. degree of intrusion and success in delivering human rights protection). The Grand Chamber is composed of 17 judges coming from different cultures, which unavoidably influences the judgements, and results in fragmentation of the ECtHR's decisions with multiplication of separate opinions. Nonetheless, applying the work of Max Weber in the context of international Courts, Mikael Madsen notes that the legitimacy of the ECtHR as an international institution relies more on them being reflective rather than representative of society[174]. This proposal invites an investigation of cases beyond the coherence of the legal reasoning to understand the production of law at the European level. Those constraints explain the ECtHR's reluctance to endorse a European definition of pre-natal life, which is probably one of the most dividing issues in the reproductive area.

[173] *Id.* at 967.

[174] Mikael R. Madsen, *Sociological Approaches to International ECtHRs*, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano et al. ed, 2013), at 392.

B. The Court's reluctance to elaborate a European definition of pre-natal life

Part II. B. argued that the ECtHR's treatment of reproductive issues usually rely on an imaginary of neutrality of legal rights. The legal recognition of certain biorights is intrinsically linked to national political choices that the ECtHR elects not to engage with. From a historical perspective, collective needs such as the mastering of demography explained the regulation of reproduction. Michel Foucault framed this state power as *biopolitics*[175]. Examples are numerous. In 1942, the French legislator adopted a statute criminalizing abortion of death penalty because in a war context, it was perceived as a crime against society[176]. More recently in Denmark, a country facing falling birth-rates, a campaign encouraged reproduction through the unambiguous slogan "Do it for Denmark", making it a "welfare-state duty"[177].

Those collective needs surrounding reproductive liberties do not appear in the case law of the ECtHR. In fact, the underlying issues connected to the interpretation of reproductive rights deal with conflicting definitions of the beginning of life and the concept of person. Limitations to reproductive liberties rely on specific conceptions of life. In his book *Homo Sacer*, Giogio Agamben differentiated between "natural life" (coming from the greek term *Zoe*) and "qualified life, a particular way of life" (coming from the Greek term *bios*)[178]. Both representations of life as such or the good life are amongst the arguments of the various cases participants. The abovementioned constraints weighing on the ECtHR explain its reluctance to endorse the specific and diverging imaginaries on life itself (1). However, the Grand Chamber had the occasion to refuse an imaginary of the "good life" (2).

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175 Michel Foucault, *La naissance de la médecine sociale* » in DITS ET ÉCRITS, t. 2, 2001) 207-228 (from a lecture of 1974). For a presentation and a connection with the following work of Giorgio Agamben *see* Xavier Bioy, *BIODROIT, DE LA BIOPOLITIQUE AU DROIT DE LA BIOÉTHIQUE* (LGDJ, 2016).

176 LAURIE MARGUET, *SUPRA*.

177 Janne Rothmar Herrmann & Charlotte Kroløkke, "Eggs on Ice: Imaginaries of Eggs and Cryopreservation in Denmark", 26 NORA - NORDIC JOURNAL OF FEMINIST AND GENDER RESEARCH 19 (2018).

178 GIORGIO AGAMBEN, HOMO SACER, SOVEREIGN POWER AND BARE LIFE 1 (1998).

1. Life imaginaries emerging from reproductive cases and the ECtHR's restraint

At the crossroad of science, medicine, and philosophy, the definition of life is unsurprisingly the subject of various collective imaginaries. Several cases of the ECtHR demonstrate its unwillingness to arbitrate between those different visions in order to balance them with the applicant's privacy.

Abortion cases provide examples of the imaginary of the sanctity of human life. In *Tysiac*, the dissenting judge Borrego Borrego associated the right to life of the child (at the moment of the decision) with the one of the fetus (at the moment of contested facts). He deplored that

> *Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention. [space] I would never have thought that the Convention would go so far, and I find it frightening*[179].

Similarly, in *A, B and C* the government argued that the protection of the rights of others, "*including protection of pre-natal life*"[180] was a legitimate aim, which the ECtHR accepted. Third parties were more explicit, defending the "*sanctity of human life*" leading them to the abovementioned argument of prioritization of the right to life[181].

The argument of the promotion of life as such, as opposed to the good life, can be formulated against both abortion and pre-natal diagnosis. In certain circumstances, it could also oppose to the selection of gametes or embryos. Before the ECtHR, the Italian government –and a third-party- explained in *Costa and Pavan* the restrictive access to prenatal diagnosis by, among other things, the necessary prevention of eugenic practices[182]. Austria also

[179] Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, Dissenting opinion of Judge Borrego Borrego at 15.
[180] A, B & C v. Ir, 2010-VI Eur. Ct. H.R. 185, at 185.
[181] *Id.* at 196-197. On the contrary, In Joint Observations, the Centre for Reproductive Rights and the International Reproductive and Sexual Health Law Programme recalled the absence of hierarchy between human rights, at 208 and following.
[182] Costa and Pavan v. Italy, Eur. Ct. H.R. (2012), at 46 and 61.

mentioned the issue of selective reproduction concerning the use of *in vitro* fertilization[183].

In contrast with the *American Convention on Human rights*, which states that the right to life "*shall be protected by law and, in general, from the moment of conception*[184]*,"* the ECHR does not contain such precision. Instead, Article 2 of the *ECHR* guarantees the right to life to "everyone" (to any "personne" according to the French version). Faced to those representations of life, both the criteria and the authority to define it are questionable in the context of the ECtHR. The least to be said is that the ECtHR was cautious when it came to defining life and "everyone" ("personne").

In *W.P. v. the United Kingdom* of 1980, already quoted, the former Commission addressed the right to life with respect to a fetus. After observing that the fetus did not fit in the original limitations of the right to life (Article 2 para. 2), the Commission needed to determine if it meant that Article 2 was "*not covering the foetus at all*", or if it "*should be interpreted as recognizing a right to life of the foetus with certain implied limitations, or as recognizing an absolute "right to life" of the foetus*"[185]. The ECtHR excluded the last option, finding such interpretation as "*contrary to the object and purpose of the Convention*"[186]. Indeed, a total prohibition of abortion even in situations where pregnancy posed a serious risk for the woman's life "*would mean that the "unborn life" of the foetus would be regarded as being a higher value than the life of the pregnant woman*"[187]. After narrowing the scope of the two other options to the issue of a fetus' right to life in the early stages of pregnancy, and only in case of a medical condition of the woman[188], the Commission decided not to interpret Article 2, finding that the application was manifestly ill-founded[189].

In *H. v. Norway* of 1992, the partner of the woman who had an abortion after 14 weeks of pregnancy claimed that by allowing such procedure, the

[183] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295, at 20.
[184] Organization of American States, American Convention on Human Rights, art. 4§1, Nov. 22, 1969, O.A.T.S. N° 36, 1144 U.N.T.S. 123.
[185] Decision (inadmissibility) W.P. v. the United Kingdom, 8416/78 Eur. Comm'n H.R at 17.
[186] *Id.* at 20.
[187] *Id.*at 19.
[188] *Id.*at 22.
[189] *Id.* at 23-24.

Norwegian authorities had violated in particular the right to life of the fetus[190]. The Commission stated that it did not have to decide whether the fetus enjoyed protection under Article 2, specifying however that "*it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 […] protects the unborn life*[191]." Finding it necessary to allow states to exercise discretion in "such a delicate area", the Commission considered that Norway had not exceeded this discretion and rejected the application as manifestly ill-founded[192].

Twelve years after, the Grand Chamber was directly confronted to the status of the fetus in the famous *Vo v. France* case, which was analyzed on the merits. Unlike the subsequent abortion cases where the applicants wanted to abort, here a six-month pregnant woman went through an unwanted abortion because doctors made a confusion between her and a homonym patient. While the applicant came for a routine examination concerning her pregnancy, her homonym was scheduled to have her coil removed. Since the French legislation did not recognize the status of "person" to the fetus, Ms Vo could not initiate criminal proceedings. The ECtHR reaffirmed that it belonged to the states to determine the beginning of life. It stated "*the Court is convinced 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* ("*personne*" in the French text)[193]." This issue divided the Court and ten judges contributed to the writing of four separate opinions, among which two were dissenting opinions.

Another twelve years later, the Grand Chamber confirmed the findings of *Vo v. France* in a case concerning a stillborn child after a caesarean section, noting that "*in the absence of a European consensus on the scientific and legal definition of the beginnings of life, the starting point of the right to life falls within the [States'] margin of appreciation*"[194]. It reaffirmed that it was "*neither desirable, nor even possible as*

[190] Decision (inadmissibility) H. v. Norway, Eur. Comm. H.R. (1992), n°17004/90. Concerning the fetus, the application also argued there was a violation of the prohibition of inhuman and degrading treatment.
[191] *Id.*
[192] *Id.*
[193] Vo v. France, Eur. Ct. H.R. (2004), at 85.
[194] Sayan v. Turkey Eur. Ct. H.R. (2016), at 123 (personal translation from the French official version).

matters stand, to answer in the abstract the question whether the unborn child is a person"[195].

The ECtHR confirmed the States discretion when it came to embryos, which it distinguished from the category of "child" in *Costa and Pavan*.[196] Based on this state discretion, judges considered in *Evans* that cryopreserved embryos did not have a right to life protected by Article 2,[197] and refused to say in *Parrillo* if they were "others" in the sense of the Convention.[198] In this last case though, the ECtHR clearly rejected the application of the autonomous notion of "possessions" to *in vitro* embryos, affirming that "*human embryos cannot be reduced to "possessions" within the meaning of that provision*[199]*."*

Those different cases illustrate the unwillingness of the ECtHR to adopt a European definition of life itself.

Besides the imaginaries surrounding life as such, whether it is to define its beginning or to proclaim its sanctity in broader terms, reproductive rights are also dependent on imaginaries concerning what is considered the *good life* and by extension the good family.

2. Good life imaginaries:

Unlike the protection of the inherent value of life -and the disagreements on its definition as such-, the interests facing reproductive liberties are the product of the politicization of life. This kind of argument can be identified in at least one case, *SH and others v. Austria*, through the promotion of a specific definition of the good family. In contrast with the abovementioned argument it made against selective reproduction[200], the Austrian government argued that one of the aims of the legislature was "*to avoid the forming of unusual family relationships, such as a child having more than one biological mother (a genetic mother and one carrying the child)*[201]*."* The fulfilment of a political vision of the family oriented the state's regulation of the use of ART, the ideology of the

[195] *Id.* quoting Vo v. France Eur. Ct. H.R. (2004) at 85.
[196] Costa and Pavan v. Italy, Eur.Ct. H.R. (2012) at 62.
[197] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, at 56.
[198] Parrillo v. Italy, Eur. Ct. H.R. (2015), at 167.
[199] *Id.* at 215.
[200] *See supra.*
[201] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295 at 19.

good family shaping the construction of the good life. This is a usual and underlying argument of some conservative associations. However, the Chamber considered that "*these problems could be overcome by enacting appropriate legislation.*[202]*"* Subsequently, the Grand chamber responded that

> *unusual family relations in a broad sense, which do not follow the typical parent-child relationship based on a direct biological link, are not unknown in the legal orders of the Contracting States. The institution of adoption was created over time in order to provide a satisfactory legal framework for such relations and is known in all the member States. Thus, a legal framework satisfactorily regulating the problems arising from ovum donation could also have been adopted. However, the Court cannot overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and has added a new aspect to this issue*[203].

The elaboration of a definition of life is certainly emblematic of judicial restraint as an application to the principle of subsidiarity and political constraints. However, the ECtHR had to develop some tools in order to fulfil its adjudicatory mission and resolve reproductive cases.

[202] *Id.* at 54.
[203] *Id.* at 105.

IV. The ECtHR's tools to resolve reproductive cases

In reproductive cases like in any other case, the ECtHR needs to reconcile the protection and promotion of human rights with legal and social constraints playing on the institution. This part builds on prior developments and analyses the different interpretative tools used by the ECtHR in order to resolve the most controversial aspects of reproductive cases. Those tools appear as strategies to ensure the Court's legitimacy such as defined, in particular, by Çali et al. as a perception of *fair compromise*. The ECtHR's decisions generally rely on minimalist strategies that fulfil their objectives with more or less success (A). The second strategy developed by the ECtHR is the doctrine of the European consensus, with the effect of limiting the national margin of appreciation. While consensual interpretation generally contributes to a dynamic interpretation of the *ECHR*, in favor of the promotion of fundamental rights, its use by the ECtHR in reproductive cases is particularly malleable (B).

A. The recurrent strategy of minimalism

When confronted to a dispute implying irreconcilable moral views, a Court's minimalist choice refers to a strategy of choosing the concrete angle that will allow cases to be decided rather than solve theoretical issues. The American constitutionalist Cass Sunstein framed it as reaching "*incompletely theorized agreements*.[204]" For the sake of this paper, the ECtHR's minimalist choices consist in choosing a less controversial angle, whether by reducing the issues to their concrete aspects ("vertical minimalism" –i.e. by reduction of an issue-), or by deliberately choosing an angle not necessarily concrete but that is the less contentious ("horizontal minimalism" –i.e. by comparison and choice between different issues-). While its use by the ECtHR in reproductive cases looks coherent in certain cases (1), it also led the ECtHR to hide between "reproductive tourism" and to fail to fulfil its missions (2).

[204] CASS SUNSTEIN, DESIGNING DEMOCRACY. WHAT CONSTITUTIONS DO 50 (OUP 2001) (emphasis from the author).

1. Minimalism in reproductive cases as a coherent strategy for the ECtHR's legitimacy

"*You cannot force things to happen, and the purpose of the Court is not to educate countries by force. It is to put standards and to make [everyone] aware that if you abide by these standards human rights will be better protected, people will be happier, freer*[205]*.*"

Minimalist strategy is a way "not to upset domestic institutionalists" as Cali et al recommended[206]. In the reproductive area, some cases show minimalism in the choice the ECtHR made between different grounds: finding violations of procedural rights rather than substantive rights (a), or choosing the less conflicting path when there are different options for its substantive analysis (b).

a. The minimalist choice of procedural obligations under Article 8 ECHR

Part I presented the positive procedural obligations identified by the ECtHR on reproductive issues in the basis of Article 8 as a common feature of reproductive cases. In this scenario, the ECtHR applies the *ECHR* to interests only protected as such by national law. The right does not benefit of conventional protection as such, but its recognition in the state triggers the ECtHR's scrutiny of the necessity of the interference in Article 8. In fact, this frequent scenario can be completed by another one, in which the ECtHR would characterize an interest as a human right protected by the *ECHR* as such. The ECtHR would infer from the *ECHR* a reproductive right. On this basis, the ECtHR could identify a violation of substantive and/or procedural obligations. In this regard, the ECtHR did not infer from the *ECHR* the obligation to recognize a general right to abortion, nor a general right to give home-birth, to access medically assisted reproduction, or to decide the fate or embryos. However, as mentioned earlier, the ECtHR did infer from the right to privacy the woman's right to physical integrity in the context of

[205] Interview with Turkish Supreme ECtHR of Cassation Judge, Ankara (Aug. 2008), quoted by Cali et al, *supra*, at 966.
[206] *Supra*, at 982.

abortion for therapeutic reasons in *Tysiac*. The right to receive information concerning one's health is applicable in the reproductive area.

Hence, in both scenarios, what comes out in practice from the cases is the identification of state procedural obligations rather than substantive obligations. This proceduralization of substantive rights appears as a Court's strategy, faced to the abovementioned constraints. Unlike the US Supreme Court, which affirmed in 1973 a right to abortion in a highly divided country[207]. exposing its decision to resistance, the ECtHR did not proclaim such a right, focusing instead on the effectiveness of legal rights. In *Tysiac*, the ECtHR explicitly avoided the crucial question of the conventional protection of the right to abortion[208]. and analyzed the violation of Article 8 from a procedural perspective. The ECtHR found that the procedure should enable a pregnant woman to be heard and have her views considered[209]. In the continuity of *Tysiac*, the ECtHR found a violation of a positive obligation derived from Article 8 in *P and S v. Poland*. This avoidance could be explained because of the socio-political context in Poland[210]. Minimalism can be the way to have stronger ECtHR's opinions, by avoiding dissent (but not concurrence), even though their content might be modest. There was only one dissenting opinion concerning the finding of a violation of Article 8 in *Tysiac* and *P. and S*. This doctrine of the minimal basis of agreement (rather than compromise) is confirmed by the separate opinion of Judge Bonello in *Tysiac*, according to whom

> *the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention.*
> *[…] The Court was only called upon to decide whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to*

[207] Roe v. Wade, 410 U.S. 113.
[208] Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219 at 104.
[209] *Id.* at 117.
[210] JEAN-MANUEL LARRALDE, *LA COUR EUROPÉENNE DES DROITS DE L'HOMME ET LE DROIT À L'AVORTEMENT : ENTRE AVANCÉES PRUDENTES ET CONSERVATISME ASSUMÉ. COUR EUROPÉENNE DES DROITS DE L'HOMME, R.R. C. POLOGNE, 26 MAI 2011*, 91 REV. TRIM. DR. H. 609 (2012).

> *whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place.[…] My vote for finding a violation goes no further than that.*

The avoidance of conflict may frustrate both those who expect a substantial decision, and those who believe on the contrary that the ECtHR made an extensive interpretation of private life. In that sense, minimalist solutions differ from a *fair compromise*. In his dissenting opinion in *P and S* for instance, Judge De Gaetano argued that "*The issue should […] have been examined under Article 6. Invoking Article 8 in such cases not only distorts the true meaning of "private life", but ignores the most fundamental of values underpinning the Convention, namely the value of life […]*[211]*."* Likewise, in the *A, B and C* case, the ECtHR abstained from looking into a right to abortion as such. Concerning the third applicant, the ECtHR unanimously found that while the margin of appreciation was important concerning the authorization to access abortion, when that decision was taken, states had the obligation to enact a consistent legislation[212]. Yet, for at least two of the applicants[213], the issue was abortion in a broader sense than in *Tysiac* based on health reasons. Notwithstanding the incoherence of the ECtHR's reasoning in *A, B and C*[214]*,* the sole fact that the applications were admissible demonstrate, if not an implicit right to abortion[215], a minimalist strategy to leave the door open to a potentially more dynamic interpretation of the *ECHR* in the future. At this stage though, the ECtHR bypasses this crucial issue by analyzing the case through positive obligations, which allows judges to identify procedural obligations. The ECtHR reiterated this method in *R.R. v. Poland*, where it did not deal either directly with the right to abortion, but rather on the timely access to information to determine if the woman could have recourse to a legal abortion[216]. Yet, despite this minimalist angle, the ECtHR acknowledged the "general national context" of abortion in Poland, where doctors terminating

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211 P. & S. v. Poland, Eur. Ct. H.R (2012), partly dissenting opinion of Judge De Gaetano, at 1.
212 A, B & C v. Ir, 2010-VI Eur. Ct. H.R. 185 at 249.
213 *Id.* at 125.
214 *See infra.*
215 Edouard Dubout, *La CEDH et la limitation constitutionnelle de l'avortement : une question procédurale ?*, 213 CONSTITUTIONS (2011).
216 R.R. v. Poland, 2011-111 Eur. Ct. H.R. 209.

a pregnancy in contradiction with the legislation incurred criminal responsibility. It stated that "*the Court is of the view that provisions regulating the ability of lawful abortion should be formulated in such a way to alleviate this chilling effect*" on doctors[217].

Minimalist strategies are constructive in controversial cases. However, they start to lose legitimacy when the Court continues to use them despite social evolutions and the progressive disappearance of conflict. Hence, the time factor allows determining if a strategy is still necessary to avoid a conflict or to achieve a *fair compromise*, or if it constitutes an undue conservatism. In the abortion context, the ECtHR's ongoing reluctance to adopt a more dynamic interpretation and abandon its self-restraint, while the right to abortion is affirmed in many states and by international law, is surprising and creates a gap between society and the ECtHR in benefit of the ECtHR's internal reflexivity on those issues.

b. The minimalist choice of the less controverted substantive right

Surrogacy cases provide another example of minimalism. Unlike abortion cases, they were not about the proceduralization of rights. The issues were not on legal access to surrogacy, but on its legal effects. Between the rights of parents and the rights of children, often aligned, the ECtHR's jurisprudence relies on the less controversial option: the children's rights. This sort of minimalism appears less as an alternate choice than in abortion cases. It sometimes derives from the facts and arguments of the applicants, but also from the ECtHR's first interpretation of its mandate according to Protocol 16 to give advisory opinions.

Because all the submitted cases concerned post-surrogacy arrangements, it permitted the ECtHR not providing a judgement on the practice of surrogacy as such or on the argument of reproductive autonomy. The ECtHR needed to analyze the conventionality of French and Italian authorities' reluctance to allow the registration of children born abroad from surrogacy (and for the Italian case, the proceeding to release the child for adoption). The fact that

[217] *Id.* at 193.

the children were already born allowed the ECtHR to deal with family life and the interests of children rather than focus on the intended parents' privacy.

In the French cases, the existence of *de facto* family life made it more relevant as a legal basis. Besides, the applicants had not framed any particular argument on the basis of the intended parents' privacy[218]. Not finding any violation of family life, the ECtHR was still able to find a violation of the children's right to private life[219].

Unlike the French cases, the ECtHR could not identify a family life in *Paradiso and Campanelli* where the child did not have a biological tie with the intended parents, nor *de facto* family life. Although the ECtHR refuses to define a particular duration of cohabitation to characterize family life, the fact that it was here limited to six months was a key factor to observe the inexistence of *de facto* family life. Above all, the child was not represented in the procedure. Therefore, the ECtHR had to scrutinize the applicant's private life and found the interference of the authorities both legitimate as "weighty public interests" and proportionate, since they acted quickly to allow the child to be adopted.

Following the Mennesson decision, a revision of the French legislation allowed the biological father of a child born abroad from surrogacy to be registered as a legal parent, illustrating a successful *judicial dialogue*. The Mennesson case went back to ECtHR, concerning the recognition of the intended and non-biological mother as a legal mother. In this context, the highest civil jurisdiction of the country, the Cour de cassation, addressed two questions to the ECtHR in application of Protocol 16. The questions were the following:

> *1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the 'intended mother' as the 'legal mother', while accepting registration in so far*

[218] Labbassee v. France, Eur. Ct. H.R. (2014) at 34, Foulon and Bouvet v. France, Eur. Ct. H.R. (2016), Mennesson v. France, Eur. Ct. H.R. (2014).
[219] *See supra.*

> *as the certificate designates the 'intended father', who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the 'intended mother'?*
>
> *2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?*

Article 1 of the Protocol limits the seeking of an advisory opinion on "questions of principle relating to the interpretation or application[220]" of rights contained in the *ECHR* or its Protocols by a highest domestic ECtHR "only in the context of a case pending before it[221]." The ECtHR inferred from those provisions that "*the opinions it delivers […] must be confined to points that are directly connected to the proceedings pending at domestic level*[222]*."* While the questions were broadly written, the ECtHR relied on the context of the case in France to limit their scope, which gave in practice a minimalist scope to its opinion.

Hence, as the ECtHR noted, only the children were represented in the French procedure, which was the basis for the ECtHR's exclusion of "*the right to respect for family life of the children or the intended parents, or the latter's right to respect for their private life*[223]*."* As regards to the first question, the ECtHR took into account both the best interest of the child and the traditional wide margin of appreciation. Since an important aspect of the children's identity was at stake, the ECtHR concluded the margin was reduced and there was an obligation to offer the possibility of legally recognizing the relationship between the child and the intended mother. Concerning the second question, the ECtHR

[220] Protocol 16, *supra* at 1.
[221] *Id.* at 2.
[222] Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother requested by the French ECtHR of cassation, Request no. P16-2018-001, Eur. Ct. H.R., 10 April 2019, at 26.
[223] *Id.* at 30.

recognized a certain flexibility to states, accepting adoption as a possible way to recognize this tie. Nonetheless, the ECtHR affirmed the obligation of effectiveness and celerity of the procedure[224]. Doing so, the ECtHR protected the child and mother's interests through the "best interest of the child" standard. Focusing on the child's interests, the ECtHR's choice appears as a constructive strategy to promote fundamental rights without infringing the principle of subsidiarity. Besides, states have an obligation of result, but stay free on the means to achieve it. Advisory opinions are not legally binding[225]. This procedure aims to promote dialogue between the ECtHR and domestic judges. However, those opinions form part of the ECtHR's jurisprudence, have interpretative value[226] and are highly indicative of the ECtHR's reasoning. In this regard, a subsequent decision of inadmissibility in 2019 applied the findings of the advisory opinion and confirmed that "*it is not imposing an excessive burden on the concerned children to expect that the applicants initiate an adoption procedure for that purpose*[227]*.*"

By self-restraining, the ECtHR can appear to domestic actors as satisfying its performance-based legitimacy, by avoiding a perceived undue intrusion into states sovereignty. The ECtHR gives itself more time by deciding on common grounds and limiting conflict. It regularly associates a minimalist interpretation with the affirmation of the progressivity of law in technological fields. In *SH* for example, the ECtHR explicitly states it could run differently in the future[228]. Likewise, in the home-birth cases, the ECtHR encouraged the State to pursue its efforts[229]. In *Pojatina v. Croatia*, it noted the "*gradual development of law in the sphere*[230]."

Both the admissibility in *A, B and C* and the argument of progressivity appear as minimalist safeguard clauses for human rights and at the same time as

[224] *Id.* at 55.
[225] Protocol 16, *supra,* art. 5.
[226] Council of Europe, Explanatory report of Protocol 16, at 27.
[227] Dec. C. v. France and E. v. France. At 43. Referring to the advisory opinion at 39. The ECtHR rejected the application as manifestly ill-founded.
[228] S.H. v. Austria, 2011-V Eur. Ct. H.R. at 22, 84, and 118. "*Even if it finds no breach of Article 8 in the present case, the ECtHR 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*," at 118.
[229] Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), at 189.
[230] Pojatina v. Croatia, Eur. Ct. H.R. (2018), at 85.

political strategies of the ECtHR to legitimize its surprising caution by reporting its substantial ruling. This avoidance of the analysis of conflicting rights is a limit to a conceptualization of reproductive rights at the European level. Sometimes it can be enough and consistent, at least for a while. At other times, minimalist choices appear like inappropriate choices, in the sense that by avoiding crucial issues, it might encourage illegal procedures.

2. From minimalism to failure: the encouragement of reproductive tourism without prior scrutiny

As Cass Sunstein pointed out, minimalism is a short-term strategy that defers the burden of the decision to other actors[231]. In the long-term, the ECtHR would not always be able to avoid the crucial issues, at the risk of losing influence. Reproductive cases are striking examples of that. In a European space based on freedom of circulation of goods and services, people who can afford it can travel to get better healthcare services, or access to technologies unavailable in their country[232]. Cross-border care or "reproductive tourism"[233] was an issue in the post-surrogacy cases (outside EU) but also in the abortion case *A, B and C,*[234] and in the assisted reproduction case *SH and others*.

In *A, B and C*, the Grand chamber started by analyzing if the interference in the two first applicants' private life was not exceeding Ireland's margin of appreciation[235]. A decisive factor in its appraisal was the absence of legal

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231 Sunstein, *supra.*

232 Healthcare as a service in EU law, *see* Case C-120/95, Nicolas Decker v. Caisse de maladie des employés privés, 1998 ECR I-1831; Case C-158/96, Raymond Kohll v. Union des caisses de maladie, 1998 ECR I-1935. *See* also for abortion Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others, 1991 E.C.R. *I-04685.*

233 For scholarship on "reproductive tourism" in Europe, *see* Ruth Deech, Reproductive Tourism in Europe: Infertility and Human Rights, 9 Global Governance 425 (2003). For works on cross-care/reproductive tourism and on the need to harmonize European legislations *see* Flatscher-Th*öni and Voithofer, Should Reproductive Medicine Be Harmonized within Europe?, European Journal of Health law 22 (2015) 61-74,* Guido Pennings, Legal harmonization and reproductive tourism in Europe, *Human Reproduction*, Vol. 19, n°12, December 2004, pp. 2689–2694, https://doi.org/10.1093/humrep/deh486 The author argues in favor of reproductive tourism as an alternative to harmonization of legislations on ethical issues. According to G. Pennings, it is a "safety valve that reduces moral conflict and expresses minimal recognition of the others' moral autonomy."

234 *Infra.* In Decision (inadmissibility) D. v. Ireland, Eur. Ct. H.R. (2006) the applicant also travelled from Ireland to the UK, but the ECtHR considered she had not comply with the requirement to exhaustion of domestic remedies and found, by a majority, the application inadmissible

235 A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185, at 231 and following.

impediment to travel abroad in order to access to abortion[236]. Besides, this observation led the ECtHR to reject the claim of violation of Article 2 on the right to life of the third applicant[237], and was a barrier to reach the level of severity required for a violation of Article 3 on freedom from inhuman and degrading treatment[238]. In brief, while the ECtHR admitted that "*travelling abroad for an abortion was both psychologically and physically arduous for each of the applicants"* and *"also financially burdensome for the first applicant*[239]," it looked at the travel possibility as a satisfaction of a negative obligation rather than an aggravating factor of the applicant's situation. In 2016, the UN Human Rights Committee considered the travel to the UK of a pregnant Irish-American woman whose fetus inevitably died as an aggravating factor:

> *Many of the negative experiences described that she went through could have been avoided if the author had not been prohibited from terminating her pregnancy in the familiar environment of her own country and under the care of the health professionals whom she knew and trusted, and if she had been afforded the health benefits she needed that were available in Ireland, were enjoyed by others, and could have been enjoyed by her, had she continued her non-viable pregnancy to deliver a stillborn child in Ireland*[240].

In the ART case *SH v. others*, the ECtHR found that the absence of "*prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria*" contributed to show the "*careful and cautious approach*" of the Austrian legislator.[241] Dissenting judges denounced the ECtHR's avoidance of the real issue at stake: the denial of access to available treatment. They noted that the argument of capacity to travel was

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236 *Id.* at 239.
237 *Id.* at 158.
238 *Id.* at 164-165.
239 *Id.* at 164.
240 UN, HR COMMITTEE, VIEWS ADOPTED BY THE COMMITTEE UNDER ARTICLE 5 (4) OF THE OPTIONAL PROTOCOL, CONCERNING COMMUNICATION NO. 2324/2013, CCPR/C/116/D/2324/2013, 17 NOVEMBER 2016, AT 7.4.
241 S.H. v. Austria, 2011-V Eur. Ct. H.R. 295, at 114.

"*without taking into account the potential practical difficulties or the costs that may be involved*[242]."

Finally, without neglecting the state's discretion concerning the regulation of surrogacy, the ECtHR's minimalist strategy in the field can encourage in practice "transgressive law[243]". While it was fundamental to apply the best interest of the child standard, its sole consideration might lead to the progressive alteration of the law after transgression. As in the abortion case, the ECtHR found sufficient in *Mennesson* that "*the Government have not established that where French nationals have recourse to a surrogacy arrangement in a country in which such an agreement is legal this amounts to an offence under French law*[244]."

In that respect, applicants recently unsuccessfully argued in favor of the alteration of the law after transgression in front of the ECtHR (joint applications C v. France, E v. France). Two couples had resorted to gestational surrogacy in the United States and Ghana and contested the fact they could not obtain full registration of the birth certificates in France, unlike other children born abroad[245]. They characterized the recent possibility of adoption by the intended mother as an "*adoption-sanction*[246]." Relying on the protection of children, they argued that either gestational surrogacy should be legalized "*according to the principles, values and criteria that the French society would give itself*", or the modification of the criminal legislation[247].

The ECtHR's frequent way of fulfilling its adjudicatory mission whilst taking into account its constraints leaves crucial questions to other actors or postpone its own decision, creating much uncertainty for individuals. Yet, the *ECHR* is the source of State obligations and to defer the burden on foreign countries does not look satisfactory in any way. Moreover, it leads to an

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242 ID., JOINT DISSENTING OPINION OF JUDGES TULKENS, HIRVELÄ, LAZAROVA TRAJKOVSKA AND TSOTSORIA, AT 13. IN BRACKETS.

243 Expression borrowed from Astrid Marais, *Résister au « droit transgressif » de la maternité de substitution*, LA PROCRÉATION POUR TOUS ? (Dalloz, 2015).

244 Mennesson v. France, Eur. Ct. H.R. (2014) at 61.

245 *See supra* Part II (A).

246 Decision (inadmissibility) C. v. France and E. v. France, Eur. Ct. H.R. App. N° 1462/18 and 17348/18 (2019) at 49.

247 *Id.* Personal translation. However, the ECtHR found that the authorities' refusal to register the full details of the birth certificates was not disproportionate, relying on the existing legal possibility of adoption. The ECtHR concluded the applications were manifestly ill-founded and therefore inadmissible.

inadequate response to reproductive tourism. Reproductive tourism is not only a question of autonomy and involves distress of women and couples for health and infertility reasons. It might also raise important issues of discriminatory access and protection of the vulnerable, as well as of commodification of the human body. The prohibition of financial gain in the use of the human body is not only a matter of state law as it is specifically prohibited in Article 21 of the Oviedo Convention[248].

To summarize, the ECtHR's use of minimalist strategies in reproductive cases, appears as a limit to a conceptualization of reproductive rights. Another tool lies in the identification of a "European consensus", supposed to reduce the margin of appreciation. Here again, the plasticity of its use indicates the division of the ECtHR on reproductive issues and makes it harder to identify a sound concept of reproductive rights.

B. The plasticity of the European consensus on reproductive issues

Consensual interpretation takes its roots in the preamble of the *ECHR*, according to which fundamental freedoms are best maintained by "*a common understanding and observance of the Human Rights upon which they depend*". The identification of a European consensus should have the effect of narrowing the States margin of appreciation concerning the legal protection of certain rights and/or their balance with competing interests/rights. The margin of appreciation doctrine and the "European consensus" are tools that should allow the reconciliation of different sources of legitimacy of the ECtHR and reach a fair compromise[249]. The ECtHR's instable use of those tools is emblematic of the reflexivity of the ECtHR defined by Mikael Madsen[250]. Both the identification of a "European consensus" in reproductive cases (1) and its effects (2) reflect societal debates and judges disagreements. Several

[248] Council of Europe, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Strasbourg, 4 April 1997, Eur. TS 164, Art. 21. The Explanatory Report of the Convention makes a distinction between compensation and financial gain, at least when it comes to living organ or tissue donation. *See* Explanatory Report, Strasbourg, 4 April 1997, at 132.
[249] Başak Çali, et al, *supra.*
[250] Mikael Madsen, *Sociological approaches to international ECtHRs*, *supra.*

inconsistencies suggest the utilitarian aspect of such consensus and the failure to reach a "fair compromise" on certain reproductive issues. While it is revelatory on the mode of production of law, the recurrent and inconsistent use of the European consensus is an obstacle to the elaboration of European concept of reproductive rights.

1. Inconsistencies concerning the determination of the consensus

The ECtHR refers to the margin of appreciation and the existence of a European consensus when it scrutinizes the necessity of an interference. As explained earlier, several reproductive cases did not reach that step. When the analysis reached that step, the identification of a European consensus is usually a tool for a constructivist interpretation of the *ECHR*. As Kanstansin Dzehtsiarou frames it, the European consensus is "*a way of mediating between the margin of appreciation and evolutive interpretation*[251]*,"* providing that its identification allows the evolutive interpretation and reduce the margin of appreciation. However, the ECtHR's developments on reproductive cases illustrate two kind of inconsistencies concerning the determination of the consensus. The first is on the object of the consensus. Traditionally, the consensual interpretation serves the dynamic interpretation of conventional rights claimed by the applicant. However, the *A, B and C* case provides the most incoherent use of the doctrine. After identifying a consensus on abortion that it chose to disregard, the ECtHR looked for another consensus concerning the right to life[252]. Not finding such consensus, the ECtHR recognized the state margin of appreciation. The use of the European consensus interpretative tool to determine collective values conflicting with a claimed right illustrates its manipulation by the ECtHR.

The second kind of uncertainty comes from the method with which the ECtHR determines the consensus. The diversity of sources and the flexibility of their use complicate the teachings of its jurisprudence. It is unclear how

[251] Kanstantsin Dzehtsiarou, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN ECTHR OF HUMAN RIGHTS, (Cambridge University Press, 2015), at 138. This principle, expressed in *Tyrer v. the United Kingdom* (25 April 1978, § 31, Series A no. 26) is reminded by the ECtHR in the A, B and C case, at 234, before it introduced another distinction concerning 1) the issue of decisive narrowing down of the margin 2) if the consensus is relevant at 235.
[252] A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185 at 237.

the numerous references to international legal instruments contribute to the identification of a consensus. Besides, the ECtHR recurrently, but not always coherently, compares national legislations. The comparison of national legislations sometimes turns out purely quantitative rather than qualitative, and without a particular proportion of States being *a priori* determined to demonstrate a "consensus". For instance, the ECtHR made in *Dubská* a quantitative comparison of legislations that in its views contradicted a consensus on the general authorization of home-birth[253]. The ECtHR adopted a general comparative approach in *Evans*[254]. In *Dickson*, it noted than more than a half allowed conjugal visits for prisoners and relied on a lack of proportionality to conclude to a violation and not a European consensus[255]. The ECtHR also proceeded to a comparison in *SH*, noting that only three other countries prohibited sperm donation like Austria and a bit more for ovum donation, but also observed the variety of the content. In the ECtHR's terms, this indicated an "emerging European consensus" concerning the authorization of gamete donation for IVF[256]. In *SH and others*, the joint dissenting opinion criticized the "*lax approach to the objective indicia to determine consensus are pushed to their limit here, endangering legal uncertainty*"[257]. In the same regard, in *Parrillo*, it enumerated legislations rather than relied on social consensus. In *A, B and C*, the ECtHR explicitly rejected limited polls as demonstrative of a change in the views of the Irish people[258].

Beyond the uncertainties concerning the ECtHR's method of determining the consensus, reproductive cases also show some inconsistencies of the ECtHR's scrutiny concerning the effects of the consensus.

253 Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R. (2016), at 183.
254 Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353 at 79.
255 Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.
256 S.H. v. Austria, 2011-V Eur. Ct. H.R. 295 at 95-96.
257 *Id.* Joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Trotsoria, at 8.
258 A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185 at 226.

2. Inconsistencies concerning the effects of consensus

For the great majority of the reproductive cases, the ECtHR did not identify a consensus when it looked for it. Whether in home-birth[259], access to assisted reproduction in prison[260] or implantation of embryos[261], the ECtHR found no consensus between the contracting states, thus concluding to a broad margin of appreciation. Conversely, in *A, B and C* and *SH and others v. Austria*, the ECtHR identified some form of consensus. Yet, the ECtHR did not deduce from these observations a need to adopt a dynamic interpretation of the *ECHR*. Judges unambiguously rejected the government's argument denying the existence of a European consensus related to the authorization of abortion. At the end of a comparative analysis, the ECtHR observed the "*consensus amongst a substantial majority of the Contracting States*[262]*."* However, the ECtHR undermined the effects of its own doctrine by immediately stating that it did "*not consider that this consensus decisively narrows the broad margin of appreciation*[263]*."* The ECtHR's observations in *SH and others* are comparable. Although the ECtHR found "*a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of in vitro fertilization, which reflects an emerging European consensus*", it refused to deduce a decisive impact on the margin of appreciation because it was not based on "*settled and long-standing principles*" in the different legislations[264]. There is something paradoxical in acknowledging the progressive character of the law but then requiring, in order to adopt a dynamic interpretation of the *ECHR*, a consensus based on "settled and long standing principles" deeply rooted in the states. *SH* introduced a distinction between strong and weaker consensus, based on the strength of the states' principles. The joint dissenting opinion qualified the ECtHR's approach as an "*unprecedented step of conferring a new dimension on the European consensus*[265]*."*

[259] Dubská and Krejzová v. the Czech Republic, Eur. Ct. H.R.
[260] Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.
[261] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353
[262] A, B & C v. Ir, 2010-VI Eur. Ct. H.R. 185, at 235.
[263] *Id.* at 236.
[264] S.H. v. Austria, 2011-V Eur. Ct. H.R. 295 at 96.
[265] *Id.* Joint dissenting opinion of Judges Tulkens, Hirvelä, Lazarova Trajkovska and Trotsoria, at 8.

All this demonstrates the usefulness of the European consensus technique, as a tool of the ECtHR in quest for political legitimacy. Dissenters in *Evans* argued that "*the Court should not use the margin of appreciation as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review*[266]". However, a sociological approach of the ECtHR allows to understand, as Paul Johnson pointed out, that "*This is not to suggest that judges fabricate or 'make up' consensus but, rather, that they use consensus analysis as a method to represent social and moral relations in a manner that supports their broader policy ambitions*[267]."

V. Conclusion:

Reproductive issues highlight the interactions between the ECtHR and the national legislations when it comes to identifying non-enumerated rights. The disagreements between judges, shown by the formulation of various separate opinions, contribute to a better understanding of the law. Although the ECtHR applies the *ECHR* to reproductive issues, it does not engage in a conceptualization of those rights as a distinct category. The principle of subsidiarity does not always explain the reluctance of the ECtHR to adopt a dynamic interpretation in the reproductive area. Indeed, its persistence in showing deference to national approaches, for example, in abortion cases, suggests a reluctance of the ECtHR to develop a European approach despite the evolution of European legislations. In many instances, the application of the *ECHR* depends on a prior legal recognition of an individual right in the State. Besides, this application relies on an interpretation of reproductive rights through a narrow angle, the ECtHR being globally gender and context blind when applying the conventional standards. The usual reluctance of the ECtHR to protect the right to health despite its interactions with the *ECHR* enumerated rights is illustrated in the reproductive context where only acts of a certain gravity justify the ECtHR's particular attention. Again, this resistance cannot be only explained by its quest for legitimacy, since it would not have been controversial to engage in reproductive health, which benefits

[266] Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, Joint dissenting opinion of Judges Türmen, Tsatsa-Nikolovska, Spielmann and Ziemele, at 12.
[267] Paul Johnson, *Sociology and the European ECtHR of Human Rights*, 62 SOCIOLOGICAL REVIEW 3 (2014), at 552.

from great support in international law and national legislations. In the current state of its jurisprudence, the ECtHR ensures a minimalist role in the protection of reproductive rights, following social and legal evolutions rather than endorsing a dynamic interpretation. In this regard, its case law does not differ from other cases with strong "moral and ethical" dimensions. While "reproductive rights" are referred to as such on the international political and legal scene, an inquiry into their conceptualization should be made more successfully elsewhere than in the ECtHR's jurisprudence.