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Surrogacy and Parenthood: A European Saga of Genetic Essentialism and Gender Discrimination

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SURROGACY AND PARENTHOOD: A EUROPEAN SAGA OF GENETIC ESSENTIALISM AND GENDER DISCRIMINATION

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ABSTRACT

This paper tells a story of shifting normativities, from tradition to modernity and back, regarding the recognition of legal parenthood in non-traditional families created through cross-border surrogacy. The cross-border nature of the surrogacy is often forced as most domestic legal frameworks in Europe still restrict the creation of non-traditional families through assisted reproductive technologies. Once back home, these families struggle to have birth certificates recognized and establish legal parenthood. The disjuncture between social reality and domestic law creates a situation of legal limbo. In its recent case law, the European Court of Human Rights has pushed for domestic authorities to rectify this situation but, at the same time, has filled the legal limbo with genetic essentialism and allowed for gender discrimination when recognizing legal parenthood. While giving full effect to a genetic father's foreign birth certificate based on identity and best interests arguments, the Court accepts that a genetic mother must adopt to establish a legal parent-child relationship. The paper critically addresses this intriguing imbalance. It deconstructs the Court's genetic essentialism encouraging a biologically determined view of parenting, which sidelines the social (i.e., non-genetically related) parent and contradicts the purpose of assisted reproduction to overcome biological barriers. The paper concludes by rejecting the gender-discriminatory element of power and control over legal motherhood imposed by the procedural step of adoption.

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Legal parenthood "*goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being*."[1]

I. INTRODUCTION

Family law and the regulation of assisted reproduction are areas in which new technologies highlight the state's power to define legal concepts, rendering public the intimately private affair of baby and family making.[2] In European[3] domestic legal frameworks, sexual orientation, civil status, and access to assisted reproductive technologies (ART) are closely linked.[4] Family law and ART regulation built on arguments of bionormativity[5] impose restrictions on non-traditional family creation.[6]

1. Re X (A Child) (Surrogacy: Time Limit) [2014] EWHC (Fam) 3135 [54] (Eng.).
2. *See* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) [hereinafter Garrison, *Law Making for Baby Making*]; Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 260 (2017) [hereinafter NeJaime, *Nature of Parenthood*]; ROBERT LECKEY, CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY (2008); DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION (2017).
3. The paper's analysis is limited to the forty-seven Member States of the Council of Europe, which are under the jurisdiction of the European Court of Human Rights through their ratification of the European Convention on Human Rights. *See* EUROPEAN COURT OF HUMAN RIGHTS, [https://perma.cc/N3XP-9E4U].
4. *See generally* ALICE MARGARIA, THE CONSTRUCTION OF FATHERHOOD: THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS (2019); Sasha Roseneil et al., *Changing Landscapes of Heteronormativity: The Regulation and Normalization of Same-Sex Sexualities in Europe*, 20(2) SOC. POLS. 165 (2013) [hereinafter Roseneil et al.]; Katarina Trimmings & Paul Reid Beaumont, *in Parentage and Surrogacy in a European Perspective*, 3 EUROPEAN FAMILY LAW 232 (2016).
5. Bionormativity entails the use of biology for normative purposes. What is natural or may occur in nature is good and thus allowed. In the context of ART, bionormativity implies that legal parenthood must be a mirror image of the biological possibility of parenthood. *See* ANNA SMAJDOR, NATURALNESS AND UNNATURALNESS IN CONTEMPORARY BIOETHICS: PRELIMINARY BACKGROUND PAPER (2015).
6. *See* MARGARIA, *supra* note 4; Guillaume Kessler, *The Parentage Disruption: A Comparative Approach*, 33 INT. J.L. POL'Y FAM. 316 (2019); Darren Langdridge & Eric Blyth, *Regulation of Assisted Conception Services in Europe: Implications of the New Reproductive Technologies for "the Family"*, 23 J. SOC. WELFARE FAM. L. 45 (2001); Richard F. Storrow, *International Surrogacy in the European Court of Human Rights*, N.C. J. INT'L L. 38 (2018) [hereinafter Storrow, *International Surrogacy in the European Court of Human Rights*]; Andrea Mulligan, *Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements*, 26 MED. L. REV. 449 (2018). This paper refers to non-traditional

These norms depart from the liberal ideal of state neutrality. They establish a hierarchy of desirable family forms and protect a legal ideology of the family within the public realm.[7] Although framed as health regulation, ART regulation's underlying rationale stems from legal concepts of the family rather than health.[8] This rationale considers potential parents not only as patients with fertility issues. Since access to ART grants access to family creation, the design of ART regulation controls what is meant by the family. Restrictive regulation of access to ART is equivalent to restrictions on non-traditional family creation.

These restrictive domestic legal frameworks force same-sex and opposite-sex couples to travel beyond the borders of their jurisdiction to access assisted reproductive services such as surrogacy in states that allow them to do so.[9] Through this process, they create social realities of families that do not necessarily fit into the traditional family law framework as maintained in a domestic context.[10] Once back home, these families

families in cases of families involving non-marital and non-heterosexual relationships and non-genetic parent-child links.

7. *See* Roxanne Mykitiuk, *Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies*, 39 OSGOODE HALL L.J. 771 (2001).
8. Naomi Cahn, *The Uncertain Legal Basis for the New Kinship*, 36 J. FAM. ISSUES 501, 502 (2015) [hereinafter Cahn, *Uncertain Legal Basis*].
9. *See* Máire Ní Shúilleabháin, *Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights*, 33 INT. J.L. POL'Y FAM. 104 (2018); Richard F. Storrow, *The Proportionality Problem in Cross-border Reproductive Care*, *in* THE GLOBALIZATION OF HEALTH CARE: LEGAL AND ETHICAL ISSUES 125 (I. Glenn Cohen ed., 2013) [hereinafter Storrow, *Proportionality Problem*]; Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295 (2005) [hereinafter Storrow, *Quests for Conception*]. Popular destinations for surrogacy are the United States, India, Russia, and the Ukraine.
10. MARGARIA, *supra* note 4; Storrow, *International Surrogacy in the European Court of Human Rights, supra* note 6; Mulligan, *supra* note 6; Alice Margaria, *Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion*, 28 MED. L. REV. 412 (2020) [hereinafter Margaria, *Parenthood and Cross-Border Surrogacy*]; Ní Shúilleabháin, *supra* note 9; Kessler, *supra* note 6; Lydia Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy: Inconsistency in the Strasbourg Approach?*, 39 J. SOC. WELFARE FAM. L. 368 (2017) [hereinafter Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*]; Marianna Iliadou, *Surrogacy and the ECtHR: Reflections on* Paradiso and Campanelli v. Italy, 27 MED. L. REV. 144 (2019); Paul Beaumont & Katarina Trimmings, *Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy?*, *in* MIGRANT CHILDREN IN THE XXI CENTURY. SELECTED ISSUES OF PUBLIC AND PRIVATE INTERNATIONAL LAW (Giacomo Biagioni & Francesca Ippolito eds., 2016) [hereinafter Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*]; Claire Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, 13 J. PRIV. INT'L L. 546 (2017) [hereinafter Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*].

struggle to have birth certificates recognized, establish legal parenthood, obtain citizenship, and claim social benefits associated with the parent-child relationship such as parental leave, child benefits, or orphan's pension.[11] The disjunction between social practice and domestic law creates a situation of legal limbo. Confronted with legislative inaction, these families seek to clarify their status through adjudication.[12] Thus, the judiciary, both domestically and regionally through the European Court of Human Rights (ECtHR), gets involved in conceptualizing non-traditional families and debating their legal recognition.

ART's power to shape kinship relations and concepts of relatedness is a well-researched topic in the fields of sociology and anthropology.[13] The legal literature at the intersection of family law and health law related to assisted reproduction has intensely debated family forms, legal parenthood, and ART as a driving force of change.[14] This paper focuses

11. *See* MARGARIA, *supra* note 4; Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6; Richard F. Storrow, *The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy*, 20 J. GENDER SOC. POL'Y & L. 561 (2011); Mulligan, *supra* note 6; Kessler, *supra* note 6; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Iliadou, *supra* note 10; Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10.

12. *See generally*, MARGARIA, *supra* note 4; Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6; Storrow, *Proportionality Problem*, *supra* note 9; Mulligan, *supra* note 6; Kessler, *supra* note 6; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Iliadou, *supra* note 10; Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10.

13. *See*, *e.g.*, DOLGIN, *supra* note 2; SARAH FRANKLIN, EMBODIED PROGRESS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION (2002); Sarah Franklin & Susan McKinnon, *New Directions in Kinship Study: A Core Concept Revisited*, 41 CURR. ANTHROPOL. 275 (2000); SARAH FRANKLIN & SUSAN MCKINNON, RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES (2002); REPRODUCING REPRODUCTION: KINSHIP, POWER, AND TECHNOLOGICAL INNOVATION, (Sarah Franklin & Helena Ragoné ed., 1998); HELENA RAGONE, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART (2019); MARILYN STRATHERN, REPRODUCING THE FUTURE: ESSAYS ON ANTHROPOLOGY, KINSHIP AND THE NEW REPRODUCTIVE TECHNOLOGIES (1992); Cahn, *Uncertain Legal Basis*, *supra* note 8; Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2011) [hereinafter Cahn, *New Kinship*]; Nancy E. Levine, *Alternative Kinship, Marriage, and Reproduction*, 37 ANN. REV. ANTHROPOLOGY 375 (2008); Jeanette Edwards et al., TECHNOLOGIES OF PROCREATION: KINSHIP IN THE AGE OF ASSISTED CONCEPTION (2005).

14. *See*, *e.g.*, Angela Campbell, *Conceiving Parents Through Law*, 21 INT. J.L. POL'Y FAM. 242 (2007); DOLGIN, *supra* note 2; Daniel Gruenbaum, *Foreign Surrogate Motherhood:*

on the judiciary and the role of the European Court of Human Rights (ECtHR) more specifically.[15] It offers an analysis and critique of the ECtHR's reaction to the social change happening with the increased use of ART and its impact in a cross-border and domestic context. Judicial

Mater Semper Certa Erat, 60 AM. J. COMPAR. L. 475 (2012); Cahn, *Uncertain Legal Basis*, *supra* note 8; Cahn, *New Kinship*, *supra* note 13; Yehezkel Margalit, Orrie Levy & John Loike, *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107 (2014) [hereinafter Margalit et al., *The New Frontier*]]; Mykitiuk, *supra* note 7; Cherylon Robinson & Michael V. Miller, *Emergent Legal Definitions of Parentage in Assisted Reproductive Technology*, 8 J. FAM. SOC. WORK 21 (2004); Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 FAM. L.Q. 691 (1999); Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29 (2009); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMPAR. L. 125 (2006); Garrison, *Law Making for Baby Making*, *supra* note 2; Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: Arts, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER L. 1 (2003); Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037 (2016); Kessler, *supra* note 6; NeJaime, *Nature of Parenthood*, *supra* note 2; Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. WOMEN'S L.J. 119 (2018). There is also significant legal literature offering a normative analysis of reproductive rights and non-traditional family creation through access to ART. This literature usually focuses on reproductive rights, reproductive justice, autonomy, and equality. *See*, *e.g.*, Kimberly M. Mutcherson, *Procreative Pluralism*, 30 BERKELEY J. GENDER L. & JUST. 22 (2015); Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons From (And To) Western World*, 25 DUKE J. COMPAR. & INT'L L. 125 (2014); Lynn D. Wardle, *Reflections on Equality in Family Law*, MICH. ST. L. REV. 1385 (2013); Martha Minow, *The Free Exercise of Families*, UNIV. ILL. L. REV. 925 (1991); Max D. Siegel, *The Future of Family*, 23 GEO. MASON U. C.R. L.J. 177 (2012); Catherine E. Smith, *Equal Protection for Children of Gay and Lesbian Parents: Challenging the Three Pillars of Exclusion-Legitimacy, Dual-Gender Parenting, and Biology*, 28 L. INEQ. 307 (2010).

15. A few scholars have focused specifically on the role of the judiciary. *See*, *e.g.*, Linda S. Maule & Karen Schmid, *Assisted Reproduction and the Courts: The Case of California*, 27 J. FAM. ISSUES 464 (2006); Mellisa Holtzman, *Nonmarital Unions, Family Definitions, and Custody Decision Making*, 60 FAM. RELAT. 617 (2011); Timothy Caulfield, *Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing*, 26 QUEEN'S L.J. 67 (2000); Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Mulligan, *supra* note 6; Ní Shúilleabháin, *supra* note 9; Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6; Katarina Trimmings, *Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights*, *in* FUNDAMENTAL RIGHTS AND BEST INTERESTS OF THE CHILD IN TRANSNATIONAL FAMILIES 187 (Elisabetta Bergamini & Chiara Ragni eds., 2019); Andrea Büchler, *The Right to Respect for Private and Family Life: The Case Law of the European Court of Human Rights on Parenthood and Family Form*, *in* FAMILY FORMS AND PARENTHOOD: THEORY AND PRACTICE OF ARTICLE 8 ECHR 29 (Andrea Büchler and Helen Keller eds., 2016).

discourse has the power to shape the structure of moral and political debate.[16] It serves as an impetus for the legislature who is eventually responsible for democratically legitimized law reform and establishes the human rights framework in which such law reform can materialize.

Despite the globalization of reproductive technology and the rise of cross-border fertility services, the legal concepts of parenthood, family, and family life remain a domestic affair,[17] as reflected in the variety of legislation throughout Europe.[18] Nevertheless, the ECtHR has recently taken a more active stance, bringing about a Europeanization of these legal concepts.[19] The ECtHR case law in this context provides empirical evidence as to the evolution of legal standards and judicial reasoning.

A critical aspect of recognizing non-traditional family creation and family life is the legal recognition of parent-child relationships. This paper traces the ECtHR's role in defining legal parenthood—the legal determination of who is a parent—for children born through cross-border surrogacy in the early 21st century.[20] In a series of cases, the Court has made clear that the European Convention on Human Rights (ECHR)[21] imposes domestic recognition of a legal parent-child relationship for children born through cross-border surrogacy to some

16. *See generally* Susanne Baer, *Who Cares? A Defence of Judicial Review*, 8 J. BRITISH ACAD. 75 (2020).

17. *See* Storrow, *Proportionality Problem*, *supra* note 9; HACKER, *supra* note 2 at 37 (describing a '*bordered globalization'* to highlight the globalization of ART and the domestic character of legal concepts such as parenthood, family, and family life).

18. *See* NEZA KOGOVSEK SALAMON, WHITE PAPER: RIGHTS ON THE MOVE, RAINBOW FAMILIES IN EUROPE (2015); Francesco Paolo Busardò, Matteo Gulino, Simona Napoletano, Simona Zaami & Paola Frati, *The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members*, 2014 BIOMED RSCH. INT'L 1 (2014) [hereinafter Busardò et al.]; ILGA-Europe Rainbow Map 2020, ILGA-EUROPE, [https://perma.cc/C876-Q8XV] [hereinafter ILGA-Europe Rainbow Map].

19. *See* MARGARIA, *supra* note 4; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6; Mulligan, *supra* note 6; Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10; Ní Shúilleabháin, *supra* note 9; Kessler, *supra* note 6; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Iliadou, *supra* note 10; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10. *See also*, more generally, Sabrina Ragone & Valentina Volpe, *An Emerging Right to a "Gay" Family Life? The Case Oliari v. Italy in a Comparative Perspective*, 17 GERMAN L. J. 451 (2016).

20. Daphna Hacker uses the term cross-border surrogacy, as opposed to international surrogacy. *See* HACKER, *supra* note 2 at 133.

21. The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on November 4, 1950, and came into force in 1953.

extent.[22] The Court thus forced all Member States of the Council of Europe, even those prohibiting domestic surrogacy, to make their legal framework uniform in this matter.[23] However, the ECtHR's reasoning in these cases is noteworthy in several regards.

First, the ECtHR's recognition of legal parenthood in non-traditional families falling outside of a domestic family law framework relies neither on reproductive rights nor the intended parents' right to family life, nor on the principle of non-discrimination between opposite-sex and same-sex couples.[24] In a novel move, the Court frames the recognition of the legal parent-child link as an essential element of the child's identity.[25] Non-recognition of this link is contrary to the child's best interests and constitutes a violation of the child's right to respect for private life protected by Article 8 of the ECHR.[26]

Second, the ECtHR links genetics, identity, and best interests when recognizing legal parenthood in non-traditional families. In *Mennesson v. France*[27], *Labassee v. France*[28], and subsequent cases,[29] the ECtHR advances that legal recognition of the parent-child link is an essential

22. *See* Mennesson v. France, 2014-III Eur. Ct. H.R. 257; Labassee v. France, App. No. 65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378; Foulon v. France, App. No. 9063/14 et 10410/14 (July 21, 2016), [https://perma.cc/AEU9-SA69]; Laborie v. France, App. No. 44024/13 (January 19, 2017), https://hudoc.echr.coe.int/eng?i=001-170661; Paradiso v. Italy, App. No. 25358/12 (January 24, 2017), [https://perma.cc/XJ8G-Z7YE]; C v. France, App. No. 1462/18 and 17348/18 (November 19, 2019), [https://perma.cc/HYF6-GLMC]; D v. France, App. No. 11288/18 (July 16, 2020), [https://perma.cc/H74R-QEDE]; Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 (May 18, 2021), [https://perma.cc/45J6-KE9H].
23. *See Mennesson*, 2014-III Eur. Ct. H.R. 257; *Labassee*, App. No. 65941/11; *Foulon*, App. No. 9063/14 and 10410/14; *Laborie*, App. No. 44024/13*; Paradiso*, App. No. 25358/12; *C and E v. France*, App. No. 1462/18 and 17348/18; *D v. France*, App. No. 11288/18; *Valdís Fjölnisdóttir*, App. No. 71552/17.
24. This paper refers to non-traditional families as families involving non-marital and non-heterosexual relationships and non-genetic parent-child links.
25. *See Mennesson*, 2014-III Eur. Ct. H.R. 257; *Labassee*, App. No. 65941/11; *Foulon*, App. No. 9063/14 and 10410/14; *Laborie*, App. No. 44024/13*; Paradiso*, App. No. 25358/12; *C and E v. France*, App. No. 1462/18 and 17348/18; *D v. France*, App. No. 11288/18; *Valdís Fjölnisdóttir*, App. No. 71552/17.
26. *See Mennesson*, 2014-III Eur. Ct. H.R. 257; *Labassee*, App. No. 65941/11; *Foulon*, App. No. 9063/14 and 10410/14; *Laborie*, App. No. 44024/13; *Paradiso*, App. No. 25358/12; *C v. France*, App. No. 1462/18 and 17348/18*; D v. France*, App. No. 11288/18; *Valdís Fjölnisdóttir*, App. No. 71552/17.
27. *Mennesson*, 2014-III Eur. Ct. H.R. 257, ¶ 100.
28. *Labassee*, App. No. 65941/11, ¶ 59.
29. *See Foulon*, App. No. 9063/14 and 10410/14; *Laborie*, App. No. 44024/13; *Paradiso*, App. No. 25358/12; *C v. France*, App. No. 1462/18 and 17348/18; *D v. France*, App. No. 11288/18; *Valdís Fjölnisdóttir*, App. No. 71552/17.

element of the child's identity and best interests, but only concerning the genetic parent. The language that emerges emphasizes the importance of the genetic link when determining legal parenthood. The Court's reasoning embodies the assumption that social (*i.e.*, non-genetically related) parenthood resulting from the use of donor gametes and a surrogate mother does not rise to the level of an important facet of the child's identity.

The consequences of the ECtHR's stance are revealing in a domestic context. Following the ECtHR's jurisprudence, domestic supreme courts have refused to recognize legal parenthood in cases where neither of the intended parents have a genetic link with the child, thus allowing domestic authorities to register the child as being born to unknown parents and eventually give them up for adoption.[30] The ECtHR accepted this result in its decisions *Paradiso and Campanelli v. Italy*[31] and *Valdís Fjölnisdóttir and Others v. Iceland*.[32]

Third, in the recent case *D v. France*,[33] the ECtHR introduced a gender-discriminatory twist to its genetic view of legal parenthood. While pushing for giving full effect to the foreign birth certificate for the intended genetic father, the Court accepted that intended genetic mothers must go through the additional step of domestic adoption to establish a legal parent-child relationship.

This paper offers a critical reading of these recent jurisprudential developments pushed by the ECtHR. Their significance transpires beyond the individual outcomes in the cases concerned. Through the empirical evidence of the ECtHR case law, this paper documents the power of the genetic link in judicial recognition of legal parenthood in non-traditional families, pushed by an increasing reliance on genetic evidence and biological relatedness. The paper critically discusses the formal legitimization of biology's importance in the formulation of parental rights and obligations through judicial statements about the value of biological relationships in legal parenthood. In contrast to the

30. *See*, *e.g.*, two precedents of the Swiss Federal Supreme Court which follow the ECtHR's case law: Bundesgericht [BGer] [Federal Supreme Court] May 21, 2015, 141 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 312 [https://perma.cc/WJS7-GFC3] [hereinafter Swiss Same-sex Case]; Bundesgericht [BGer] [Federal Supreme Court] Sept. 14, 2015 141 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 328 [https://perma.cc/KT5Q-NMPV] [hereinafter Swiss Opposite-sex Case]. For more examples of domestic case law in the aftermath of the relevant ECtHR precedents, see Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10.

31. *Paradiso*, App. No. 25358/12.

32. *Valdís Fjölnisdóttir*, App. No. 71552/17.

33. *D v. France*, App. No. 11288/18.

purpose of ART—to surmount biological barriers—genetic essentialism, as relied on by the Court, encourages a biologically determined view of parenthood which sidelines the intended social parent and ignores the circumstances of non-traditional family creation. The paper addresses the disregard in the Court's precedents as to the situation of the intended social parents. These individuals usually play an equal role in the creation of non-traditional families but, due to the absence of a genetic link to the child, face obstacles and exclusions, if not discriminations, in obtaining recognition of parental status.

Furthermore, this paper attempts to situate the focus on biology as a natural blueprint of the social reality (of parenting) in the broader context of a reorientation towards genetics due to the technological advances in genetic medicine. This development has occurred in a line of ECtHR case law recognizing a new individual human right to know one's origins.[34] The Court has gradually recognized knowledge about one's genetic inheritance as something substantial to the human being and its well-being.[35] The recognition of this new human right is closely connected to the technological possibility of determining genetic relatedness with precision and the still unfolding scientific link of genetics to health and disease.

The paper argues that in the context of ART, technological progress impacts legal reasoning and recognition of new rights. The ECtHR's

34. *See, e.g.*, Phinikaridou v. Cyprus, App. No. 238/90 (December 20, 2007), https://hudoc.echr.coe.int/eng?i=001-84106; Mikulić v. Croatia, 2002-I Eur. Ct. H.R. 143; Çolak v. Turkey, App. No. 60176/00 (May 30, 2006) https://hudoc.echr.coe.int/eng?i=001-75510; Jäggi v. Switzerland, 2006-X Eur. Ct. H.R. 21, Kalacheva v. Russia, App. No. 3451/05 (May 7, 2009), https://hudoc.echr.coe.int/eng?i=001-92572; Grönmark v. Finland, App. No. 17038 /04 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-105630; Backlund v. Finland, App. No. 36498/05 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-99784; Pascaud v. France, App. No. 19535/08 (June 16, 2011), https://hudoc.echr.coe.int/eng?i=001-105158; A. M. M. v. Romania, App. No. 2151 /10 (February 14, 2012), https://hudoc.echr.coe.int/eng-press?i=003-3844592-4417275; Godelli v. Italy, App. No. 33783/09 (September 25, 2012), https://hudoc.echr.coe.int/eng?i=001-113460; Laakso v. Finland, App. No. 7361/05 (January 15, 2013), https://hudoc.echr.coe.int/eng?i=001-115861; Röman v. Finland, App. No. 13072/05 (January 29, 2013), https://hudoc.echr.coe.int/eng?i=001-115864; Gaskin v. UK, App. No. 10454/83, 12 Eur. H.R. Rep. 36 (1989); Odièvre v. France, 2003-III Eur. Ct. H.R.53.

35. *See, e.g.*, *Phinikaridou*, App. No. 238/90; *Mikulić*, 2002-I Eur. Ct. H.R. 143; *Çolak*, App. No. 60176/00*; Jäggi*, 2006-X Eur. Ct. H.R. 21, *Kalacheva*, App. No. 3451/05; *Grönmark*, App. No. 17038/04; *Backlund*, App. No. 36498/05; *Pascaud*, App. No. 19535/08; *A. M. M*., App. No. 2151/10; *Godelli*, App. No. 33783/09; *Laakso*, App. No. 7361/05; *Ro*

reasoning and its focus on genetic relatedness might be explained by the search for clarity in the context of fluid, non-traditional family forms. The technologies of genetic testing provide certainty. A dichotomy thus becomes apparent between ART which allow for the creation of a more plural and diversified social reality including non-traditional families, and genetic technologies which serve as a tool nudging towards a narrower legal definition of the parent-child relationship based on verifiable genetic relatedness. Eventually, these issues decided by the Court go beyond biological truth and its normative implications. They also speak to the political relationship between citizens and the polity and how polity membership is defined in a European context.

Finally, this paper addresses the gender discriminatory twist introduced by the ECtHR to its genetic view of legal parenthood in the context of cross-border surrogacy and speculates about the future trajectory of the ECtHR's jurisprudence. The Court accepts that intended genetic mothers must go through the additional procedural step of domestic adoption for their genetically related child. In contrast, intended genetic fathers benefit from direct legal recognition of the foreign birth certificate.[36] Thus, the Court seems to endorse an additional element of power and control over legal motherhood imposed by evaluating a genetic mother's fitness to be a legal mother, which violates the ECHR's prohibition of discrimination.

Part II of this paper briefly summarizes how the development and progress of ART have brought about significant social change by diversifying family creation and family life. Part III describes how current European domestic legal frameworks regulating ART still impose many restrictions on non-traditional family creation, forcing opposite-sex and same-sex couples to travel abroad to access services such as gamete donation and surrogacy. Cross-border surrogacy creates a situation of legal limbo in a domestic context, as the legal parent-child relationship and the critical consequences attached to this relationship are not recognized once these families return home. Through the empirical evidence of the ECtHR's case law, Part IV uncovers how the Court has taken an active stance in forcing European states to address the legal limbo and recognize legal parenthood for children born through cross-border surrogacy, with an exclusive focus on genetics, identity, and best interests. Part V depicts the latest twist in the ECtHR's case law on cross-border surrogacy, refusing parity of reasoning for recognizing legal motherhood and fatherhood. Part VI offers a critical analysis of the Court's reasoning and its positions; in particular, its genetic essentialism and the gender-

36. D v. France, App. No. 11288/18 at ¶¶ 43, 62, 85, and 86.

discriminatory aspects of recognizing legal parenthood in cross-border surrogacy cases. Part VII concludes, reflecting on how scientific progress allows for the creation of more diversified family forms, while the ECtHR limits its reasoning to the biological truth of genetics, thus disregarding both the child's and the intended social parent's interests and rights.

II. TECHNOLOGY AND SOCIAL CHANGE

Our growing knowledge of reproduction and genetics has facilitated the development and success of ART.[37] These technologies diversify how parenthood may be achieved, including through egg, sperm, and embryo donation, artificial insemination, in vitro fertilization (IVF), and traditional and gestational surrogacy.[38] The impact of ART, however, goes beyond science and medicine.

ART usage has broadened to not only treat medical conditions but also to address social realities, such as in the case of same-sex couples whose desire to become parents is hindered by a biological obstacle.[39] As such, ART have allowed for questioning and disrupting the biological underpinnings of traditional conceptions of family and parenthood, pushing away from the heteronormative and bionormative standards of a married male-female couple and their biologically related children.[40] In other words, ART explode the myth that parenthood and family are purely biological.[41] The technology is not at the origin of changing conceptions of the family, but has pushed the unfolding of this ongoing development of social change. Since ART make it possible to split up

37. *See* Ruth Deech, *Family Law and Genetics*, 61 MOD. L. REV. 697, 697-98 (1998).
38. Egg and sperm donations implicate the genetic material of one individual, while an embryo contains the genetic material of two individuals. In gestational surrogacy, the surrogate mother is not genetically related to the embryo she is carrying. In traditional surrogacy, she is genetically related to the embryo.
39. Maule & Schmid, *supra* note 15, at 479.
40. *See* DOLGIN, *supra* note 2. As Dolgin notes, "society faces dramatic shifts in the contours and significance of what has, for centuries, been among its central institutions — the family." *Id.* at ix. Dolgin situates the contribution of ART to these shifts as follows: "[A]lthough reproductive technology has revolutionized traditional understandings of the family, the advent of reproductive technology did not initiate the process of change. The new technological options for human reproduction did not come widely available until after the family (and family law) had accepted a wide set of changes, including no-fault divorce, nonmarital cohabitation, and prenuptial agreements in contemplation of divorce, that challenge traditional understandings of proper family relationships." *Id*. at 4.
41. *See* Mykitiuk, *supra* note 7.

genetic, gestational, and social parenthood, they fragment the concept of family and promise diversified family creation and family life.[42]

III. SOCIAL REALITY AND LEGAL LIMBO

In the European context, restrictive family laws and health laws regulating access to ART pose significant obstacles to realizing this technological promise of social change in favor of non-traditional families. Existing regulatory frameworks not only affect potential parents as patients with fertility issues but also reflect an attempt to control what is meant by the family. Both family laws and ART regulations depart from the liberal ideal of state neutrality and express a hierarchy of desirable—traditional—family forms, thus pursuing a legal ideology of the family.[43] This context is crucial to understand the phenomenon of cross-border surrogacy and the legal limbo the parents and their children find themselves in.

Two major variables define access to ART: the type of services permitted or prohibited and the individuals allowed access to the services provided.[44] Family law and ART regulation based on a traditional notion of the family circumscribe these two variables and impose restrictions on non-traditional family creation for same-sex couples, opposite-sex couples, and individuals.[45] The term traditional refers to two opposite-sex parents, a mother and a father, with children to whom they are

42. *See* Mykitiuk, *supra* note 7; Garrison, *The Technological Family, supra* note 14; Anderson, *supra* note 14; Meyer, *supra* note 14; Garrison, *Law Making for Baby Making, supra* note 2; Kessler, *supra* note 6; Robinson & Miller, *supra* note 14; DOLGIN, *supra* note 2; S. Golombok, C. Murray, V. Jadva, E. Lycett, F. MacCallum & J. Rust, *Non-Genetic and Non-Gestational Parenthood: Consequences for Parent–Child Relationships and the Psychological Well-Being of Mothers, Fathers and Children at Age 3*, 21 HUM. REPROD. 1918 (2006); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951 (1995). Langdridge and Blyth define "traditional" as two opposite-sex parents with children to whom they are biologically related and conceived without medical or third party assistance. Langdridge & Blyth, *supra* note 6, at 55. Some authors argue that ART push towards an area of family creation and family life based on intent, choice, and contract. *See, e.g.*, YEHEZKEL MARGALIT, DETERMINING LEGAL PARENTAGE: BETWEEN FAMILY LAW AND CONTRACT LAW (2019) [hereinafter MARGALIT, DETERMINING LEGAL PARENTAGE]; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002) [hereinafter Storrow, *Parenthood by Pure Intention*]; Gillian Douglas, *The Intention to be a Parent and the Making of Mothers*, 57 MOD. L. REV. 636 (1994).

43. *See* Mykitiuk, *supra* note 7.

44. Langdridge & Blyth, *supra* note 6, at 48.

45. *See* MARGARIA, *supra* note 4.

biologically related ("nuclear ideal").[46] This notion of the family is the archetype that retains considerable influence in framing European domestic laws. However, it is becoming increasingly distant from the lived reality of many European families and their children.[47]

One of the driving forces of restrictive family laws and health laws regulating access to ART are bionormative naturalness arguments. Nature, naturalness, or bionormativity—according to which only parenthood links which may occur in nature are good and thus allowed—is still very present in Europe.[48] Through relying on the concept of nature

46. Langdridge & Blyth, *supra* note 6, at 55.

47. *See* Salamon, *supra* note 18; INGEBORG SCHWENZER, TENSIONS BETWEEN LEGAL, BIOLOGICAL AND SOCIAL CONCEPTIONS OF PARENTAGE (2007); Trimmings & Beaumont, *supra* note 4; Roseneil et al., *supra* note 4; Carmen Garcimartin, *Defining Familial Relations Within the Law: Nuclear Family vs. Extended Family*, 3 INT'L J. JURISPRUDENCE FAM. 85 (2012). The same is true for the United States. *See*, *e.g.*, Cahn, *New Kinship*, *supra* note 13; William N. Eskridge Jr, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2011); Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012); Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) [hereinafter Nejaime, *Marriage Equality*]; Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015); Martha Minow, *All in the Family & in all Families: Membership, Loving, and Owing*, 95 W. VA. L. REV. 275 (1993); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007); Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012); Robinson & Miller, *supra* note 14; Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233 (2015). For the Canadian context, *see* Campbell, *supra* note 14; Mykitiuk, *supra* note 7.

48. *See* Kessler, *supra* note 6. For a historical perspective on bionormativity, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008). The Swiss government, in its 1996 report accompanying the draft of the Federal Act on Medically Assisted Reproduction, provides an enlightening example of bionormativity: "Nature wants every child to have a father and a mother. These individuals have special importance for the development of the child. . . . These fundamental principles of human nature must be respected in the implementation of ART. Thus these techniques should be considered only for heterosexual couples, a woman and a man, who intend to assume all parental responsibility together." 26 BBL III 205, 250 (1996) (Switz.). Moreover: "The fact that medically assisted reproduction should not give rise to family relations which differ from those which nature makes possible is decisive." *Id.* at 254. The Swiss government continued to adhere to these bionormative tendencies in 2013, in its report on the revision of the constitutional article on reproductive medicine: "The right of a child resulting from IVF treatment to have a father and a mother, and to grow up in a family as children conceived naturally, must also be guaranteed." Federal Council, Botschaft zur Änderung der Verfassungsbestimmung zur Fortpflanzungsmedizin und Gentechnologie im Humanbereich (Art. 119 BV) sowie des Fortpflanzungsmedizingesetzes

and using biology for normative purposes, many European regulations still bar access to ART for same-sex couples, arguing that in their case, there is no medical indication for treatment (social as opposed to medical infertility).[49] It is true that in both areas, family law and access to ART, regulations in European states have been liberalized over the years by national legislatures, gradually expanding rights for same-sex couples and non-traditional families.[50] However, the liberalization and diversification witnessed are mainly limited to adult relationships and family life.[51] It has not yet broadly reached the legal parent-child relationship.[52] As Margaria notes that "despite the trend of providing some form of legal recognition to same-sex relationships mainly through civil partnership, the institution of marriage and, most importantly, the rights and benefits associated to it—for instance, adoption rights or access to ARTs—remain mostly reserved for heterosexual couples."[53] The link between marital status, sexual orientation, and access to ART remains strong under the current restrictive regulations.[54]

Certain ART, such as egg donation, are barred for opposite-sex couples as well, based on the normative argument that genetic and gestational motherhood should not be split.[55] Commercial surrogacy is

(Präimplantationsdiagnostik) vom 7 BBL 5853, 5953 (2013) (Switz.). For a critic, *see* Melanie Levy, *Beyond Bionormativity - Revision of Article 119 of the Swiss Constitution*, *in* RÉVISION IMAGINAIRE DE LA CONSTITUTION FÉDÉRALE: MÉLANGES EN HOMMAGE AU PROF. LUZIUS MADER 193 (Sophie Weerts et al. eds., 2018).

49. Langdridge & Blyth, *supra* note 6; MARGARIA, *supra* note 4.
50. *See, e.g.*, Kessler, *supra* note 6; Roseneil et al., *supra* note 4; MARGARIA, *supra* note 4.
51. Kessler, *supra* note 6; Roseneil et al., *supra* note 4; MARGARIA, *supra* note 4; Langdridge & Blyth, *supra* note 6, at 55. ("One of the major remaining institutionalized prejudices for lesbians and gay men concerns their right to have and/or care for children as evidenced by the regulation of assisted conception services throughout Europe.").
52. The rights of same-sex couples to adopt children and access ART are limited in most European states. Out of the forty-nine European countries indexed in the ILGA-Europe Rainbow Map 2020, only seventeen allow for joint adoption, nineteen allow for second-parent adoption, fourteen allow for access to ART, and ten allow for automatic co-parent recognition. *See* Salamon, *supra* note 18; Busardò et al., *supra* note 18. ILGA-Europe Rainbow Map, *supra* note 18.
53. MARGARIA, *supra* note 4, at 128.
54. MARGARIA, *supra* note 4; Salamon, *supra* note 18; Busardò et al., *supra* note 18. ILGA-Europe Rainbow Map, *supra* note 18. In Europe, the symbolic power of the marriage sacrament, which sought to perpetuate the opposite-sex couple relationship for reproduction, still figures prominently. There still is a (normative) link between marriage or marital status and access to parenthood through adoption and ART in many European states. *See* Salamon, *supra* note 18; Busardò et al., *supra* note 18.
55. *See* S.H. v. Austria, 2011-V Eur. Ct. H.R. 297.

prohibited in most of Europe, except Ukraine, Russia, and Belarus.[56] Non-commercial surrogacy is legal in the UK, the Netherlands, Denmark, Portugal, and the Czech Republic. In Greece, Belgium, Spain, and Finland, surrogacy is not regulated by law, but it is not prohibited either. Beyond bionormativity, restrictions on surrogacy are maintained based on additional arguments, such as the protection of vulnerable women against exploitation, commercialization of the female body and pregnancy, protection against trafficking, and the child's best interests.[57]

Access to ART grants access to family creation and family life. Restrictive European domestic legal frameworks on access to ART are equivalent to restrictions on non-traditional family creation. They force same-sex couples, opposite-sex couples, and individuals, to travel abroad to obtain assisted reproduction services such as sperm, ova, and embryo donation, and surrogacy services. A normative analysis of cross-border reproductive services and their consequences on the individuals involved, in particular the surrogate mothers, goes beyond the scope of this paper.[58] However, from the intended parent perspective, it is critical to note that the cross-border element is a forced element, as no alternative is available to them domestically.[59] Having to travel abroad, these couples or individuals create social realities of families that do not fit into the traditional family law framework as maintained in their domestic contexts.

The social reality of using cross-border fertility services has bypassed the state of domestic law, revealing a conflict between the law's certainty and the fluidity and openness of non-traditional family forms. The disjuncture between social practice and domestic legal regimes creates a situation of legal limbo for these children and their families. What does this legal limbo look like if the social reality of non-traditional families created abroad is not transformed into a legal reality in the domestic context? Once back home, these families struggle to have birth certificates

56. Valeria Piersanti, Francesca Consalvo, Fabrizio Signore, Alessandro Del Rio & Simona Zaami, *Surrogacy and "Procreative Tourism," What Does the Future Hold from the Ethical and Legal Perspectives?*, 57 MEDICINA 47 (2021).

57. DOLGIN, *supra* note 2; Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Gruenbaum, *supra* note 14.

58. DOLGIN, *supra* note 2; Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Gruenbaum, *supra* note 14.

59. Ní Shúilleabháin, *supra* note 9; Storrow, *Proportionality Problem*, *supra* note 9; Storrow, *Quests for Conception*, *supra* note 9.

officially recognized because surrogacy is prohibited by domestic law.[60] Inscribing a child's birth into a state database for civil status records and establishing a legal parent-child relationship—the civil status of a family member as a legal parent—is a precondition for claiming other rights and benefits. Having two legal parents entitles the child to both parents' employer or government-sponsored health and disability insurance, education, housing, and nutrition assistance; and social security benefits.[61] Recognition of legal parenthood is also essential for inheritance and in cases of separation, divorce, or death of the parents. Furthermore, the legal limbo also impacts the political relationship between citizen and polity, as recognizing legal parenthood is a precondition for establishing the child's citizenship.[62] All of these legal challenges occur regardless of whether the couple is same-sex or opposite-sex.

ART have led to widespread impact, even though only a small percentage of children are born through cross-border surrogacy.[63] Furthermore, the number of children born in such circumstances is

60. Birth certificates for children born through cross-border fertility services include both cases of children born through ART when the partner of the child's biological parent is granted parental rights based on a second-parent adoption and is subsequently inscribed onto the birth certificate, and cases when the second non-biological parent obtains parental rights and is inscribed onto the birth certificate immediately at the child's birth. This also includes cases of surrogacy in which two opposite-sex or same-sex partners are registered as intended and legal parents on the birth certificate, independently of their respective genetic link to the child.

61. MARGARIA, *supra* note 4; Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6; Storrow, *Proportionality Problem*, supra note 9; Mulligan, *supra* note 6; Kessler, *supra* note 6; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Iliadou, *supra* note 10; Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Holtzman, *supra* note 15.

62. Caitlin Pryce, *Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem*, 23 IND. J. GLOB. LEGAL STUD. 925 (2016); Charles P. Kindregan & Danielle White, *International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements*, 36 SUFFOLK TRANSNAT'L. L. R. 527 (2013); Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6, at 63. As Storrow notes, "citizenship is transmitted to the newly born via consanguinity with a citizen parent—jus sanguinis. The blood tie assumes central importance as the ultimate symbol of citizenship. Birth certificates in this system provide evidence of consanguinity and are recorded not only to define lines of descent but to transmit citizenship. The evidence of consanguinity they contain is sufficient for the child to achieve the status of a citizen. But if the mother named in the birth certificate is not the natural mother, then anxiety about whether citizenship has been properly or ought to be transmitted results. It is a question, it turns out, about the public order." *Id*.

63. Maule & Schmid, *supra* note 15.

rising.[64] While official numbers are lacking, a report of the European Parliament of 2013 clearly shows an increase in the number of individuals and couples who create their families through surrogacy.[65]

IV. LEGAL PARENTHOOD IN CROSS-BORDER SURROGACY FAMILIES: THE ECTHR'S FOCUS ON GENETICS

In many European states, political decision-making processes have been slow to adjust the law to new social realities in the context of family and ART.[66] Confronted with legislative inaction, some families seek judicial adjudication to clarify their status, forcing the courts to deal with the gap between family law and the social realities of non-traditional families.[67] Therefore, the judiciary gets involved in conceptualizing non-traditional families and debating their legal recognition.

This paper documents empirical evidence from a bundle of recent cases on the legal parenthood ramifications of cross-border surrogacy adjudicated by the ECtHR in the early 21st century. It analyzes how the ECtHR considers the social reality of non-traditional families and paves the way for the legal recognition of more diverse family forms. Disentangling judicial reasoning and rationales through the empirical evidence of the ECtHR's case law allows for a critical analysis of the shifting normativities in the definition of legal parenthood in the European context. As Storrow notes,

64. Kessler, *supra* note 6; Justo Aznar & Miriam Martínez Peris, *Gestational Surrogacy: Current View*, 86 LINACRE Q. 56 (2019).

65. Laurence Brunet, Janeen Carruthers, Konstantina Davaki, Derek King, Claire Marzo & Julie McCandless, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, *A Comparative Study on the Regime of Surrogacy in EU Member States*, PE 474.403 (2013).

66. MARGARIA, *supra* note 4; Salamon, *supra* note 18; Busardò et al., *supra* note 18.

67. Mennesson v. France, 2014-III Eur. Ct. H.R. 257; Labassee v. France, App. No. 65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378; Foulon and Bouvet v. France, App. No. 9063/14 et 10410/14 (July 21, 2016), http://hudoc.echr.coe.int/eng?i=001-165462; Laborie v. France, App. No. 44024/13 (January 19, 2017), https://hudoc.echr.coe.int/eng?i=001-170661; Paradiso v. Italy, App. No. 25358/12 (January 24, 2017) https://hudoc.echr.coe.int/eng?i=001-170359; C v. France, App. No. 1462/18 and 17348/18 (November 19, 2019); https://hudoc.echr.coe.int/eng?i=003-6589814-8731890; D v. France, App. No. 11288/18 (July 16, 2020), https://hudoc.echr.coe.int/eng?i=001-203938; Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 (May 18, 2021), https://hudoc.echr.coe.int/eng?i=001-209992.

> [C]ourts play an essential function in holding the more extreme manifestations of majoritarian control in check, thereby safeguarding the rights of minorities. An effective judiciary is necessary to ensure that democracy will function well enough to respect minority rights. This is the role that the members of the Council of Europe have agreed the [ECtHR] should fulfill.[68]

The ECtHR's approach to judicial intervention depends on the issues at stake.[69] If there is a lack of consensus within the Member States of the Council of Europe, either as to the relative importance of an interest or as to the best means of protecting it, in particular where the case raises sensitive moral or ethical issues (*e.g.*, abortion, ART, adoption, assisted suicide, euthanasia), the Court grants a wide margin of appreciation at the domestic level. However, when a particularly important facet of an individual's existence or identity is at stake (*e.g.*, knowledge about one's origins, physical and moral security, and possibility of personal development of transsexuals), the Court usually narrows the Member States' margin.[70] This distinction has a significant impact on how the ECtHR developed its case law regarding legal parenthood ramifications of cross-border surrogacy.

A. *Taxonomy of ECtHR Case Law*

A brief taxonomy of the ECtHR's case law in the context of ART provides an overview of the Court's stance in these matters.[71] First of all, there is case law on individuals' reproductive rights in the context of *traditional family creation* through ART, that is, opposite-sex couples in need of ART such as IVF to become parents using their own eggs and sperm.[72] Another area of jurisprudence concerns *non-traditional family*

68. Storrow, *Proportionality Problem*, *supra* note 9 at 146. *See also* Baer, *supra* note 16 (noting the importance of the ECtHR for the protection of minority rights in Europe).

69. Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495 (2018).

70. For a detailed discussion of the ECtHR's doctrine on the margin of appreciation and relevant case law, see European Court of Human Rights, *Guide on the Article 8 of the European Convention on Human Rights—Right to Respect for Private and Family Life, Home and Correspondence*, Case-Law Guide (2021), [https://perma.cc/8SKD-4RVV].

71. *See also* Büchler, *supra* note 15; Mulligan, *supra* note 6; Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6.

72. For cases concerning reproductive rights but unrelated to non-traditional family formation, see Evans v. United Kingdom, App. No, 6339/05 (April, 10 2007),

creation through ART. These cases are brought forward by same-sex and opposite-sex couples and individuals in need of ART such as IVF, egg, sperm, or embryo donation, and/or surrogacy to realize their desire to become parents.

The ECtHR's jurisprudence in the area of *non-traditional family creation* can be divided into two categories. The first category includes cases in which individuals demand a general change of principles, contesting restrictive domestic ART regulation and claiming access to ART prohibited by domestic law (*e.g.*, access to egg donation for opposite-sex couples, sperm donation for same-sex couples). In this area, the Court has usually refrained from intervening, granting Member States a wide margin of appreciation to regulate domestic access to ART.[73] By doing so, the Court expresses respect for democracy, subsidiarity, and sovereignty of the Member States. At the same time, the Court underlines the importance of keeping fast-moving scientific and legal developments in the field of ART under review, leaving the door open for the evolution of its jurisprudence in the matter.[74] The Court recognizes that the

https://hudoc.echr.coe.int/eng?i=001-80046; Dickson v. United Kingdom, App. No.44362/04 (December 4, 2007), https://hudoc.echr.coe.int/eng?i=001-83788; Costa and Pavan v. Italy, App. No. 54270/10 (August, 28 2012), https://hudoc.echr.coe.int/eng?i=001-112993; Knecht v. Romania, App. No. 10048 /10 (October 2, 2012).

73. The Court has so far refrained from using human rights to challenge the limits on non-traditional family creation set by traditional family law and restrictive ART regulation, based on the right to respect for private and family life (Article 8), or equal treatment and non-discrimination (Article 14). The most common legal restrictions on ART tend to burden the creation of social parenthood relationships or single-parent families. In this context of non-traditional family creation, or, as the ECtHR describes it, "unusual family relations . . . which do not follow the typical parent-child relationship based on a direct biological link," the Court has granted a wide margin of appreciation to Member States to regulate ART and place restrictions on access to these technologies in a domestic context. *See* S.H. v. Austria, 2011-V Eur. Ct. H.R. 297. For domestic regulation restricting access to adoption for same-sex couples and single individuals, the situation is different. Here the ECtHR has intervened, recognizing a violation of the parent's rights, *i.e.*, Article 14 (prohibition of discrimination) in conjunction with Article 8 ECHR (right to respect for private and family life). *See* Wagner and J.M.W.L. v. Luxembourg, App. No.76240/01 (June 28, 2007) https://hudoc.echr.coe.int /eng?i=001-81328; E.B. v. France, App. No. 43546/02 (January 22, 2008) [https://perma.cc/7PF7-XX2J]; X v. Austria, 2013-II Eur. Ct. H.R. 1. However, the Court has not recognized discrimination in cases of difference of treatment based on marriage, *i.e.*, limiting common or stepparent adoption to married couples is not a violation of Article 14 in conjunction with Article 8 ECHR. *See* Gas and Dubois v. France, 2012-II Eur. Ct. H.R. 245.

74. S.H. v. Austria, 2011-V Eur. Ct. H.R. 297.

Convention's interpretation should be made in light of present-day conditions, and thus is a living instrument.[75]

The second category concerns cases of cross-border reproductive services in which individuals are pushed to leave their jurisdiction due to restrictive domestic ART regulation and then depend on status normalization and the creation of a legal reality for children born abroad through ART and surrogacy. In this strand of case law, the Court has been confronted with existing non-traditional families, children born into these families through cross-border reproductive services and surrogacy, and non-recognition of the children in the parent's country of origin. These cases thus raise the issue of recognition of legal parenthood, that is, the legal parent-child relationship. Here the Court has engaged in a more proactive approach, refusing to grant a wide margin of appreciation to the Member States. It has established European legal standards for recognizing legal parent-child relationships that authorities must adhere to, irrespective of the domestic legal framework that might prohibit specific ART or surrogacy.[76]

The paper only briefly alludes here to the first category and focuses on the second category henceforth. It does not address the broader issue concerning the boundaries of the legal concept of family life and the protection of family life in Article 8 ECHR.[77] This issue was addressed, for example, in *Paradiso and Campanelli v. Italy*.[78] In this case, the Grand Chamber denied the existence and protection of *de facto* family life between the intended parents and their genetically unrelated child born through cross-border surrogacy.[79] In *Valdís Fjölnisdóttir and Others v.*

75. S.H. v. Austria, 2011-V Eur. Ct. H.R. 297.

76. Mennesson v. France, 2014-III Eur. Ct. H.R. 257; Labassee v. France, App. No. 65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378; Foulon v. France, App. No. 9063/14 et 10410/14 (July 21, 2016), http://hudoc.echr.coe.int/eng?i=001-165462; Laborie v. France, App. No. 44024/13 (January 19, 2017), https://hudoc.echr.coe.int/eng?i=001-170661; Paradiso v. Italy, App. No. 25358/12 (January 24, 2017) https://hudoc.echr.coe.int/eng?i=001-170359; C v. France, App. No. 1462/18 and 17348/18 (November 19, 2019), https://hudoc.echr.coe.int/eng?i=003-6589814-8731890; D v. France, App. No. 11288/18 (July 16, 2020), https://hudoc.echr.coe.int/eng?i=001-203938; Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 (May 18, 2021), https://hudoc.echr.coe.int/eng?i=001-209992.

77. Büchler, *supra* note 15; Linda Hart, *Anthropology of Kinship Meets Human Rights Rationality: Limits of Marriage and Family Life in the European Court of Human Rights*, 20 EUR. SOCIETIES 816 (2018).

78. *Paradiso*, App. No. 25358/12.

79. *Paradiso*, App. No. 25358/12. For a detailed case discussion, see Ní Shúilleabháin, *supra* note 9; Iliadou, *supra* note 10; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Mulligan, *supra* note 6; Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10.

Iceland, which also involved a child born through cross-border surrogacy and their intended, genetically unrelated parents, the Court recognized, however, *de facto* family life.[80] While essential in the context of non-traditional families created through (cross-border) reproductive services, the legal concept of family life[81] and its protection goes beyond the scope of this paper which focuses on the recognition of the legal parent-child relationship.

B. *Mennesson v. France and Labassee v. France*

In *Mennesson v. France*[82] and *Labassee v. France*[83] the ECtHR condemned France for infringement of Article 8 ECHR (right to respect for private and family life). Both cases involved the French authorities' refusal to recognize parent-child relationships legally established in the U.S.A. between children born through surrogacy and their intended parents.

The facts of the two cases are similar. They both involve an opposite-sex French couple and their children conceived and born abroad in the U.S.A. via egg donation, sperm of the French father, and a surrogate mother. The genetic ties between the children and their French fathers were established. The U.S. authorities issued a birth certificate recognizing the intended parents as the legal parents. On the parents' return to France, the French authorities refused to transcribe the details of the birth certificates, and thus, the legal parenthood link of the children with their intended parents, in the Central Civil Register of Births, Marriages, and Deaths. Although aware that the children had been legally identified elsewhere as the children of the intended parents, the French authorities did not recognize their relationship.

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80. *Valdís Fjölnisdóttir*, App. No. 71552/17. For a detailed case discussion, see Julian W. März, *What Makes a Parent in Surrogacy Cases? Reflections on the* Fjölnisdóttir et al. v. Iceland *Decision of the European Court of Human Rights*, 21 MED. L. INT'L 272 (2021); Lydia Bracken, *Cross-Border Surrogacy Before the European Court of Human Rights: Analysis of* Valdís Fjölnisdóttir And Others v. Iceland, 28 EUR. J. HEALTH L. 1 (2021) [hereinafter Bracken, *Cross Border Surrogacy*].

81. The existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties. The notion of "family" in Article 8 concerns marriage-based relationships, and also other de facto "family ties" where the parties are living together outside marriage or where other factors demonstrate that the relationship had sufficient constancy. For an excellent summary of the relevant case law, see *Paradiso*, App. No. 25358/12.

82. Mennesson v. France, 2014-III Eur. Ct. H.R. 257.

83. Labassee v. France, App. No. 65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378.

France justified its refusal to recognize a legal relationship between children born abroad through surrogacy and the intended parents on several grounds. French public policy precludes registration in the Central Civil Register of Births, Marriages, and Deaths if a foreign birth certificate's details conflict with essential principles of French law.[84] Under French law, surrogacy agreements are null and void. As such, French authorities claimed it was contrary to the inalienability of civil status to give effect to such agreements regarding the legal parent-child relationship.[85] They also aimed to discourage French nationals from having recourse outside France to a reproductive technique prohibited within the country.[86] Finally, French authorities were concerned with tacitly accepting the circumvention of domestic law, thus "jeopardi[zing] the consistent application of the provisions outlawing surrogacy."[87]

French law's failure to recognize the parent-child relationship affected the applicants' family life on various levels. As they did not have French documents, the applicants were obliged to produce the American civil-status documents, accompanied by a sworn translation, whenever access to a right or service required proof of the legal parent-child relationship. These documents were sometimes met with suspicion or incomprehension. The parents referred to difficulties encountered when registering their children with social security, enrolling them at a school canteen or an outdoor center, and applying to the Family Allowances Office for financial assistance. Furthermore, the applicant children had not obtained French nationality, which affected the families' travels, caused concern regarding the children's right of residence in France once they became adults, and undermined the stability of the family unit. There were also concerns about the authorities' reaction in the event of the biological father's death or the couple's separation, and concerns about inheritance.[88]

In *Mennesson* and *Labassee*, the ECtHR, for the first time, examined the authorities' refusal to recognize the parent-child relationship between children born through surrogacy abroad and the individuals who initiated the surrogacy to create their family in the domestic legal order.[89] First, the Court specified that there had been an interference in the exercise of

84. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 82.
85. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 82.
86. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 62.
87. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 83.
88. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶¶ 68-91.
89. *See also,* for similar, later cases: Foulon v. France, App. No. 9063/14 et 10410/14 (July 21, 2016), http://hudoc.echr.coe.int/eng?i=001-165462; Laborie v. France, App. No. 44024/13 (January 19, 2017), https://hudoc.echr.coe.int/eng?i=001-170661.

the rights guaranteed by Article 8 ECHR not only regarding family life but also private life of the individuals involved.[90] In its reasoning, the Court then distinguished between the parents' and the children's rights.

Examining the parents' rights, the Court concluded that the French authorities' decision did not cause excessive disruption to their family life. As they could reside in France together as a family, a just balance is achieved between the parents' interest to care for their children and the state's interest to discourage the practice of surrogacy. Consequently, the Court held that the practical consequences and difficulties for their family life due to the lack of domestic recognition of the legal parent-child relationship did not amount to a violation of the right to respect for family life (Article 8 ECHR). The Court argued that *de facto* family life is possible even without recognizing a legal parent-child link.[91]

The Court then turned to the children's rights. It recognized that France might legitimately wish to discourage its citizens while they are abroad from using ART that is prohibited domestically. However, as the Court noted, "the effects of non-recognition in French law of the legal parent-child relationship between children thus conceived and the intended parents are not limited to the parents alone. . . . They also affect the children themselves."[92]

Addressing the situation of legal limbo, the Court held that the non-recognition of the legal parent-child link constitutes a violation of the child's right to respect for private life (Article 8 ECHR).[93] According to the Court, respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship.[94] In the words of the Court, "an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned."[95] As French law refuses to recognize the parent-child relationship between the intended parents and the children, the children find themselves in a state of "legal uncertainty" undermining their identity within French society.[96] The Court noted that "uncertainty is liable to have negative repercussions on the definition of their personal identity."[97] More specifically, the Court identified nationality and inheritance rights as relevant elements of a person's

90. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 49.
91. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶¶ 92–94.
92. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 99.
93. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 101.
94. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 96.
95. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 80.
96. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 96.
97. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 97.

identity.[98] Although the children's genetic father is French, they are unable to obtain French nationality.[99] Also, the children's inheritance rights are "less favorabl[e]" as they can only inherit from the intended parents as legatees.[100]

The Court's remedy to the situation of legal limbo is, however, significantly qualified. Its considerations on identity and the legal parent-child relationship rely on an additional component: the intended father is also the children's genetic father. The existence of this biological relationship is decisive in the Court's findings. As the Court noted, its analysis of the situation "takes on a special dimension where, as in the present case, one of the intended parents is also the child's biological parent."[101]

The Court underlined "the importance of biological parentage as a component of identity."[102] It thus admitted that the right to respect for private life under Article 8 ECHR includes the right to have one's descent established in law, but only insofar as genetic descent is concerned. The refusal to recognize a parent-child relationship legally established abroad constitutes a violation of Article 8 ECHR, but only with regard to one of the intended parents, the genetic parent, and not the other, social parent.

Beyond the child's identity, the connection of that identity to legal parenthood, and the importance of genetics, the Court heavily relied on the child's best interests standard in its reasoning. The child's best interest is a recognized and long-standing legal standard in family law.[103] It is also

98. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶¶ 97-98.

99. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 97.

100. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 98. A deceased's estate is divided among their legal heirs, *i.e.*, the persons that the law says have the right to inherit their assets, and other individuals designated as legatees under the terms of the will of the person who has died. Legal heirs are a deceased person's spouse or partner (husband, wife, or registered partner) and their closest relatives (their children, or if they do not have children, their parents, or siblings). Legal heirs inherit in a predetermined order, according to their statutory succession rights. The protection offered by the law to legal heirs is stronger in comparison to the legatee's status (*e.g.*, statutory entitlement of legal heirs). Furthermore, a deceased person's children are normally exempt from inheritance taxes, while legatees do not typically get such an exemption. Ní Shúilleabháin, *supra* note 9, at 109.

101. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 100.

102. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 100.

103. *See, e.g.*, LYDIA BRACKEN, SAME-SEX PARENTING AND THE BEST INTERESTS PRINCIPLE (2020) [hereinafter Bracken, Same-Sex Parenting]; FUNDAMENTAL RIGHTS AND BEST INTERESTS OF THE CHILD IN TRANSNATIONAL FAMILIES (ELISABETTA BERGAMINI, CHIARA RAGNI & FRANCESCO DEANA, EDS. 2019); Geoffrey Willems, *La filiation et l'intérêt supérieur de l'enfant dans la jurisprudence de la Cour européenne des droits de l'homme*, 2018 JOURNAL EUROPÉEN DES DROITS DE L'HOMME [EUR. J. HUM. RTS.] 435 (Fr.); Büchler, *supra* note 15.

an established standard in the Court's decision-making.[104] The Court's reflections in this context focus on the clash between public policy considerations regarding surrogacy and the child's right to respect for private life guaranteed by Article 8 ECHR.[105]

In line with its established case law, whenever the Court examined whether a fair balance was struck between the public interest and respect for private and family life, it highlighted "the essential principle according to which, whenever the situation of a child is an issue, the best interests of that child are paramount."[106]

Reducing its analysis of the child's best interests to genetics, the Court underlined that:

> Having regard to the importance of biological parentage as a component of identity . . . it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof.[107]

The ECtHR declared the situation of legal limbo as incompatible with the child's best interests.[108] The non-recognition of the legal parent-child relationship severely restricts the child's ability to establish their identity in law. Their right to respect for private and family life has thus been violated.[109] It follows from the Court's decision, first of all, that the child's best interests standard prevails over domestic public policy considerations regarding surrogacy and adoption.[110] Furthermore, the child's best interests are safeguarded if the child's legal relationship with one parent, the genetic parent, is recognized.

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104. The best interests of the child is a preeminent part of the UN Convention on the Rights of the Child (UNCRC), enshrined in Article 3 ("In all actions concerning children . . . the best interests of the child shall be a primary consideration."). *See* G.A. Res. 44/25, at 2 (Nov. 20, 1989). The ECtHR has recognized the child's best interests as an essential part of the Article 8 ECHR balancing exercise, even though the ECHR does not explicitly refer to the child's best interests and the ECtHR is not a party to the UNCRC. *See* Willems, *supra* note 103.

105. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶¶ 84, 99.

106. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 81. "[T]he child's best interests, respect for which must guide any decision in their regard." *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 99.

107. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶100.

108. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶100.

109. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶101.

110. *See* Mulligan, *supra* note 6, at 460.

C. *Advisory Opinion: Adoption as an Acceptable Alternative*

The legal status of the relationship between the child and a second, genetically unrelated, parent (*i.e.*, the intended mother as in *Mennesson v. France*[111] and *Labassee v. France*[112]) remained unresolved in these two cases. The issue came up, again in the French context, when the French Court of Cassation requested an advisory opinion from the ECtHR.[113] Advisory opinions are a new tool in the ECtHR's general architecture, allowing the Court to provide guidance to a requesting domestic court on Convention issues when determining a case before it, without transferring a dispute to the ECtHR.[114] Advisory opinions are non-binding and do not have value of a precedent.

In its request for an advisory opinion, the French Court of Cassation addressed two questions to the ECtHR:[115] 1. Does the non-recognition of a legal relationship between a child born abroad as the result of a gestational surrogacy arrangement and their intended mother (designated as the legal mother in the foreign birth certificate) violate Article 8 ECHR? And should a distinction be drawn according to whether or not the child was conceived using the eggs of the intended mother? 2. Does the possibility for the intended mother to adopt the child of her spouse, the genetically-related father, to establish a legal mother-child relationship ensure compliance with Article 8 ECHR?

In its first-ever *Advisory Opinion,* in April 2019,[116] the Court clarified its position as follows: With regard to the first question, the Court noted that preventing a child born through surrogacy from obtaining legal recognition of their relationship with their intended mother is incompatible with their best interests.[117] Here, the Court's analysis of the child's best interests goes beyond genetics. The Court states that the best interests standard also includes the child's legal and economic interests, including citizenship, welfare benefits, security in case

111. *Mennesson*, 2014-III Eur. Ct. H.R. 257.
112. Labassee v. France, App. No. 65941/11 (June 26, 2014), https://hudoc.echr.coe.int/eng?i=001-145180.
113. 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 Court of Cassation, App. No. P16-2018-001 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.
114. Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10, at 414.
115. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 9.
116. Margaria, *Parenthood and Cross-Border Surrogacy*, *supra* note 10.
117. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 42.

of death or separation of the parents, and inheritance.[118] In the absence of a legal parent-child relationship with the intended mother, these interests are threatened. Article 8 ECHR, protecting the child's right to respect for private life, thus requires that domestic law provide a possibility to recognize a legal parent-child relationship with the intended mother, designated in the foreign birth certificate as the "legal mother."[119] If the intended mother is also the genetic mother, "the Court considers it important to emphasise that… the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case."[120]

In response to the second question, the Court noted that, contrary to the recognition that the legal parent-child link touches the child's very identity, the choice of means by which to realize such recognition is less significant.[121] The Court thus allowed a wide margin of appreciation for the Member States to choose how they decide to recognize the legal relationship between the child and the intended parents.[122] The Court noted that adoption is an acceptable alternative to registering the foreign birth certificate, allowing for the legal recognition of the parent-child relationship between the second intended parent and the child.[123] According to the Court, adoption "with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details."[124] It follows that Article 8 ECHR does not impose a general obligation on the Member States to recognize from the beginning a legal

118. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 40 ("The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of that child's right to respect for [their] private life. In general terms, . . . the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society. . . . In particular, there is a risk that such children will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees; it may be more difficult for them to remain in their intended mother's country of residence (although this risk does not arise in the case before the Court of Cassation, as the intended father, who is also the biological father, has French nationality); their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have no protection should their intended mother refuse to take care of them or cease doing so."). *Advisory Opinion*, App. No. P16-2018-001 at ¶ 40.
119. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 46.
120. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 47.
121. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 51.
122. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 51.
123. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 53.
124. *Advisory Opinion*, App. No. P16-2018-001 at ¶ 53.

parent-child relationship by registering the details of the foreign birth certificate of a child born through cross-border surrogacy. However, the Court suggested that an adoption procedure must be readily and effectively available to safeguard the child's best interests.[125]

V. *D V. FRANCE*: THE ECTHR'S GENDER DISCRIMINATORY TWIST TO GENETIC ESSENTIALISM

In the recent case *D v. France*, the ECtHR faced a slightly different set of facts which presented the issue of recognizing legal parenthood for a child born through cross-border surrogacy.[126] In this case, the child was born in Ukraine in 2012 to a French opposite-sex couple who had hired a surrogate mother. The child's birth certificate named the intended father and mother as the legal parents without mentioning the woman who had given birth to the child. French authorities registered the foreign birth certificate with regard to the details of the intended genetic father. However, they refused to record in the Central Civil Register of Births, Marriages, and Deaths the details of the child's birth certificate so far as the certificate designated the intended mother, who was also the child's genetic mother, as the legal mother.[127]

Taking their case to the ECtHR, the father, the mother, and the child complained of a violation of the child's right to respect for private life (Article 8 ECHR) and discrimination on the grounds of birth in the enjoyment of that right (Article 14 ECHR).[128] In its decision, the Court concluded that there was no violation of the child's right to respect for private life (Article 8 ECHR). It noted that France did not overstep its margin of appreciation when refusing to register the details of the foreign birth certificate in the French register of births, insofar as the certificate designated the child's intended and genetic mother.[129]

Referring to its previous case law on cross-border surrogacy, the Court held that

> [T]he existence of a genetic link did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of the recording of the details of the

125. *Advisory Opinion*, App. No. P16-2018-001 at ¶¶ 54–55.
126. D v. France, App. No. 11288/18 (July 16, 2020), [https://perma.cc/H74R-QEDE].
127. *D v. France*, App. No. 11288/18 at ¶¶ 1–10.
128. *D v. France*, App. No. 11288/18 at ¶¶ 29, 73.
129. *D v. France*, App. No. 11288/18 at ¶¶ 71–72.

> foreign birth certificate. The Court saw no reason in the circumstances of the present case to reach a different decision regarding recognition of the legal relationship with the intended mother, who was the child's genetic mother.[130]

However, the protection of the child's right to respect for private life (Article 8 ECHR) demands access to an effective and sufficiently speedy mechanism that allows for the recognition of the legal relationship between the child and the genetic mother.[131] In a clear parallel to its *Advisory Opinion*,[132] it is decisive for the Court that the refusal to register the foreign birth certificate does not preclude domestic recognition of the legal parent-child relationship since the mother-child link can be legally established through adoption.[133] The Court reiterated that "adoption produced similar effects to registration of the foreign birth details when it came to recognising the legal relationship between the child and the intended mother."[134] Thus, the Court concluded that the adoption of her husband's child (second-parent adoption) constituted a readily and effectively available procedure enabling the legal relationship between the intended mother and the child to be recognized.[135]

The Court also dealt with the complaint relating to the difference in treatment between French children born through cross-border surrogacy and other French children born abroad. The Court recognized that the latter can demand registration of the foreign birth certificate's details and thus obtain a direct recognition of the legal mother-child relationship. For children born through cross-border surrogacy, however, the intended mother has to go through a regular domestic adoption procedure to establish the same legal parenthood link. The Court reiterated its finding that "adoption of the spouse's child constituted in the present case an effective mechanism for recognition of the legal relationship" between the mother and the child.[136]

The Court did not consider this difference in treatment to be discriminatory. It even noted that "this difference in treatment regarding

130. *D v. France*, App. No. 11288/18 at ¶¶ 58–59.
131. *D v. France*, App. No. 11288/18 at ¶¶ 64–70.
132. 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 Court of Cassation, App. No. P16-2018-001 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i= 003-6380685-8364782.
133. *D v. France*, App. No. 11288/18 at ¶ 62.
134. *D v. France*, App. No. 11288/18 at ¶ 66.
135. *D v. France*, App. No. 11288/18 at ¶ 70.
136. *D v. France*, App. No. 11288/18 at ¶ 85.

the means of establishing the legal mother-child relationship was designed to ensure, in the specific circumstances of each case, that it was in the best interests of the child born through surrogacy for such a relationship to be established with the intended mother."[137] In the Court's view, the difference in treatment thus has an objective and reasonable justification: to verify that the second parent adoption by the intended, genetic mother is in the child's best interests. As a result, the Court held that there was no violation of Article 14 ECHR in relation to Article 8 ECHR.[138]

The Court did not address the difference in treatment between the intended genetic father, who benefited from registration of the foreign birth certificate and being directly recognized as the legal father, and the intended genetic mother, for whom the French authorities refused such registration.[139] In the domestic judicial proceedings leading up to the ECtHR proceeding, the parents did not raise violations of their rights as intended and genetic father and mother.[140] They only raised rights violations regarding the child,[141] potentially influenced by the Court's previous surrogacy judgments in which it only considered the child's rights as relevant.[142] In addition, the parents revealed that the intended mother was the genetic mother only very late in the proceedings.[143] Consequently, the Court refused to consider alleged rights violations regarding the intended genetic mother based on procedural reasons.[144]

VI. CRITICAL ANALYSIS

A. *Social Change and the Judiciary*

The social understanding of the family is subject to constant change. Although the traditional family has consisted of two married opposite-sex adults and their biological children, families have changed significantly

137. *D v. France*, App. No. 11288/18 at ¶ 86.
138. *D v. France*, App. No. 11288/18 at ¶ 89.
139. *D v. France*, App. No. 11288/18 at ¶¶ 81–82.
140. *D v. France*, App. No. 11288/18 at ¶ 61.
141. *D v. France*, App. No. 11288/18 at ¶ 61.
142. Mennesson v. France, 2014-III Eur. Ct. H.R. 257.
143. *Mennesson*, 2014-III Eur. Ct. H.R. 257 ¶ 81.
144. *D v. France*, App. No. 11288/18 at ¶¶ 61, 81-82.

over the last half-century and even longer.[145] ART, while not the only factors, are significant contributors to this change.[146]

The progress of ART and the pluralism of families created by ART have overrun the law's channeling functions and social control.[147] Even though family law and ART regulation might be designed to channel the avenues of family creation and restrict the creation of non-traditional families, couples and individuals find ways to access ART and surrogacy, most importantly by travelling abroad. The legal limbo that non-traditional families then find themselves in reveals the relative gap in the law's response to recognize new forms of familial relationships. The gap is "relative" in that the law always remains slow to catch up with fast-paced social change.

The ECtHR's case law suggests that the judiciary adheres to existing legal standards, such as the child's best interests, to regularize the social realities of non-traditional families and transform them into legal realities. With *Mennesson v. France*[148] and *Labassee v. France*,[149] the Court imposed recognition in the domestic context of non-traditional families created through cross-border surrogacy. The Court's reasoning and decisions in these and subsequent cases mandated the direct recognition of the legal parent-child relationship based on the foreign birth certificate, at least for genetically-related, intended fathers.[150] By denouncing the situation of legal limbo as a violation of the ECHR, the Court brought about a

145. Holtzman, *supra* note 15, at 618; Paul C. Glick, *Fifty Years of Family Demography: A Record of Social Change*, 50 J. MARRIAGE FAM. 861 (1988); Lori Kowaleski-Jones and Rachel Dunifon, *Children's home environments: Understanding the role of family structure changes*, 25 J. Fam. Issues 3–28 (2004).

146. DOLGIN, *supra* note 2, at 1-2.

147. *See* McClain, *supra* note 47, at 2141-44 (explaining how ART assisted in making motherhood without marriage more viable as an example of circumventing the channeling function of marriage).

148. *Mennesson*, 2014-III Eur. Ct. H.R. 257.

149. Labassee v. France, App. No. 65941/11 (June 26, 2014), https://hudoc.echr.coe.int/eng?i=001-145180.

150. *See, e.g.*, *Mennesson*, 2014-III Eur. Ct. H.R. 257; *Labassee*, App. No. 65941/11; Foulon v. France, App. No. 9063/14 et 10410/14, (July 21, 2016), https://hudoc.echr.coe.int/eng?i=001-164968; Laborie v. France, App No. 44024/13 (January 19, 2017), https://hudoc.echr.coe.int/eng?i=001-170369; C and E v. France, App. No. 1462/18 et 17348/18 (November 19, 2019), https://hudoc.echr.coe.int/eng?i=001-199497; D v. France, App. No. 11288/18 (July 16, 2020), https://hudoc.echr.coe.int/eng?i=001-203565. *See also*, Paradiso v. Italy, App. No. 25358/12 (January 24, 2017), https://hudoc.echr.coe.int/eng?i=001-170359; Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 (May 18, 2021), https://hudoc.echr.coe.int/eng?i=001-209992 (refusing to impose an obligation to recognize a legal parent-child relationship, based on the absence of a genetic link between the intended parents and the child).

slightly more inclusive and liberal approach in the legal recognition of non-traditional families.[151]

These are positive developments demonstrating that the Court's stance reacts to societal change and contributes to legal change. However, as in the cases discussed, this liberalization is accompanied by two major flaws in how the Court justified its decisions: genetic essentialism first, and then a gender-discriminatory twist in how legal motherhood and fatherhood are conceived. The remainder of this paper critically analyzes these two flaws and speculates about the future trajectory of the Court's jurisprudence.

The legal recognition of non-traditional families created abroad brings us back to the question of the adequacy of the still very narrow (*i.e.*, heteronormative, bionormative, favoring marital supremacy) domestic definitions of the family which many European states still adhere to in their regulation of family law and access to ART. A normative critique is not the purpose of this paper. However, a brief remark is necessary. One of the drawbacks of the ECtHR's push for more inclusive definitions of family and legal parent-child relationships is that it offers only a solution after the fact based on the recognition method.[152] Although capable of reducing situations of legal limbo, this method offers a solution in individual cases but does not address the broader issue of restrictive domestic ART regulations forcing couples and individuals to use cross-border fertility services.

Adding reproductive justice to the picture, recognition, and regularization by the judiciary of social realities created through cross-border reproductive services provide a solution only for those who can afford such services. It does not address the injustice imposed on those who lack the financial means to do so. Whether the mechanism of private international law is appropriate for driving legal change in the domestic context goes beyond the scope of this paper.[153] However, one might hope

151. This liberalization phenomenon occurred in other areas of the ECtHR's case law as well. *See e.g.*, Büchler, *supra* note 15 (discussing the Court's precedents on adoption in non-traditional families and recognition of *de facto* family life); Storrow, *Proportionality Problem*, *supra* note 9, at 143 (discussing the ECtHR's role in addressing the status of "illegitimate" children born out of wedlock and the discrimination against nonmarital children that lingered in the latter half of the twentieth century).

152. Ní Shúilleabháin, *supra* note 9; Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10.

153. Claire Fenton-Glynn, *Review Article: Human Rights and Private International Law: Regulating International Surrogacy*, 10 J. PRIV. INT'L L. 157-69 (2014); Claire Fenton-Glynn, *Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements*, 24 MED. L. REV. 59-75 (2016); Fenton-Glynn, *International Surrogacy Before the European Court of Human Rights*, *supra* note 10; Ní Shúilleabháin, *supra* note 9.

that judicial recognition in cross-border cases reflects the first step in a trend towards more liberal and inclusive domestic legal frameworks regulating family law and access to ART.[154]

As a social construct, the law naturally undergoes change that reflects new phenomena and needs within society.[155] This change, essentially political, must follow the usual legitimation processes in constitutional democracies. Having judges fight out disagreements about matters of baby and family making, or nature and technology, offers no guarantee that society's majority will come any closer to appreciating views with which it disagrees. However, judicial discourse has the power to shape the structure of moral and political debate.[156] It serves as an impetus for the legislature who is ultimately responsible for democratically legitimized law reform and establishes the human rights framework in which such law reform can materialize.

B. *The Power of the Genetic Link and Biological Truth*

The language emerging in *Mennesson v. France*[157] and *Labassee v. France*[158] emphasizes the significance of the genetic link when recognizing legal parenthood, at least for fatherhood.[159] A similar pattern emerged in another cross-border surrogacy case, *Paradiso and Campanelli v. Italy*, although the outcome for the child was very different since none of the intended parents were genetically related.[160] In this case, the applicants were Italian nationals who entered into a surrogacy agreement with a woman in Russia. The child, conceived through IVF, was born in 2011. The surrogate mother signed a document confirming that the baby was the applicants' genetic child. The Russian authorities issued a birth certificate designating the applicants as parents without mentioning that

154. *See generally* Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10; Ní Shúilleabháin, *supra* note 9; Mulligan, *supra* note 6.

155. Sheila Jasanoff, *Introduction: Rewriting Life, Reframing Rights*, *in* REFRAMING RIGHTS: BIOCONSTITUTIONALISM IN THE GENETIC AGE 1, 1-27 (Sheila Jasanoff ed., 2011).

156. Baer, *supra* note 16; Melanie Levy, *The Rise of the Swiss Regulatory Healthcare State: On Preserving the Just in the Quest for the Better (or Less Expensive?)*, REGUL. & GOVERNANCE (July 26, 2020), [https://perma.cc/33HR-T3YH].

157. Mennesson v. France, 2014-III Eur. Ct. H.R. 257.

158. Labassee v. France, App. No. 65941/11 (June 26, 2014), https://hudoc.echr.coe.int/eng?i=001-145180.

159. MARGARIA, *supra* note 4; Mulligan, *supra* note 6. *See also Advisory Opinion*, App. No. P16-2018-001 (noting that "to date, it has placed some emphasis in its case-law on the existence of a biological link with at least one of the intended parents"). *Id.*

160. *See* Paradiso v. Italy, App. No. 25358/12; s*ee also* Iliadou, *supra* note 10 (discussing this case in detail).

the child had been born through surrogacy. When the applicants returned to Italy with the child, they unsuccessfully tried to register the birth. The applicants were then charged with misrepresentation of civil status and violation of the adoption legislation prohibiting the adoption of such a young child.[161]

During the proceedings in Italy, it was revealed that neither of the intended parents were genetically related to the child. Due to an error in the Russian clinic, the intended father's sperm was not used to fertilize the donor egg. Considering the absence of a genetic link to the intended parents, an Italian court ordered removal the child from the applicants. The child was placed in a children's home and later foster care without any contact with the applicants or formal identity.[162]

The Court in *Paradiso and Campanelli v. Italy* did not address legal parenthood directly but focused on the Italian authorities' actions leading to the permanent separation of the applicants from the child. The Court's analysis revolved around the definition and protection of family life. The ECtHR Grand Chamber accepted the child's removal from their intended parents by the Italian authorities. It concluded that there was no family life, not even *de facto* family life, and upheld the Italian authorities' decision to put the child in foster care and eventually giving it up for adoption. The absence of a genetic link was decisive in the Court's finding.[163] As Mulligan notes, "the Court in *Paradiso* concluded that even the good faith belief on the part of the intended father that he was in fact the genetic father of the child was not enough to make up for the absence of a genetic link. . . ."[164]

Comparing *Mennesson* and *Labassee* with *Paradiso*, it becomes evident that in the context of cross-border surrogacy, when at least one of the intended parents is genetically related to the child, some protection is granted to the intended parents and the child. If the intended parents believe that their genetic material was used to create the embryo, but due to an error in the clinic, this did not occur, the parents and the child are left unprotected.[165] Shuilleabhain heavily criticizes this outcome, noting that,

> Ultimately *Paradiso* signifies that the absence of a genetic tie (even in the event of an accidental clinic error) will catapult a relationship from the realm of cherished family ties (deserving

161. *Paradiso*, App. No. 25358/12 at ¶¶ 9-21.
162. *Paradiso*, App. No. 25358/12 at ¶¶ 22-33, 49-53.
163. *Paradiso*, App. No. 25358/12 at ¶ 157.
164. Mulligan, *supra* note 6, at 469.
165. Iliadou, *supra* note 10, at 151.

> of the highest Article 8 ECHR protection) into a detestable 'human trafficking' classification. This binary perspective – and polarisation of the two situations – is rather extreme, and potentially very unfair from the perspective of affected children.[166]

The ECtHR follows the same reasoning in *Valdís Fjölnisdóttir and Others v. Iceland*.[167] In this case, a same-sex couple from Iceland had a child through sperm and egg donors and a surrogate mother in the United States. Both intended mothers were genetically unrelated to the child. Upon the couple's return to Iceland with the child, domestic authorities refused to recognize a parental link between either mother and the child, noting that since there was no genetic relatedness, there was no reason to do so. The child thus remained without legal parents. However, the child is allowed to live with their intended parents as part of a foster care arrangement.[168] In its decision, the ECtHR again upheld the non-recognition of a legal parent-child relationship.[169]

In its cross-border surrogacy precedents, the Court insists on the concept of biological truth to establish legal parenthood.[170] As Mulligan notes, "the identity cases emphasise the importance of biological truth, the significance of the search for that truth and the importance of reflecting that truth in State documents."[171] Interestingly, the Court's focus on the genetic or biological aspects of parenthood as a basis for its normative arguments transpires not only in its case law dealing with a situation of legal limbo created through the use of cross-border fertility services but also in cases without a cross-border element. The ECtHR case *Boeckel and Gessner-Boeckel v. Germany*,[172] for example, involved two women living in a registered civil partnership. They complained about

166. Ní Shúilleabháin, *supra* note 9, at 109. *See also* Mulligan, *supra* note 6, at 474 (comparing *Paradiso* and *Mennesson*, to show that the *Paradiso* court focused more on legality and less on the best interest of the child).

167. Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 (May 18, 2021), https://hudoc.echr.coe.int/eng?i=001-209992; *See* März, *supra* note 80 (discussing this case in detail); Bracken, *Cross Border Surrogacy*, *supra* note 80 (discussing this case in detail).

168. *Valdís Fjölnisdóttir*, App. No. 71552/17 at ¶¶ 8-25.

169. *Valdís Fjölnisdóttir*, App. No. 71552/17 at ¶ 75.

170. Mulligan, *supra* note 6, at 459.

171. *Id.*

172. Boeckel and Gessner-Boeckel v. Germany, App. No. 8017/11 (May 7, 2013), https://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=001-120617&filename=BOECKEL%20AND%20GESSNER-BOECKEL%20v.%20GERMANY.pdf.

the German authorities' refusal to register one of them as a parent on the birth certificate of the other partner's child born during their partnership. The non-biological mother had to undergo an adoption procedure to be recognized as the second parent.[173] Relying on Articles 8 ECHR (right to respect for private and family life) and 14 ECHR (prohibition of discrimination), the applicants argued that there was no reasonable justification for allowing a biological mother's husband to be entered on a birth certificate as the child's father (legal presumption of fatherhood) while refusing to enter the biological mother's same-sex civil partner. The applicants argued that there was no reason to treat children born into a civil partnership differently from children born in wedlock.[174]

Based on its established jurisprudence, for the ECtHR to analyze a case under Article 14, a difference in the treatment of persons in similar situations must occur. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized.[175] In *Boeckel and Gessner-Boeckel v. Germany*, the Court held that the applicants—bound by a registered civil partnership—were not in a relevantly similar situation to a married husband and wife regarding the entries made on the birth certificate.[176] The Court's main argument emphasized that domestic law relies on a legal presumption according to which the man married to the mother at the time of birth is the child's biological father. This construct is "not called into question by the fact that this legal presumption might not always reflect the true descent."[177] In the case of a same-sex couple, however, it can, with certainty, be ruled on biological grounds that the child only descends from one of the partners. Therefore, there is "no factual foundation for a legal presumption" that the child descends from the other partner as well.[178] It is noteworthy that the Court concentrated on the biological differences between different-sex and same-sex couples. It excluded the recognition of a legal presumption based on these biological differences, even though one might think that the legal presumption is based on the institution of marriage or civil partnership and not the possibility of biological descent. What follows from the Court's stance is that a legal presumption is only admissible if there is a hypothetical possibility that it matches the

173. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶¶ 2-15.
174. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶ 6.
175. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶ 28.
176. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶ 31.
177. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶ 30.
178. *Boeckel and Gessner-Boeckel*, App. No. 8017/11 at ¶ 30.

biological reality.[179] As a consequence, the Court rejected the case, stating that there was no violation of Article 14 in conjunction with Article 8.

The ECtHR's precedents clearly reveal the power of the genetic link. *Boeckel and Gessner-Boeckel v. Germany* demonstrates that the Court's focus on biological relatedness is not limited to cross-border surrogacy cases. Through these recent cases, one might suspect genetic essentialism sweeping through the area of family law and ART regulation, as genetics are the main criterion for recognizing legal parenthood. Bender defines genetic essentialism as follows:

> Genetic essentialism asserts that our genes and our DNA are the essence, the core, the most important constituent part of who we are as human beings . . . . Genetic essentialism reduces human beings to the contents of our cells. It ignores the ways our cells and environments interrelate, the ways our physiological system functions as a whole organism, and the ways our minds and hearts affect our being. Additionally, genetic essentialism renders all our ways of nurturing and being nurtured by one another for naught.[180]

The genetic connection based on biological truth, as relied on by the Court, encourages a biologically determined view of parenting, which does not reflect the lived reality of non-traditional families. One of the reasons it doesn't line up with modern conceptions of parenting is due to ART, which enable non-biologically determinative family creation.[181] Couples and individuals escape bionormativity by engaging in cross-border reproductive services only to be confronted with legal standards focusing on genetics in order to recognize legal parenthood or requiring additional legal hurdles such as the adoption process once back home.

While advances in ART enables society to discard the naturalness argument in reproduction and family making and allows for the creation of more diversified families, the ECtHR seems to confine itself to the traditional view of the family by defining identity and best interests in

179. For a similar critic in the context of US law, *see* Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgements of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEM. 99 (2018) [hereinafter Feinberg, *A Logical Step Forward*]. *See also* Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era,* 104 MINN. L. REV. 243, 244 (2019) (discussing how the inconsistency was resolved by the US Supreme Court in its decisions *Obergefell v. Hodges*, which struck down bans on same-sex marriage, and *Pavan v. Smith*, which held that states must equally provide opportunities to any spouses to be listed on a child's birth certificate).

180. Bender, *supra* note 14, at 4.

181. Campbell, *supra* note 14.

genetic terms.[182] A possible reading of the ECtHR's emphasis on the importance of the genetic link when recognizing legal parenthood in non-traditional families could be that while ART allow for more diversified social realities, the availability of genetic testing nudges towards a narrower legal definition of the parent-child relationship based on verifiable genetic relatedness. Scientific progress thus acts both as a facilitator and constraint for family diversity.

The ECtHR case law is by no means an exception but corroborates research findings on the interaction between the law and genetics. Several scholars have demonstrated that the idea of genetics as the preeminent determinant of parenthood is experiencing a resurgence in the law. Hendricks describes an "increasing commitment again—in both law and culture—to genes as the essence, the sine qua non, the definitional element of parenthood."[183] According to Meyer, this phenomenon is linked to the increasing availability of genetic testing.[184] He also notes that this development "reveals a reflexive commitment to biology as the essential foundation of parenthood."[185]

The "geneticization" phenomenon or genetic essentialism might have an impact on how European societies define the family. By the end of the 20th century, legal definitions of the family had become more inclusive and pluralistic, even in Europe, increasingly emphasizing social and emotional bonds rather than biological relatedness and embracing non-traditional families. A re-emphasis on the genetic link by the judiciary, as witnessed in the recent ECtHR case law, might alter how the family is defined, both legally and socially, risking a breakdown of more inclusive and pluralistic definitions of family.[186] The application of genetics in the realm of family law and ART regulation might cause the concept of "biological family" to become preeminent again.[187]

C. *Right to Know One's Origins*

In the broader view of things, the ECtHR's focus on the child's identity, best interests, and genetics must be considered together with the Court's jurisprudence recognizing a new individual human right to know

182. Mennesson v. France, App. No. 65192/11, ¶¶ 99-100 (June 26, 2014).
183. Jennifer S. Hendricks, *Genetic Essentialism in Family Law*, 26 HEALTH MATRIX: J. L.-MED. 109, 109 (2016).
184. Meyer, *supra* note 14, at 126.
185. *Id*. at 139.
186. SCHWENZER, *supra* note 47, at 2.
187. Caulfield, *supra* note 15, at 69-70.

one's origins as protected by Article 8 ECHR (right to respect for private and family life). The Court has developed this body of case law in recent years.[188]

The Court has gradually recognized knowledge about one's origins as an essential part of one's identity.[189] The right to know the identity of one's biological parents, or one's genetic inheritance, has come to be viewed as something substantial to the human and its well-being. The Court defines the right to know one's origins as a right to have uncertainty as to one's identity eliminated and underscores the genetic link as an essential part of one's identity or identity building.[190] In this context, the Court also noted that birth, particularly the circumstances in which a child is born, form part of a child's, and subsequently an adult's, private life guaranteed by Article 8 ECHR.[191] The Court's case law that created a human right to know one's origins developed in various areas of family law, such as the status of minors under the guardianship of a public administration and adopted children, and to justify claims to non-marital paternity.[192]

188. *See generally* Richard Blauwhoff & Lisette Frohn, *International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law*, *in* FUNDAMENTAL RIGHTS IN INTERNATIONAL AND EUROPEAN LAW: PUBLIC AND PRIVATE LAW PERSPECTIVES 211 (Christophe Paulussen et al. eds., 2016); Kessler, *supra* note 6; Mulligan, *supra* note 6.

189. *See e.g.*, Phinikaridou v. Cyprus, App. No. 238/90 (December 20, 2007), https://hudoc.echr.coe.int/eng?i=001-84106; Mikulić v. Croatia, 2002-I Eur. Ct. H.R. 143; Çolak v. Turkey, App. No. 60176/00 (May 30, 2006) https://hudoc.echr.coe.int/eng?i=001-75510; Jäggi v. Switzerland, 2006-X Eur. Ct. H.R. 21, Kalacheva v. Russia, App. No. 3451/05 (May 7, 2009), https://hudoc.echr.coe.int/eng?i=001-92572; Grönmark v. Finland, App. No. 17038 /04 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-105630; Backlund v. Finland, App. No. 36498/05 (July 6, 2010), https://hudoc.echr.coe.int/eng?i=001-99784; Pascaud v. France, App. No. 19535/08 (June 16, 2011), https://hudoc.echr.coe.int/eng?i=001-105158; A. M. M. v. Romania, App. No. 2151 /10 (February 14, 2012), https://hudoc.echr.coe.int/eng-press?i=003-3844592-4417275; Godelli v. Italy, App. No. 33783/09 (September 25, 2012), https://hudoc.echr.coe.int/eng?i=001-113460; Laakso v. Finland, App. No. 7361/05 (January 15, 2013), https://hudoc.echr.coe.int/eng?i=001-115861; Röman v. Finland, App. No. 13072/05 (January 29, 2013), https://hudoc.echr.coe.int/eng?i=001-115864; Gaskin v. UK, App. No. 10454/83, 12 Eur. H.R. Rep. 36 (1989); Odièvre v. France, 2003-III Eur. Ct. H.R.53.

190. *See, e.g., Odièvre*, 2003-III Eur. Ct. H.R.5 at ¶ 29.

191. *Odièvre*, 2003-III Eur. Ct. H.R.5 at ¶ 29.

192. *See, e.g.*, *Phinikaridou*, App. No. 238/90; *Mikulić*, 2002-I Eur. Ct. H.R. 143; *Çolak*, App. No. 60176/00; *Jäggi*, 2006-X Eur. Ct. H.R. 21, *Kalacheva*, App. No. 3451/05; *Grönmark,* App. No. 17038/04; *Backlund*, App. No. 36498/05; *Pascaud*, App. No. 19535/08; *A. M. M. v. Romania*, App. No. 2151/10; *Godelli*, App. No. 33783/09;

The new emphasis on biology or genetics is, for example, visible in adoption law. Based on the right to know one's origins, the ECtHR has allowed adopted children to trace their birth parents, declaring domestic laws imposing anonymity in adoption procedures to violate the ECHR. The Court has thus lifted the veil of anonymity which has surrounded adoption for decades.[193] The link to birth parents is more readily accessible today, "despite the overwhelming emotional, social and financial contributions of the nurturing parents, that is, the adoptive parents . . . ."[194] The ECtHR's recognition of a human right to know one's origins has indirectly led to another development. States have pursued law reform on a domestic level to lift the veil of anonymity surrounding sperm donors and allow children born of sperm donation to trace and identify their biological fathers.[195]

Most recently, the ECtHR further underscored the importance of genetic parentage and knowledge about one's genetic origins as an essential part of one's identity. In *Mandet v. France*, the Court dealt with the quashing of a paternity recognition made by the mother's husband at the request of the child's biological father.[196] The mother was not married at the time of birth and the man whom she later married signed a paternity recognition, thus becoming the child's legal father. This case did not involve ART. The applicants—the mother, her husband, and the child—complained about the quashing of the paternity recognition and the removal of the child's legitimation. They considered these measures to be disproportionate interference with the child's best interests, which, they submitted, required that the legal parent-child relationship, established for several years, be maintained and that his emotional stability be preserved.[197]

The Court held that there was no violation of Article 8 ECHR (right to respect for private and family life). It noted the French courts' decisions placed the child's best interests at the heart of their considerations. Although the child considered his mother's husband his father, his interests lay primarily in knowing the truth about his origins.[198] The

Laakso, App. No. 7361/05; *Röman*, App. No. 13072/05; *Gaskin*, App. No. 10454/83, 12 Eur. H.R. Rep. 36 (1989); *Odièvre*, 2003-III Eur. Ct. H.R.53.

193. *E.g.*, *Odièvre,* 2003-III Eur. Ct. H.R.5; *Godelli*, App. No. 33783/09.

194. Deech, *supra* note 37, at 700.

195. Caulfield, *supra* note 15, at 76; Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416 (2018).

196. Mandet v. France, App. No. 30955/12 (Jan. 14, 2016), https://hudoc.echr.coe.int/eng?i=001-159795.

197. *Mandet*, App. No. 30955/12 at ¶ 22.

198. *Mandet*, App. No. 30955/12 at ¶ 56.

Court held that the child's best interests do not necessarily lie where the child perceives them—in maintaining the parent-child relationship as established and in preserving emotional stability—but rather in ascertaining his "real paternity."[199] The Court argued that the domestic decisions did not unduly favor the biological father's interests over those of the child, but held that the child's and biological father's interests overlapped.[200] Going beyond an individual right to know one's origins, *Mandet v. France* seems to imply an individual's obligation to know or recognize their genetic origins and to have a legal parent-child relationship established that reflects this genetic relatedness.

The case law recognizing an individual human right to know one's origins contributes to exaggerating the normative value of biological relatedness.[201] The interests involved in this context not only include the right to obtain information regarding one's genetic parentage, but also in having biological truth recognized as a matter of law.[202] The ECtHR's focus on the genetic link when considering legal parenthood in cross-border surrogacy cases is evidently part of the same school of thought.

D. *What's Genetics Got to Do with Identity and Best Interests?*

The Court's recognition of the legal parent-child relationship as an essential element of a child's identity, connected to the right to know one's origins, expresses that the gap between the social and legal realities of children in non-traditional families and the question of how to deal with the situation of legal limbo is not just a theoretical thought experiment. The legal parent-child relationship is an essential part of one's identity as an individual human being. In the Court's understanding, identity is "almost exclusively conceived of as being important for the purposes of self-formation, and self-development."[203]

However, as discussed, the Court's precedents focus on "the concept of biological truth; it is this biological truth and its legal recognition that the Court views as central to the formation of personal identity."[204] One must know one's genetic heritage to be able to form one's personality.

199. *Mandet*, App. No. 30955/12 at ¶ 57.
200. *Mandet*, App. No. 30955/12. Because the French courts conferred parental responsibility to the mother, their decisions had not prevented the child from continuing to live as part of the Mandet family, in accordance with his wishes. *Mandet*, App. No. 30955/12.
201. Ní Shúilleabháin, *supra* note 9, at 106.
202. Mulligan, *supra* note 6, at 462.
203. Mulligan, *supra* note 6, at 471.
204. Mulligan, *supra* note 6, at 469.

Interestingly, as Mulligan notes, the Court's reasoning reveals that "[t]here is no real sense in which knowledge of genetic heritage is necessary for practical reasons such as medical or inheritance concerns."[205]

When declaring that the recognition of a legal parent-child link with the genetic parent is an essential element of the child's identity, the ECtHR does not provide any empirical evidence to support the predominant role of genetics, as opposed to "the social," for the formation of a child's identity. The scientific literature seems to be pointing in the opposite direction, noting that a child's well-being and thus their best interests mainly depend on the nature and strength of the relationship with the parent, and not the existence of a blood relationship.[206]

The ECtHR's concept of identity as being exclusively linked to genetic and biological facts is disconnected from children's lived reality which is composed of a much broader and richer concept of identity.[207] A child has both social and biological identities.[208] The right to identity, as prescribed by Article 8 of the United Nations Convention on the Rights of the Child (UNCRC), includes "the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."[209] The ECtHR's narrow focus on genetics and disregard of social parenthood seems disconnected from the protection guaranteed by Article 8 of the UNCRC. Mulligan argues that "intention is an essential aspect of parenthood in assisted reproduction, and thus the relationship to the intended parent should be captured by the Article 8 right to identity."[210] A child's identity is as strongly defined by link to the social parent as it is by the link to the genetic parent.

Beyond the issue of identity, the child's best interest standard plays an important role in the Court's reasoning in the cross-border surrogacy and legal parenthood cases. An established standard in the Court's

205. Mulligan, *supra* note 6, at 471.
206. Caulfield, *supra* note 15, at 71, 90.
207. LECKEY, *supra* note 2, at 65.
208. *See* Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT'L. J. L. POL'Y & FAM. 137–59 (2007); Mulligan, *supra* note 6; Campbell, *supra* note 14; R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap*, 3 TEX. J. WOMEN & L. 265 (1994).
209. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.
210. Mulligan, *supra* note 6, at 472.

decision-making is that whenever a child's interests are at stake, those interests receive primary consideration.[211]

However, in the case law discussed, the Court links the child's best interests, identity, and genetics. As with the child's identity, the Court considers the child's well-being predominantly through the lens of biological relatedness and genetics.[212] The Court embraces the idea that it is in a child's best interests to establish a legal relationship with their genetic parent(s). To safeguard the child's best interests, it is not necessary to recognize legal parenthood with the two intended parents, that is, the two individuals that are usually equally involved in the project of creating a family. One link is sufficient, as long as it is the link with a genetic parent.[213] The Court does not address "the social," that is, the parent-child link with a social parent, as part of the child's best interests.

In *Paradiso and Campanelli v. Italy*,[214] the absence of a genetic link to both intended parents pushes the ECtHR assessment of the child's best interests even further.[215] As Mulligan notes,

> [T]he *Paradiso* court placed its focus far more on the illegal actions of the applicants and the State's interest in addressing this, rather than on the interests or welfare of the child. The reason for this difference seems to be the fact that the genetic link existed in *Mennesson* but not in *Paradiso*, giving the parents standing to advance the children's interests, causing the right to identity being engaged, and ultimately leading to a narrower margin of appreciation and a much higher degree of scrutiny.[216]

211. The best interests of the child is a preeminent part of the UN Convention on the Rights of the Child (UNCRC), enshrined in Article 3 ("In all actions concerning children . . . the best interests of the child shall be a primary consideration"). The ECtHR has recognized the child's best interests as an essential part of the Article 8 ECHR balancing exercise, even though the ECtHR does not explicitly refer to the child's best interests and the ECtHR is not a party to the UNCRC. *See* Holtzman, *supra* note 15.

212. Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10, at 280; Mulligan, *supra* note 6.

213. Mennesson v. France, 2014-III Eur. Ct. H.R. 257 at ¶ 100.

214. Paradiso v. Italy, App. No. 25358/12 (January 24, 2017), [https://perma.cc/Y5YB-EKLW]. For a detailed case discussion, see Iliadou, *supra* note 10.

215. *See* Mulligan, *supra* note 6; Bracken, *Assessing the Best Interests of the Child in Cases of Cross-border Surrogacy*, *supra* note 10; Trimmings, *supra* note 15.

216. Mulligan, *supra* note 6, at 474.

This pattern repeats itself in *Valdís Fjölnisdóttir and Others v. Iceland*, in which, in the absence of a genetic link to the two intended parents, no legal parent-child relationship was recognized.[217]

Based on the ECtHR jurisprudence, the Swiss Federal Supreme Court, for example, has ruled that in cross-border surrogacy cases in which none of the intended parents is genetically related to the child, authorities must not recognize a legal parent-child relationship.[218] This legal reasoning leaves the child in a precarious situation, as they might be placed with a foster family and be given up for adoption. The ECtHR accepted such an outcome caused by the Italian authorities' actions in *Paradiso and Campanelli v. Italy*.[219] To be forcefully given up for adoption instead of growing up with the intended parents who initiated the creation of their family seems contrary to the child's best interests standard. It places a child in an unstable and vulnerable position, potentially for a prolonged time, while adoption proceedings are pending. The outcome in *Valdís Fjölnisdóttir and Others v. Iceland* is similar, although less severe.[220] The Court again confirmed the non-recognition of a parental link between the intended parents and their genetically unrelated child. However, it allows for the child to grow up in their *de facto* family.

There is an inherent contradiction between the ECtHR's affirmation that the child's best interests are paramount and the simultaneous, exclusive focus on the genetic link. In its case law, the ECtHR neglects to acknowledge that the child's best interests go beyond genetics.[221] Only in the *Advisory Opinion* the Court mentions that the best interests standard also includes the child's legal and economic interests, including citizenship, immigration status, welfare benefits, security in case of

217. Valdís Fjölnisdóttir v. Iceland App. No. 71552/17 (May 18, 2021), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-209992%22]}. For a detailed case discussion, see März, *supra* note 80; Bracken, *Cross Border Surrogacy*, *supra* note 80.

218. There are two precedents of the Swiss Federal Supreme Court which follow the ECtHR's case law. *See* Bundesgericht [BGer] [Federal Supreme Court] May 21, 2015, 141 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 312 [https://perma.cc/WJS7-GFC3] [Swiss Same-sex Case]; Bundesgericht [BGer] [Federal Supreme Court] Sept. 14, 2015 141 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 328 [https://perma.cc/KT5Q-NMPV] [Swiss Opposite-sex Case]. For more examples of domestic case law in the aftermath of the relevant ECtHR precedents, see Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10.

219. *Paradiso*, App. No. 25358/12.

220. *Valdís Fjölnisdóttir*, App. No. 71552/17.

221. Caulfield, *supra* note 15.

separation or death of the parents, and inheritance.[222] In the absence of a legal parent-child link with the intended, non-genetically related, parent, the protection of these interests is incomplete. The Court eventually mitigates its incoherent position on the child's best interests by stating, in the *Advisory Opinion* and later also in *D v. France*, that adoption must be readily and effectively available for the second intended parent.[223]

E. *Disregarding the Social*

The ECtHR's focus on biology leads to tensions arising between genetic and social parenthood. In *Mennesson v. France*[224] and *Labassee v. France,*[225] the Court does not address the legal parenthood of the social, *i.e.*, genetically unrelated, intended parent (in both cases, this is the mother). The Court considers the situation of legal limbo with regard to the relationship between the child and their intended, non-genetically related parent, as compatible with the ECHR. Its stance is that genetics are an essential aspect of a child's identity and best interests, but the legal recognition of a parent-child link with the social parent is not.[226] In the *Advisory Opinion* and *D v. France*, the Court has since slightly backtracked on this position, stating that an alternative means of recognizing legal parentage with the social parent is necessary, for example through adoption.[227]

Nevertheless, the Court's case law on legal parenthood and cross-border surrogacy is highly problematic from the intended social parent's perspective. The exclusive link, recognized by the Court, between the child and their genetic parent ignores the intended social parent, even though social parents form a constitutive role in non-traditional families. The Court's stance discriminates against the social parent, who has contributed equally (except for their genetic material) to the couple's parental project of creating a family and bringing a child into this world

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 Court of Cassation, App. No. P16-2018-001 at ¶ 40 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.

223. *Advisory Opinion,* App. No. P16-2018-001 at ¶¶ 54–55; D v. France, App. No. 11288/18 at ¶ 70.

224. Mennesson v. France, 2014-III Eur. Ct. H.R. 257.

225. Labassee v. France, App. No. 65941/11.

226. *Mennesson*, 2014-III Eur. Ct. H.R. 257 at ¶ 100.

227. *Advisory Opinion*, App. No. P16-2018-001 at ¶¶ 54-55; *D v. France*, App. No. 11288/18 at ¶ 70.

through cross-border surrogacy. It also disregards that genetic and social parents jointly rear a child. The Court's stance excludes, if not discriminates against, the social parent who, for either medical (*e.g.*, infertility) or biological (in the case of same-sex couples) reasons, cannot contribute their genetic material.

Alternative means of recognizing the legal parent-child relationship, such as domestic adoption, are not equivalent to transcription of a birth certificate established abroad. As Kessler notes, "requiring a same-sex parent to adopt their own child to be legally recognized as a parent 'disparages their choices and diminishes their parenthood' and 'places the nonbiological parent in a sort of second-class parental status.'"[228] Kessler refers to "two-tier parentage" to describe the difference between establishing legal parenthood by registering foreign birth certificates and adoption.[229] While the genetically related parent can claim the benefits and protections attached to the legal recognition of the parent-child relationship (for themselves and the child) from the very beginning, the non-genetically related, intended parent has to wait, sometimes for a prolonged time, to receive the same status. In addition, while second-parent adoption might be readily available for opposite-sex couples, this is not the case for same-sex couples. In the European context, it is important to add that second-parent adoption for same-sex couples is still not legal in thirty out of forty-nine countries.[230] This fact renders void the ECtHR's claim that adoption constitutes a valid alternative means of recognizing the legal parent-child relationship between the child and the intended social parent.

Looking to the future, one may worry that the power of judicial discourse, disregarding "the social", is detrimental to the social parent's status in non-traditional families, beyond the initial step from baby-making to family making. In fact, another concerning judicial phenomenon, reported so far mainly in the United States, involves family dissolution instead of family creation. This phenomenon includes custody decision-making in case of separation of parents in non-traditional families. When children are genetically related to only one of the adults, their relationship with their non-biological parent is at risk of being involuntarily severed if the adult union dissolves.[231] In her work,

228. Kessler, *supra* note 6, at 322 (quoting Geri C., Sjoquist, *Defining Parenthood: Changing Families, the Law, and the Element of Intent*, 75 Bench & Bar Minn. 16, 18 (2018)).

229. Kessler, *supra* note 6, at 322.

230. ILGA-Europe Rainbow Map 2020, *supra* note 18.

231. Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331 (2016), at 331 [hereinafter Feinberg, *Consideration of Genetic Connections*].

Feinberg documents the attitudes of U.S. courts favoring the genetic parent in divorce proceedings and child custody claims involving non-traditional families.[232] There are no comparable ECtHR cases so far, but non-traditional family dissolution will eventually come up in Strasbourg.

F. *The Distinction Between Legal Motherhood and Fatherhood*

The ECtHR distinguishes between the parents' and the children's perspectives when considering the legal parent-child relationship. There is no symmetry in the protection offered to intended parents and their children. For intended parents, *de facto* family life is sufficient, whereas for the children, recognizing the legal parent-child relationship is necessary as an essential element of their identity and thus their best interests. This contradiction is unfortunate. However, the ECtHR's precedents go further, touching upon the delicate issue of differentiating between the recognition of legal fatherhood and legal motherhood.

In *Mennesson v. France*,[233] *Labassee v. France*,[234] and the *Advisory Opinion*,[235] the Court only referred to legal parenthood without differentiating between fatherhood and motherhood.[236] It established the significance of the genetic link in the determination of legal parenthood. However, in all three instances, the genetically related intended parent was the children's father. The Court's focus on genetics for fatherhood is unexpected. In European family law, the establishment of legal

232. *Id*. It is interesting to note that there is sparse empirical evidence pointing in the opposite direction too. In Israel, for example, the Supreme Court imposed joint custody, even for a child born after the separation of a same-sex couple, thus favoring a "continuation of the 'family story.'. . ." *See* Lee Yaron, *In Israel, Lesbian Ex Wins Joint Custody of Son Born After Split with Mom*, ISR. NEWS (May 3, 2018), [https://perma.cc/2W8J-V75B].

233. *See* Mennesson v. France, 2014-III Eur. Ct. H.R. 257.

234. *See* Labassee v. France, App. No.65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378.

235. *See* 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 Court of Cassation, App. No. P16-2018-001 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.

236. *See generally* Beaumont & Trimmings, *Recent Jurisprudence of European Court of Human Rights*, *supra* note 10 (noting that surprisingly the Court did not explicitly discuss whether there is a difference between legal fatherhood and legal motherhood and instead referred to a single concept of parenthood).

fatherhood primarily relies on marriage or recognition of fatherhood, not genetics.[237]

Legal motherhood traditionally relies on gestation, the birth mother being the legal mother, or adoption.[238] With regard to motherhood, there are two notions of "biological" at play, "biological" as in genetic motherhood, and "biological" as in gestational motherhood (*i.e.*, the woman who gives birth to a child, independently of her genetic link to the baby).[239] In the past, traditional motherhood was certain and proven by giving birth. The birth mother was the biological mother, both in terms of gestation and genetics, which were intrinsically linked.[240] With the advent of ART, allowing for the transfer of genetic material from one woman to another through gamete donation and surrogacy, the biological truth for motherhood has evolved. The concept of the gestational birth mother always being the genetic mother has become a legal fiction, as the two can be distinct.[241]

The ECtHR's precedents in *Mennesson v. France*[242] and *Labassee v. France*[243] left open whether the legal reasoning would have been the same if the surrogate mother had carried out a pregnancy with an embryo created with an ovum of the intended mother and a sperm donor. In *D v. France*, the Court did not impose domestic registration of the foreign birth certificate to establish the legal mother-child link with the genetically related intended mother, as opposed to its decision with regard to the genetically related father in *Mennesson v. France*[244] and *Labassee v. France*.[245] The Court noted that the child has a right for their genetically related intended mother to be recognized as their legal mother.[246] However, the Court considered it compatible with the child's right to respect for private life that the genetically related mother had to go through the additional procedural step of adoption to have the legal

237. There is a legal presumption that the man married to the birth mother is the legal father, even if this might not necessarily reflect the biological truth. On the traditionally limited role of genetics for establishing legal fatherhood, see DOLGIN, *supra* note 2, at 134.

238. Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6, at 62.

239. *See* Mulligan, *supra* note 6, at 463-64.

240. *Id.*

241. DOLGIN, *supra* note 2, at 2.

242. Mennesson v. France, App. No. 65192/11 (June 26, 2014).

243. Labassee v. France, App. No. 65941/11 (June 26, 2014), http://hudoc.echr.coe.int/eng?i=001-145378.

244. *Mennesson*, App. No. 65192/11 at ¶ 100.

245. *Labassee*, App. No. 65941/11 at ¶ 79.

246. D v. France, App. No. 11288/18 at ¶¶ 64, 70.

parent-child link recognized, as opposed to the genetically related father.[247] The latter was recognized through the domestic registration of his inscription on the foreign birth certificate.

In its *Advisory Opinion*, the Court had already considered the issue of adoption, noting that if adoption by the intended mother is effectively and readily available, there is no need to register the foreign birth certificate directly.[248] However, the *Advisory Opinion* dealt with a case in which the intended mother was not genetically related to the child.[249] In *D v. France*, both the intended father and the intended mother were genetically related to the child and thus in an identical situation.[250] But the Court still treated them differently with regard to the recognition of the legal parent-child relationship (direct recognition versus recognition through adoption). Pushing for the registration of foreign birth certificates designating the intended genetic father, while accepting that the intended genetic mother must adopt her child, equates to gender discrimination, which is incompatible with Articles 8 and 14 ECHR. The ECtHR only briefly mentioned this concern in *D v. France*.[251] It did not address, however, the flagrant gender discrimination, as the claimants themselves did not raise the point.[252] The Court simply acknowledged that the intended genetic mother might find it difficult to consider going through an adoption procedure to establish legal parenthood for her genetic child under domestic law. [253] However, the Court was unwilling to interfere in this matter on procedural grounds.

A feminist critique of the ECtHR's stance in *D v. France* goes beyond the scope of this paper.[254] A few thoughts are nevertheless crucial

247. *D v. France*, App. No. 11288/18 at ¶¶ 66, 70.

248. 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 Court of Cassation, App. No. P16-2018-001 at ¶¶ 54-55 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.

249. *Advisory Opinion*, App. No. P16-2018-001 at ¶¶ 27-28.

250. *D v. France*, App. No. 11288/18 at ¶¶ 1–10.

251. *D v. France*, App. No. 11288/18 at ¶¶ 81-82.

252. In *D v. France*, the claimants only raised violations of the child's right to respect for private life and right to non-discrimination, and not possible rights violations of the intended genetic mother. D v. France, App. No. 11288/18 at ¶ 61.

253. *D v. France*, App. No. 11288/18 at ¶ 63.

254. For an overview of the literature on feminist critiques of ART, see LAURA M. PURDY, REPRODUCING PERSONS: ISSUES IN FEMINIST BIOETHICS (1996); REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES (Joan C. Callahan ed., 1995); EMILY MARTIN, THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION (rev. ed. 2001); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD (Rutgers Univ. Press 2000) (1989); Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique*

here. First of all, the Court's position is incoherent with regard to the role of genetics for the child's identity. As Mulligan notes, "the genetic relationship between a genetic father and a genetic mother and his or her child is precisely the same. Each shares 50% of the child's DNA."[255] If this relationship is so significant regarding the genetic father and constitutes, as the Court recognizes, an essential element of the child's identity and thus its best interests, this relationship is equally important with regard to the genetic mother. If the legal recognition of biological truth is an essential element of the child's identity when it comes to the genetic father, as the Court argues, then the same must be true regarding the genetic mother. The child's identity is as intensely connected to the genetic mother as it is with regard to the genetic father.

Furthermore, the ECtHR's conclusion in *D v. France*[256] that adoption produces similar effects to registering the foreign birth certificate is unconvincing. While it may be true that at the end of an adoption procedure, the child's status and its legal parenthood relations are the same, adoption is not a simple formality. The additional procedural step of adoption imposed on the genetic mother represents a significant hurdle, as adoption can be lengthy and costly.[257] Second parent adoption usually requires "hiring an attorney, paying court fees, executing various documents, submitting to background checks, and appearing in court."[258] During the adoption process and until the authorities reach a decision, the adopting parent is considered "a legal stranger to the child" and thus in a vulnerable position.[259] Feinberg is adamant that the legal means for establishing legal parenthood—direct recognition, voluntary acknowledgment, or adoption—are not

of Surrogacy Be Answered?, 68 IND. L.J. 205 (1992); SOPHIE LEWIS, FULL SURROGACY NOW: FEMINISM AGAINST FAMILY (2019); Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV. 1077 (2014); IDEOLOGIES AND TECHNOLOGIES OF MOTHERHOOD: RACE, CLASS, SEXUALITY, NATIONALISM (Heléna Ragoné & France Winddance Twine eds., 2000); Storrow, *Quests for Conception*, *supra* note 9.

255. Mulligan, *supra* note 6, at 470.

256. *D v. France*, App. No. 11288/18 at ¶ 66.

257. Kessler, *supra* note 6, at 322.

258. Jessica Feinberg, *Whither the Functional Parent: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 81 (2017) [hereinafter Feinberg, *Whither the Functional Parent*].

259. *Id.* at 82.

equivalent from the perspective of equal treatment of all the intended parents involved even they eventually may produce the same result.[260]

The ECtHR's assertion that adoption produces the same result for the parent-child-relationship as direct recognition and registration of the foreign birth certificate ignores the elements of power and control over legal motherhood at play in adoption processes. Adoption requires examining the genetic mother's fitness to be a legal mother and a child's best interests evaluation.[261] The Court acknowledges this additional layer of control and praises it, thus reiterating the focus on the child's best interests. Such an interest evaluation does not occur when legal parenthood for the genetic father is established by registering the foreign birth certificate. The genetic father's fitness for legal fatherhood is not examined at any point. There is no verification if the legal recognition of the link between the child and the genetic father corresponds to the child's best interests.

Finally, what about parity of reasoning?[262] A man can establish a father-child relationship via evidence derived from blood testing. Thus, parity of reasoning suggests that blood testing can also be conclusive for the determination of motherhood. Of course, such an approach implies a new, genetic testing involving, interpretation of the age-old adage that the mother is always certain—*mater semper certa est*. If the law recognizes genetic testing as a valid means to determine fatherhood, it should recognize genetic testing to determine motherhood as well, independently of who has given birth to the child and without imposing the additional procedural step of adoption.[263]

The power struggle behind the domestic authorities' refusal to directly recognize a birth certificate established abroad is about maintaining obstacles to a practice—surrogacy—that is considered illegal in a domestic context and that morally is still condemned in most of

260. Feinberg, *Whither the Functional Parent*, *supra* note 258, at 58; Feinberg, *Consideration of Genetic Connections*, *supra* note 231, at 375; Feinberg, *A Logical Step Forward, supra* note 179, at 105.

261. Kathryn Webb Bradley, *Surrogacy and Sovereignty: Safeguarding the Interests of Both the Child and the State*, 43 N.C. J. INT'L L. 1, 8 (2018).

262. For a critique of parity of reasoning, see Bender, *supra* note 14; Hendricks, *supra* note 183.

263. This is the case in Israel for example. Following a court decision, the intended mother of a child born through surrogacy can complete a DNA test to confirm her link to the child. Legal motherhood in such a case is established based on genetic testing. The Tel Aviv Family Court judge in this case noted "that a biological mother must adopt her natural children, is intolerable and defies common sense." *See* Dana Weiler-Polak, *Israeli Moms Won't Have to Adopt Babies Born to Surrogates*, HAARETZ (Mar. 7, 2012), [https://perma.cc/8PSX-58CB].

Europe, based on arguments such as the commercialization of motherhood and the vulnerability of surrogate mothers.[264] However, it is inappropriate to pursue this public order or public policy purpose in a gender-discriminatory manner and at the cost of the child's best interests. As the Court rightly recognized in its *Advisory Opinion*,[265] there are many interests attached to the recognition of the legal parent-child relationship between the mother and the child. The additional step that adoption imposes may well harm the child's interests.

Though the ECtHR refused to address possible discrimination against the intended genetic mother in *D v. France*, it nevertheless hinted to the absurdity of the situation by noting that as the child's genetic parent, the intended mother might find it difficult to consider going through an adoption procedure to establish a parenthood link with her child under French law.[266] This indicates that the Court might have decided differently if the claimants had raised their allegations as to a violation of Article 14 ECHR with regard to the mother's rights in a procedurally proper manner. Considering the facts of the case and the domestic authorities' actions, it is difficult to imagine how the government's actions would not constitute gender discrimination and, thus, a violation of Article 8 in combination with Article 14 ECHR.

Beyond the cross-border surrogacy cases discussed in this paper, open questions remain within the context of ART and legal motherhood. What about egg donation, not in the context of surrogacy but as another type of ART procedure for couples desiring to have a child? What about cases of errors in domestic ART treatments, such as in the Italian IVF clinic mix-up case that reached the ECtHR, where embryos were switched and implanted in the wrong mothers who were seeking fertility treatments in the same clinic?[267] Who is the legal mother there, the

264. *See* Ní Shúilleabháin, *supra* note 9, at 105; Beaumont & Trimmings, *supra* note 10, at 240; Gruenbaum, *supra* note 14, at 495; Storrow, *Proportionality Problem, supra* note 9, at 143.

265. 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 Court of Cassation, App. No. P16-2018-001 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.

266. D v. France, App. No. 11288/18 at ¶ 63.

267. *See* X and Y v. Italy, App. No. 41146/14, (Sept. 16, 2014), [https://perma.cc/6N7L-6P7R]. The embryos of the applicants in the case were mistakenly implanted in a different mother following an error that occurred at an Italian IVF clinic. *X and Y v. Italy*, App. No. 41146/14 at 1–2. The biological parents brought the case to the ECtHR after a judge in Rome ruled that the children must stay with their birth mother, as per Italian law. *X and Y v. Italy*, App. No. 41146/14 at 2. The ECtHR dismissed the case because the couple had not exhausted all the possibilities provided under

woman who gives birth, or the genetically related woman? Linking motherhood to genetics opens up a pandora's box of normative questions and addressing those questions is beyond the scope of this paper. The interactions between the adage that the mother is always certain—*mater semper certa est*—and genetics are a topic of ongoing legal theoretical debate.[268] However, normative uncertainty about how to define legal motherhood does not temper the gender discrimination condoned by the ECtHR's decision in *D v. France*, which allowed the genetically related father to be recognized as the legal father from the beginning, with all the benefits and protections that go with this status, while the genetically related mother had to undergo the process of domestic adoption to achieve the same status.[269]

VII. CONCLUSION

There is a biological reality of conceiving a child and a social reality relating to concepts of family and parenthood. These concepts have been changing over time. There are increasing societal tendencies toward embracing non-traditional families, facilitated by ART and the tremendous progress achieved and still ongoing. Today, many combinations of genetic, gestational, and social parenthood exist. Judicial recognition of non-traditional families can support this social change and push for democratically legitimized law reform by the legislature. This trend towards family diversity and pluralism has been accompanied by an emphasis on respect for human rights, including the right to respect for family life and gender and sexual equality.[270] However, the scope of liberalization and inclusiveness is limited. As Dolgin notes:

> [T]he law's developing recognition of individualism and choice in the creation and operation of families has limited

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Italian legislation for the recognition of their rights. *X and Y v. Italy*, App. No. 41146 /14 at 3. For a critical analysis, *see* Bender, *supra* note 14 (on these mix-up cases); Hendricks, *supra* note 183 (on the issue of genetic essentialism).

268. *See, e.g.,* Campbell, *supra* note 14; DOLGIN, *supra* note 2; Gruenbaum, *supra* note 14; Cahn, *Uncertain Legal Basis*, *supra* note 8; Margalit et al., *The New Frontier*, *supra* note 14; Mykitiuk, *supra* note 7; Robinson & Miller, *supra* note 14; Garrison, *The Technological Family, supra* note 14; Anderson, *supra* note 14; Meyer, *supra* note 14; Garrison, *The Law Making for Baby Making, supra* note 2; Bender, *supra* note 14; Baker, *supra* note 14; Kessler, *supra* note 6; NeJaime, *Nature of Parenthood*, *supra* note 2; Blecher-Prigat, *supra* note 14.

269. *D v. France*, App. No. 11288/18 at ¶¶ 81–82.

270. Büchler, *supra* note 15, at 30–35.

> itself to relationships between adults (especially spouses and cohabitants) within families. With regard to the parent-child connection, the law has been much slower to accept change. But disputes occasioned by reproductive technology often involve questions about parentage.…[271]

The relationship between the intended social parent and the child is often left without legal protection, even when the legal relationship between the parents is recognized. A genetically unrelated parent in non-traditional families created through ART is legally part of the family, but their role as a legal parent remains precarious.

This paper tells a story of shifting normativities, from tradition to modernity and back, with regard to the recognition of legal parenthood in non-traditional families created through cross-border surrogacy. The cross-border element is a forced element. Couples and individuals must travel abroad because most domestic legal frameworks in Europe still restrict the creation of non-traditional families through ART. Once back home, these families face a situation of legal limbo regarding the children's status and their legal parenthood. The ECtHR agrees with the need to rectify this situation but, in parallel, fills the legal limbo with genetic essentialism and allows for gender discrimination when recognizing legal parenthood. When discussing the recognition of birth certificates for children born through cross-border surrogacy, the ECtHR relies on the genetic parent-child link as an essential element of the child's identity. The Court also underlines the connection between genetics and the child's best interests.

The traditional "nuclear ideal" of the family offers clarity in the assignment of parenthood and its rights. With the combination of ART and cross-border fertility services, a blurring of lines occurs as family diversity becomes more prevalent. At the same time, the reality depicted by genetics does not allow for blurred lines. On the contrary, genetics testing can determine genetic parenthood with precision. One might argue that the ECtHR's reasoning and its focus on genetic relatedness can be explained with the search for clarity in the context of fluid, non-traditional family forms. The technologies of genetic testing provide certainty.

A dichotomy thus becomes apparent between assisted reproductive technologies and services, allowing for the creation of a more plural and diversified social reality including non-traditional families, and genetic

271. DOLGIN, *supra* note 2, at 32.

technologies, serving as a tool nudging towards a narrower legal definition of the parent-child relationship based on verifiable genetic relatedness.

The new status quo brought about by the ECtHR's precedents is problematic. Biological realities are not a natural blueprint for social reality. Biological classifications are but one factor in defining social classifications.[272] Campbell pinpoints that "[i]n circumstances involving assisted reproduction, identifying biology as a basis for [the legal parent-child link] seems perplexing, given that the point of using reproductive materials or services from third parties is to acquire parental status even where one cannot rely (or chooses not to rely) on biological/'natural' methods of procreation."[273] The normative power of biological reality or biological truth created by genetic parent-child links is overrun by the social reality of family pluralism brought about by ART and cross-border reproductive services. The ECtHR's adherence to genetic essentialism in the recognition of the legal parent-child relationship sidelines other essential elements of a child's identity and best interests.[274]

The law must consider the lived diversity of families and thus accommodate not only the majority, but also the minority cases, without discrimination. In its recent case law, the ECtHR insists that it is necessary to ensure that a child is not disadvantaged because they were conceived through ART and cross-border surrogacy.[275] However, the ECtHR's focus on genetics allows the method of reproduction used by the intended parents to determine the child's status and legal rights and the recognition of legal parenthood.[276] The Court does not take

272. The understanding that biology is not the sole criteria for determining parent-child relationships is reflected in existing, traditional legal rules such as the marital presumption rule, or legal presumption of fatherhood in marriage, creating a "legal fiction" of biological fatherhood in marriage. *See* R. Alta Charo, *Biological Truths and Legal Fictions*, 1 J. HEALTH CARE L. & POL'Y 301 (1998).

273. Campbell, *supra* note 14, at 259.

274. Caulfield, *supra* note 15, at 100. As Charo notes: "A child needs protection. The law is there to identify the adults who will provide it. Biology may tell us who birthed the child, and whose egg provided the maternal DNA. But this is neither necessary nor sufficient to determine whom the law should call a mother." *See* Charo, *supra* note 272, at 327.

275. The ECtHR relied on the same line of arguments in another area of family law, such as with regard to "illegitimate" children, *i.e.*, children born outside of wedlock. It was the judiciary that played the most significant role in addressing the status of "illegitimate" children and the discrimination against nonmarital children that lingered in the latter half of the twentieth century. On the ECtHR's role in this context, *see* Storrow, *Proportionality Problem*, *supra* note 9, at 143.

276. In his concurring opinion in *Valdís Fjölnisdóttir v. Iceland*, Judge Lemmens notes that "I wonder whether the legal limbo in which a child finds [them]self can be justified on

intentionality and the intended social parent's role under consideration. This undermines the child's best interests, recognized as predominant by the same Court.

The child's best interests standard requires that courts balance different factors: the biological parent does not receive an automatic or exclusive preference. Mulligan argues, "intention is an essential aspect of parenthood in assisted reproduction, and thus the relationship to the intended parent should be captured by the Article 8 right to identity."[277] The standard of intention does not necessarily directly focus on the child's best interests.[278] However, it is fair to assume that the individuals who are at the origin of creating a non-traditional family through the means of cross-border surrogacy will assume their role as parents and act in the child's best interests, whether they are genetically related to the child or not.[279]

Children in non-traditional families, conceived through ART or surrogacy and born abroad, have the right to equal legal protection as other children in the domestic context. This protection should include the guarantee that civil status documents (*i.e.*, birth certificates) of these children are recognized in all Member States of the Council of Europe, regardless of whether they provide access to specific ART and surrogacy in a purely domestic context. The recognition of a legal relationship with both parents, genetic or social, not only protects the child's identity but is also directly relevant to other interests and rights such as citizenship, welfare benefits, security in case of death or separation of the parents, and inheritance.

The ECtHR demands that recognition of the legal parent-child relationship with the second intended parent (the mother) has to be effectively and readily available through adoption.[280] However, it turns a blind eye to several crucial issues for non-traditional families created through ART abroad. Accepting adoption as an additional procedural step creates an obstacle for recognizing the social parent, who plays an equal role in the creation of non-traditional families. The Court's position

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the basis of the conduct of [their] intended parents or with reference to the moral views prevailing in society." Valdís Fjölnisdóttir v. Iceland, App. No. 71552/17 at ¶ 64.

277. Mulligan, *supra* note 6, at 472.

278. Maule & Schmid, *supra* note 15, at 477.

279. *Id.*

280. 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 Court of Cassation, App. No. P16-2018-001 at ¶ 55 (April 10, 2019), http://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782; D v. France, App. No. 11288/18 at ¶ 70.

also imposes an element of power and control over the recognition of legal motherhood, an element not imposed as such on legal fatherhood. This element of power and control in recognizing legal motherhood can hardly be justified based on protecting the child's best interests. Imposing an additional evaluation, as to a genetic mother's fitness to be a legal mother, constitutes discrimination based on gender, in violation of Articles 8 and 14 ECHR.

Eventually, the issues decided by the Court go beyond family and recognition of legal parent-child relationships. They also speak to the political relationship between citizens and the polity and how membership in this polity is defined in a European context.[281] Lastly, Bradley notes, regarding the trajectory of the ECtHR's reasoning and its implications, "The state has the right and responsibility to define citizenship and parentage, to protect children within its borders, and to enact policies and laws, including those relating to surrogacy, that fulfill these sovereign duties."[282] Bradley further explains that "[e]xpecting individuals who wish to assume legal responsibility for a particular child to demonstrate that they are entitled to do so—whether by birth, genetics, or other means—is within the authority and responsibility of the state."[283]

In fulfilling these sovereign duties, the child's best interests must be considered, and genetic essentialism is not necessarily in the child's best interests. How the law conceives families is not a scientific inquiry looking for biological truth. While genetic connections will likely always be meaningful to parents and children alike, they are not all that matters for parenthood. Intention is an essential aspect of parenthood in assisted reproduction and families created through these technologies. The relationship to the intended social parent should thus be recognized in an equal manner.[284] In fulfilling its sovereign duties, the state has to impose rules and procedures that guarantee equal treatment to intended mothers and fathers and equal treatment to genetic and social parents. Only if the law becomes aware of all the dimensions of non-traditional families can the child's best interests be fully respected. ♣

281. Storrow, *International Surrogacy in the European Court of Human Rights*, *supra* note 6, at 67.
282. Bradley, *supra* note 261, at 5.
283. *Id.* at 8.
284. Mulligan, *supra* note 6, at 472.