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## **The Scope of Reproductive Choice and Ectogenesis**

### **A Comparison of European Regional Frameworks and Canadian Constitutional Standards**

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*Abstract:* The purpose of this paper is to contribute to the theoretical understanding of the possible effects on the scope of reproductive choice that the emergence and introduction of artificial wombs into the health care system might produce, considering the ordinary meanings of the right to private life under the European Convention, on the one hand, and Canadian constitutional standards, on the other. The aim of the research is to demonstrate how such a technical possibility could have different effects on the same core value in different democratic jurisdictions.

An analysis has been conducted, first through the allocation of new circumstances arising from the process of artificial gestation, which were recognised as legally relevant either in the case law or in the national statutes, and then through an examination of how they could affect settled determinants of the scope of the reproductive choice. In the analysis, I took into consideration the interpretative strategies applied by the institutions of the European Convention when defining who is the bearer of legal protection and whose interests are at stake in the sphere of reproductive choice. Following that, I compared them to that of the Supreme Court of Canada. The whole analysis rests on two main presumptions. First, I presumed that relevant judicial instances will maintain a coherent interpretation of the guarantees covered by the right to private life, in compliance to their ordinary meaning. The second presumption is a twofold construct. The first element assumes that there is no specific legislation regulating new technology. The second element of the construct reflects the persuasion that, even if the introduction of new technology is followed by specific national legislation, supremacy shall be given to regional/constitutional standards when interpreting legal subjecthood and the reproductive powers of the progenitors.

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The inquiry resulted with conclusions that (1) as far as the European regional frameworks are concerned, the obtainment of viability and the exclusion of the conflict between competitive rights 1-a) provides the state with a wide margin of appreciation to restrict the scope of reproductive choice on the basis of the public interest, 1-b) disconnects the demand of progenitors to end the process of ectogenesis from the guarantees safeguarded through the European Convention, and 1-c) requires autonomous recognition of the artificially gestated human entity under the European Convention; (2) as far as Canada is concerned 2-a) the obtainment of viability is just one of three cumulative requirements for the legal protection and as such it cannot reduce the scope of reproductive choice, and 2-b) neither the unborn nor the state have their interests recognised in the sphere of reproductive choice.

The inquiry in this paper is limited to the examination of the effects that full artificial gestation (which commences with an artificial equivalent to the natural implantation of *in vitro* created embryos into an ectogenetic machine) is expected to have to the precisely one among numerous human rights issues that would be affected. Another limitation of the research is imposed by focusing only on the effects that new technology would have with respect to the scope of the reproductive choice of all progenitors, regardless of their sex or gender orientation. A significant question when discussing new reproductive technologies is, of course, the distribution of decision-making powers between the progenitors themselves. And the last but not the least is the limitation with respect to the physical/genetic features of the artificially gestated agent. The analysis was limited to the examination of the subject of the research in the event that an able-bodied agent was implanted and gestated. The above conclusions could significantly and unjustly differ if there were a disabled agent.

The intention was to provide a contribution with dual benefits. First, as far as I am aware, legal (not just moral) analysis of the effects of ectogenesis on the scope of reproductive choice that is centred on the guarantees of the European Convention is still missing. Accordingly, there is no adequate comparison between European regional frameworks and Canadian constitutional standards.

## I Introduction

In the last several decades, we have been witnessing a technological revolution designed to facilitate reproductive choice, firstly enabling progenitors to have genetically related offspring by means of different methods of artificial fertilisation and now enabling progenitors to have a genetically preferred child using various techniques of prenatal genetic testing. However, progress in developing reproductive technologies might not always have extensive effects on the scope of reproductive choice. This could be well displayed on the example of expected development of artificial wombs (ectogenesis) that entirely substitutes natural gestation. The process of ectogenesis is actually a two-stage artificially administered process. First, it involves artificial creation of *in vitro* embryos. The second stage begins with implantation of *in vitro*

embryos into an artificial device as a replacement for a womb.<sup>1</sup> This stage ends with delivery of a fully developed foetus. The technology started to develop in order to increase the survival chances of premature babies. Now, it is developing toward full substitution for natural gestation. Different research centres periodically announce the development of artificial wombs,<sup>2</sup> as well as the successful culturing of embryos within *in vitro* systems<sup>3</sup> and without maternal tissue.<sup>4</sup> Currently, new technology appears to be easier to achieve than to regulate. Many legal and ethical questions are preceding it.

According to one approach to the issue, ectogenesis could be regarded as a means of eliminating the present inequality in the division of reproductive labour.<sup>5</sup> The mother–child relationship was considered by Shulamith Firestone as an aspect of female inequality and therefore something to be done away with if at all possible.<sup>6</sup> Kendal argues that the ideals of equal opportunity demand continued research into ectogenesis, since it is expected to liberate future women from unjust physical, social and financial burdens imposed upon them by the current necessity for biological gestation and childbirth.<sup>7</sup>

A different view is taken by Bard, who maintains that the invention of a method to gestate a baby outside the human womb would have enormous implications for how the courts, ethicists and society at large currently view the right of a foetus to be born.<sup>8</sup> In this line, Boonin thinks that, if there is someone (or something in the context of present discussion) who (or that) would have taken the embryo and brought it to term, they would probably have acquired a duty to keep it alive.<sup>9</sup> At that point, Karnein argues, birth may no longer have even normative significance, and conception may take its place.<sup>10</sup> Recently, some authors have made a claim that the right to protection of life would radically change if there were an

<sup>1</sup> Marion Abecassis, 'Artificial Wombs: "The Third Era of Human Reproduction" and the Likely Impact on French and U.S. Law' (2016) 27 (1) *Hastings Women's Law Journal* 3–28, 12.

<sup>2</sup> A. Emily Partridge and others, 'An extra-uterine system to physiologically support the extreme premature lamb' [2017] *Nature Communications* DOI: 10.1038/ncomms15112.

<sup>3</sup> Sara Reardon, 'Human embryos grown in lab for longer than ever before' (2016) *Nature* (04 May 2016, corrected: 06 May 2016). Retrieved from: <<https://www.nature.com/news/human-embryos-grown-in-lab-for-longer-than-ever-before-1.19847>> accessed 20 May 2017.

<sup>4</sup> N. Marta Shahbazi, 'Self-organization of the human embryo in the absence of maternal tissues' (2016) 18 *Nature Cell Biology* 700–708, doi:10.1038/ncb3347.

<sup>5</sup> Peter Singer, Deane Wells, *The reproduction revolution: New ways of making babies* (Oxford University Press 1984, Melbourne) 135.

<sup>6</sup> *Ibid.*

<sup>7</sup> Evie Kendal, *Equal Opportunity and the Case for State Sponsored Ectogenesis* (Palgrave Macmillan 2015, Basingstoke) doi: 10.1057/9781137549877.0003.

<sup>8</sup> Jennifer S. Bard, 'Immaculate Gestation? How will ectogenesis change current paradigms of social relationships and Values?' in Scott Gelfand, John R. Shook (eds), *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Rodopi 2006, Amsterdam – New York) 149–157.

<sup>9</sup> See John Martin Fischer, 'Abortion and Ownership' (2013) 17 *Ethics* 275–304, 284 and 294, doi 10.1007/s10892-013-9152-z.

<sup>10</sup> Anja Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation* (Oxford University Press 2012, Oxford) 24.

artificial replacement for the unborn's connection to a woman's body. Substantively, the objection that such prenatal life is not a proper object for the right to protection of life due to its 'structural (dis)position',<sup>11</sup> cannot be sustained. Alghrani recognises that, from this stage on, the prenatal life that is gestated through ectogenesis (ectogenetic agent or EA) can be protected independently without violating a woman's bodily autonomy,<sup>12</sup> and proposes the irrevocability of the process from the stage that is equivalent to natural gestation.<sup>13</sup> In this light Bard wonders 'If technology advances to a point that every foetus was viable at every stage of development how can society permit abortion?'<sup>14</sup>

There are two main arguments based on which the latter group of authors make their claims. First, it is reaching viability from the moment that is equivalent to commencement of natural gestation, which could confer the right to life protection on the prenatal human life. The second argument is conflict exclusion. Namely, from the moment that is equivalent to natural implantation, the prenatal life is in the position where no one could invoke his/her competitive interests in order to challenge its interests. Therefore, the scope of reproductive choice was tested against the viability and structural position of just-implanted prenatal life.

The discussion about the element of viability starts with a description of two different sorts of viability and the determination of which of them is relevant for the present topic and why. The investigation further proceeds with an analysis of the legal reflections of this element in precedents of the US Supreme Court, national legislations in Europe and an indication of the margin of appreciation that was recognised to the Member States of the Council of Europe (the States, State). Through such efforts, I have set out to provide a picture of the possible implications that the introduction of ectogenesis might have for the scope of reproductive choice in the systems that accept viability as a determinant of the legal status. In contrast to that, I have emphasised two distinctive refuters of the Canadian judicial doctrine when interpreting the subjects of the legal protection, the criteria of personhood, and the resulting list of the relevant parties in the sphere of reproductive choice.

As for conflict exclusion, in this analysis I focused onto the scope of reproductive choice as it is recognised through the case law of the former Commission of Human Rights (Commission) and the European Court of Human Rights (the Court). Given that the case law of the Supreme Court of Canada gave no recognition to the interests of pre-persons, the effects of this element on the scope of reproductive choice could not be discussed. The relation between this element and the scope of reproductive choice has been observed in regard to its reflections on the private life from the ambit of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention, Convention), and the autonomy of the relevant parties in the sphere of reproductive choice.

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<sup>11</sup> Ibid, 39.

<sup>12</sup> Amel Alghrani, 'Regulating the Reproductive Revolution: Ectogenesis – A Regulatory Minefield?' in Michael Freeman (ed), *Law and Bioethics: Current Legal Issues* (Oxford Scholarship Online 2009) DOI: 10.1093/acprof:oso/9780199545520.001.0001.

<sup>13</sup> Ibid.

<sup>14</sup> Bard (n 8).

## II Viability

Along with the capability of feeling pain, a theory proposed viability (the stage at which the unborn becomes capable of surviving outside the womb, with or without medical assistance) as the determinant of personhood.<sup>15</sup> Kewon finds that it is ethically defensible to attach moral significance to this criterion.<sup>16</sup> Thomson agrees that the foetus has already become a human person well before birth,<sup>17</sup> referring to the stage no later than viability. It should be noted herein that viability could be understood in a narrow or a broader sense. The narrow approach defines viability as the point at which the unborn can survive independently outside the womb.<sup>18</sup> Such a position is strongly suggested by Wicks, due to the fact that, from this point, the functions of the human organism are integrated.<sup>19</sup> In this regard, Wicks maintains that ‘the key requirement for an individual to qualify for the special legal and ethical protection given to the human life was said to be an integrative function of a human organism. Such an integrative function will be governed by the brain and will require sufficiently developed lungs to supply oxygen to the major bodily organs.’<sup>20</sup> She further concludes that a human organism has the potential to function in a required manner from viability to brain death and thus should enjoy the special protection accorded to the human species during that period, regardless of considerations of birth or consciousness.<sup>21</sup> Contrariwise, Boonin defines the viability criterion in a broad sense. He considers ‘that a foetus is viable if the technological means of keeping it alive outside of the womb are in principle available somewhere, even if not to this particular foetus.’<sup>22</sup>

For the purpose of this topic, viability should be discussed in the broader sense of the term, because analysis refers to an entirely artificial process which implies *medical assistance* during the whole course of development and there is no reason to insist on natural parameters that emerge at an indeterminable point on the path. The narrow approach refers to natural viability, which is of course relevant when gestation occurs naturally. Also, the operation of this approach is not deprived of practical difficulties. Namely, natural viability is not a temporarily fixed point in the developmental path.<sup>23</sup> It is a potential result, which depends on various factors, clinical and social, and which can be

<sup>15</sup> See Anne Mary Warren, ‘The Moral Significance of Birth’ (1989) 4 (3) *Hypatia*.

<sup>16</sup> John Kewon, *The scope of the offense of child destruction in The Law and Ethics of Medicine: Essays on the Inviolability of Human Life* (Oxford University Press 2012, Oxford).

<sup>17</sup> J. Judith Thomson, ‘A Defence of Abortion’ (1971) 1 (1) *Philosophy and Public Affairs* 46.

<sup>18</sup> Rani Pillay, ‘The beginning of human personhood: is South African law outdated?’ (2010) 21 (2) *Stellenbosch Law Review = Stellenbosch Regsdykskrif* 230–238.

<sup>19</sup> Elizabeth Wicks, *The right to Life and Conflicting Rights of objection is the Others* (Oxford University Press 2010, Oxford) 19, 20.

<sup>20</sup> Wicks (n 19) 239.

<sup>21</sup> *Ibid.*

<sup>22</sup> David Boonin, *A Defense Of Abortion* (Cambridge University Press 2003, Cambridge) 131–132.

<sup>23</sup> Camilla Pickles, ‘Personhood: Proving Significance of the Born Alive Rule with Reference to Medical Knowledge of Fetal Viability’ (2013) 24 (1) *Stellenbosch Law Review* 146–164.

verified only upon birth.<sup>24</sup> As such, it is not a reliable criterion for determining when the right to life begins. Under this approach, we might not know if the particular unborn was viable or not, regardless of the gestation. We can only presume. However, presumptions are not a suitable basis on which to claim fundamental rights. In legally disputable situations, presumptions imply an operation of the benefit-of-the-doubt or detriment-of-the-doubt approach, which is not an acceptable way for settling disputes on highly sensitive issues. Unlike that, the operation of the broader approach provides a temporarily defined point of viability and as such it is a reliable determinant for moral and legal status. The practical problems with the broad understanding of viability (as described by Wicks, who says that there ‘seems to be something absurd about a moving boundary, so that we might say “last year this foetus would not have been a person at this stage, but since they re-equipped the intensive care unit, it is one”;<sup>25</sup>) are not applicable to the present situation, where whole gestation occurs artificially. Same applies to the objections described by Kornegay.<sup>26</sup>

The legal relevance of viability in the field of the right to life protection has been reflected in some common law jurisdictions.<sup>27</sup> In the United States, the decisive criterion for the beginning of the right to life protection is viability.<sup>28</sup> In the *Colautti v Franklin* case, the United States Supreme Court defined ‘viable’ to mean capable of prolonged life outside the mother’s womb, ‘with or without artificial support’<sup>29</sup>. The foetal-viability standard was re-evaluated by the same court in *Stenehjem*.<sup>30</sup> It was considered that this standard ‘has proven unsatisfactory because it gives too little consideration to the “substantial state interest in potential life throughout pregnancy”’. The United States Supreme Court considered that this standard disregards the states’ ability to account for ‘advances in medical and scientific technology [that] have greatly expanded our knowledge of prenatal life’<sup>31</sup>. This consideration is in line with the technical possibility of prenatal life becoming viable from the very moment of *syngamy*. As to national legislations in Europe, abortion is temporally limited with the child’s viability regardless of indications (in Norway,<sup>32</sup> Portugal<sup>33</sup> and Sweden,<sup>34</sup> for example).

<sup>24</sup> Ibid.

<sup>25</sup> Wicks (n 19) 125.

<sup>26</sup> R. Jo Kornegay, *Hursthouse’s Virtue Ethics and Abortion: Abortion Ethics without Metaphysics?* (2011) 14 (1) *Ethic Theory Moral Practice* 51–71, doi 10.1007/s10677-010-9230-2.

<sup>27</sup> Pickles (n 23) 151–153.

<sup>28</sup> *Stenberg v Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000); *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); and *Roe v Wade*, 410 U.S. 113, 93 S.Ct.705, 35 L.Ed.2d 147(1973).

<sup>29</sup> *Colautti v Franklin*, 439 U.S. 379, 388 (1979).

<sup>30</sup> *MKB Management Corp. v Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied, 2016 WL 280836 (U.S. Jan. 25, 2016).

<sup>31</sup> Ibid.

<sup>32</sup> Article 2, para. 6. Lov om svangerskapsavbrudd [abortloven] Lov No. 50 of June 13, 1975, *as amended*, <<https://lovdata.no/dokument/NL/lov/1975-06-13-50?q=abortlov>> accessed 13 March 2016.

<sup>33</sup> Código Penal, Decreto-Lei No. 48/1995, de 15 de Março, <[http://www.pgdlisboa.pt/pgdl/leis/lei\\_mostra\\_articulado.php?tabela=leis&artigo\\_id=&nid=109&ficha=101&pagina=&nverso](http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?tabela=leis&artigo_id=&nid=109&ficha=101&pagina=&nverso)> accessed 13 March 2016.

<sup>34</sup> Article 3 § 2. Sweden, Lag om abort [Abortlagen] (Svensk Författningssamling [SFS] 1974:595), <<http://www.notisum.se/rnp/SLS/lag/19740595.htm>> accessed 13 March 2016.

Viability is an abortion limit in Denmark,<sup>35</sup> and the Netherlands,<sup>36</sup> but it is not preclusive. If the abortion is permitted after the child reaches viability, then every appropriate measure to save the life of the child must be taken (Italy,<sup>37</sup> Ireland,<sup>38</sup>). Because, from the aspect of the scope of reproductive choice, Alghrani fairly maintains that, after ectogenesis becomes a safe alternative to human gestation, '(...) countries around the world that use viability as the point at which the foetus deserves protection will be forced to reconsider their legislation on abortion'<sup>39</sup>. In this sense, the Convention's institutions recognised 'public interest'<sup>40</sup> as a legitimate ground for intruding into women's private sphere, which requires a fair balance to be maintained. The Commission for Human Rights stated that 'pregnancy and its termination do not, as a matter of principle, pertain uniquely to the sphere of the mother's private life'<sup>41</sup>. This position was already open to review as it might potentially cast doubt upon the private life nature of pregnancy itself.<sup>42</sup> Recognition of the state's 'interest in protecting unborn children'<sup>43</sup> was an inducement for Bard to maintain that 'even if the mother and father agree on an abortion, the existence of ectogenesis may give the state grounds to override their decision'<sup>44</sup>.

However, even if it might be relevant in respect to European legislation(s), Warren's consideration that artificially moving boundaries would force us to 'make a hazardous leap from the technologically possible to the morally mandatory'<sup>45</sup> does not sound so convincing as far as Canada is concerned. Unlike the case law of the European region, where the Commission and the ECtHR separated personhood from the right to life protection,<sup>46</sup> the Supreme Court of Canada made the right to life protection of the unborn with (missing)

<sup>35</sup> Article 94 § 3. Sundhedsloven, LBK nr. 1202 af 14/11/2014, <<https://www.retsinformation.dk/forms/r0710.aspx?id=152710#Kap25>> accessed 13 March 2016.

<sup>36</sup> *Late zwangerschapsafbreking en levensbeëindiging bij pasgeborenen* [*Late Abortion and Euthanasia in Newborns*], Rijksoverheid [Government of The Netherlands], <<http://www.rijksoverheid.nl/onderwerpen/levenseinde-en-euthanasie/late-zwangerschapsafbreking-en-levensbeëindiging-bij-pasgeborenen>> accessed 13 March 2016.

<sup>37</sup> Article 7 § 3. Legge 22 maggio 1978, n. 194, *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza* [Law No. 194 of May 22, 1978, Provisions on the Social Protection of Maternity and the Voluntary Interruption of Pregnancy], *Gazzetta Ufficiale della Repubblica Italiana* [G. U.] [Official Gazette] No. 140 (May 22, 1978), <<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1978-05-22:194.>> accessed 13 March 2016.

<sup>38</sup> Department of Health, Implementation of the Protection of Life During Pregnancy Act 2013: Guidance Document for Health Professionals 1.2 (2014), <http://health.gov.ie/wp-content/uploads/2014/09/Guidance-Document-Final-September-2014.pdf>. March 2016.

<sup>39</sup> Amel Alghrani, 'The Legal and Ethical Ramifications of Ectogenesis' (2007) 2 *Asian Journal of World Trade Organization & International Health Law and Policy* 189–211, 200.

<sup>40</sup> See, for example *Boso v Italy*, no. 50490/99, 5 September 2002.

<sup>41</sup> See *Brüggenmann and Scheuten v Germany*, No. 6959/75, Commission's report of 12 July 1977, DR 10, 100.

<sup>42</sup> Elizabeth Wicks, 'A, B, C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) 5 (2) *Human Rights Law Review* 556–566, 560.

<sup>43</sup> *MKB Management Corp. v Stenehjem*, 795 F.3d 768 (8th Cir. 2015), cert. denied, 2016 WL 280836 (U.S. Jan. 25, 2016).

<sup>44</sup> Bard (n 8).

<sup>45</sup> Warren (n 15) 46–64.

<sup>46</sup> Wicks (n 42) 209.



personhood conditional.<sup>47</sup> Furthermore, personhood in Canada is not conferred based on a single criterion. Along with viability, two additional requirements of common law must be cumulatively met; hence personhood in Canada is determined based on the ‘born, alive and viable’ rule.<sup>48</sup> It could be considered that this rule was clearly defined through the case law addressing opaque circumstances. In *R. V. Sullivan* (1991),<sup>49</sup> the Supreme Court of Canada was faced with the question of the legal status of the foetus when coming through the birth canal. The case evoked before the Supreme Court of Canada originally concerned the criminal law liability of midwives for causing bodily harm to a pregnant mother, and causing death to the child during childbirth.<sup>50</sup> Even though the child was viable, it was not ‘born, alive and viable’ and it was not eligible for personhood and the associated protection.

Also, due to the lack of personhood, the relevant case law made no reference to the ‘public interest’ in the same way as European case law, when balancing the obligations of established person and the eventual demand for the protection of prenatal life. The mother cannot be held responsible for causing damage to the child before it meets personhood requirements, because, according to the case-law, insisting on a duty of care ‘would result in very extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women’<sup>51</sup>. It is so even if the established person was not competent and suffered addiction that was proven to be hazardous to the prenatal life.<sup>52</sup> In *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997), the Supreme Court of Canada considered that the lack of the personhood of the prenatal life prevents a social services agency from detaining a pregnant woman until her child is born, because such a measure would require the exercise of *parens patriae* jurisdiction.<sup>53</sup>

### III Conflict Exclusion

When we consider the scope of the reproductive choice, the discussion in the European regional frameworks is typically centred on a fair balance between the demands for the protection of the unborn life and conflicting rights and interests of others. Through the abortion case law, the Conventional institutions intended to determine what could be considered as fair balance between the woman’s interests and ‘the need to ensure protection of the unborn child’,<sup>54</sup> under the European Convention. A crucially important determinant for the judicial

<sup>47</sup> *R. V. Sullivan* (1991) the Supreme Court of Canada; *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) the Supreme Court of Canada.

<sup>48</sup> *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) the Supreme Court of Canada.

<sup>49</sup> *R. V. Sullivan* (1991) the Supreme Court of Canada.

<sup>50</sup> See Dave Snow, ‘Reproductive Autonomy and the Evolving Family in the Supreme Court of Canada: Implications for Assisted Reproductive Technologies’ (2014) 48 (1) *Journal of Canadian Studies* 153–189.

<sup>51</sup> *Dobson (Litigation Guardian of) v Dobson* (1999), paras 22–23 the Supreme Court of Canada.

<sup>52</sup> *Ibid.*, 162.

<sup>53</sup> *Winnipeg Child and Family Services (Northwest Area) v G. (D.F.)* (1997) para 11, the Supreme Court of Canada.

<sup>54</sup> *Boso v Italy*, no. 50490/99, 5 September 2002.



interpretation of fairness in the concerning conflict arose from woman's irreplaceable role in reproduction, i.e. the ability to gestate. Unique gestational interconnection between the woman and the unborn conferred greater control upon her over reproduction as compared to man,<sup>55</sup> as she is the person 'primarily concerned by the pregnancy and its continuation or termination,'<sup>56</sup> and made it impossible to isolate the life of the unborn from that of the mother.<sup>57</sup> The institutions of the Convention granted that gestational connection imposes limitations to unborn life protection when it is in conflict with the mother's interests.<sup>58</sup> It was considered that 'if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests'<sup>59</sup>.

Within such a framework, it appears reasonable to consider that, according to the European case law, the scope of reproductive choice would be affected significantly if we could eliminate the conflict of the competing rights of the mother and those of the unborn. The situation in Canada is quite different. Namely, a human pre-person has no legal status and it is entirely precluded from legal protection. The case law of the Canadian Supreme Court gave no reason to consider the interests of prenatal human life under any scope. Furthermore, according to the reasoning from *Tremblay v Daigle* (1989), 'a foetus is not included within the term "human being".<sup>60</sup> For this reason, the following discussion almost exclusively refers to the situation that might arise under European frameworks.

## 1 Private Life and Conflict Exclusion

Bearing in mind that the finalisation of ectogenesis results in genetic offspring out there in the world and in accordance with the European case law,<sup>61</sup> it is necessary to examine this fact from the aspect of the Article 8 of the Convention, which safeguards the right to respect for private and family life. The notion of private life from the ambit of Article 8 has a broad meaning and, along with personal autonomy, it provides the right to psychological integrity.<sup>62</sup> As for personal autonomy in terms of physical-bodily integrity, it is not possible to make an incontestable claim of its infringement without gestational interconnection. Contrary to this, it is possible to claim that the existence of the offspring in the world could be disturbing to progenitors and consequently could infringe upon their psychological integrity. Namely, the existence of psychosocial indications is a widely accepted ground for abortion across Europe. It might appear that the 'psycho' component of the phrase implies a quest for the psychological

<sup>55</sup> See Sally Sheldon, 'Gender Equality and Reproductive Decision-Making' (2004) 12 *Feminist Legal Studies* 303–316, 312.

<sup>56</sup> *Boso*, para. 4.

<sup>57</sup> *Ibid.*, § 19.

<sup>58</sup> *R.H. v Norway*, no. 17004/90, Commission decision of 19 May 1992.

<sup>59</sup> *Vo v France*, no. 17004/90, 8 July 2004, § 12.

<sup>60</sup> *Tremblay v Daigle* (1989).

<sup>61</sup> *Evans v the United Kingdom*, No. 6339/05, 10 April 2007, § 72.

<sup>62</sup> *A, B and C v Ireland*, no. 25579/05, 16 December 2010, § 216.

emergency to engage. In fact, however, this component does not require a specific illness neither to occur nor to threaten. Otherwise, it would be expressly stated, as it is for instance in Denmark's Health Act.<sup>63</sup> In this way, it rather refers to any circumstance which might be burdensome or distressful<sup>64</sup> to the mother, such as living conditions, marital status, employment, education, etc. For instance, in Germany, which is considered a restrictive regime by some,<sup>65</sup> the law tolerates abortion on medical grounds when a combination of economic and family hardships can justify it, even if the condition is not pathological in the sense of classical psychiatry.<sup>66</sup> In the US, the psychological factors were classified under the well-being grounds for abortion.<sup>67</sup> For the reasons of such a broad concept of private life and a broad understanding of psycho-indications, it is reasonable to consider that the inability to bring the ultimate request (to demand the death of the ectogenetic agent) could amount to interference with the right to respect the private life of progenitors.<sup>68</sup> Furthermore, the preclusion of biological conflicts cannot neutralise the social conflicts that are inherent in parenting obligations. According to the Court, preventing an infertile woman from using her only chance to become a genetic mother struck a fair balance between her interests and those of a fertile man,<sup>69</sup> due to his inability to discard the legal and social parenting obligations.<sup>70</sup> Referring to the present standing of the Court, Prialux observes that the choice to avoid reproduction is 'more worthy of respect than decisions to reproduce (...)'<sup>71</sup>. From this aspect, it is even easier to insist on the compelling necessity to respect the ultimate request of progenitors who seek to discard their future legal and social parenting obligations.

In the light of the above, the ectogenetic agent is not immune from the conflicting interests of the progenitors, which are safeguarded through Article 8. This is because the claim for conflict exclusion is not absolute. However, the mere existence of the conflict concerned does not necessarily preclude the right to life entitlement of the ectogenetic agent. The outcome of the related conflict in Europe could be significantly affected by the public

<sup>63</sup> Sundhedsloven, LBK nr. 1202 af 14/11/2014, <<https://www.retsinformation.dk/forms/r0710.aspx?id=152710#Kap25>> accessed March 2016.

<sup>64</sup> 'Distress' as abortion ground is applicable in the Belgium. See *Sénat et Chambre des représentants de Belgique* [Senate and Chamber of Representatives of Belgium], *Rapport de la Commission nationale d'évaluation de la loi du 3 avril 1990 relative à l'interruption de grossesse* [Report of the National Commission for the Evaluation of the Law of April 3, 1990, Regarding Pregnancy Interruption] 60 (Aug. 27, 2012), <<http://www.lachambre.be/FLWB/PDF/53/2399/53K2399001.pdf>> accessed 13 March 2016.

<sup>65</sup> Karnein (n 10).

<sup>66</sup> Eser Albin, 'Reform of German Abortion Law: First Experiences' (1986) 34 (2) *The American Journal of Comparative Law* 369–383.

<sup>67</sup> See *Doe v Bolton*, 410 U.S. 179 (1973), § 192.

<sup>68</sup> *A, B and C*, § 216.

<sup>69</sup> *Evans*, § 92.

<sup>70</sup> See Caroline Morris, 'Evans v The United Kingdom: Paradigms of Parenting' (2007) 70 (6) *The Modern Law Review* 979–1007, 997–999.

<sup>71</sup> Nicolette Prialux, 'Why Reproductive Autonomy Matters' (2008) 16 *Medical Law Review* 169–200 doi: 10.1093/medlaw/fwn009.

interest in protecting the unborn/ ectogenetic agent. From the aspect of the Convention, it is required that State interference on behalf of the public interest must be (a) ‘in accordance with the law’ (which requires that legislation is accessible and foreseeable),<sup>72</sup> for one of the (b) ‘legitimate aims’ (conferred upon the State authorities to determine the necessity of the restrictions intended, in order to meet the requirements of profound values in the Country),<sup>73</sup> and (c) ‘necessary in a democratic society’ (which refers to fair balancing between the relevant competing interests) specified in Article 8 (2) of the Convention. Further discussion will be limited to the situation where requirements (a) and (b) are met.

With regard to the (c) requirement, fair balancing should be maintained between the right to respect the decision of the progenitors not to have a child or to become parents,<sup>74</sup> on the one hand, and the profound moral values of the State concerned ‘to the nature of life and consequently as to the need to protect the life of the’ ...<sup>75</sup> [ectogenetic agent], on the other. I consider that the reasoning from the *Evans* case in regard to the right to family life is not applicable herein because, unlike in that case, we are discussing the situation following the completed conception (implantation). Bearing this in mind, infringement refers to the right of unwilling progenitors to psychological integrity, which places their ultimate request in symmetry with the demand to access abortion for health and well-being reasons. In *A, B, and C v Ireland*,<sup>76</sup> the Court found that the symmetric prohibition to access abortion for health and well-being reasons struck a fair balance between the right to respect private lives and the rights invoked by the State on behalf of the unborn.<sup>77</sup> As such, the infringement of psychological integrity cannot guarantee the prevalence of the interests of progenitors. At this point, we can grant that it is up to the State to decide which of the conflicting interests are favoured based on its own profound values regardless of the eventual existence,<sup>78</sup> or nonexistence of the relevant consensus within the States.<sup>79</sup> Contrariwise, Canadian public policies and case law of the Supreme Court are instead directed toward the expansion of reproductive autonomy, according to which the decision of the woman is decisively important. Considerations of public interest in the sphere of reproduction are observed as a legal anachronism of the former conservative policies.<sup>80</sup>

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<sup>72</sup> *A, B and C*, § 221.

<sup>73</sup> *Ibid.*, § 223–228.

<sup>74</sup> *Evans* § 71.

<sup>75</sup> *A, B and C*, § 230.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, § 241.

<sup>78</sup> *Ibid.*, § 234.

<sup>79</sup> *Evans*, § 54.

<sup>80</sup> Snow (n 50) 166.

## 2 Autonomy and Conflict Exclusion

The claim for autonomy could be invoked on behalf of progenitors, referring to their reproductive sphere, and on behalf of ectogenetic agents, referring to their autonomous existence. As to progenitors, autonomy in the reproductive sphere has been interpreted as if it conferred the right to control their bodies upon women, implying abortion as a necessary means to that end. Considering that the reproductive autonomy has been safeguarded through Article 8, it is accepted that it incorporates the right to respect both the decisions to become and not to become a parent.<sup>81</sup> This extensive interpretation of the content of the reproductive autonomy implies extensive interpretation of its scope and it might appear as if it conferred unlimited control of parenthood. Consequently, it precludes autonomy to human pre-persons. However, it is not clear if abortion could be legitimately purposed to facilitate an unlimited scope of reproductive choice. European standards are broadly framed through the case law, which only noted that the woman's right to respect for her private life in this context must be weighed against other competing rights and freedoms invoked, including those of the unborn child.<sup>82</sup> In her article,<sup>83</sup> Abecassis points to the intensifying legal importance of the question concerned, which will gain its practical relevance with the appearance of artificial wombs. She distinguishes between the definitions of abortion as 'a right of evacuation ("the right not to be pregnant") or a right of termination ("the right not to procreate")<sup>84</sup>. Scholarship generally agrees that it is not easy to argue for the latter definition, which implies the intentional killing of a human being who is capable of remaining alive and being cared for by others. Nevertheless, there is no unique interpretation of the scope of reproductive autonomy in terms of the reproductive choice that is conferred on women. In this regard, it is possible to allocate the 'only own body control' approach and 'motherhood control' approach in defining the purpose of abortion and the scope of reproductive choice. Similarly to the 'motherhood control' approach, some could claim that the power to 'decide if continued life when removed from the womb is in the best interests of the foetus' should be conferred on women.<sup>85</sup> However, this perception of the best interest appears to be absurd because it designates a woman who is demanding the death of her unborn 'for comparatively trivial reasons',<sup>86</sup> as 'an appropriate person to safeguard its interest.'<sup>87</sup>

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<sup>81</sup> Ibid, § 71.

<sup>82</sup> *Tysiāc v Poland*, No. 5410/03, 20 March 2007, § 106; and *Vo*, §§ 76, 80 and 82.

<sup>83</sup> Abecassis (n 1).

<sup>84</sup> Ibid, 12.

<sup>85</sup> See Amel Alghrani, Margaret Brazier, 'Re-positioning the Fetus in the Context of Research?' (2011) 70 (1) *The Cambridge Law Journal* 51–82, doi:10.1017/S0008197311000171.

<sup>86</sup> Paul Ramsey, *The Ethics of Fetal Research* (New Haven 1975), 89. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

<sup>87</sup> See John Keown, 'The Polkinghorne Report on Fetal Research; nice recommendations, shame about the reasoning' (1993) 19 *Journal of Medical Ethics* 114–120, 116. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

Scholars who consider that reproductive choice does not imply the entitlement of a woman to ensure the death of her foetus ground their position on the 'only own body control' approach. This approach accepts that woman can deny her assistance to the foetus developing inside her but not more than that.<sup>88</sup> Death of the unborn is the most frequent, but side- or unintended effect of the medical intervention. According to Thompson, if death is not the result of abortion, then the woman cannot secure the death of the foetus by some other means.<sup>89</sup> A similar position is shared by Boonin.<sup>90</sup> Singer and Wells say that the 'Freedom to choose what is to happen to one's body is one thing; freedom to insist on the death of a being that is capable of living outside one's body is another.'<sup>91</sup> Kaczor maintains that if reproductive choice implies the 'only own body control', then the woman is entitled just to decide whether or not she wishes to pursue pregnancy.<sup>92</sup> The destiny of the foetus is outside the scope of reproductive choice.<sup>93</sup> According to Harris, who argues that the *in vivo* foetus has no status, the woman has no claim, not even over her dead foetus that she had aborted.<sup>94</sup> Dworkin's understanding of autonomy as if it were 'a right to control their own role in procreation unless the state has a compelling reason for denying them that control'<sup>95</sup> also represents an 'only own body control' approach to the issue.

Contrary to this approach, there is the 'motherhood control' approach, according to which reproductive choice entitles the woman not only to abort her pregnancy but also to terminate a foetus. Abortion was not intended only to disconnect the woman from the foetus, but to also prevent motherhood.<sup>96</sup> In this line, Langford argues that 'abortion cannot be reduced to a matter of removing foetal and child dependency upon a woman; otherwise adoption would have brought an end to abortion centuries ago.'<sup>97</sup> Her main argument is that women undergo an abortion procedure exclusively because they are refusing to become mothers.<sup>98</sup> The crux of this argument, as well as of the whole approach, is the recognition of the social burden of motherhood 'within patriarchy'<sup>99</sup> as legitimising the request to ensure the death of the foetus (ultimate request). It should be noted herein that abortions performed for wellbeing reasons are mostly designed to meet the intention of women to escape motherhood.

<sup>88</sup> See Sheila McLean 'Women's Rights and Reproduction' in S.A.M. McLean (ed), *Legal Issues in Human Reproduction* (Aldershot 1989, Gower), 213–232. Reference from Alghrani and Brazier, Re-positioning the Fetus in the Context of Research? (n 85).

<sup>89</sup> Thomson (n 17) 47–66, 66.

<sup>90</sup> Boonin (n 22) 254–260.

<sup>91</sup> Singer, Wells (n 5) 135.

<sup>92</sup> Christopher Kaczor, *The Ethics of Abortion: Women's Rights, Human Life, and the Question of Justice* (Routledge 2011, New York) 245.

<sup>93</sup> *Ibid.*

<sup>94</sup> John Harris, *The Value of Life* (Routledge & Kegan Paul 1985, London) 122.

<sup>95</sup> Ronald Dworkin, *Life's Dominion* (Harper Collins 1993, London) 148.

<sup>96</sup> Alghrani (n 39) 190–211.

<sup>97</sup> Sarah Langford, 'An end to abortion? A feminist critique of the 'ectogenetic solution' to abortion' (2008) 31 *Women's Studies International Forum* 263–269.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*, 267.

However, escaping motherhood for wellbeing reasons is only one aspect of a far more complex issue. It would therefore, not be tenable to define the whole phenomenon of abortion based on only one of its aspects. A firm objection to a suchlike generalisation with regard to Europe arises from abortion laws. Every European legislation,<sup>100</sup> along with wellbeing reasons, simultaneously introduces strict temporal limits on access to abortion on that ground. Typically, temporal permissibility to access abortion on that ground is narrower, compared to other grounds. In the previous discussion, we saw that viability is a preclusive constraint on accessing abortion in almost every State. The purpose of that temporal constraint is either to avoid intentional killing or to maintain a fair balance between the woman's interests and the need to ensure the protection of the unborn child.<sup>101</sup> In any event, it arises from societal interest in the foetus.<sup>102</sup> Apparently, it is considered that after the point of viability, the interests of the unborn become stronger.

The above discussion elucidated that the logic of the 'motherhood control' approach against the EA recognition under Article 2 concerns balancing the right to respect for the decision of the progenitors not to have a child by *ensuring the death* of the ectogenetic agent on the one hand, and the *autonomy* of the ectogenetic agent, on the other. The starting point could be the recognition that the conflict concerns disputable means of accepted right versus an opaque feature and the right that is inextricably associated to it. Hence, the question might be which of those two, if either, could be backed up by the case law of the ECtHR. Such a question could not be evoked with regard to Canada where, as we have seen, no considerations were given to prenatal life.

As to the ultimate request of progenitors, we saw that it could be legitimately restricted on the basis of the public interest if the State concerned decides to do so. Also, in the case law of the ECtHR, reproductive choice has never been interpreted more broadly than as self-determination, which enables a woman control of the use of their own body.<sup>103</sup> Such an understanding of reproductive choice has been consistently held by the Court in the case law referring to new reproductive technologies and the capacity of the participants.<sup>104</sup> The right to reproductive autonomy in the sense of physical self-determination is the core argument for the recognition of reproductive rights. The request to ensure the death of another human being could hardly be grounded on the Convention, which confers the diametrically opposite right, namely the right to life. In this context, it is not surprising that the Court underlined on several occasions that Article 8 cannot be interpreted as conferring a right to abortion.<sup>105</sup>

<sup>100</sup> But see *Zakon o uslovima i postupku za prekid trudnoće Republike Srpske* (Law on the Conditions and Proceedings for Pregnancy Termination) Official Gazette of Republic of Srpska No. 34/08.

<sup>101</sup> See *Boso v Italy*.

<sup>102</sup> Alghrani, Brazier (n 85) 58.

<sup>103</sup> See Chiara Cosentino, 'Safe and Legal Abortion: European Convention on Human Rights Jurisprudence' (2015) 15 *Human Rights Law Review* 569–589, doi: 10.1093/hrlr/ngv013.

<sup>104</sup> *Evans*.

<sup>105</sup> *Maria do Céu Silva Monteiro Martins Ribeiro v Portugal*. No. 16471/02, 26 October 2004 and *A, B and C v Ireland* § 214.

Recently, several judges of the Court<sup>106</sup> have criticised gestational surrogacy as if it were incompatible with human dignity, since it treats both the child and the surrogate mother not as ends in themselves, but as means to satisfy the desires of other persons. According to them, satisfying parental desires, even those that were beneficial for the child,<sup>107</sup> 'is not compatible with the values underlying the Convention.'<sup>108</sup> In this light, it is hardly imaginable that satisfying parental desires through the death of the child could be qualified as compatible with the values of the Convention. Also, the present question cannot be extracted from the context of the Convention as whole, which prohibits the death penalty as a form of intentional killing.<sup>109</sup> It appears that the means discussed cannot find grounds in the Convention or any relevant case law.

Undoubtedly, an ectogenetic agent is physically autonomous with respect to its progenitors. The claim for the autonomy of the ectogenetic agent could partly be observed by analogy with that of the unborn. Even though it was in the physically-dependant position with regard to the woman, the case law indicates that prenatal life enjoys autonomous recognition under the Convention. For instance, the unborn was granted victim standing and the Commission and ECtHR examined in each case if the present violation of the right to life could be justified under the Convention. According to them, the inseparability of the prenatal life from that of the mother due to physical interconnection was a barrier to recognise the absolute 'right to life' of the foetus.<sup>110</sup> In *Paton v United Kingdom*,<sup>111</sup> the Commission stated that conferring the absolute right to life protection on the unborn would preclude the interests of the expectant mother 'even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman.'<sup>112</sup> This argument does not apply in the case of an ectogenetic agent. The autonomy of the unborn and rights associated to it were instead subrogated to those of the expectant mother due to the then-existing physical bond, rather than denial.<sup>113</sup> Furthermore, there are no grounds to preclude autonomy and the consequent entitlement to right to life of the ectogenetic agent who has a separate existence. After a comprehensive analysis of the parental powers of the woman and the status of the foetus that was partly gestated by her, Alghrani and Brazier are even insistent that 'once removed from

<sup>106</sup> *Paradiso and Campanelli v Italy*, No. 25358/1224, Merits: 24 January 2017, see joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov.

<sup>107</sup> *Paradiso*, § 25.

<sup>108</sup> *Paradiso*, see joint concurring opinion of judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov.

<sup>109</sup> *Soering v The United Kingdom*, no. 14038/88, 07 July 1989.

<sup>110</sup> *Paton v The United Kingdom*, no. 8416/78, Decision of the Commission 1980.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*, § 19.

<sup>113</sup> Dragan Dakić, 'Introduction into principles of unborn life protection under the European Convention on Human Rights' UDC 341 231 14:347.158 at: Dragana Kolarić (ed), et al. *Archibald Reiss Days: International Scientific Conference, Belgrade, 3-4 March 2014: Thematic Conference Proceedings of International Significance. Vol. 3.* Belgrade: Academy of Criminalistic and Police Studies; Bonn: German Foundation for International Legal Cooperation (2014) 3 IRZ 343–352.



the woman and in transit to or in an ectogenic chamber, the foetus crosses the law's bright line and thus acquires independent legal personality'.<sup>114</sup>

Therefore, the ultimate request of the progenitors cannot be claimed on the grounds of the Convention while the right to life of the ectogenetic agent incontestably can. Because of that, I think that ectogenesis cannot be considered as if it were a solely reproductive medical treatment. From the stage that is technically equivalent to natural implantation, ectogenesis does not concern only progenitors who are, up until that point, freely entitled to decide to proceed with it or to withdraw from it. Since it concerns a human being that is biologically autonomous with regard to other humans, ectogenesis could be defined instead as *medical life-sustaining treatment*. The latter is firm inducement for the application of the Conventional standards introduced in the field of life-sustaining treatment, including its withdrawal, which makes ultimate the request of progenitors to be even more unsuitable to be subsumed under the Convention.<sup>115</sup>

## IV Conclusion

The conflict between the demands for the right to life protection and competitive rights and interests of others is at the core of academic discussions worldwide and judicial reasoning in Europe. Academia proposed a great number of theories on how to resolve the conflict concerned in a fair manner. The European judicial response to the arguments and the shortcomings of those theories could be reduced to the distinction between (graded) right to life protection and the legal status recognition in respect to pre-persons. In Europe, a decisively important determinant for the regional judicial interpretation of the fairness in resolving the conflict concerned arose from the woman's role in reproduction, i.e. the ability to gestate, which had no replacement and conferred greater control over reproduction on her as compared to man. Also, gestational connection imposed limitations to the unborn life protection when it is in conflict with the mother's interests. Even though it was subrogated to that of the mother, the recognition of the interests to the unborn presents an important feature of the European discourse.

Bearing in mind that, on the one hand, institutions under the Convention introduced that the woman's competing rights and interests must be weighed against those of the unborn child, and on the other, judicial recognition of the 'public interest' as a legitimate ground for intruding into the women's private sphere, the emergence of technological innovation which could eliminate the conflict between competing rights, as well as relativise the boundaries of viability, could also eliminate the European cornerstones of reproductive autonomy.

Under the national statutes in Europe, viability is the threshold for the commencement of abortion constraints. After reaching the stage of viability, the rights and interests of the

<sup>114</sup> Alghrani, Brazier (n 85) 72.

<sup>115</sup> See *Lambert and others v France*, Application no. 46043/14. Merits from 5 June 2015 §§ 156–161.

unborn are strictly protected and the list of legitimising grounds for their infringement narrows down. In some jurisdictions, even the interests of the pregnant woman in life and health are not privileged as compared to the interests of the viable unborn. If the technology enables the elimination of the conflict between comparable rights, it would be hard to argue for the broad understanding of the scope of reproductive choice on the basis of the settled standards of the right to respect for private life under European law. Both of these elements, viability and conflict exclusion, provide a wide margin of appreciation to the State when imposing constraints on reproductive choice based on 'public interest'. Also, due to the conflict exclusion, the claim for autonomy disconnects the ultimate demands of the progenitors from the Convention, but simultaneously it confers the entitlement to right to life on the ectogenetic agent, which is yet another restriction to the scope of reproductive choice.

Unlike that, the case law of the Supreme Court of Canada established that protection cannot be conferred before meeting the cumulative requirements of the 'born, alive and viable' rule. This entirely precluded both the interests of the unborn and public interest from intruding into the women's private sphere. For this reason, neither technologically induced viability nor artificial conflict exclusion could affect the scope of the reproductive choice in Canada. The progenitors would be free to demand the interruption of the process in order to avoid parenthood.