*Aleksandra Deanoska Trendafilova**

BIOETHICAL AND MEDICAL ISSUES IN THE EUROPEAN COURT OF HUMAN RIGHTS CASE - LAW

Abstract

The European Court of Human Rights has proved to have an enormous influence in the protection of important rights and freedoms at all levels often setting valuable standards relevant for the national legislations. Its role, therefore, is not just protective but also indirectly legislative policy directed. This especially applies to issues that haven't been globally legally and ethically established, especially the bioethics and medicine related ones. The surrogacy issues, for example, are very differently assessed in different states, varying from comprehensive and detailed regulation to total prohibition. However, from the perspective of the protection of the rights of the children born via surrogacy arrangements, the ECrHR has reached important decisions that will most probably lead to acceptance of surrogacy in the European countries. That Judgements of Mennesson v. France (2014) and Labasse v. France (2014) but also Foulon and Bouvet v. France (2016), Paradiso and Campanelli v. Italy (2017) etc. will inevitably shape the future surrogacy legislations. Other important bioethical issue that the ECrHR dealt with is the dignified end of life/assisted suicide. Petty v. The United Kingdom (2002), Haas v. Switzerland (2011) and Koch v. Germany (2012) will be elaborated in other to determine the standpoints of the Court on the respective issues. Taking into consideration that consent has been labelled as a core principle and requirement of the biomedical procedures, the Court addressed it in many cases from several specific aspects. Therefore, several issues will be evaluated regarding their relevance vis-a-vis the informed consent and articles 2, 3, 8 and other provisions of the Convention in several cases. At the end, conclusions will be presented about which issues have the potential to be resolved and which remain open due to the ECrHR case law.

Keywords: case-law, court, private life, surrogacy, reproductive right, informed consent.

I. INTRODUCTION

The rapid scientific development and the enormous leap in certain areas of technology have contributed, in the field of medicine, for example, to the development of many technologies and methods of treatment that significantly add to raising the quality of human life. But in reality that turned out to be a double-edged sword, so industrial development, for example,

* Aleksandra Deanoska Trendafilova, Full Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, e-mail: a.deanoskatrendafilova@pf.ukim.edu.mk

undoubtedly led to the great pollution of soil and air, disturbing the balance in nature, disturbing the natural habitats of many species of fauna and flora, and even the balance of the "micro-world", such as viruses, for example, that have the so-called natural reservoirs that have been disturbed by people.

The situation with the current pandemic is the biggest proof of that. Although there are generally two views on the origin of the SARS-CoV-2 virus (natural origin or artificially created or modified virus) in both cases the fact that the fault lies with humans cannot be ignored. In the case of artificial creation or modification, it is clear that the scientific order has been abused or that the security rules and protocols have been neglected. In the case of a natural origin of the virus, whose natural habitat is some animal species, it is clear that man in some way contributed to pass over the natural barrier that existed until recently for this species.

Undoubtedly, science must not be limited in its development, but only to the extent that it does not violate basic human rights for its own purposes. Let us not forget that according to the Oviedo Convention on Human Rights and Biomedicine, "The interests and welfare of the human being shall prevail over the sole interest of society or science."[1]

Although many Council of Europe acts undoubtedly address the issues of Human Rights and Biomedicine, the European Convention on Human Rights itself does not explicitly cover these areas. However, the Court developed a rich practice with extensive and arguments based interpretations that established standards and protection of many bioethical areas under the existing articles of the ECHR.

These Rights and the need for their protection as already mentioned rise from the rapid scientific development, the evolution of biomedical techniques and the threats to human dignity. They are considered also as Rights of the Future Generations as in the centre of this complex are the reproductive rights, rights related to genetics and genetic engineering, embryo – research etc. Some of these rights, as certain authors point out belong to humanity as a whole and not to individuals, social groups or nations.[2]

The Council of Europe's role in the protection of the Fourth Generation Rights is crucial and evident (Convention of Oviedo, Protocol on Prohibition of Cloning, Protocol on Genetic Testing for Therapeutic Purposes etc.).

Abortion, end of life, euthanasia and assisted suicide, surrogacy, protection of privacy in medical procedures etc. have focal part of many cases examined and judged by the European Court of Human Rights.

The respective issues have been observed in the light of articles 8 (specifically right to respect for private life), article 3 (mostly in respect of the inhuman or humiliating treatment) and article 2 (right to life versus the so-called "right to die in dignity" or the issue of the extension of protection of life).

II. HUMAN RIGHTS WITH BIOETHICAL AND MEDICAL PRETEXT – WHY ARE THEY IMPORTANT?

The European Court of Human Rights (ECrHR) has demonstrated a great capability of protection of the bioethical and medical rights making sometimes references to the Oviedo Convention and similar documents in many of its cases but providing it through the mechanism of the ECHR. In fact, the Oviedo Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on

[1] Council of Europe Convention on Human Rights and Biomedicine, article 2, available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf98

[2] Cornesku, A.V., The Generations of Human Rights, Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition. Brno: Masaryk University, 2009, ISBN 978-80-210-4990-1

Human Rights and Biomedicine "is the first legally binding international text designed to preserve human dignity, rights and freedoms, through a series of principles and prohibitions against the misuse of biological and medical advances. The Convention's starting point is that the interests of human beings must come before the interests of science or society".[3]
The emergence and development of bioethics is also in itself a bridge between the centuries-old gap between the social sciences and the humanities on the one hand and the natural sciences on the other.[4] In Europe, the debate over the principles of bioethics is developed (among others) within the so-called EU's Biolaw project, where the Final Report[5] proposes that, in addition to the informed consent principle, three more principles be added: dignity, integrity and vulnerability. Scientists rightly point out that an open global call for (bio)ethical education is needed in order for every individual to acquire the so-called "bioethical maturity" which is especially important given the fact that each of us will face a situation once or more in life to have to make a (bio)ethical decision.[6]
Thus, for example, the Action Plan for Bioethical Education developed at the Asia-Pacific Perspectives for Bioethical Education of UNESCO,[7] outlines several goals that specifically include knowledge, namely: development of trans-disciplinary knowledge, understanding of developed scientific concepts, development ability to integrate the use of scientific knowledge, facts and ethical principles and argumentation in discussions of cases involving moral dilemmas, etc.
In Europe, informed consent has become a *conditio sine qua non* in biomedical interventions of therapeutic and experimental nature. The Nuremberg Code and the Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects[8], are sufficient indicators of this.
Biomedical area is getting intensively regulated in the last decades and the human rights that fall within the scope of application of biology and medicine have been recognized and safeguarded. As we already mentioned not only that ECrHR discusses many issues of this kind in its case- law, but also specifically refers to the articles of the Convention of Oviedo in cases like: Glass v. The United Kingdom, Evans v. United Kingdom, M.A.K. and R.K. v. the United Kingdom, Bataliny v. Russia, Parrillo v. Italy etc. elaborated below in the text and in many others.[9]

III. THE INFORMED CONSENT AS "GOLDEN STANDARD" OF BIOMEDICAL PROCEDURES IN THE ECrHR CASE LAW

The golden standard of biomedical procedures is undoubtedly the emanation of the development of bioethics and its firm establishment of certain generally accepted principles.
The principles of bioethics are at first glance, subtly different in American and European bioethics. American bioethics recognizes three/four general principles: autonomy, beneficence and "do not harm" as well as justice, firstly established in the Belmont Report on the Ethical

[3] Details of the Treaty No.164: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164
[4] Rincic, I., Europska bioetika, ideje i institucije, Zagreb, 2011, p. 21.
[5] Basic Ethical Principles in Bioethics and Biolaw, Final Report, Copenhagen, 1999, p. 8-9.
[6] Ibid., p. 240-241.
[7] UNESCO Regional Unit for Social and Human Science, Asia Pacific Perspectives on Bioethics Education, p. 2-3, available at: http://unesdoc.unesco.org/images /0016/001631/163183e.pdf
[8] World Medical Association, Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects, Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964 and last amended by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013, available at: https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/
[9] European Court of Human Rights, Research Report: Bioethics and the Case Law of the Court, CoE, 2016

Principles and Guidelines for the Protection of Human Subjects of Research by the US National Commission on Human Rights - Biomedical and Medical Research[10] and clearly defined by Beauchamp and Childress.[11] The criticism coming from the European side of this set of principles is mostly in the direction that the principle of autonomy is dominant over other principles in American bioethics. The system of European bioethical principles also consists of four principles, namely: the principle of autonomy, the principle of dignity, the principle of integrity and the principle of vulnerability.[12] As we note, the principle that has become the golden standard is the foundation on which bioethical principles continue to be built on both European and American bioethics development.

A direct expression of the principle of autonomy in medical ethics is the doctrine of "informed consent".[13] The claim that autonomy as a standard is related to other principles is confirmed by one of the bioethical arguments that define dignity as an autonomous ability of the person who has become the object of treatment.[14] Respect for human dignity forms the ethical basis of self-determination.[15]

Another specific issue related to this one is the provision of consent for medical procedures in children.[16] As is well known, a child cannot give consent as an expression of a relevant will, so this is usually done by his or her parents or guardian, as the whole information process is aimed at them - the legal representatives. However, the legislation more or less respects the opinion of the child, which can sometimes be contrary to that of the legal representatives.

In the case of Glass v. The United Kingdom,[17] for example, the Court found violation of the article 8, because an unauthorised medical treatment was undertaken to the mentally and psychologically disabled son of the applicant without court authorisation and without the consent of the applicant – the mother of the child with special needs.

In the case of M.A.K. and R.K. v. the United Kingdom, the Court also found a violation of article 8 of the ECHR due to the medical examination undertaken to a nine years old child of the applicant without parental consent.[18]

Petrova v. Latvia[19] is another case where the Court found violation of article 8 in cases where certain medical action was undertaken without the consent of the person concerned, in this case, it is in respect of transplantation of an organ. Namely, the applicants were not asked for the necessary consent required by law for the removal of organs for transplantation from the applicant son's body following a road traffic accident.

In M. S v. Croatia,[20] the applicant was confined for one month in a psychiatric institution involuntarily. There she was tied in an isolation room for a period of time, furthermore, she was not provided effective legal aid and representation during the proceedings in which the courts confirmed her placement in an institution. She claimed violations of her rights in respect to articles 3 and 5, for which the Court found they existed. The violation of article 3 was found regarding procedural but also in respect of the substantive limb, and violation of article 5 due

[10] US Department of Health and human services, The Belmont Report, достапно на: http://www.hhs.gov/ohrp/humansubjects/ guidance/belmont.html

[11] Rincic, I., Europska bioetika, ideje i institucije, Zagreb, 2011, p. 50.

[12] Ibid., p. 100-104.

[13] Ibid., p.105.

[14] Tomasevic, L., Ljudsko dostojanstvo: Filozofsko – teoloski pristup, p. 56, published in Covic, A., Gosic, N, Tomasevic, L., Od nove medicinske etike do integrativne bioetike, Zagreb, 2009

[15] Macer, D., Self-determination and Informed Choice, p. 238, published in: Covic, A. Gosic, N, Tomasevic, L., Od nove medicinske etike do integrativne bioetike, Zagreb, 2009

[16] Turkovic, K., Roksanovic Vidlicka, S., Brozovic, J., Informirani pristanak djece u hrvatskom zakonodavstvu, Bioetika i djete, Zagreb, 2011, p. 196

[17] Glass v. the United Kingdom, no. 61827/00, ECHR 2004-II, Judgment of 9 March 2004

[18] M.A.K. and R.K. v. the United Kingdom, nos. 45901/05 and 40146/06, Judgment of 23 March 2010

[19] Petrova v. Latvia, no. 4605/05, Judgment of 24 June 2014

[20] M.S. v. Croatia (no. 2), no. 75450/12, Judgment of 19 February 2015

to failure of the national authorities to ensure effective legal representation and fulfilment of procedural guarantees.[21]

The case of Bataliny v. Russia[22] is about a new drug that was tested (since it was not authorised for sale at the time) on a patient without his consent. It took place in a psychiatric institution where he was placed after an attempted suicide and his parents were not allowed to take him home. The state did not prove that the involuntary placement was due to a severe mental condition and that it was necessary all that time. The use of a new non-marketed antipsychotic drug and the restriction of the free movement resulted in feelings of fear, humiliation and inferiority. Therefore, the Court found violations of articles 3 and 5.[23]

IV. CASES CONCERNING RIGHT TO LIFE VERSUS END OF LIFE ISSUES

In several cases, the Court ruled that the right to life does not constitute a right to death in cases where a distressing death is expected.

There is also no violation of Article 8 (regarding the right to private life) or article 3 (prohibition of torture and other inhuman or degrading treatment or punishment) unless the state facilitates assisted suicide in any way. The court specifically emphasizes that in some countries assisting in suicide in such cases has been decriminalized, but that most countries still take the opposite view and place more emphasis on the protection of the right to life.

In that respect, in the case of Pretty v. the United Kingdom,[24] the applicant who suffered a lethal end-stage disease, but maintained full intellectual capacity, wished to end her life in dignity as she faced distressing final stages of life but as she was physically unable to do it, she wanted to be assisted by her husband requesting from the Public Prosecution not to prosecute her husband for the action of assistance in her attended suicide. As the request was denied by the Prosecution and she used (unsuccessfully) all other national legal mechanisms, she continued her battle in front of the ECrHR, claiming that in her case her rights under articles 2, 3, 8 and 9 have been violated (right to life, freedom from torture or to inhuman or degrading treatment or punishment, right to respect for private and family life and right to freedom of thought, conscience and religion). The Court found no violations of these rights, first, stating that the right to death does not derive from the right to life and second, regarding the right to private life it did not find unreasonable that the universal ban of assisted suicide of the state did not distinct those able from those unable to commit suicide. Also, the Court found no ill-treatment of the applicant by the state in the respective case.

Haas v. Switzerland[25] is another case where the applicant intended to commit suicide because of suffering a health condition and requested assistance to obtain sodium pentobarbital from physicians at first and then from state authorities as well, who denied his request stating that ECHR (article 8) "does not impose on states a positive duty to create the conditions for committing suicide without the risk of failure or pain."[26] The Court, as expected, found no violation of article 8, stating in the Judgement that *"*In the light of this case-law, the Court considers that an individual's right to decide by what means and at what point his or her life will end, provided he or she is capable of freely reaching a decision on this question and acting

[21] European Court of Human Rights, Research Report: Bioethics and the Case Law of the Court, CoE, 2016, 51/114

[22] Bataliny v. Russia, no. 10060/07, Judgment of 23 July 2015

[23] See: Bataliny v Russia: ECHR 23 Jul 2015, https://swarb.co.uk/bataliny-v-russia-echr-23-jul-2015/

[24] Pretty v. the United Kingdom, no. 2346/02, ECHR 2002-III, Judgment of 29 April 2002

[25] Haas v. Switzerland, no. 31322/07, judgment of 20 January 2011

[26] See: Haas v. Switzerland, Global Health and Human Rights, https://www.globalhealthrights.org/health-topics/health-care-and-health-services/haas-v-switzerland/

in consequence, is one of the aspects of the right to respect for private life within the meaning of Article 8 of the Convention".
In Koch v Germany,[27] the applicant was the husband of the late wife suffering from sensorimotor quadriplegia and who claimed violation of article 8 because the state failed to grant her authorization to obtain a lethal dose of sodium pentobarbital. In this case, the Court found a violation of article 8, because the federal health authority, as well as the domestic courts, refused to examine the merits of the request.
Several other cases deal with similar situations like the above presented: Gross v. Switzerland[28], Jack Nicklinson v. the United Kingdom and Paul Lamb v. the United Kingdom, etc.[29]
To conclude, the Court states that the right to death cannot be drawn from the right to life and that the refusal of the state to grant legal access to lethal substance as assistance to suicide does not constitute a violation of article 8 when the merit of the case is examined.

V. REPRODUCTIVE RIGHTS RELATED CASES

The number of reproductive rights-related cases is very big and the scope itself is very broad. From abortion to surrogacy, research on embryos etc. the case law is mainly related to the possible violations of article 8, specifically the right to private life.
Several cases deal with abortion issues, among which the following are well known: Bosso v. Italy, A B and C v. Ireland, P and S v. Poland etc.
In Bosso v. Italy,[30] the applicant as the presumed father claimed to be a victim as his wife terminated the pregnancy without his prior consent. He claimed violation of articles 2 and 8, which was not found by the Court, who determined that the termination of pregnancy was performed according to the law and that "the mother is primarily concerned by the pregnancy and its continuation or termination" and that her rights should above all be taken into account.
A B and C v. Ireland is a case where the Court found a violation of the right to private life of the third applicant who had a rare form of cancer and went from Ireland to UK in order to terminate the pregnancy that could lead to recurrence of the cancer as that was not possible in Ireland.[31]
P and S v. Poland[32] is a very complex and interesting case where the ECrHR found violations of articles 3, 5 and 8 (in this respect - double violation). Namely, P, a fourteen years old girl had been raped and as a result, got pregnant. The Polish law is very restrictive in respect to abortion and although it envisaged as a ground for abortion - the strong reasons to believe that the pregnancy was the result of a crime, in practice P underwent a very unpleasant experience: the whole process was made difficult, her personal data were disclosed, she had been a victim of anti-abortion activists and she was even placed in a juvenile shelter centre by court order. Eventually, the abortion was performed but without all the legal prerequisites and without post-abortion care. Therefore, the Court considered that the whole treatment of the state was severe for the child and constituted a violation of article 3; the placement in the Centre where she was separated from her family was a breach of the right stipulated in article 5 of the ECHR and that article 8 was violated on two grounds – disclosure of her personal data and the right to access to abortion that was granted by the law, but that was in practice made extremely difficult.

[27] Koch v Germany, no. 497/09, Judgment of 19 July 2012
[28] Gross v. Switzerland [GC], no. 67810/10, Judgment of 30 September 2014
[29] Jack Nicklinson v. the United Kingdom and Paul Lamb v. the United Kingdom, nos. 2478/15 and 1787/15, Decision of 23 June 2015
[30] Bosso v. Italy, no. 50490/99, Decision of 5 September 2002
[31] A, B, and C v. Ireland [GC], no. 25579/05, Judgment of 16 December 2010
[32] P. and S. v. Poland, no. 57375/08, Judgment of 30 October 2012

Medically assisted procreation was an issue in several cases as well. In Evans v. United Kingdom,[33] the applicant was a woman that had ovarian cancer and with her partner at the time decided to undergo IVF treatment before removal of her ovaries. Several embryos were created in order to be implanted later. In the meanwhile, the relationship ended and the ex-partner withdraws his consent for the embryos to be used, due to a lack of wish that he is the genetic father of a future child his former partner would have. As a result, according to the national law, the embryos should be destroyed. The applicant argued that she was a victim of the violation of her rights stipulated in several articles, among which article 8 and that she was forever prevented by that from having her genetic child. As it is well known, for issues that haven't been resolved by consensus, the Court gives a wide margin of appreciation. Regarding article 8, the Court stated that in absence of consensus regarding these issues and having into consideration that the law was clear and strict and that the applicant's right to respect for the decision to have a genetically related child is not considered greater than the right of her former partner not to have a child genetically related with her.

Parrillo v. Italy deals with a case related to embryo donation.[34] The applicant underwent a treatment that resulted in several embryos for future implantation, but as her partner passed away, she decided not to proceed with implantation and decided to donate the embryos for scientific research. But the clinic refused to release her embryos at her disposal due to a legal prohibition. The Court had a unique and very specific discussion, but finally ruled against Parrillo and decided that there is no violation of article 8 since the embryos were not subject to prospective parenthood but to something more distant than the core of protection of article 8. Additionally, it was also taken into consideration that the late partner of Parrillo did not (nor been able to) consent to the donation of the embryos. All these reasoning resulted in the abovementioned decision.[35]

The privacy at childbirth has also been discussed in one of the ECrHR cases. Namely, in Konovalova v Russia,[36] the applicant upon contractions was admitted at a hospital where at admission she was given a booklet that contained information that it is a university hospital where students attend different procedures. After several drug-induced sleeps and prolonged contractions, she underwent vaginal delivery in presence of students. The Court found that the prior booklet with information for possible presence of students during procedures was not enough to give legitimacy to the present situation of violation of privacy regarding her physical integrity, moreover considering the fact that sensitive medical and health information has been disclosed in front of the medical students as well. Furthermore, due to the several drug-induced sleeps, she was not in position to give relevant statements/consent for it. In this case, the ECrHR found a violation of article 8.

Prenatal testing is also an issue in several ECrHR cases as AK v. Latvia,[37] where the Court found a violation of article 8 from procedural aspect – the courts acting in an arbitrary manner regarding the alleged failure to refer for the antenatal screening test and judicial scrutiny;[38] Draon v. France,[39] where the Court found that limitation of compensation claims in domestic

[33] Evans v. the United Kingdom [GC], no. 6339/05, Judgment of 10 April 2007
[34] Parrillo v. Italy [GC], no. 46470/11, Judgment of 27 August 2015
[35] Parrillo v. Italy, Global Health and Human Rights Database, https://www.globalhealthrights.org/health-topics/sexual-and-reproductive-health/parrillo-v-italy/
[36] Konovalova v. Russia, no. 37873/04, Judgment of 9 October 2014
[37] A.K. v. Latvia, no. 33011/08, Judgment of 24 June 2014
[38] European Court of Human Rights, Research Report: Bioethics and the Case Law of the Court, CoE, 2016, 8/114
[39] Draon v. France [GC] (merits), no. 1513/03, Judgment of 6 October 2005

law for parents of children whose disabilities were undetected before birth constitutes a violation of article 1 of Protocol no. 1,[40] Maurice v. France[41] etc.

VI. SURROGACY AND ECrHR CASE - LAW

The surrogacy becomes an emerging issue in the reproductive area that has been challenged and raised to the ECrHR multiple times. Therefore it is elaborated in this article separately. First, it is important to note that the legislations vary from liberal to total prohibitive on the grounds of surrogacy arrangements and the reality of children being born via surrogates abroad and then denied their basic rights in their own countries cannot be neglected. Milestone cases in this repect are Mennesson v. France, Labassee v. France, Paradiso and Campanell v. Italy, but also known are Foulon and Bouvet v. France, Laborie v. France etc. The inability of the intended parents to provide an identity to the child born via surrogacy arrangement due to the declination of the state to recognize as legal and legitimate the birth certificate from another country is the main problem, but the position of the Court is that the right to identity is an integral part of the concept of private life and there was a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage.[42]
The Case of Mennesson v. France[43] is about a couple unable to have children due to infertility. After several unsuccessful IVF attempts, fertilized embryos have been made from the sperm of Mr. Mennesson and an egg obtained via donation. The surrogacy arrangement took place in California, USA.[44] The Supreme Court of California ruled that Mr. Mennesson is the genetic father and Mrs. Mennesson the legal mother and that following the birth in the birth certificate Mr. and Mrs. Mennesson should be recorded as the father and mother of the baby/babies. After the twins were born, Mr. Mennesson went to the French Consulate in Los Angeles with the birth certificates in order for the twins to be registered but as it failed and the case spent years in the judicial procedures, lastly the Court of Cassation dismissed all the claims of Mennessons. In 2014 they filed an application to the European Court of Human Rights on the grounds of violation of Article 8 of the ECHR. The Court found no violation of article 8 in respect of Mr. and Mrs. Mennesson's right to the family life, as it was undisturbed by the state, but ruled that a violation of article 8 existed regarding the right to respect of the private life of the Mennesson's twins.
The Case of Labassee v. France[45] is similar; namely, Mr. and Mrs. Labassee were a married couple who went to the USA and completed a surrogacy agreement and the birth of Juliette Labassee took place there. In the birth certificate, Mr. and Mrs. Labassee have been stated to be the parents. Upon return to France, the French authorities refused to enter the birth certificate in the relevant register and the child could not be given French nationality. The Court found no violation of Mr. and Mrs. Labassee right to respect to their family life, but a violation of the right to respect of the private life of the child. According to the Court, the right to private life covers the right to establish identity, including parentage.

[40] European Court of Human Rights, Research Report: Bioethics and the Case Law of the Court, CoE, 2016, 7/114
[41] Maurice v. France [GC], no. 11810/03; Judgment of 6 October 2005
[42] For a more profound elaboration of the surrogacy see: Mickovik, D., Deanoska, A., Surrogacy in the West: Giving Birth in the Shadow of the Law, LA, Berlin, 2017
[43] Mennesson v. France, Application no. 65192/11, https://www.abdn.ac.uk/law/documents/CPIL_2016-4.pdf.
[44] Mohapatra, S., States of Confusion: Regulation of Surrogacy in the United States in Commodification of the Human body: A Cannibal Market (Eds. J.D. Rainhorn & S. El Boudamoussi) Editions de la Fondation Maison des Sciences de l'Homme, Paris, 2015, p. 6.
[45] Labassee v. France, Application No. 65941/11

It must be stressed that in the cases of Mennesson v. France and Labassee v. France[46] there is a biological connection between the applicant and the child, usually a father-child genetic link. In both cases, children were genetically related to their fathers and the embryo was created with a donated egg cell.
It seems that the biological/genetic connection between one of the intended parents and the child and the existing *de facto* family life in these cases had a significant impact to the European Court of Human Rights.
The case of Paradiso and Campanelli v. Italy[47] is, however, different. Ms. Paradiso and Mr. Campanelli entered into an agreement with a fertility clinic from Russia. They even paid almost 50.000 EUR for the surrogacy arrangement. Ms. Paradiso and Mr. Campanelli were registered as parents in the document given to them, but the fact that the baby had been obtained via surrogacy was omitted. After they were denied by Italian authorities to enter the details of the birth certificate in the records, they were placed under formal investigation for "misrepresentation of civil status" and the DNA test discovered that Mr. Campanelli was not the child's biological father as stated before. The Italian court brought a decision for the child to be removed from them and placed in a children's home. Later it was placed in a foster family. After using all legal option in their country, Ms. Paradiso and Mr. Campanelli filed an application to the European Court of Human Rights on a claim for violation of article 8. The Court brought the Judgment in January 2015, holding that there had been a violation of Article 8 of the Convention, specifically stressing that it was wrong that the public policy prevailed over the child's best interests in the considerations of the Italian authorities, no matter of the absence of a biological link and the short period of caring for the child by the intended parents but without an obligation for Italy to return the child to the applicants, as the boy was living with the foster family for about two years already. On 1 June 2015, the case was referred to the Grand Chamber at the request of the Italian Government deciding finally that there has been no violation of Article 8 of the Convention.[48]
The Court recognizes, as evident from some of the concurring opinions of several judges that child trafficking cases can easily be presented in certain cases as surrogacy arrangements.[49]
In the case of Foulon and Bouvet v. France[50] and Laborie v. France[51] the Court also found a violation of children's right to respect for private life, but not to their parents right to family life. Foulon and Bouvet took surrogacy arrangements in India and Labories in Ukraine.
On request of the French Court of Cassation, the Grand Chamber issued an Advisory opinion concerning the recognition in the domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, stating that "States were not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother, as adoption may also serve as a means of recognising that relationship.[52]

From the abovementioned, we can conclude that the refusal of the state to recognize the identity of the child constitutes a violation of article 8 in the term of respect for his private life, especially in cases where the biological connection exists. It seems that the biological parent in a surrogacy arrangement is logical to be recognized as a parent and registered by the

[46] Ibid.
[47] Paradiso and Campanelli v. Italy, no. 25358/12.
[48] Application No.25358/12, url: http://hudoc.echr.coe.int/eng?i=001-170359.
[49] Concurring Opinion Judge Dedov, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-170359%22]}
[50] Affaire Foulon et Bouvet c. France, Requêtes nos 9063/14 et 10410/14
[51] See: Mickovik, D., Deanoska, A., Surrogacy in the West: Giving Birth in the Shadow of the Law, LA, Berlin, 2017
[52] European Court of Human Rights, Gestational surrogacy, Factsheet, November 2020, available at: https://www.echr.coe.int/Documents/FS_Surrogacy_eng.pdf

state, but the legal parent relationship should be established via adoption if possible under domestic law.

VII. CONCLUSION

Although the European Convention on Human Rights is an "old" instrument, it does not fail to provide protection of human rights in areas that have not been specifically addressed at the time of its adoption. Bioethical and biomedical issues have become particularly actual and emerging in the last decade with the fast development of the fourth generation of rights. The Court leaves many issues of the aforementioned nature under the margin of appreciation of the states and many of the dilemmas and questions still remain open and out of consensus.
Unfortunately, the process is not on a fast path, but one cannot fail to conclude that the Court reasoning will definitely influence the future harmonized legislations at least in respect to abortion and surrogacy in the area of reproductive rights, at least giving very clear rules for recognition of the parent-child relationship in countries that remain on the path of a strict ban on surrogacy; whereas, it seems that still prevails on its classic positions regarding "dying in dignity" rights and the scope of the right to life.
Therefore, the 70th anniversary of the Convention should be a celebration of liberty, dignity and rights because European Convention on Human Rights remains to be a very powerful and effective international level human rights protection instrument. The Convention and the Court are policy-shaping, influential and paving the road to more corresponding legislations and practice. Additionally, ECrHR gives the spirit to the Convention that proves to be an evolving and living document.
The judgments of the Court, the unique reasoning, the clearly demonstrated sensitiveness to the nature of these areas and many of the dissenting opinions in cases of this kind are confirmation that the expanding and adaptive character of the Convention to the new generation of rights will be even further expressed in a more specific perspective.

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