Reprodnctive Technology and International Mechanisms of Protection of the Human Person

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The author discusses reproductive technology with a view to examining the sufficiency of current domestic regulation and proposed reforms, and the need for the development of international norms for the protection of the human person. The first part of the article studies the current legal status of human genctie material (foetus, embryo and gametes) used in, or resulting from, reproductive technology (artificial insemination and *in vitro* fertilization). This is followed by an examination of domcstic law reform proposals from commissions in the Commonwealth, Europe and the United States. Thcse proposals reveal the emergence of a consensus on a number of points, namely on the need to protect human genetic material without necessarily according it legal personality; on a time limit to *in vitro* culture; on prohibiting embryo implantation aftcr experimentation; and on limiting access to reproductive technology to stable unions. The sccond part of the article discusscs the possible application of constitutional rights and international human rights to reproductive tcchnology. According to the author, some national reforms belong in the international arena since the respect for human life and dignity are universal values. Furthermore, the protection of human genetic material cannot be effective where there are no international standards of control to prevent forum shopping as a means of circumventing future national regulation.

L'auteur étudie les technologies de fertilité pour déterminer si les législations nationales actuelles et les propositions de réforme sont adéquates, ainsi que la nécessité de développer des normes internationales de protection de la personne humaine. La première partie de l'article concerne le statut juridique actuel du matériel génétique humain (foetus, embryon et gamètes) utilisé ou produit par les technologies de fertilité (insémination artificielle et fertilisation *in vitro*). L'auteur examine ensuite les recommendations provenant de commissions de réforme du droit américaines, européennes et du Commonwealth. Il se dégage de ces différentes recommendations un consensus sur un certain nombre de questions, notamment: le besoin de protéger le matériel génétique sans nécessairement lui aceorder la personnalité juridique; l'imposition d'un délai pour les cultures *in vitro*; l'interdiction d'implanter des embryons après expérimentation; et la limitation de l'accès aux technologies de fertilité aux unions stables. La deuxième partie de l'article examine la possibilité d'appliquer des droits constitutionnels ou des droits de la personne internationaux aux technologies de fertilité. Selon l'auteur, certaines réformes nationales devraient être élevées au niveau international, puisque le respect de la vie et de la dignité humaines sont des valeurs universclles. De plus, la protection du matériel génétique humain ne peut pas être efficace en l'absence de mécanismes de contrôle internationaux qui empêchent les abus inter-juridictionnels destinés à contourner les éventuelles réglementations nationales.

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Synopsis

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Introduction

While offering new hope to the infertile, the advent of reproductive technologies undermines all existing notions of the family and, more particularly, of what constitutes a human being under law. Individual human gametes (sperm and ova) can be obtained from donors, given to third parties, destroyed or stored for future use by the donors themselves or by third parties. If united to form an embryo *in vitro* (outside of the uterus), the embryo may be donated, implanted, experimented upon, destroyed or again, stored for future use. In both these situations, such genetic material can be kept beyond the lifetime of the donors.

Leaving aside those techniques affecting the gene structure itself (genetic manipulation) or seeking to reproduce life artificially (cloning, parthenogenesis and ectogenesis), to concentrate instead on those techniques of assisted conception currently in practice (artificial insemination by donor, *in vitro* fertilization and embryo transfer), it is obvious that their most immediate impact as concerns the rights and freedoms of an individual over human genetic material is in the area of domestic private law. The status and protection of the genetic material will therefore first be studied on a

national level. Indeed, the reform of private law is already underway in those countries possessing reproductive technologies.

The ambit of rights and freedoms that the human person has over genetic material will also be subject to constitutional scrutiny and interpretation under public law. The constitutional rights to life, to personal integrity, to privacy, to dignity and to self-determination are themselves limited by notions of public order and national interest.

Finally, while "efficient norms and institutions at the national level provide the elemental basis for the discussion and eventual practical application of international health law",[1] international instruments themselves reflect the possibility of varied viewpoints on whether there is a right to privacy, a right to health — with a correlative right to fertility, a right to found a family — with a correlative right to access reproductive technology, and the right to life — with the remaining question of determining from which stage of development this right arises.

While individual countries are presently seeking to establish guidelines or to legislate specifically in those areas affected by reproductive technologies such as family law, filiation, successions, property law, civil and criminal responsibility,. and contract law, the repercussions go beyond national boundaries to problems of international regulation and protection. Indeed, regulation on a national level will be neither sufficient nor workable where the parties to reproductive technology can benefit from different domestic regulation existing in other countries.[2] As one author pointed out:

> Une pré-harmonisation législative est en effet indispensable car l'existence de législations nationales disparates aurait des effets immédiats sur le comportement des individus; ceux qui souhaitent se soumettre à un acte médical controversé ou prohibé dans leur pays n'hésiteraient pas à se déplacer dans un Etat voisin, si la législation de ce dernier est plus permissive. Ce "tourisme juridique et procréatique" ouvrirait une brèche périlleuse dans le patrimoine commun de valeurs spirituelles et morales que les Etats européens se sont engagés à défendre en adoptant la Convention européenne des droits de l'homme.[3]

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[1]H. Fuenzalida, "The Concepts of Health and Health Law" (Address to the Société québécoise de droit international, 16-17 May 1985) [unpublished].

[2]See P. Widmer, "Les perspectives législatives, en particulier vues du Conseil de l'Europe" in *Artificial Procreation, Genetics and the Law: Lausanne Colloquium of November 29-30, 1985* (Zürich: Publications de l'Institut suisse de droit comparé, 1986) 211 at 215.

[3]*Ibid.* See also M. Torrelli, "La protection internationale de la vie prénatale" in *La vie prénatale: Biologie, morale et droit (Actes du VIe Colloque national des Juristes Catholiques)* (Paris: TEQUI, 1986) 169 at 171:

> Une protection internationale est nécessaire pour deux raisons:
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> — le respect de la vie et la dignité de la personne sont des valeurs universelles qui doivent donc être universellement reconnues et protégées,
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> — la généralisation des techniques, du moins dans les pays développés, conduit au dépassement des frontières, et leur mise en oeuvre permet aussi d'échapper à une règlementation exclusivement nationale.

This potential for "tourisme juridique et procréatique", already the case with abortion,[4] warrants the conclusion that in this field the transnational harmonization of laws is a necessity.[5] The recognition of the need to protect a certain community of spiritual and moral values already reflected in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[6] resulted in the adoption of a recommendation by the Council of Europe in 1986 on the more extreme applications of reproductive technology.[7] What remains to be seen, however, is whether there is sufficient maturation of public opinion and national consensus to permit the international elaboration of certain commonly held principles while respecting national, cultural and social differences.

I. Domestic Private Law

The artificial insemination of a woman with the sperm of a donor as a means of alleviating male sterility has been extensively practiced since World War II. Nevertheless, it has only recently attracted the attention of legislators, particularly as regards the principle common to most legal systems of presuming the legitimacy and paternity of the child in the marital context. Similarly, the principle of the inviolability of the human person, as translated in the prohibition excluding the human body from commerce (*res extra commercium*), has been attenuated by the proliferation of human tissue legislation especially as concerns the donation of organs, blood and human sperm. Generally, the freedom of the individual to participate in such procedures has been affirmed subject to certain conditions, such as the risk-benefit ratio.

More recently, the possible use of donated ova for fertilization *in vivo* or *in vitro*, or of donated embryos followed by the transfer to a host mother (the surrogate), has shaken the one remaining immutable private law prin-

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[4]See M.-L. Revillard, "Fécondation in vitro et congélation d'embryons" in *Artificial Procreation, Genetics and the Law: Lausanne Colloquium of November 29-30, 1985*, *supra*, note 2, 157 at 170. As Revillard notes:

> Les législations relatives à la procréation artificielle établies par certains pays peuvent être plus ou moins restrictives. Verra-t-on se développer des Etats refuges de la procréation artificielle à l'instar des pays qui avaient autorisé l'avortement sans restriction pour les étrangers? ... Va-t-on refuser les possibilités qu'offre la procréation artificielle à des couples étrangers sous prétexte que leur législation nationale le leur interdit?

[5]Indeed, such was the conclusion reached by participants at a recent international colloquium: see J. Stepan's discussion in *Artificial Procreation, Genetics and the Law: Lausanne Colloquium of November 29-30, 1985*, *ibid.* at 301.

[6]4 November 1950, 213 U.N.T.S. 221, E.T.S. No. 5 [hereinafter *European Convention*].

[7]Council of Europe, P.A., *Recommendation 1046 on the Use of Human Embryos and Foetuses for Diagnostic, Therapeutic, Scientific, Industrial and Commercial Purposes*, provisional edition, adopted 24 September 1986 [hereinafter *Recommendation 1046*].

ciple governing maternal filiation (*mater semper certa est*). That principle itself is based on the traditional view that a woman who gestates and delivers a child is its mother (*mater est quam gestatio demonstrat*).[8]

Together, these developments have prompted legislation assuring the legitimacy and paternity of the child born of artificial insemination. Other law reforms seeking to limit the freedom to dispose of one's gametes and to ensure the *maternal* filiation of the child are on the horizon.

A brief examination of positive law concerning the status of human genetic material is essential in order to comprehend the hesitancy of recent reform proposals to delineate clearly a starting point for the attribution of legal personality. This hesitancy, as well as a concern for those suffering from infertility, has prompted a general consensus by most countries towards an approach fostering donor autonomy and control over his or her gametes and yet protecting the human embryo from undue exploitation and experimentation.

A. Current Legal Status of Human Genetic Material

Most countries do not confer juridical personality on the human foetus prior to live birth.[9] This is so even in those countries providing for abortion only where necessary to preserve the life of the mother.[10] Protection of the foetus *in utero* is thus indirect and consists of limitations on abortion, the promotion of maternal health programs and medical surveillance.

From conception onwards, however, the embryo or foetus (*nasciturus*) can be the subject of certain patrimonial rights (gifts, successions or donations), rights which are contingent not only on live birth, but under the civil law, on the viability of the child as well.[11] Furthermore, under the principles of civil liability, any harm inflicted prenatally or during birth to the foetus which can be related causally to the fault of another can be the source of an action by the child at birth. Generally, where the wrongful act of a third party causes the loss of a foetus prior to birth such loss is not

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[8]See J.K. Mason & R.A. McCall Smith, *Law and Medical Ethics* (London: Butterworths, 1983) at 46.

[9]See R.J. Cook & B.M. Dickens, *Emerging Issues in Commonwealth Abortion Laws 1982* (London: Commonwealth Secretariat, 1983) at 31; see also, by the same authors, *Issues in Reproductive Health Law in the Commonwealth* (London: Commonwealth Secretariat, 1986) at 51-78.

[10]See United Nations, Fund for Population Activities, *Annual Review of Population Law*, vol. 9, (1982). See also C. Tietze & S.K. Henshaw, eds, *Induced Abortion: A World Review 1986*, 6th ed. (New York: Alan Guttmacher Institute, 1986).

[11]See *Montreal Tramways Co.* v. *Léveillé* (1933), [1933] S.C.R. 456, [1933] 4 D.L.R. 337.

compensable in itself for the parents in the absence of specific legislation.[12] Even in those countries having a limited legal period of abortion, wrongful loss of a foetus before or after that legal period, prior to viability or thereafter, is probably not compensable. Recent studies show a 62 percent natural spontaneous abortion rate prior to the twelfth week of pregnancy.[13] Thus, irrespective of abortion law and in the absence of specific wrongful death legislation, under current positive law damages cannot be claimed for pre-birth wrongful loss of a foetus caused by a third party. This is due not only to the lack of legal personality of the foetus but also to problems in proving causation.

Under current positive law, no specific mention is made of early embryonic loss *in utero*. Generally, stillbirths are only recorded for those foetuses exceeding 500 grams in weight.[14] Yet, where abortion is prohibited or regulated, any attempt to provoke a miscarriage is usually considered criminal whether or not the woman is actually pregnant.[15] Such an approach seems to indicate a greater concern for an abstract protection of human life than for the rights and freedoms of a person already in existence, namely, the woman.

These restrictions and variations on the "valuation" of foetal loss at various stages are as much based on an emphasis on patrimonial rights, or on some limited protection of human life, as they are linked to problems of proof. However, difficulties of proof may not be applicable to *in vitro* embryos where wrongful loss or destruction would immediately be evident and perhaps compensable for the parents.[16] The child once born could also sue for negligently caused injury whether it occurred before or after implantation in the mother. Yet again, under current positive law, the human embryo *in vitro* would not possess legal personality.

Turning from a discussion of the status of the embryo or foetus to the gametes themselves (sperm and ova), some countries have included sperm within the regenerative human tissues and organs covered by human tissue

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[12]See B.M. Knoppers, "Modern Birth Technology and Human Rights" (1985) 33 Am. J. Comp. Law 1.

[13]R. Cook, "Legal Abortion: Limits and Contributions to Human Life" in R. Porter & M. O'Connor, eds, *Abortion: Medical Progress and Social Implications* (London: Pitman, 1982) 211 at 213.

[14]See World Health Organization, *Health Aspects of Human Rights* (Geneva, 1976) at 14; see also World Health Organization, "Recommended Definitions, Terminology and Format for Statistical Tables Related to the Perinatal Period and Use of a New Certificate for Cause of Perinatal Deaths" (1977) 56 Acta Obstet. Gynecol. Scand. 247.

[15]See Cook & Dickens, *Emerging Issues in Commonwealth Abortion Laws 1982*, *supra*, note 9 at 33.

[16]*Del Zio* v. *Manhattan's Columbia Presbyterian Medical Center*, No. 74 Civ. 3588 (S.D.N.Y. April 12, 1978).

gift legislation. These human gametes could also fall within the broad definitions of "body parts" under such legislation.[17] Some countries have specifically excluded "[t]he transfer of embryos, the removal and transplantation of testicles and ovaries and utilisation of ova and sperm" from the application of these rules.[18] Indeed, it was not until 1986 that there was a Council of Europe recommendation concerning the use of embryos and foetuses.[19]

However, there is a recent proliferation of legislation governing the medical and legal conditions under which artificial insemination by donor can be performed, including the renunciation of the donor to any filiation, the guarantee of donor anonymity, the necessity for spousal consent where the recipient is married, and the creation of an irrebuttable presumption of paternity and legitimacy of the child where such consent is given.[20]

Very few countries have any legislation in force on ova or embryo donation, or on *in vitro* fertilization. An exception to this is Sweden which under its current legislation requires permission of the National Board of Health and Welfare for the importation of frozen sperm. No mention is made of embryo donation, importation or exportation.[21]

Another exception to this general failure to legislate is the *Infertility (Medical Procedures) Act, 1984*[22] of the State of Victoria in Australia. Although it has not been adopted as a whole, it constitutes the most comprehensive legislation in force with respect to the control of centers that offer infertility treatment as well as to the limits on the rights and freedoms of donors involved in artificial insemination by donor, *in vitro* fertilization and surrogacy. Its articles prohibit payment in excess of expenses incurred for the giving of gametes or embryos.[23] Both England and the State of Victoria in Australia have specifically prohibited commercial forms of surrogacy.[24]

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[17]See the legislation reproduced in D. Giesen, *Medical Malpractice Law* (Bielefeld: Gieseking-Verlag, 1981) app. 2-3.

[18]Council of Europe, Committee of Ministers, *Resolution 29 on Harmonization of Legislation of Member States Relating to Removal, Grafting and Transplantation of Human Substances*, adopted 11 May 1978, art. 1(2) [hereinafter *Resolution 29*].

[19]*Recommendation 1046, supra*, note 7.

[20]See J. Stepan, "Legislation Relating to Human Artificial Procreation" in *Artificial Procreation, Genetics and the Law: Lausanne Colloquium of November 29-30, 1985, supra*, note 2, 331.

[21]See art. 6, *Code Relating to Parents, Guardians and Children*, as am. *Law No. 1139 of 20 December 1984* and *Law No. 1140 of 20 December 1984 on Insemination*, as reproduced in Stepan, *ibid.* at 335-36.

[22]Vict. Acts 1984, no. 10163. The Act was assented to on 20 November 1984.

[23]*Ibid.*, ss 11(6), 12(6), 13(7) and 13(9). As of August 10, 1986, these articles were not yet in force.

[24]See B.M. Knoppers, "Legislative Reforms in Reproductive Technology" (1986) 18 Ottawa L. Rev. [forthcoming].

Finally, legislation already in force prohibiting experimentation on the foetus (*in utero* or *extra uterum*) is generally presumed to be applicable to the *in vitro* embryo.[25] Distinctions need to be made however between "embryo research followed by transfer to a uterus and research where no transfer will occur ... [as well as] between laboratory and clinical research, or basic and applied research."[26] Foetal experimentation laws as they currently stand have "a chilling effect on embryo research."[27]

Current domestic private law then offers a limited protection and recognition to the foetus prior to live birth and even less so to the human embryo and individual gametes.

B. Private Law Reforms

The question of whether the individual human gamete, embryo or foetus can be owned or passed on to one's heirs, donated to others, or experimented upon, traded, aborted, imported or exported concerns the actual degree of legal status or protection afforded to human life. Before any reform can be undertaken specifically with regard to the uses of human genetic material, its qualification as person or property must be decided. Commonwealth, American and European law reform commissions[28] studying

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[25]See L.B. Andrews, *New Conceptions* (New York: St Martin's Press, 1983) at 253; Geisen, *supra*, note 17 at 258.

[26]J.A. Robertson, "Embryo Research" (1986) 24 U.W.O. L. Rev. 15 at 16.

[27]*Ibid.* at 18. The State of Pennsylvania includes *in vitro* fertilization within its section on "prohibited acts": see Stepan, *supra*, note 20 at 356.

[28]Among the more important commission reports considered in this study are the following: Australia, National Health & Medical Research Council, *First Report by NH & MRC Working Party on Ethics in Medical Research: Research on Humans* (Commonwealth Government Printer, August 1982) (Chair: R.R.H. Lovell) [hereinafter *NH & MRC Report*]; Queensland, *Report of the Special Committee Appointed by the Queensland Government to Inquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters*, vol. 1 (March 1984) [hereinafter *Queensland Report*]; U.K., Department of Health & Social Security, "Report of the Committee of Inquiry into Human Fertilisation and Embryology" Cmnd 9314 (July 1984) (Chair: M. Warnock) [hereinafter *Warnock Report*]; Council for Science and Society, *Human Procreation: Ethical Aspects of the New Techniques* (Oxford: Oxford University Press, 1984); Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, vols 1, 2 (Toronto: Ministry of the Attorney General, 1985) (Chair: J.R. Breithaupt) [hereinafter *O.L.R.C. Report*]; Canada, Ministry of Health and Welfare, *Report of the Advisory Committee on the Storage and Utilisation of Human Sperm* (April 1981) (Chair: S. Segal); Medical Research Council of Canada, *Discussion Draft of Revised Guidelines on Research Involving Human Subjects* (Ottawa, October 1986); Federal Republic of Germany, Arbeitsgruppe des Bundesministers für Forschung und Technologie und des Bundesministers der Justiz, *In Vitro Fertilisation, Genomanalyse und Gentherapie: Bericht der Gemeinsamen* (Munich: J. Sweitzer Verlag, 1985); France, Comité consultatif national d'éthique pour les sciences de la vie et de la santé, *Rapport 1984* (Paris: La Documentation Française, 1985) (Chair: J. Bernard); France, Comité consultatif national d'éthique pour les sciences de la vie et de la

ing the impact of reproductive technologies on private law have arrived at some consensus on the issue of the future qualification of the embryo. No report recommended that the embryo be expressly recognized as possessing legal personality, that is, the status of personhood under law, prior to implantation or live birth.[29]

Nevertheless, it should be remembered that with gamete or embryo donation, there is a donation of genetic information. Even though all human tissues contain living cells, "each carrying all the genetic information needed to code for the synthesis of a person, ... [only] the genetic information carried by sperm and ova is *usable*"[30] and accessible.[31] For that reason, no current reform proposal would leave the embryo *in vitro* in its current unprotected state. Moreover, due to its unique character, all proposals would exempt it from actual human tissue gift legislation. This is achieved by treating the embryo as human life worthy of protection, as having a special status,[32] or, according to the French national bioethics committee, as a "personne humaine potentielle".[33] In fact, in 1986 the Council of Europe recognized that the issue of the legal personality of the embryo was secondary to the search for appropriate legal protection.[34] It is not clear, however, whether this special status is distinguishable from the protection already afforded to the foetus *in utero* by the application of the positive law *nasciturus* principle, nor whether the proposals do more than protect the interests of others in the embryo.

Indeed, a closer examination of the issue of donor control in these proposals reveals a rather hybrid person/property approach to the question

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santé, *Avis relatif aux recherches sur les embryons humains* in vitro *et à leur utilisation à des fins médicales et scientifiques* (Paris, 15 décembre 1986); Académie suisse des sciences médicales, *Directives médico-éthiques pour le traitement de la stérilité par fécondation in vitro et transfert d'embryons: Version 1985* (Bâle, May 1985) (Co-Chairs: A. Cerletti & B. Courvoisier); American Fertility Society, *Ethical Considerations of the New Reproductive Technologies* (Birmingham, September 1986) published as supp. 1 of (1986) 46 Fertility and Sterility; American Fertility Society, *New Guidelines for the Use of Semen Donor Insemination* (Birmingham, October 1986) published as supp. 2 of (1986) 46 Fertility and Society; and World Health Organisation & Council for International Organizations of Medical Sciences, *Proposed International Guidelines for Biomedical Research* (Geneva, 1982).

[29]See Knoppers, *supra*, note 24, where this discussion on the protection of humain genetic material and private law reforms is more fully developed.

[30]R. Jansen, "Sperm and Ova as Property" (1985) 11 J. Med. Ethics 123 at 124.

[31]See Robertson, *supra*, note 26 at 37.

[32]See *Warnock Report*, *supra*, note 28, no. 11.17.

[33]See "Avis sur les prélèvements de tissus d'embryons ou de foetus humains morts à des fins thérapeutiques, diagnostiques et scientifiques" in *Rapport 1984*, *supra*, note 28, 23 at 23.

[34]See principle 2 of Council of Europe, Ad Hoc Committee of Experts on Progress in the Biomedical Sciences, *Provisional Principles on the Techniques of Human Artificial Procreation and Certain Procedures Carried out on Embryos in Connection with those Techniques* (5 March 1986) at 3 [hereinafter *Provisional Principles*].

of the embryo's status. This is due to the failure of current law to define clearly both the extent of, and limit on, self-determination over one's body, life and health, and whether this autonomy includes a proprietary or possessory interest in one's body parts.[35]

The American Fertility Society reports on reproductive technology consider gametes and concepti as property of the donors.[36] In contrast, commissions like the Warnock Committee in the United Kingdom specifically recommend that "legislation be enacted to ensure there is no right of ownership in a human embryo".[37]

Yet, the majority of law reform commissions also recommended that donors have full control over the uses to which their gametes are put. Thus, according to the Ontario Law Reform Commission, where there is a "fertilized ovum outside the body, produced with the gametes of the intended recipient and her husband or partner, [it] should be under the joint legal control of the man and woman",[38] with a right of survivorship in case of death. Moreover, in the case of the absence of a survivor, or dispute among joint donors, or storage beyond normal reproductive life, final authority over the embryo would pass to the physician, gamete storage bank or other government authority in actual possession.[39] Another commission has suggested that disputes over embryos go before the courts as in a custody or adoption case.[40]

Furthermore, while there seems to be consensus on a fourteen-day limit of growth *in vitro* of a human embryo prior to transfer to a recipient, there is none concerning donation of an embryo to third parties. Amongst the reasons given for the latter are problems of ethics, of possible consanguinity among unknown siblings following cryopreservation, of donors wishing to store "extra embryos" for their own future use, and of the difficulty in obtaining the consent of both donors.

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[35]See L.B. Andrews, "My Body, My Property" (October 1986) 16 Hastings Center Report 28; and B.M. Dickens, "The Control of Living Body Materials" (1977) 27 U.T.L.J. 142.

[36]*Ethical Considerations of the New Reproductive Technologies* and *New Guidelines for the Use of Semen Donor Insemination, supra*, note 28. See also American Fertility Society, "Ethical Statement on In Vitro Fertilization" (1984) 41 Fertility and Sterility 12.

[37]*Warnock Report, supra*, note 28, no. 10.11. This may seem paradoxical considering that the Warnock Commission would permit the selling and purchasing of human gametes or embryos, subject to licensing requirements: see *infra*, note 41.

[38]Recommendation 27 of *O.L.R.C. Report*, vol. 2, *supra*, note 28 at 280.

[39]*Ibid.* See also *NH & MRC Report, supra*, note 28 at 27.

[40]*Queensland Report, supra*, note 28.

The majority of the reports recommend the prohibition of experimentation on the embryo or embryonic tissues, or suggest the imposition of strict regulation. All reports are unanimous in recommending the prohibition of the implantation in a woman of an embryo subjected to non-therapeutic experimentation. Only two reports have advocated that storage banks be permitted to sell and purchase human gametes or embryos subject to regulation.[41] The Ontario Law Reform Commission would go further and permit the exportation and importation of gametes and embryos subject to regulation.[42]

While all agree that the embryo *in vitro* constitutes human life worthy of protection (through future medical or statutory regulation of reproductive technology), the degree of recognition varies greatly from one commission report to another. Furthermore, while the majority deny the possibility of granting the donor a proprietary interest in human gametes or embryos, most would seem to grant the donor at least some possessory interest, and in some cases, a residual right. These options are indicative of the difficult political and social problems underlying the question. While this range of options, however, represents the particular compromises various jurisdictions were willing to make, if implemented in their present garden-variety form, they could also lead to forum-shopping by participants and scientists alike.[43] Indeed, there is no area where the need for some common international principles of respect and protection is more imperative, if we are truly to distinguish between human genetic material as property, as a simple product of conception or as human life.

II. Public Law

The eventual adoption of the proposed domestic reforms will require a debate on the issues of public law. Claims of a legal right to parenthood or personal liberty, of a right to privacy, of a right of access to these infertility treatment programs irrespective of marital status, or finally, of the right of the embryo itself to life or to inherit a genetic patrimony which has not been artificially changed will frame the eventual adoption or interpretation of any domestic regulation. These issues have been treated only indirectly within national constitutional provisions relating to human rights. Their future delineation will also be subjected to scrutiny and refinement under international human rights instruments.

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[41]See *Warnock Report*, *supra*, note 28, no. 13.13; and recommendation 17 of *O.L.R.C. Report*, vol. 2, *supra*, note 28 at 277. See also Sweden, *Law No. 1140 of 20 December 1984 on Insemination*, *supra*, note 21 at 335-36.

[42]Recommendation 18 of *O.L.R.C. Report*, *ibid.*

[43]See, generally, Widmer, *supra*, note 2; Revillard, *supra*, note 4; and Stepan, *supra*, note 5.

A. Constitutional Law

Prior to the advent of reproductive technologies, most constitutional debates centered on the abortion issue, a discussion of great importance for the legal status and protection of human genetic material. A brief examination of the possible resolution of the constitutional issues is necessary in order to understand the current reform proposals specific to the area of reproductive technology.

The constitutional right to life is again limited by the interpretation to be given by the courts to the notion of "person", or "everyone", or "individual", or "human being" possessing the right. Thus, unless qualified as a "person", as included under "everyone", or "individual", or unless considered as a "human being", the right (whatever its ambit) would not apply to the foetus or human embryo. Furthermore, the right to life of the foetus has been held to be a right limited by abortion law.[44] The commencing point for State interest in the protection of the foetus is then subject to the statutory time period for abortion or, in its absence, to indications prescribed by law (notably, the life of the mother). The interest of the potential father is also limited in that his consent is usually not a legal prerequisite for abortion.[45]

In the initial stages of pregnancy, then, there is currently no constitutional right to life of the foetus or embryo.[46]

Once past the early stages of pregnancy, however, there is an expansion of legal protection of the unborn. This protection is being challenged by a claimed constitutional right to procreative autonomy by the woman. There has only been a limited recognition of procreative autonomy and then it has generally fallen within the concept of personal liberty.[47]

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[44]In France, see Cons. const., 15 janvier 1975, J.O. 16 janvier 1975; in Austria, see Verfassungsgerichtshof, 2 Eu GRZ 74 (1975); in Italy, see Corte Constituzionale, 1 Eu GRZ 167 (1975). See also P. Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983) at 132; and A.E. Michel, "Abortion and International Law: The Status and Possible Extension of Women's Right to Privacy" (1981-82) 20 J. Fam. L. 241.

[45]For the United Kingdom, see *Paton* v. *British Pregnancy Advisory Service Trustees* (1978), [1978] 2 All E.R. 987, [1978] 3 W.L.R. 687 (Q.B.); for France, see Cons. d'État, 31 octobre 1980, *L.*, J.C.P. 1982.II.19732; and for the United States, see *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976).

[46]Knoppers, *supra*, note 12 at 21; see also S.L. Isaacs, "Reproductive Rights 1983: An International Survey" (1982-83) 14 Colum. Human Rights L. Rev. 311 at 339-50. Professor Stepan cites Chile and Ireland (save the exception for the life of the mother) as the only two countries in which constitutional provisions prohibit abortion, even at the early stages of pregnancy: see J. Stepan, "How the Law Reacts to Various Stages of the Development of Potential Life" (Address to Seventh World Congress on Medical Law, Gent, 18-22 August 1985) at I-1 [unpublished].

[47]In the United States, see *Roe* v. *Wade*, 410 U.S. 113 (1973), aff'd *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 106 S. Ct 2169 (1986).

The constitutional right of privacy has also been invoked with regards to procreative autonomy. The right to privacy includes the individual constitutional right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,[48] or to found a family,[49] or to have the number and spacing of children that he or she desires.[50] To date, the interpretation by the courts of this right demonstrates an effort to balance State interest in health, safety, welfare or morality against individual rights. However, no Constitution or court has yet addressed the possibility of State limitation or regulation of the means used by individuals to procreate. In fact, no legislator or court has addressed the possibility of preconceptual regulation by the State of the individual means used to procreate.[51]

The proposals for reform do not contain much discussion pertaining to the constitutional issues surrounding reproductive technologies. The four most fundamental constitutional issues are the right to procreate, the right of access to assisted conception without discrimination, the right to marry and found a family, and the right to life.

Presuming then the legality of artificial conception techniques (excepting surrogacy), and taking these rights in turn, few States expressly mention the "human right to freely decide whether to have or not to have children."[52] American case law, however, has included this right within the right of privacy.[53] An express mention may not be necessary considering the fact that most States have traditionally ranked marriage and the family (including the freedom or obligation to reproduce) as being of public interest. Any

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[48]See, for the United States, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[49]In Canada, see *R.* v. *Morgentaler* (1985), 52 O.R. (2d) 353 at 377, 22 D.L.R. (4th) 641 (C.A.) [hereinafter cited to O.R.]. The Court found no fundamental right to procure an abortion, yet it concluded that the right to decide whether or not to have children was "so deeply rooted in our traditions and way of life as to be fundamental . . .".

[50]See, *e.g.*, *Constitution of the Socialist Federal Republic of Yugoslavia*, art. 191; *Constitution of the Republic of Portugal*, art. 67; *Constitution of Ecuador*, art. 25; *Constitution of Mexico*, art. 4. See also the *National Population Policy Law* of Peru, as reproduced in (1985) 36 Int. Dig. Hlth Leg. 980-83.

[51]See, however, the recent case of *Eve* v. *Mrs. E.* (1986), [1986] 2 S.C.R. 388 at 434, (*sub nom. Re Eve*) 31 D.L.R. (4th) 1 where, refusing to authorize a hysterectomy intended to sterilize a mentally incompetent adult female, the Court affirmed "[t]he importance of maintaining the physical integrity of a human being . . . particularly as it affects the privilege of giving life".

[52]Croatia, *Law of 21 April 1978 on Medical Measures to Implement the Right to Freely Decide on the Birth of Children*, art. 1, as reproduced in Stepan, *supra*, note 20 at 345. See also the constitutional provisions, *supra*, note 50.

[53]See *Roe* v. *Wade*, *supra*, note 47. See also *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). The American position contrasts with the Canadian decision of *R.* v. *Morgentaler*, *supra*, note 49 at 376-79, where the Ontario Court of Appeal found that the right of personal privacy as understood in American case law was not included under the right to life, liberty and security of the person as found in s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

prohibition of, or limitation on, the recourse to assisted conception, even if considered as a "liberty" or "privacy" right, could probably be justified under a reasonable limitation clause as found in most State constitutions.[54]

Furthermore, an express legislative prohibition against reproductive technologies would equally affect fertile couples seeking to avoid the transmission of genetic diseases by the use of artificial conception. Since at present most proposals for reform concern private law, the future inclusion of a constitutional right to procreate by whatever means available as an expression of personal liberty or privacy is uncertain.

Even in those countries whose legislation requires the State to assure medical services in the case of sterility, the duty of the State to provide medical services cannot be considered the equivalent of a constitutional right to procreate.[55]

Turning to the right of access, the recommendation to adopt an unqualified constitutional right of access to assisted conception without any discrimination based on criteria such as age, marital status, sexual orientation or other social conditions is not found in any proposed reforms. They do contain, however, restrictions based on the age of the donor or recipient, on marital status and spousal consent as an eligibility requirement. Some of these restrictions might not withstand constitutional challenge. Psychosocial criteria such as the "stability" or "ability to nurture" of a couple or individual could also be subject to constitutional challenge.[56]

The right to found a family is not found in most national constitutions.[57] Again, such a right need not be expressly articulated in fundamental documents in order to exist and could well exist conventionally in the absence of any prohibition. The Constitution of Italy gives considerable importance to the family as an autonomous unit with its own normative structure. It consecrates the right of individuals to freely organize their familial relations.[58] Again, the question remains open whether this right includes constitutional protection of a right to reproductive technologies. Finally, the

[54]See the essays in A. de Mestral *et al.*, eds, *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Qué.: Yvon Blais, 1986).

[55]See Portugal, *Law No. 3184 of 24 March 1984 on Sexual Education and Family Planning*, art. 9, as reproduced in Stepan, *supra*, note 20 at 334; Croatia, *Law of 21 April 1978 on Medical Measures to Implement the Right to Freely Decide on the Birth of Children*, *supra*, note 52, art. 29: "A woman and a man who cannot fulfil their wish for their own descendant have the right to medical help"; and see Slovania, *Law of 20 April 1977 on Medical Measures to Implement the Right to a Free Decision on the Birth of Children*, art. 31, as reproduced in Stepan, *supra* at 348.

[56]See Knoppers, *supra*, note 24.

[57]See, however, the constitutional provisions, *supra*, note 50.

[58]*Constitution of Italy*, arts 29-31.

right to found a family may also be included under the fundamental right to liberty or to privacy. This right to found a family has however been expressed most frequently in international conventions.[59]

In the context of reproductive technologies, no constitutional proposals for reform have been made with regard to the right to life.[60] Such a right could however be extended to the embryo or foetus if States were to protect potential human life or potential persons under domestic law reforms. We have seen that such a right is limited in order to protect the mother's life or health.[61] Furthermore, "[t]he question of whether the right to life implies the right to reproduce life has also not yet been pronounced upon authoritatively."[62] Such a decision would have an impact not only for the infertile seeking access to this technology but also for the question of sterilization. Indeed, the repeal of involuntary sterilization laws as well as the movement towards the recognition of the right of the handicapped to reproduce could well establish an equivalent right for the infertile.[63]

It remains to be seen whether the current limitations on constitutional rights are compatible with international law which obliges States to bring their legislation into conformity with international human rights obligations.

B. International Human Rights Law

Under principles of international human rights law the question of the status, protection and uses of, and access to, human genetic material could be raised under the right to marry and to found a family, the right to life, the right to equality, the right to health, to respect for privacy and family life and to dignity. Taking these rights in turn, we will first examine their possible applicability before raising those issues that need to be answered and may not necessarily be covered by such rights.

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[59]See *infra*, notes 64, 65 and 67-69.

[60]See, however, with respect to domestic regulation, the "*in vitro* provision" of the Illinois *Abortion Law of 1975*, Ill. Rev. Stat. ch. 38 s. 81-26(7) (1981):

> Any person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended, [Ill.Rev.Stat. ch. 23, s. 2354 (1981)] . . . .

[61]*Roe* v. *Wade*, *supra*, note 47. See also, M.-T. Meulders-Klein & B. Maingain, "Le droit de disposer de soi-même: Étendue et limites en droit comparé" (1982) 14 Journées Juridiques Jean Dabin 215, nos 61-65.

[62]Sieghart, *supra*, note 44 at 132.

[63]See *Eve* v. *Mrs. E.*, *supra*, note 51.

The 1948 *Universal Declaration of Human Rights* recognizes the right to marry and found a family.[64] This right was reiterated under the *International Covenant on Civil and Political Rights*[65] which requires States to undertake "to respect and to ensure to all individuals within [their] territory ... the rights recognized in the ... Covenant, without distinction of any kind ...".[66] The language of these instruments would seem to link marital status with the right to found a family, perhaps precluding recourse by single individuals seeking access to reproductive technologies, but also indicating that married persons could raise legal questions if access were refused.

For those countries party to it, the *International Covenant on Economic, Social and Cultural Rights* requires a recognition that "[t]he widest possible protection and assistance should be accorded to the family ...".[67]

According to the Ontario Law Reform Commission, "[t]aken together, these provisions may require ratifying States to protect the establishment of families, by legislation if possible and necessary, and to afford individuals access to such 'benefits of scientific progress and its applications' as artificial means of conception, or at least not to deny that access where it is available."[68] It is, of course, a duty of governments to enact legislation to implement treaties covering matters within their jurisdiction when such legislation is necessary.

The *European Convention* also provides for the right to found a family without any express restrictions.[69] Yet as we have seen, this right is not absolute in that a husband has no enforceable right to prevent his wife from obtaining a legal abortion.[70] Thus, "provided that legislation adequately respects privacy interests in early pregnancy, it may impose limits upon abortion thereafter consistently with human rights provisions".[71] Similarly,

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[64]G.A. Res. 217A, 3 U.N. GAOR Pt I, U.N. Doc A/810 (1948), Art. 16(1) [hereinafter *Universal Declaration*].

[65]16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, Art. 23(2).

[66]*Ibid.*, Art. 2. See also the *American Convention on Human Rights*, Art. 17(2), as reproduced in Inter-American Commission on Human Rights, Organisation of American States, *Handbook of Existing Rules Pertaining to Human Rights* (29 March 1979) O.A.S./ser.L/V/II.23/doc.21 rev.6 at 48ff [hereinafter *American Convention*]: "The right of men and women of marriageable age to marry and to found a family shall be recognized ... ."

[67]16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, Art. 10(1).

[68]*O.L.R.C. Report*, vol. 1, *supra*, note 28 at 37.

[69]*Supra*, note 6, Art. 12. See also Sieghart, *supra*, note 44 at 203.

[70]*Paton* v. *British Pregnancy Advisory Service Trustees*, *supra*, note 45, which was subsequently heard in Eur. Comm. H.R., No. 8416/79, Decision of 13 May 1980, *X.* v. *The United Kingdom*, 19 D.R. 244 (*sub nom. Paton* v. *United Kingdom*) 3 E.H.R.R. 408.

[71]*Emerging Issues in Commonwealth Abortion Laws 1982*, *supra*, note 9 at 63.

a lawfully convicted person detained in prison does not have the right to be given the actual possibility to procreate.[72]

The right to life is found in various international instrnments.[73] According to one author, this right is not absolute in that human life can be deliberately terminated in certain specified cases, in contrast to other absolute rights sucli as freedom from torture, ill treatment and slavery cases: "It may therefore be said that international human rights law assigns a higher value to the quality of living as a process, than to the existence of life as a state."[74]

This interpretation is borne out by the jurisprudence. Tlie ambit of the right to life has frequently been raised before the European Commission of Human Rights. In 1960, it heard an application by a Norwegian citizen against a resolution passed by the Norwegian Parliament providing for the interruption of pregnancy under certain circumstances. On behalf of parents and the abortus, the citizen requested the Commission to decide "[w]hether the human right to beget offspring is an inalicnable liuman right or if not, under what conditions and circumstances that this right may be forfeited, and whether human rights are fully applicable to the liuman embryo from the time of conception, or if not, at what stages in tlie development of the human individual these rights take part and full force".[75] Since the applicant was not himself subject to the domestic legislation, the Commission did not consider itself competent to examine *in abstracto* the question of the conformity of the Act witli the provisions of the *European Convention.* In 1980, however, the Commission held that "[e]veryone's right to life" under article 2 of the *European Convention* did not, at least in the early stages of pregnancy, include the unborn.[76]

Similarly, in the 1981 case of *Baby Boy,*[77] the Inter-American Commission on Human Rights considered the scope of the right to life contained in Article I of the *American Declaration* and its equivalent in Article 4 of the *American Convention.* The *American Declaration* upholds the right to

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[72]Eur. Comm. H.R., No. 6564/74, Decision of 21 May 1975, *X.* v. *United Kingdom,* 2 D.R. 105.

[73]*Universal Declaration, supra,* note 64, Art. 3; *American Declaration of the Rights and Duties of Man,* Art. I, as reproduced in *Handbook of Existing Rules Pertaining to Human Rights, supra,* note 66 at 16ff [hereinafter *American Declaration*]; *International Covenant on Civil and Political Rights, supra,* note 65, Art. 6(1); *European Convention, supra,* note 6, Art. 2(1); *African Charter on Human and Peoples' Rights,* Art. 4 (Nairobi, 28 June 1981), as reproduced in 4 E.H.R.R. 417 [hereinafter *African Charter*].

[74]Sieghart, *supra,* note 44 at 130.

[75]No. 867/60, Decision of 29 May 1961, *X.* v. *Norway,* 6 C.D. 34, 4 Y.B.Conv. H.R. 270.

[76]*X.* v. *United Kingdom, supra,* note 70.

[77]Case 2141 (United States) (6 March 1981), O.A.S./ser L/V/II.52 doc.48, as reprinted in (1981) 2 Human Rights L.J. 110 [hereinafter *Baby Boy* cited to Human Rights L.J.].

life[78] (for every "human being") as does the *American Convention*[79] (for every "person"), the difference being that the latter protects the right "in general, from the moment of conception". According to the applicants, the 1973 American abortion case *Roe* v. *Wade*[80] constituted a violation of the right to life in ending the legal protection of unborn children. A majority of the Commission found that United States abortion laws and policies were not in violation of the *American Declaration*. In contrast to the Norwegian case, the issue of standing for purposes of jurisdiction was not raised. "Failure to discuss the issue produces the incongruous impression that the fetus is a 'person' for jurisdictional purposes, but not a 'human being' for Article I."[81]

Under the *American Declaration*, no precise moment is chosen for the commencement of the right, leaving to each State the power to determine in its domestic law whether life begins and warrants protection from the moment of conception or at any other stage of development prior to birth. Furthermore, to argue that the foetus is included under the wider term "human being" fails to take into account the final clause of the *American Declaration* limiting rights and freedoms by the rights and freedoms of others such as the mother's right to life, physical well-being and privacy. Thus even if the "human being" were held to exist from the moment of conception, abortion would not necessarily be precluded.[82] The final conclusion of the Commission on the use of the *American Convention* to expand the *American Declaration* was that it could not impose an interpretation of an absolute concept of the right to life from the moment of conception found in a treaty that a State had not duly accepted or ratified.[83]

The rights to equality, to health, and to privacy and family life have traditionally been discussed with respect to the protection of human life. Nevertheless, in the future, these three rights could be raised in the context of the protection of genetic material.

The right to equality[84] could be raised by those seeking access to medical treatment for infertility as for any other disabling condition, or by women

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[78]*Supra*, note 73.

[79]*Supra*, note 66, Art. 4.

[80]*Supra*, note 47.

[81]D. Shelton, "Abortion and the Right to Life in the Inter-American System: The Case of 'Baby Boy'" (1981) 2 Human Rights L.J. 309 at 312.

[82]*Ibid.* at 314. See also *Baby Boy*, *supra*, note 77 at 122-30, where the dissenting commissioners argue that the foetus is a "human being" protected by Art. I of the *American Declaration*.

[83]*Baby Boy*, *ibid.* at 129-30.

[84]*Universal Declaration*, *supra*, note 64, Arts 1 and 7; *American Convention*, *supra*, note 66, Arts 1 and 24; *International Covenant on Economic, Social and Cultural Rights*, *supra*, note 67, Arts 2 and 3; *African Charter*, *supra*, note 73, Art. 3. See also A.F. Bayefsky, "Defining Equality Rights" in A. Bayefsky & M. Eberts, eds, *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) 1.

claiming that ova or embryo donation is a treatment equivalent to artificial insemination by donor in case of male sterility. This right to equality was also raised, albeit unsuccessfully, by the applicants in *Baby Boy*. They alleged however, that the equality of "[a]ll persons ... without distinction as to race, sex ... or any other factor", under Article II of the *American Declaration*, extended to the foetus.

Health is linked to the standard of living under paragraph 25(1) of the *Universal Declaration*, while Article XI of the *American Declaration* guarantees the preservation of health. The right to enjoy the highest attainable standard of physical and mental health has also been specifically recognized.[85]

The right to the preservation of health was also raised unsuccessfully on behalf of the foetus as a person in the case of *Baby Boy*.[86] Theoretically, the right to health could also be invoked by the infertile, particularly if health were to be interpreted as a state of complete physical, mental and social well-being.[87] But the interpretation of "health" under international law is not clear. In the words of one author:

> Some international texts treat health as a basic Human Right, like life itself, for whose protection the responsibility of the State is absolute. Others treat health as one of several social conditions, with the responsibility of the State confined to assuming minimum levels of decency while aiming to improve the general and individual levels of health.[88]

Finally, the right to respect for one's private and family life and to be protected from interference in such is found under Article 8 of the *European Convention* as well as other international instruments.[89] Furthermore, the protection of the family by the State is also guaranteed under various international instruments.[90]

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[85]*International Covenant on Economic, Social and Cultural Rights, ibid.*, Art. 12; *European Social Charter*, Art. I(11), 18 October 1961, E.T.S. No. 35; *African Charter, ibid.*, Art. 16.

[86]*Supra*, note 76 at 120.

[87]Such is the interpretation of the World Health Organization: see the preamble to *Constitution of the World Health Organization*, U.N. Doc. E/155 (October 1946) 9 at 11: "Health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity."

[88]Fucnzalida, *supra*, note 1. See also P. de la Pradelle, "Le droit fondamental de l'homme à la protection de la santé" (1983) 31 Annales de droit international médical [n.p.]; and M. Bélanger, *Droit international de la santé* (Paris: Economica, 1983), especially nos 5, 25 and 29-33.

[89]*Universal Declaration, supra*, note 64, Art. 12; *American Declaration, supra*, note 73, Art. V; *International Covenant on Civil and Political Rights, supra*, note 65, Art. 17(1); *American Convention, supra*, note 66, Art. 11(2).

[90]*Universal Declaration, ibid.*, Art. 16(3); *American Declaration, ibid.*, Art. VI; *International Covenant on Civil and Political Rights, ibid.*, Art. 23(1); *International Covenant on Economic, Social and Cultural Rights, supra*, note 67, Art. 10(1); *European Social Charter, supra*, note 85, Arts I(16) and II(16); *American Convention, ibid.*, Art. 17(1); *African Charter, supra*, note 73, Art. 18.

Interpreting the right to privacy and family life, the European Human Rights Commission held in 1975 that the right to respect for private life was not violated by a prohibition against abortion after the twelfth week of pregnancy under German law.[91] It held that the claim to respect for private life was reduced to the extent that the individual brings his private life into contact with public life or other protected interests. Similarly, a prospective father was not successful in his claim that the termination by his wife of her pregnancy without his consent constituted an interference with his right to respect for his family life since, according to the European Human Rights Commission, it was justified as necessary for the protection of the rights of others.[92] It is uncertain, however, whether the failure to obtain spousal consent prior to participation as a donor or recipient in artificial conception procedures will be considered a legitimate exercise of one's right to privacy.

Moreover, the right to privacy can also be raised with respect to the genetic information gathered on participants or on the gametes or embryo. Indeed, there is a need for "principles governing the preparation, storage, safeguarding and use of genetic information on individuals, with particular reference to protecting the rights to privacy of the persons concerned".[93] Respect for one's family life is interpreted mainly as meaning the right to assistance and protection.[94] This does not exclude however the possible legal recourse by the donor or by a child conceived with the use of reproductive technology to request testing for filiation[95] or access to genetic information, so as to find and establish the true biological or genetic origins.[96]

Possible claims may also lie under the rights and protection afforded to mothers before and during pregnancy and to children. Again, this special protection of children would presumably, but not necessarily, begin at birth. More importantly, *Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* would permit States to take necessary measures in the interest of children in addition to the rights and responsibilities granted to parents.[97]

Finally, a claim could also be based on the need for a protection unique to the human embryo as being more than a simple product of conception

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[91]No. 6959/75, Decision of 19 May 1976, *Brüggeman* v. *Federal Republic of Germany*, 5 D.R. 103, report adopted 12 July 1977, 10 D.R. 100, 3 E.H.R.R. 244, 21 Y.B.Conv. H.R. 638.

[92]*X.* v. *United Kingdom*, *supra*, note 72.

[93]Council of Europe, P.A., *Recommendation 934 on Genetic Engineering*, Texts Adopted, January 1982, art. 7(d). See also principle 9(1) of *Provisional Principles*, *supra*, note 34 at 5.

[94]Sieghart, *supra*, note 44 at 204 and 315-16.

[95]Eur. Ct H.R., Series A No. 31, Decision of 13 June 1979, *Marckx Case* (*sub nom. Marckx* v. *Belgium*) 2 E.H.R.R. 330, 22 Y.B.Conv. H.R. 410.

[96]See principle 9(2) of *Provisional Principles*, *supra*, note 34 at 6.

[97]22 November 1984, E.T.S. No. 117, Art. 5.

considering the dignity inherent in all human beings.[98] The need for an explicit recognition of the right to dignity as it applies to human genetic material has found support in a 1982 recommendation of the Council of Europe based on the rights to life and to human dignity protected by Articles 2 and 3 of the *European Convention.* According to the Assembly of the Council, such rights (within the context of genetic engineering) "imply the right to inherit a genetic pattern which has not been artificially changed."[99] Under this recommendation of the Council, however, legitimate therapeutic genetic engineering applied in the context of the treatment and eradication of genetically transmitted diseases would be permitted. Thus, the recourse to infertility treatment, to gamete or to embryo donation or to gene therapy for the avoidance of the transmission of deleterious genes would not necessarily be incompatible with the right to dignity.[100] Again, this raises the questions of whether infertility is a "disease" and whether the exercise of an alleged right to health through the use of reproductive technologies is incompatible with the inherent dignity of human beings.

This brief description of the principles of international human rights law outlines issues that will, in all likelihood, be raised in the context of the international protection and regulation of human genetic material. The appearance of public regulation generally follows private law arrangements and, in this case, research and scientific exchanges. Models already exist in the areas of international regulation of blood or organ donation and the importation and exportation of animal embryos, models which need to be examined to determine their possible or limited application to human genetic material. It goes without saying that the application of international human rights law requires a more extensive study and analysis specific to the science of reproductive technology, as well as the elaboration of possible codes of conduct or conventions respecting these rights. Proposed international guidelines for biomedical research involving human subjects would also have to make specific reference to human genetic material.[101] Moreover, our summary overview of domestic, private law reforms revealed the possibility of the storage and trade of, and commerce in, human genetic material, developments which have implications beyond international human rights legislation.

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[98]*Universal Declaration, supra,* note 64, Art. 1; *American Convention, supra,* note 66, Art. 11(1); *African Charter, supra,* note 73, Art. 5.

[99]*Recommendation 934 on Genetic Engineering, supra,* note 93, art. 4(i).

[100]See principle 7 of *Provisional Principles, supra,* note 34 at 5.

[101]The 1982 *Proposed International Guidelines for Biomedical Research Involving Human Subjects, supra,* note 28, contain no such reference.

Conclusion — From Rights to Regulation

In 1981, the Council of Europe considered a draft resolution on the artificial insemination of human beings which, like most proposed reforms in this area, would permit the recovery of costs, but would prohibit profit-making in the donation of sperm. The original draft recommendation of the Council's Committee on Social and Health Questions was more extensive in its proposed rules regarding donors. It advocated that the "[c]ommercial exploitation of the procurement, collection and handling of semen not [be] permitted."[102] This principle was affirmed in the recent principles proposed by the Council's Committee on Biomedical Sciences.[103] As we have seen, the adoption of this more general prohibition against commerce was not the subject of a general consensus among commissions studying the possibility of the storage, sale and purchase of human genetic material.

There are some general conclusions as to common trends that can be drawn from the work of the various commissions, trends that will be significant for the development of international principles.[104] The first area of common agreement is, as mentioned earlier, the trend towards recognition of the need for protection of the gametes or the embryo, even in the absence of a legal personality. The second is a fourteen-day limit on *in vitro* culture (subject to cryopreservation), though this limit may result from the fact that after such time a successful implantation is unlikely rather than from medico-ethical concerns. The third is the requirement that *in vitro* fertilization be limited to married couples or those in stable unions. Fourth, there is consensus on the prohibition of implantation after embryo experimentation. Fifth, if limited to the needs and reproductive life of the couple, storage of genetic material is possible. Generally, donor anonymity is assured and commercial surrogacy arrangements or agencies prohibited. Finally, donors of gametes or embryos are given full control and autonomy over the uses to which their genetic material are put.

Nevertheless, there is no agreement as to the characterization of the interest a donor has over his or her genetic material, nor as to the use of third party genetic material, nor on the question of access by single individuals, nor even as to the medical or social conditions for access generally.

Internationally, the possible applicability of product warranties or of the rules respecting trade, patenting, commerce, importation and exportation to human genetic materials merits further study. The extent to which states can regulate genetic material coming from another state needs to be

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[102]Council of Europe, P.A., *Report on Artificial Insemination of Human Beings*, Doc. 4776, September 1981 at iii.

[103]See principle 11 of *Provisional Principles, supra*, note 34 at 6.

[104]Of particular importance are the proposals embodied in the *Provisional Principles, ibid.*

determined. While harmonization may well be difficult considering differences in cultures and values between countries, a minimum of principled standards is no doubt needed on the international level to avoid abuse of international channels as a means of circumventing national regulation. In short, before deciding what legal instruments or procedures are required, it is necessary to ascertain what the international regulatory problems are.

Possible mechanisms for international regulation include the addition of new provisions to existing international human rights covenants or the drafting of a Code of Conduct on Biogenetics in light of the urgency of the situation as well as the limited scope of the Nuremburg and Helsinki Codes. Another possibility would be the drafting of an international convention opened for signature by the World Health Organization containing a preamble of principles followed by a first part with obligatory principles for all signatories and a second with provisions accepted progressively according to national cultural and social norms.

According to the Warnock Commission, "[t]here is a case for an international approach. This approach will be best formulated, however, when individual countries have formed their own views, and are ready to pool knowledge and experience."[105] Individual countries are well on their way to completing this task and it is not too early to consider which national reforms can be brought into the international arena so as to ensure their conformity with principles of international law and provide a minimum of protection for human life in its most vulnerable form.[106] Indeed, the elaboration of international norms could well serve as a principled guide to those countries which are now considering the implementation of the current law reform proposals.[107]

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[105] *Warnock Report*, *supra*, note 28, no. 1.8.

[106] See T. Cornarvin, "Théorie des droits de l'homme et progrès de la biologie" (1985) 2 Droits 99 at 104.

[107] See Torrelli, *supra*, note 3 at 176.