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Costa and Pavan v. Italy and the convergence between human rights and biotechnologies.
Commentary on the ECHR decision *Costa and Pavan v. Italy*, No. 54270/10, 28 August 2012.

by
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Abstract: In the judgment *Costa and Pavan v. Italy* of 28 August 2012, No. 54270/10, the European Court of Human Rights (the Court) ruled that, by forbidding the recourse of couples carrying a genetic defect to medically assisted procreation and preimplantation screening, whilst simultaneously permitting abortion in cases where the foetus was suffering from such an illness, Italy had, due to this alleged inconsistency, violated Article 8 of the Convention – which guarantees the right to the respect of private and family life. Furthermore, it demonstrates the increasing willingness of the Court to limit the margin of appreciation the States possess in legislative matters, including in the most ethically controversial areas. This decision constitutes an important step in the recognition of a true right to a genetically healthy child; that is to say to eugenics; that the Court calls the "*right* [of the applicants] *to bring a child into the world who is not affected by the illness that they carry*" (§ 65).

Summary: 1. Introduction. - 2. The contestable admissibility of the request. - 3. The doubts concerning the validity of the request. – 4. Conclusion.

1. Introduction.

In this case, two Italian nationals, Rosetta Costa and Walter Pavan, born in 1977 and 1975 respectively, had learned, at the birth of their first child in 2006, that they were carriers of cystic fibrosis; the child being a sufferer of this condition. When Ms Costa became pregnant again in February 2010, the couple resorted to prenatal diagnosis, which revealed that the foetus was also a sufferer of cystic fibrosis. Ms Costa then had an abortion.
Not wanting to commence another pregnancy by natural means, and being of the opinion that the Italian legislation, due to Law No. 40 of 19 February 2004 (hereafter, "Law No. 40/2004"), did not allow them to resort to the techniques of medically assisted procreation (hereafter, "MAP") and of preimplantation genetic diagnosis (hereafter, "PGD"), the couple submitted before the Court, on 20 September 2010, an action in favour of the condemnation of Italy for violating the European Convention for the

Protection of Human Rights and Fundamental Freedoms (hereafter "the Convention"), with no prior approach to either the Italian health authorities or its Courts. The combined use of MAP and PGD would permit the artificial conception and then the genetic selection of a human embryo free from cystic fibrosis.
The applicants claimed that the Italian legislation ignored two provisions of the Convention in particular; Article 8 and Article 14. On one hand, they alleged that Law No. 40/2004, which reserves the use of MAP for sterile or infertile couples and forbids all PGD, violated their right to the respect of their private and family life, protected by Article 8 of the Convention, in such a way that the only option open to them to have healthy children was to begin a pregnancy by natural means with the risk that the foetus would be affected by cystic fibrosis and, in the case where this occurred, to resort to an abortion. On the other hand, they claimed that they were subjected to, in violation of Article 14 of the Convention, a discrimination in relation to sterile couples or couples in which the man is the sufferer of a sexually transmitted infection.
Due to the importance of the issue in question, two demands of third-party intervention were presented to the Court; the first coming from the "*European Centre for Law and Justice*", the association "*Movimento per la vita*" and fifty-two Members of the Italian Parliament; the second from the "*Luca Coscioni*", "*Amica Cicogna Onlus*", "*Cerco un bimbo*", "*L'altra cicogna*" associations, and sixty Members of the Italian and the European Parliaments.
In the judgment of 28 August 2012 [1], the Second Section of the Court ruled partially in favour of the applicants.
The Court firstly rejected the alleged violation of Article 14 of the Convention. It in effect reiterated that a discrimination, in the sense of Article 14, required the existence of a different treatment – except with an objective and reasonable justification – of people in comparable situations. However, the Court noted that in the matter of access to PGD couples of whom the man is infected with a sexually transmitted infection were not treated in a different manner to the applicants; the prohibition of access to the diagnosis in question affected all categories of person.
In contrast, the Court upheld the claim that there had been a violation of Article 8 of the Convention and, for this reason, condemned Italy to pay the applicants a sum of €15,000 in reparations due to the moral prejudice suffered. After having decided that the prohibition which prevented the applicants from resorting to MAP and PGD constituted an interference in the respect of their right to a private and family life, the Court judged that this prohibition, whether pursuing legitimate objectives or not, was disproportionate, "taking account of the inconsistency of the Italian system in relation to PGD".

Italy demanded, by virtue of Article 43 of the Convention, the referral of the case to the Grand Chamber, being of the opinion that it raises very important questions relating to the interpretation and application of the Convention. However, this demand was rejected following the judgment, by an unjustified decision given by a college of five judges. It is regrettable that the Grand Chamber will not have the possibility to re-examine this affair because the issues it raises remain [2] and are not insignificant, as will be seen. In effect, the position adopted by the Chamber in relation to the admissibility of the request (I) and its validity (II) is open to criticism and raises questions; even reasons for concern [3].

2. The contestable admissibility of the request.

The Second Section of the Court approved the admissibility of the request. However, several arguments have led to serious doubts regarding this admissibility, both in its procedural aspect (A) and *ratione materiae* (B).

A – The procedural aspect of the request's admissibility

The Court's own jurisprudence should have justified the inadmissibility of the request due to the absence of the applicants' quality as victims (1°) and the non-exhaustion of domestic remedies (2°).

1° - Inadmissibility due to the absence of the applicants' quality as victims

In the application of Article 34 of the Convention, only an applicant who is the victim of a violation of the Convention can bring an action before the Court. This provision states that the "victim" is anybody who is affected by a direct act or omission [4] ("direct victim") and exceptionally, anybody who is affected in an indirect manner, such as the spouse of the victim [5], the nephew of the deceased [6], the mother and father of a man who had disappeared [7] ("indirect victim") or who could be affected in the near future, for example by an obligation to change a behaviour under penalty of criminal proceedings [8], or when the applicant is a member of a group of people that risks being directly subjected to the effects of the criticised legislation [9] ("potential victim"). On the contrary, the Convention "*does not, therefore … permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention.*" [10] In other words, the Convention does not establish an *actio popularis* [11] to the profit of individuals. It is not expected to settle the compatibility of an internal law with the Convention, but to give a judgment on the decisions of national authorities.

Yet, in this case, whilst the Italian Government and certain intervening parties highlighted the question of the applicants' quality as victims, the Court decided on the contrary that "*there can be no doubt that the applicants were directly touched by the measure of prohibition, having as they did a child affected by the condition of which they were carriers and having already once proceeded to an abortion due to the foetus being a sufferer of cystic fibrosis*." (§ 38).
Nevertheless, the response given by the Court does not remove all doubt over the issue of whether the applicants are truly victims. In effect, although they indicated in their application that they "wanted to resort to PGD", nothing suggests that they took any steps in this sense with the Italian health authorities and that these same authorities would have opposed their plea. Moreover, whilst PGD presupposes the use of MAP, it is not even established whether the applicants would have asked for permission from the said authorities for access to MAP.
Yet, the quality of victim would at least require that they had been expressly refused MAP and PGD, since only this series of events – both time- and cost-efficient – would have given proof of the applicants' intention to have another child.
Thus, having recognised that the applicants were "victims" under Article 34 of the Convention whilst this quality was only hypothetical (the applicants did not show that they had been directly affected by the Italian legislation), the Court has also opened the possibility of the exercise of an *actio popularis*; an action that its caselaw has traditionally dismissed [12].

2° - Inadmissibility due to the non-exhaustion of domestic remedies

Article 35 § 1 of the Convention provides that in effect "*referral to the Court in a given situation may only occur after all domestic remedies have been exhausted according to the generally recognised rules of international law…*". This rule is based on the assumption, reflected in Article 13 of the Convention – and with which it presents close similarities – that a country's internal rules offer an effective mode of recourse against the alleged violation. The Court's role is therefore of an exclusively subsidiary nature in relation to national systems which protect human rights [13], and it belongs before all to national tribunals to act on supposed violations of the Convention. In the recent Declaration of Brighton of 19 and 20 April 2012, the Member States reasserted the necessity of a strict application of the admissibility criteria, notably that of the exhaustion of domestic remedies.
Yet, in this case, the internal modes of recourse were not exhausted by the applicants; they had not submitted any requests to the Italian Courts, not even at first instance. Moreover, having abstained from applying to the relevant health authorities for access to MAP and PGD, the applicants would

have encountered fundamental problems in any attempt to complain to the Italian Courts that a particular act had caused them any personal wrong.
Furthermore, the Court's past decisions show that the exhaustion of domestic remedies is not a principle of absolute character and that the applicants are held to have exhausted the internal modes of recourse only when they are available and effective, whether that be in theory or in practice; that is to say when they are accessible, able to offer the applicants satisfaction in redressing their grievances, and when they present a reasonable chance of success [14].
In this case, the Court ruled that "*the applicants cannot truly be reproached for failing to apply for a measure which, as had been explicitly stated by the* [Italian] *Government,* [was] *forbidden in an absolute manner by the law*". It added that if the Tribunal of Salerno had decided to grant such a measure to the couple, who were neither sterile nor infertile, this decision "*pronounced at first instance, would not have been confirmed by an ulterior judgment and would only have constituted an isolated decision*" (§ 38). In other words, for the Court, from the moment that it was certain the applicants could not access PGD in Italy, it was useless for them to make such a demand to the Italian health authorities and to then contest the inescapable rejection of their request before the Italian Courts.
However, it appears difficult to agree with the Court on this point. Even before the introduction of the present request [15], not only the Tribunal of Salerno, as was emphasised in the judgment, but also other Italian tribunals, had ruled on several requests for PGD submitted by couples in similar situations to that of Ms Costa and Mr Pavan, and had decided in their favour (judgments of 22 September 2007 of the Tribunal of Cagliari, 29 June 2009 of the Tribunal of Bologna and 17 December 2007 of the Tribunal of Florence [16]). In its observations before the Court, the Italian Government referred to all of these cases [17]. Thus, in the hypothesis where the applicants would have – which they abstained from doing – applied to the Italian health authorities for access to MAP and PGD, and where such a request would have been rejected, it would have been possible for them to challenge this refusal before the Italian Courts, and the decisions mentioned above demonstrate that domestic remedies have not always been deprived of success.
In conclusion, the manner in which the Court has altered and widened the scope several rules which govern the procedural admissibility of requests (the quality of victim, the exhaustion of domestic remedies) creates a certain degree of unease. In the long term, it is not without danger, since it risks provoking an influx of litigation and the installation of a "*pick and choose*" system where the judge makes a decision not on the basis of objective criteria but according to his personal opinions and priorities when declaring the admissibility of one affair in relation to another [18]. For example, regarding the implementation of the rule of the exhaustion of

domestic remedies, the tolerance the Court has shown in the present case [19] could manifest itself in other cases due to its severity [20].

B – Admissibility *ratione materiae*

The Court judged – which is undoubtedly at the heart of its reasoning – that the request fell within the field of application of Article 8 of the Convention and, therefore, that the aforementioned request was admissible *ratione materiae*. However, objections can be formulated against such a position, both because of the questionable theoretical foundation that underlies it (1°), and the worrying practical consequences that it entails (2°).

1° - A questionable theoretical foundation

As Article 8 § 1 of the Convention provides that "*everyone has the right to respect for his private and family life…*", the Court was firstly required to establish whether the desire of the applicants to use MAP and PGD fell within the field of application of Article 8 of the Convention. It responded favourably to this question, stating that "*the desire of the applicants to have a child who would not be a sufferer of the genetic defect that they carried and to resort to medically assisted procreation and PGD falls under the protection of Article 8; this choice being a form of the expression of their private and family life*" (§ 57).
In this regard, it is important to emphasise that, traditionally, Article 8 of the Convention essentially has the objective of protecting individuals from arbitrary interferences – from which the public authorities should refrain. In the matter of procreation, this "negative" obligation translates as "*incorporat*[ing] *the right to respect for both the decisions to become and not to become a parent (…)*". [21] Concretely, the State should not exert pressure on the will of the parents, for example by forcing them to use contraception or by implementing sterilisations or abortions. Thus, all interferences by the State which influence the decision of a couple to become or not to become parents should be motivated by truly compelling reasons in order to be compatible with Article 8 § 2. [22]
It is from this perspective of the State's negative obligation that *Dickson v. United Kingdom* [23] should be considered; a judgment which is often wrongly interpreted as the Court recognising that the Convention provides a positive obligation for the State to give access to MAP [24]. In this case, the British authorities had refused to allow a couple access to artificial insemination, although this was the only method by which they would be able to procreate (the man had been sentenced to a long period of imprisonment). It was the action of the State (its refusal to permit the use of this method due to a legal technicality) which was the clear obstacle to the procreation. In other words, the refusal of the applicants' request for

access to MAP by the authorities prevented them from becoming (or at least trying to become) parents. The couple did not seek a derogation from the regime of MAP in their favour, but an application to their particular situation. They therefore asked that the Court ensure the State would no longer impede the realisation of their wish to become parents. Therefore, the *Dickson v. United Kingdom* judgment recognised neither a new Conventional right to MAP, nor a new positive obligation to assure access to this technology. Certainly, the Court considered that the applicants' desire to access MAP in order to conceive a child was within the field of Article 8, however it is important to emphasise that the recognition of the applicants' right to resort to it does not derive substantially from Article 8, but from the domestic law governing access to MAP. It is because the domestic law authorised MAP that the British authorities could not deprive the applicants of it.

Yet, with the *Costa and Pavan* judgment, the Court went a step further, since it ruled that the right to respect of private and family life engendered positive obligations in the matter of procreation, and that to assure the effective respect of this right the Italian State should have permitted the applicants to access MAP and PGD. Next, the Court broadened the scope of Article 8 in a decisive manner; ruling that the proven "desire" of a couple who were carriers of cystic fibrosis to resort to this technology in order to avoid having an ill child entered within the field of application of Article 8 [25] by virtue of the Convention, and independently of the fact that the domestic law prohibited this practice.

It is important to note that due to its *purpose*, which was to become parents, the desire to artificially procreate fell within the field of private life, but that it exceeded this field by the *methods* necessary in order to put this into action. Thus, if its purpose fell within the private sphere, the means by which it could be achieved fell within the public sphere. The State should respect the will of couples to become parents, but it cannot remain indifferent to the modes of putting this desire into action when they require material and moral investment from society. This is because public issues, particularly those with an ethical character, linked to MAP and PGD were so important that before the delivery of the *Costa and Pavan* judgment the Court had established that the States had no positive Conventional obligation to legalise them, as though it considered no right to have a child existed. The Court clearly expressed this, saying that it "*would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation" [26]* and that "*the right to procreation is not covered by Article 12 or any other Article of the Convention*" [27].

There is an important difference between the *Dickson* and *Costa-Pavan* cases: in *Dickson*, the couple were prevented from trying to have a child – the desire to have a child being covered by the Convention. In *Costa-*

Pavan, the couple were not prevented from trying to have a child (healthy or ill); they were prevented from using preimplantation genetic diagnosis in order to select a healthy embryo. The obstacle was not related to the ability to conceive a child, but to use genetic screening [28]. The object of the State's interference is different, and it is therefore abusive to use the applicability criteria of Article 8 as determined by *Dickson* in relation to the couple's request in *Costa-Pavan*; however this is what the Section does at paragraph 56. Another major difference: in *Dickson* MAP was legal but inaccessible; in *Costa and Pavan* it was the technology of MAP-PGD that was illegal. Additionally, in *S.H. and Others v. Austria* [29], access to heterologous MAP – the object of the request – was partially legal in Austria [30]. Thus, the *Dickson* and *S.H.* judgments do not imply the existence of an *autonomous* right to MAP in the name of Article 8. It is an undue consequence drawn from these cases in order to assert the contrary, however this interpretative derivation is revelatory of the process which results in the emergence of new rights under the Convention, led by the Court's caselaw. These rights are firstly recognised by the domestic laws of a growing number of countries; the Convention being integrated by way of conditional applicability before the new right is enacted as a national law. This makes it a right directly attached to the Convention and therefore one which is susceptible to being imposed on countries that did not follow the general movement led by the Court [31].
In other words, by ruling that the couples' request in *Costa-Pavan* was authorised by Article 8, the Court declared that the combination of *in vitro* fertilisation and embryonic screening was a substantial and independent element of the field of private and family life guaranteed by the Convention. In both *Dickson* and *S.H.*, MAP was not an autonomous element of Article 8, because access to it was originally granted by the domestic law. Inversely, as the use of MAP-PGD was prohibited by Italian law, it could only fall within the field of Article 8 by virtue of the substance of this provision; that is to say that Article 8 itself gives a right to this form of eugenics. To rule that access to MAP-PGD falls *ratione materiae* under Article 8 is therefore a serious question, which should have merited the intervention of the Grand Chamber.

2° - The worrying practical consequences

Whilst the Italian Government raised concern over the risks of recognising the right to a "healthy child", the Court, in admitting that the "desire" of couples carrying a genetic illness to resort to MAP and PGD constituted a right under Article 8 of the Convention, explicitly excluded the consideration of this perspective. In effect it ruled that "*PGD does not exclude other factors which may compromise the health of the unborn*

child, such as, for example, the existence of other genetic defects or complications coming from the pregnancy or childbirth" (§ 54).
However, this argument is not truly convincing. In effect, the Court expressly affirmed that the applicants in this case had a "*right to bring a child into the world who was not affected by the illness of which they were carriers*" (§ 65). More precisely, *in vitro* fertilisation associated with PGD constitutes a means of avoiding the birth of ill embryos – allowing the couple to have a healthy baby. Does recognising the right not to transmit the defective genes not constitute a right to eugenics, even if the technique does not guarantee the avoidance of all illnesses?
The *Costa and Pavan v. Italy* judgment illustrates the Court's increasing tendency to enlarge the scope of Article 8. In effect, with this decision, Article 8's purpose is no longer to merely protect individuals against arbitrary actions of the State, but also to guarantee their personal autonomy [32], their right to "personal development"[33] or even their right to auto determination [34]. The consequences of this judgment – and of the extension of Article 8 – should be measured in the light of the extraordinary development of biotechnologies, since they offer people and couples the technology which permits this personal development. The effects of these legal and scientific evolutions, particularly in the matters of PMA and prenatal screening for genetic anomalies [35], should not be ignored: by successive decisions, the Court is progressively recognising the right not only to a child but to one who is "healthy". In effect, therefore, whereas on one hand biotechnology makes selective procreation outside of the physical union of a man and a woman possible, on the other access to these methods is protected by Article 8, making it difficult not to see the manner in which the factual and legal components combine to give the right to a child, and moreover the right to a healthy child.
Furthermore, the right to a healthy child which underlies the entire judgment becomes more evident when one contemplates what exactly makes the applicants victims. They complained that they could not access MAP and PGD. However, these procedures are not in themselves an end product: they are methods of giving birth to a child free of genetic defects, without the risk of having to resort to an abortion.

3. The doubts concerning the validity of the request.

Having ruled that the prohibition of MAP and PGD by the Italian legislator was in the pursuit of legitimate objectives (A), the Court nevertheless judged that this double prohibition was disproportionate to these objectives and concluded that Italy had violated Article 8 (B). However, these two stages of reasoning, in particular the second, are unconvincing.

A – The legitimacy of the objectives pursued by the Italian legislation

According to Article 8 § 2 of the Convention, there can only be an interference in the right to respect of a person's private and family life on the condition that it is authorised by law and that it constitutes a measure which, in a democratic society, is necessary, notably for the protection of health or morality, or the protection of the rights and freedoms of others.
In this case, the Court recognised that the prohibition, implemented by Law No. 40/2004, of a couple carrying a genetic defect to resort to MAP and PGD "*can be passed in order to pursue the legitimate objective of the protection of morals and the rights and freedoms of others*". At first sight, the position of the Court should be approved, though the restraint present in the formulation used should be highlighted ("*can be passed* in order to pursue…"). Furthermore, in their request, the applicants themselves did not expressly contest the legitimacy of the objectives pursued by the Italian legislation and preferred to concentrate their claims on the disproportionate character of this legislation.
However, on closer inspection, the position of the Court should be questioned further. What moral does the Court speak of when it states that it is one of the legitimate objectives? What is the nature of the "rights and freedoms" of others, the protection of which is also presented as legitimate? The response to these questions is not simple, and the Court was very cryptic in the formation of its solutions [36].
Concerning the "morals" called into question by the Court in its decisions, it is clear that they should not be composed in an objective sense; like a mass of rules the respect of which is imposed by their very existence, regardless of whether they have been approved by society [37]. In fact, the morality to which the Court refers is a sociological reality and should be considered with reference to the state of public opinion at that particular moment, on a particular subject. The terms used in the *A, B and C v. Ireland* judgment reveal the consultation of this sociological conception of morals; the Court here having judged that Irish restrictions on abortion "*pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect*". Therefore, in this case the judges of the Strasbourg Court did not consider the defence of the unborn child's right to life to be, in itself and at that time, a moral question. They were content to say that, *in Ireland*, in the situation at the moment in question [38], this issue fell under the protection of morality. By way of analogy, in *Costa and Pavan v. Italy*, having accepted that the prohibition of MAP and PGD pursued the legitimate objective of the protection of morals, the Court did not say that, by themselves, these methods raised a serious moral issue. It merely wished to state that, in the country concerned, namely Italy, the legislative system, intending to reflect the views of a majority of the population, forbade these methods in the name of morality, and that taking this

sensitivity into account, this prohibition constituted a legitimate objective capable of justifying an eventual interference in the rights of individuals to the respect of their private and family life.
However, there is a misunderstanding on this point. Although Italy forbade MAP and PGD, it was not in the name of a sociological – and therefore relativist – conception of morality. According to this State, the prohibition of the combined use of MAP and PGD by couples carrying a genetic defect is justified by several more objective reasons which are, in particular, the protection of the embryo – as a subject – and the prohibition of eugenics, but equally the protection of public health and compliance with the prohibition of discrimination on the grounds of genetic heritage.
Above all, the will to protect the human embryo is at the origin of Law No. 40/2004. It is outlined, as a principle in Article 1, that the conceived embryo is a "subject" which has rights in the same way as the other subjects implicated by MAP [39]. Therefore, the Italian legislation recognises indisputably that the conceived embryo is a legal subject. As a whole Law No. 40/2004 and its texts of application are intended to organise MAP whilst respecting the embryo's rights. The embryo is not a moral value, but a subject; it is a third person, therefore an "other" in the sense of the Convention. It is because it is a subject that its value cannot be relativised, meaning that it possesses the same rights as all of the other subjects implicated.
In this regard, it is relevant to highlight that the Court has never excluded prenatal life from the Convention's field of application. On the contrary, it has recognised that the foetus belongs to the *human species* [40]. To date, the Court has given a minimal interpretation of this recognition by giving the States, through their margin of appreciation, the freedom to determine the starting point of this protection. However, if the Court has recognised the ability to exclude the embryo from the protection of the Convention, it has not created (and could not create) the obligation to do this. Additionally, in *Vo v. France*, the Court reaffirmed that it was neither desirable nor possible to respond to the question of whether the unborn child was a "person" in the sense of Article 2 of the Convention, in such a way that each State can legitimately decide whether to consider the unborn child as a person whose life should be protected, or to adopt the opposing viewpoint [41]. Consequently, a State can decide to maintain the protection of prenatal life, thus giving Article 2 a maximum interpretation. This position also conforms to Article 53 of the Convention, according to which the States are free to offer a greater degree of human rights protection to their subjects [42]. More closely, Article 27 of the Oviedo Convention indicates that none of its provisions shall be interpreted "*as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention.*" Italy can therefore

recognise the unborn child as a legal subject and grant it an extended protection; and the Section should have taken this determining factor into account. It preferred to ignore this [43], "*emphasising*" in an excessive manner "*that the notion of a "child" could not be assimilated by that of an "embryo"* (§ 62; underlined by us). This *obiter dictum* is at least questionable: on one hand children and embryos are not abstract "notions" created by our intellect, but real things (it would have been more truthful to say that the embryos are not children); on the other, such an anthropological and biological appreciation certainly does not fall under the competences of the Court.

The prohibition of eugenics constitutes the second reason that justified the adoption by the Italian legislature of Law No. 40/2004. PGD neither heals nor treats. The child selected by PGD is born free from an illness he or she never had, which medicine never cared for nor cured. PGD permits the selection of embryos in order to implant a healthy embryo and to dispose of those who are ill. More precisely, it is eugenics, even if it has become common in Europe [44]. Where eugenics is forbidden, MAP and PGD are also forbidden in order to respect the prohibition of discrimination founded on genetics. In effect, from the moment that Italy began to consider the unborn child as a legal subject, the Government was obliged to respect the prohibition of discrimination for genetic reasons [45]. Finally, Italy cited the motive of the protection of public health, as these medical techniques not only require a great investment of public resources, but also pose risks to the health of the mother and the unborn child.

Therefore, in Italy the essential motives of the prohibition of MAP and PGD are not to be found in morals perceived in a sociological sense such as that which the Court referred to when assessing the legitimate character of the Italian law. The essential object of the Italian legislator was, by adopting Law No. 40/2004, to protect the rights of third parties – the unborn child being a legal subject – and to ban eugenics.

B – The proportionate character of the interference with the applicants' right to the respect of their private and family life

From the moment it recognised the legitimacy of the objectives pursued by Law No. 40/2004, the Court should have admitted that the prohibition of PGD was necessary in order to achieve these goals. Effectively, MAP coupled with PGD is a procedure which, in itself, infringes on the very substance of the objectives pursued, particularly the protection of the embryo and the prohibition of eugenics. Furthermore, the destruction of embryos carrying genetic defects does not merely constitute a risk of PGD: it is the very purpose of this procedure. Therefore, the only means by which Italy could respect these objectives was the prohibition of MAP-PGD.

However, the Court judged that this interference with the applicants' right was disproportionate and, moreover, that Article 8 of the Convention had been violated. In order to reach this conclusion it *de facto* limited Italy's margin of appreciation in the matter of medically assisted procreation (1°); basing its decision on an alleged inconsistency of Italian law (2°).

1° - The margin of appreciation from which the States benefit

In the judgment of *Evans v. United Kingdom* – the position subsequently taken in *A, B and C v. Ireland* – the Grand Chamber of the Court reiterated the principles which govern the determination of the extent of the Member States' margin of appreciation: "*Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted [...] Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider [...] There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights*" (§ 77). Before the *Evans* judgment, the Court equally recognised that "*the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life*" [46]. Finally, more recently, the Court confirmed that "*the State's wide margin in principle extends both to its decision to intervene in the area* [MAP] *and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests*" [47]. In such cases, the European judge's power of appreciation is normally limited to verifying that the national legislator's choice was not "manifestly without reasonable foundation" [48].
In this case, as the Court did not expressly indicate the margin of appreciation from which Italy benefitted in the matter of legislation on MAP and PGD, a close reading of the *Costa and Pavan* judgment raises doubts over whether the Court has granted the State a wide margin of appreciation. In effect, the Court emphasised that, "*while recognising that the issue of access to PGD raises sensitive moral and ethical issues,* [...]*, the choice made by the legislator in this matter does not escape the control of the Court*" (§ 69). Finally and above all, the Court noted from documents on comparative law that it consulted that, out of the thirty-two States examined by these reports, only three (Italy, Austria and Switzerland), forbade PGD.
However, the Court should have recognised that Italy had such a margin of appreciation, due to the absence of consensus in Europe on *in vitro* fertilisation and in particular on PGD [49]. In this respect, the reports of

the Council of Europe and the Commission show that, at the date of the facts in question, out of 32 European countries, 12 had not adopted a regulation in relation to PGD, 3 prohibited it and 17 authorised it in order to guarantee the health of the child [50]. However, if the Court had recognised a large margin of appreciation for Italy, it would have been impossible to rule that Law No. 40/2004 was manifestly unreasonable, and contrary to the Convention.

It is important to emphasise that Law No. 40/2004, adopted following Parliamentary procedures which had taken place over the course of several legislatures, originated from a popular initiative which, in 1995, had demanded that the principle of the recognition of the unborn child as a legal subject be introduced as a guiding standard in the material. Moreover, after the adoption of the law, the opposition initiated further debate; making five propositions to modify it by popular referendum. The first proposition, of a general character, was rejected by the Constitutional Court in judgment 45/2005 and the other four, which concerned the annulation of certain provisions of the law, were submitted to a popular vote on 12th and 13 June 2005. These referendums failed: only 25.9% of the electorate voted, meaning the quorum was not reached. In fact, certain individuals urged voters not to vote. Finally, these referendums had the effect of extending the debate on Law No. 40/2004 and of confirming the legislator's choice. Thus, few Italian texts have been discussed as much as Law No. 40/2004; discussions which were conducted in accordance with the European standards set out in Article 28 of the Oviedo Convention [51].

To refer, by analogy, to the terms used by the Court in *A, B and C v. Ireland*, the prohibition of PGD was based, in Italy, on "*profound moral values concerning the nature of life which were reflected in the stance of the majority of the* [Italian] *people*" by the vote of 2004 and the referendums of 2005, and "*which have not been demonstrated to have relevantly changed since then*"[52].

The referral to this notion of consensus, particularly in order to evaluate the margin of appreciation which the States enjoy, reflects an eminently sociological conception of law; a conception according to which human rights only partially structure the evolution of morals and technology so that, on the contrary, the evolution of morals and technology can, by means of a human movement approved by the Court, contribute to the redefinition of human rights. In this regard, the Court can choose, among these social tendencies and evolutions, those from which it feels it should refrain and those which, on the other hand, it feels it can sanction. Thus, the Court is no longer content to passively follow the evolution of morals and ensure, *a posteriori*, their reception through the definition that it gives of human rights. Indeed, being presented as the "*conscience of Europe*" [53] and driven by the ambition to exercise, if anything, a "*function inherently against the majority*" [54], the Court aims to contribute to this

evolution, even if the changes entailed are far from the original spirit and even the letter of the Convention [55]. This permits the Court, in a context often perceived as obsolete by the Council of Europe, to conserve its presence in comparison to the Court of Justice of the European Union, seated in Luxembourg, and to maintain the system of human rights in their progressive perspective despite the legal constraints of treaties which, unlike the Court, enforce the respect of the words and the spirit which were present at the time these international engagements were written.

2° - The alleged inconsistency of the Italian law

To conclude that the prohibition of MAP and PGD had violated the applicants' right to the respect of their private and family life, the Strasbourg judges relied on reasoning that shows they may now proceed in a customary manner [56]; particularly when determining the alleged inconsistency of the actions of the State concerned.
The Court observed that in effect, whilst on one hand Italy had permitted the possibility in practice for couples carrying a genetic defect to proceed to an abortion where it is established that the foetus is sick, on the other this same country prohibited MAP and PGD; two techniques which allow the implantation of embryos which are not affected by the defect of which their parents are carriers. Yet, according to the Court, the consequences of an abortion for the foetus, which is much more developed than an embryo, and for the couple – particularly the woman – would be more serious than the consequences of a MAP coupled with a PGD (§ 62). Thus, in this case, the Court found that the Italian legislation caused a "*state of anguish for the applicant*", holding that "*the only prospect of maternity was linked to the possibility that the child would be a sufferer of the genetic defect*" (§ 66), and would create a "*suffering which derived from the painful choice to proceed, where needed, to an abortion*" (§ 66).
Such a conclusion however raises certain questions.
In the first place, the existence, as stated by the Court, of an alleged "inconsistency" of the Italian law should be relativised, since the founding principles of the different laws regarding MAP, PGD and abortion, far from contradicting one another, present a clear consistency: Article 1 of Law No. 40/2004 indicates that the law takes account of "*the rights of all the parties implicated in these techniques, including those of the unborn child*", whilst Article 1 of Law No. 194/1978, reiterated by Law No. 194/2004 on maternity and abortion, recognises "*the social value of maternity and of human life from its beginning*". Thus, the prohibition, for a couple carrying a genetic defect, of the use of MAP and PGD – a prohibition founded in particular on the principle of the protection of prenatal life and the prohibition of eugenics – is perfectly consistent with the principles of Italian abortion laws.

Though it is true that Italy did not forbid the practice of abortion in an absolute manner, the law only permits it in exceptional cases, and only in the hypothesis where the life or the health of the mother would be in danger from the genetic defect from which the foetus is suffering. It is not, at least in principle, the foetus' state of health which justifies the abortion, but that of the mother. This difference is undoubtedly subtle but it is important from a theoretical point of view because it allows the consistency of the Italian legislation to be understood, the purpose of which is to protect the life of the unborn child and to allow the destruction of its life only when that of its mother is itself threatened. This conception comes from the so-called theory of double effect – a classic theory of moral philosophy – according to which the destruction of the foetus can only occur as a secondary result of the individual's will; coming as an inevitable consequence of the primary intention to preserve the mother's life. Thus, even though the principle which guarantees the inviolable character of the foetus allows some exceptions, it conserves its symbolic value and structures the Italian law relating to procreation. Yet, the Court analysed the Italian law from a purely practical viewpoint, with no regard of the principle that underlies it. No benefit can be gained from the Court comparing a principle – the prohibition of PGD – and an exception to a principle – the exceptional tolerance of abortion, since an exception should always be considered in the context of the principle from which it derogates. If a principle were being judged in the context of the exception, and not the reverse, the domestic law should be reordered to the original transgression, so that the exception can only operate in the specially foreseen event and not inform the law, which is the role of the principle [57].

Secondly, and in any event, the requirement of the national law's consistency does not implicitly fall under the Convention; indeed far from it. This reasoning can, as J. Cornides has highlighted, be broken down as follows: "*when a State, which is not bound by the Convention to grant a right X freely decides to grant it, that State should grant a right Y in the case where the denial of the right Y would be inconsistent with the granting of the right X. If it does not do this, it disrespects the provisions of the Convention, notwithstanding the fact that neither right X nor right Y would be, by themselves, a requirement of the said Convention*" [58]. This requirement of the consistency of national laws has the effect of considerably extending the Court's competences. It permits rulings on the foundation of a right which does not fall under the Convention; if it is determined without any reference to the Convention, it can only be defined in relation to the conviction of the judge. With no link to the Convention, nothing, if not the conviction of the judge, can determine the sense in which an alleged domestic consistency should be analysed: a law which forbids abortion and PGD could therefore be just as consistent as a law

which authorises them. Domestic consistency is, like the principle of non-discrimination [59], a principle which permits the "progression of the law" step by step. Thus, the obligation of consistency can justify the forcing of a State which has legalised the practice of carrier mothers to permit that of artificial uteruses, and so on. Professor Marguénaud concludes that "*in all the other Member States of the Council of Europe, the marriage of the principles of consistency and proportionality noted in Costa and Pavan should have the effect of authorising preimplantation diagnosis in order to detect all genetic defects or sexually transmitted infections, the revelation of which by prenatal examination could justify, regarding the national law, an abortion*" [60].

In *Costa and Pavan v. Austria*, the Court did not consider whether the prohibition of MAP and PGD were, *by themselves*, contrary to the provisions of the Convention. Neither did it indicate that the Convention forms an obligation for States to provide abortion. However, after establishing that Italy allowed the resort to an abortion, the Court judged that the prohibition of MAP and PGD was therefore disproportionate and violated the Convention. It is only because abortion is authorised that the judgment has a basis that allows it to impose, *in fine*, the legalisation of PGD. It is hard to find an objective, substantial and logical foundation from which, when the prohibition of MAP and PGD is not in itself contrary to the Convention, it is reasonable to suggest it becomes incompatible from the simple fact that there is a concurrent tolerance of abortion, except if the ability to resort to abortion creates in domestic law the right to a healthy child which itself falls within the field of application of Article 8 [61].

This is at the heart of the Section's reasoning; it is not by "editorial clumsiness" [62] that the Court states in paragraph 65 that "*in order to protect their right to bring a child into the world who would not be affected by the genetic defect of which they are carriers, the only manner in which they could benefit from this would be to begin a pregnancy by natural means and then proceed to an abortion should a prenatal examination show that the foetus is ill.*"

The reasoning which underlies *Costa and Pavan* is directed towards the creation of a healthy child: it is in the light of these objectives that the methods can be compared. Abortion, on one hand, and MAP and PGD, on the other, are comparable as alternative means of having a healthy child, by prenatal selection for abortion and by preimplantation selection for MAP. It is this objective which gives Costa-Pavan its consistency, and which would reveal the inconsistency of the Italian legislation if it had been the intention of the legislator to create the right to a healthy child. Yet it is precisely the opposite intention which underlies this legislation. The intentions of the Italian legislator and the majority of the Strasbourg judges are diametrically opposed: the first poses as a principle the protection of the embryo and the unborn child, the second the right of the parents to

dispose of them when they are genetically deficient. According to the adopted approach, is the Italian legislation consistent or not? It is true that it remains consistent from a theoretical point of view, but in practice – which is the real place of morality – the tolerance of therapeutic abortion has also introduced the logic of eugenics of convenience into the Italian system. The Court noted the existence of this contradiction between theory and practice, and ruled in favour of what it believed to be the most liberal solution: the extension of access to MAP and PGD.

4. Conclusion.

Before any attempt to protect the individual against the State; the movement which envisaged human rights and resulted in the creation of national and international instruments, such as the Convention; there was firstly an effort to define man as a being endowed with specific capacities. These capacities (to think, speak, pray, possess, etc.) determine man, distinguishing him from animals, and show (or according to some even constitute) the respect of dignity. The protection of man and his dignity are concretely realised by the protection of his specific capacities, which constitute his inalienable natural rights [63]. Human rights are an attempt to objectively define what in the human race deserves to be protected, and therefore what defines it.
Thus, to determine human rights, it is man himself who is defined in an implicit fashion. Since human rights express a definition of man, changes to the substance of these rights retrospectively modify the anthropology underlying this definition.
Human rights initially envisaged the "inherent" capacities or qualities of man; that is to say those which the individual enjoys from birth. However, technical instruments (such as the media and vehicles) facilitate and extend the exercise of these inherent capacities, and biotechnologies add new capacities to man which are not inherent to him, but which nevertheless contribute to redefining him. The progress of biotechnologies, by changing man, has thus advanced his rights. In return, the law, as a method of representation and social organisation, is able to integrate scientific advances into the contemporary anthropological conception [64]. Man defines human rights, which in return redefine an "increased man" through the evolution of morals and technologies, and so on. This circular and elevatory reasoning can be developed in view of a consistency which by its nature maintains the notions of dignity and human liberty at the foundation of human rights.
It is not only biotechnologies which influence the content of human rights, however the two converge on a common dynamic oriented towards the improvement of the human condition [65]. As human rights only

envisaged natural and inherent capacities, they had an exclusively protective function and manifested themselves through the negative obligation of the State to avoid restricting the exercise of these capacities. But, from the moment that human rights integrates these new, non-inherent capacities, they acquire a function which is no longer to protect, but to improve the human condition, which integrates positive obligations – also a new development – into this logic; requiring the State to facilitate the effective exercise of these capacities and/or rights.

This perspective of improvement, which would even alter the conception of the human condition, is at the heart of the debate on post-humanism [66] and trans-humanism. If these *post* and *trans* humanisms succeed from the humanism that originally underlay human rights, it is natural that this succession would also be observed in the caselaw of the Court, which would evolve the Convention over time. Moreover, the idea of a "new man"; of the regeneration of the human race [67]; is not estranged from the philosophical traditions of the Enlightenment. Furthermore, genetic selection would not be alien to human nature in that it is the mechanism at work behind the theory of evolution. The value which, in classical thought, consists of man following and accomplishing his *nature*, is now confused with evolutionism; with the law of natural selection/evolution. In these conditions, it is evident that the classical and post-Darwinian anthropologies cannot agree on a common conception of human rights.

The convergence unifying medicine and the Welfare State must be added to that between human rights and biotechnology. Human rights developed during the 20 century with the Welfare State; one of the purposes of which was to make medicine and health a public service. Human rights, the Welfare State and medicine all serve a common purpose and are linked. Yet, in the same way human rights are no longer simply to *protect*, but also to *improve*; medicine no longer functions simply to *prevent* and to *treat*, but also to *improve* the human condition. To this end, over the past few decades, the therapeutic purpose of medical acts has been abandoned [68], which prevented it from acts without such a purpose (such as experimentation with no personal therapeutic purpose, MAP for single women, aesthetic surgery, contraceptive sterilisation or abortion) [69]. These acts, much like PGD, do not treat but are permitted as they are the object of the desires of individuals and improve the condition of the said people [70]. Human rights, like non-therapeutic medicine, offer promises that the Welfare State; social and liberal; would be required to recognise and offer to all, provided it had the means to do so.

Finally, going beyond the serious criticisms to be outlined regarding this judgment, this constitutes an important step in the story of the convergence between human rights and biotechnology. The confirmation of the new right that it contains is the result of a powerful and historical movement driven by the ambition to make men the "*masters and*

possessors of nature" [71]. In this sense, the right to a healthy child; the right to eugenics; is a progressive right: it envisages the improvement of the human condition by a greater technological mastery of individual and collective existence.
To conclude with Hannah Arendt: "*The human artifice of the world separates human existence from all mere animal environment, but life itself is outside this artificial world, and through life man remains related to all other living organisms. For some time now, a great many scientific endeavors have been directed toward making life also 'artificial', toward cutting the last tie through which even man belongs among the children of nature*" (...) "*This future man, whom the scientists tell us they will produce in no more than a hundred years, seems to be possessed by a rebellion against human existence as it has been given, a free gift from nowhere (secularly speaking), which he wishes to exchange, as it were, for something he has made himself*" [72].

Note:
[*] Il presente contributo è stato preventivamente sottoposto a referaggio anonimo affidato ad un componente del Comitato di Referee secondo il Regolamento adottato da questa Rivista.
[1] The unusually rapid treatment of this case (less than two years separate the introduction of the request from the announcement of the decision) is undoubtedly explained by the sensitive character of the question. Furthermore, it is notable that the judgment was given by the Second Section of the Court, just before the departure of the President of this Section. The Counsel of the applicants is also familiar with the Section;
he represented the applicants in the famous *Lautsi v. Italy* case, GC 18 March 2011, in relation to the presence of the crucifix in classrooms.
[2] Article 43 of the Convention.
[3] See however for commentaries favourable to the decision, C. PICHERAL, "*Les prudentes avancées de la Cour EDH en matière d'accès au diagnostic préimplantatoire*" [The careful advances of the European Court of Human Rights in matters of access to preimplantation genetic diagnosis], *Semaine juridique, édition générale*, 2012, No. 43, 1148. Céline BENOS, "L'interdiction du diagnostic préimplantatoire sur la sellette européenne, Note sous Cour EDH, 28 août 2012, *Costa et Pavan c/ Italie*" [The prohibition of preimplantation genetic diagnosis in the European Spotlight, Note under the European Court of Human Rights, 28 August 2012, *Costa and Pavan v. Italy*], *Revue de droit sanitaire et social 2013*, p. 67.
[4] *Norris v. Ireland*, 26 October 1988, § 31.
[5] *McCann and Others v. United Kingdom*, 27 September 1995.

[6] *Yasa v. Turkey*, 2 September 1998, § 66.
[7] *Kurt v. Turkey,* 25 May 1998 and *Cakici v. Turkey* [GC], No. 23657/94, §§ 98-99.
[8] *Dudgeon v. United Kingdom*, 22 October 1981, §§ 40-41.
[9] *Marckx v. Belgium*, 13 June 1979, § 27; *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, §§ 43-44.
[10] *Norris,* cited above, § 31.
[11] *Sejdic and Finci v. Bosnia-Herzegovina*, [GC], Nos. 27996/06 and 34836/06, decision of 22 December 2009, § 28 and *Burden v. United Kingdom*, cited above, §§ 33-34. *"The Convention does not, therefore, envisage the bringing of an actio popularis for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention. It is, however, open to applicants to contend that a law violates their rights, in the absence of an individual measure of implementation, if they belong to a class of people who risk being directly affected by the legislation or if they are required either to modify their conduct or risk being prosecuted"*.
[12] *Klass and Others v. Germany*, § 33; *Burden v. United Kingdom* [GC], § 33; *Perez v. France* [GC], No. 47287/99, § 70, CESH 2004-I.
[13] This has been reasserted by the Member States in the Conferences of Interlaken (February 2010) and Izmir (April 2011).
[14] *Sejdovic v. Italy* [GC], § 46 ; *Paksas v. Lithuania* [GC], § 75.
[15] *Baumann v. France*, No. 33592/96, 22 May 2001, § 47.
[16] Even the Italian Constitutional Court had been questioned about Law No. 40 and declared it partially unconstitutional in Decision No. 151 of 2009.
[17] Italy had therefore satisfied the rule according to which it is for a Government claiming non-exhaustion of domestic remedies to establish that they were effective and available as much in theory as in practice.
[18] In the cases of *Vallianos and Others v. Greece*, Nos. 29381/09 and 32684/09, currently pending, the Court will again have to rule on the admissibility of requests submitted without the domestic remedies being exhausted.
[19] See also the judgment of 16 December 2010, *A, B and C v. Ireland*, No. 25579/05, §§ 145-153.
[20] See, in particular, the judgment of 28 June 2011, *League of Swiss Muslims and Others v. Switzerland*, No. 66274/09.
[21] *Evans v United Kingdom* [GC], 1 April 2010, No. 6339/05, § 71.
[22] See, for example, *Evans,* cited above, § 77; *X and Y v. the Netherlands*, 26 March 1985, §§ 24 and 27; *Dudgeon*, cited above, § 52; and *Christine Goodwin v. United Kingdom* [GC], No. 28957/95, § 90.
[23] *Dickson v. United Kingdom* [GC], No. 44362/04, § 66.

[24] See Céline BENOS, "The prohibition of preimplantation genetic diagnosis in the European Spotlight, Note under the European Court of Human Rights, 28 August 2012, *Costa and Pavan v. Italy*", *Review of Health and Social Law 2013*, p. 67.
[25] It is true that, in *S.H. v. Austria* [GC], the Court had already admitted that "*the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life*" (§ 82).
[26] *S.H. v. Austria*, Section Decision, 1 April 2010, § 74.
[27] *Margarita Šijakova and Others v. "the Former Yugoslav Republic of Macedonia"* (Dec) No. 67914/01, 6 March 2003 "*the right to procreation is not covered by Article 12 or any other Article of the Convention*". See also *S.H. v. Austria*, No. 57813/00, Decision on admissibility of 15 November 2007, § 4.
[28] This point is also emphasised by Céline Bénos, in "The prohibition of preimplantation genetic diagnosis in the European Spotlight," cited above.
[29] *S.H. and Others v. Austria* [GC], No. 57813/00, § 82.
[30] And can therefore enter into the field of Article 8 under the conditional admissibility criteria.
[31] On the extension of the scope of Article 8 : C. PICHERAL, "The careful advances of the European Court of Human Rights in matters of access to preimplantation genetic diagnosis", *Semaine juridique, édition générale*, 2012, n° 43, 1148.
[32] *Goodwin v. United Kingdom*, § 90.
[33] *Bensaïd v. United Kingdom,* No. 44599/98, § 47.
[34] *Pretty v. United Kingdom*, No. 2346/02, § 61.
[35] Jean-Yves NAU, "Diagnostic prénatal: le risque de l'eugénisme démocratique" [Prenatal Diagnosis : the risk of democratic eugenics], *Slate.fr*. 29/04/2013, Available at : http://www.slate.fr/story/71773/diagnostic-prenatal-depistage-eugenisme .
[36] This lack of clear motivation can be found in other cases, particularly in the Grand Chamber's ruling in *S.H. v. Austria*, § 90.
[37] See Ch. NOWLIN, "The protection of morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms". *Human rights quarterly*, Vol. 24 No. 1 (February 2002), pp. 264-286.
[38] Similarly the Court, in *S.H. v. Austria*, found that placing themselves in the moral context of the time, with more than ten years having passed before the delivery of the judgment, relativised the value of its decision that no infringement had occurred and gave more meaning to its concluding warning concerning the rapidly evolving character of the topic at hand.

[39] Article 1, entitled "Purpose", of Law No. 40/2004 is so worded in its first paragraph: "*Al fine di favorire la soluzione dei problemi riproduttivi derivanti dalla sterilità o dalla infertilità umana è consentito il ricorso alla procreazione medicalmente assistita, alle condizioni e secondo le modalità previste dalla presente legge, che assicura i diritti di tutti i soggetti coinvolti, compreso il concepito.*"
[40] *Vo v. France*, GC 8 July 2004, req. 53924/00, § 84.
[41] See also the judgment *A, B and C v. Ireland*, § 222.
[42] *Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*"
[43] In this regard it is significant to take into account that the judgment, in its extensive citation of Law No. 40/2004, has omitted any reproduction of Article 1.
[44] See J. HABERMAS, " L'avenir de la nature humaine. Vers un eugénisme libéral?" [The Future of Human Nature. Towards Liberal Eugenics?], Coll. Nrfessais, Gallimard, 2002; Jacques TESTARD, "*L'œuf transparent*" [The Transparent Egg]. Flammation Coll. Champs, 1986.
[45] This prohibition is notably provided by the Universal Declaration on the Human Genome and Human Rights of UNESCO of 11 November 1997 (Article 6) and in the Oviedo Convention (Article 11).
[46] *Open Door v. Ireland*, No. 14234/88; 14235/88, § 68.
[47] *S. H. v. Austria*, 1 April 2010, § 69.
[48] *Dickson v. United Kingdom,* GC, 4 December 2007, No. 44362/04, § 78.
[49] As was reasserted by the Court in the judgment *S. H. v. Austria*.
[50] Document on preimplantation and prenatal diagnosis published by the Committee on Bioethics (DH-BIO) on 22 November 2010.
[51] Article 28 – Public Debate – *Parties to this Convention shall see to it that the fundamental questions raised by the developments of biology and medicine are the subject of appropriate public discussion in the light, in particular, of relevant medical, social, economic, ethical and legal implications, and that their possible application is made the subject of appropriate consultation.*
[52] *A, B and C v. Ireland* [GC], 16 December 2010, § 226.
[53] See "La conscience de l'Europe : 50 ans de la Cour européenne des droits de l'homme" [The Conscience of Europe: 50 years of the European Court of Human Rights], Johnathan Sharpe (under the direction of), Third Millennium Information Ltd.
[54] Nicolas Hervieu, "Un long chemin européen vers la pleine reconnaissance des familles homoparentales " [A long process towards the recognition of same-sex parent families in Europe] [PDF] in *Lettre "Actualités Droits-Libertés" of CREDOF*, 26 February 2013.

[55] See for example the interpretation of Article 12 in *Goodwin* (cited above) and *Schalk and Kopf v. Austria*, 30141/04 of 24 June 2010 and *X and Others v. Austria* [GC], No. 19010/07 of 19 February 2013.
[56] For example, *Goodwin v. United Kingdom* (§ 78), *Tysiac v. Poland* (§ 116). See also, more recently, *X and Others v. Austria*, cited above, § 144.
[57] See Grégor PUPPINCK "Interdiction du diagnostic préimplantatoire : la CEDH censure le législateur italien " [Prohibition of preimplantation diagnosis: the ECHR censors the Italian legislator], *Droit de la famille*, No. 11, Commentary 170, November 2012.
[58] Dr. Jacob Cornides, „Die Krise des Europäischen Gerichtshof für Menschenrechte, dargestellt anhand der Entscheidung X. gegen Österreich" [The crisis of the European Court of Human Rights, illustrated by the decision *X v. Austria*], forthcoming.
[59] See for example the use in *X v. Austria* in the matter of homosexual adoption. See Grégor PUPPINCK, "Affaire *X et autres c/ Autriche* du 19 février 2013 : la Cour européenne pose les fondements d'un droit à l'adoption par les couples de même sexe" [*X and Others v. Austria* of 19 February 2013: the European Court poses the foundations of a right to adoption for same-sex couples]. *Droit civil*, Lamy, 2013, *forthcoming*.
[60] Jean-Pierre Marguénaud "Le droit des parents de procréer un enfant indemne de la maladie génétique dont ils sont porteurs" [The right of parents to a child free of the genetic defects they carry], *RTD Civ.* 2012, p. 697.
[61] However, consideration of the ability to access abortion does not at this stage form a part of admissibility *ratione materiae* (therefore fall within the scope of Article 8's field of application), but of the principle of proportionality.
[62] Nicolas Hervieu, in the Article cited above, thinks that this formation is the fruit of an "editorial clumsiness". Jean-Pierre Marguénaud on the other hand says that "*in any case, the Court reasons in terms of protecting the right of the parents to bring a child into the world who will not be affected by the genetic defect of which they are carriers*", in "Le droit des parents de procréer un enfant indemne de la maladie génétique dont ils sont porteurs" [The right of parents to child free of the genetic defects they carry], *RTD Civ.* 2012 p. 697.
[63] Preamble of the Declaration of Rights 1789.
[64] See the interesting reflection of Florence BELLIVIER in " Réflexion au sujet de la nature et de l'artifice dans les lois de bioéthique " [Reflection on the nature and artifice of the laws of bioethics], *LPA*, No. 35, 18 February 2005 p. 10, and BELLIVIER F., BRUNET L. "De la nature humaine à l'identité génétique : nature et artifice dans les lois dites de bioéthique" [On the human nature of genetic identity : nature and artifice in the so-called laws of bioethics], *Espaces et sociétés,* No. 99, 1999, p. 45.

[65] On the "fluid borders between technology and ethics" see Florence CHALTIEL, "La loi italienne sur la procréation médicalement assistée censurée par la Cour européenne des droits de l'Homme" [The Italian law on medically assisted procreation censored by the European Court of Human Rights], *Petites affiches,* 18 December 2012 No. 252, and on the improvement of the human condition: G. PUPPINCK, "*L'auteur de la norme bioéthique*" [The author of the bioethical norm], Doctorate thesis under the direction of Gérard Mémeteau, Poitiers, 2009.
[66] See notably D. LECOURT, "*Humain, post humain : la technique et la vie*", [Human, Post Human: technology and life], Paris, PUF, 2003. ; C. LABRUSSE-RIOU, "*L'humain en droit, réalité, fiction, utopie ?*" [The human individual in law, reality, fiction, utopia?] in, *Towards the end of man*, (s.d.) Ch. HERVÉ and J.-J. ROZENBERG, Brussels, De Broeck, 2006, pp. 157-171.
[67] See X. MARTIN, "*Régénérer l'espèce humaine, Utopie Médicale et Lumières, 1750-1850*," [Regenerating the human species, Medical Utopia and the Enlightenment, 1750-1850], Bouère, DMM, 2008.
[68] In France, the Law of 27 July 1999 called into question the requirement of therapeutic cause by substituting the adjective "medical" for "therapeutic" into Article 16-3 of the Code Civil, in order to permit a larger interpretation of the legality of the purpose of an act which attacks physical integrity.
[69] See G. PUPPINCK, Thesis, *cited above*, pages 165 and following.
[70] G. MEMETEAU "Droit médical est-il un droit au bonheur ? Apprendre à douter : Questions de droit, questions sur le droit" [Medical law – is there a right to happiness? Learn to doubt: Questions of law, questions on the law] in *Mélanges en l'honneur de J.-C. LOMBOIS*, Limoges, PULIM., 2004, p.337.
[71] R. DESCARTES, *Discours de la méthode pour bien conduire sa raison, et chercher la vérité dans les sciences* [Speech on the method of rightly conducted reason, and searching for the truth in science], 6 part, 1637. "*Renders ourselves as masters and possessors of nature*".
[72] H. ARENDT, *The Human Condition*, London, University of Chicago Press, Coll. Charles R. Walgreen Foundation lectures, 1958. pp. 2-3.