



University of  
Zurich<sup>UZH</sup>

URPP Human Reproduction  
Reloaded | H2R

**Parenthood, Reproductive Rights and the European Court of Human Rights  
Annual Conference of the International Society of Public Law (ICON-S)**

**7 July 2021**

**16:40 to 18.10 UTC+2 (Zurich time)**

**Chair:** Prof. Helen Keller, University of Zurich

**Discussant:** Prof. Andrea Büchler, University of Zurich

**Panel abstract:**

The development of different human reproduction practices brought up important legal questions, particularly as regards parenthood and reproductive rights. This panel examines how some of these questions have been framed in cases before the European Court of Human Rights (ECtHR) and reflects on the Court's challenges to engage with them. First, the panel discusses the issue of surrogacy before the ECtHR with reference to two cases against Switzerland, a country where this practice is constitutionally banned. Then the panel will focus on the Court's potential avenues when dealing with cases of trans men giving birth. This will prepare the ground for a critical analysis of the Court's variable use of its methods of interpretation and its practical effects on reproductive rights in Europe. Finally, asserting that the protection from pregnancy discrimination is an essential facet of reproductive rights, the panel will examine the Court's approach in two recent cases on this topic.

**Speakers:**

**Marie-Hélène Spiess, PhD Researcher, University of Zurich**

**Presentation Title: *Surrogacy Before the Strasbourg Court: a Discussion of Cases Against Switzerland***

**Abstract:**

This paper examines pending cases against Switzerland before the European Court of Human Rights (ECtHR) that concern the refusal to legally recognize a parent-child relationship following a surrogacy arrangement carried out abroad (more precisely: *S.C. and Others v. Switzerland*, Application no. 26848/18; and *D.B. and Ma.B. v. Switzerland* and *M.B. v. Switzerland*, Applications nos. 58817/15 and 58252/15). To contextualize the cases, the paper will start by discussing the prohibition of surrogacy in Switzerland and the current practice of Swiss authorities as regards surrogate motherhood. Then the paper will analyze the cases in light of the previous case law of the ECtHR on surrogacy and will consider the potential avenues of the Court in these cases. The paper will conclude with a few reflections on the compliance of Swiss authorities with the European Convention on Human Rights.

**Alice Margaria, Research Fellow, Max Planck Institute for Social Anthropology in Halle**

**Presentation title: *Trans(forming) Fatherhood: Potential Avenues in Strasbourg***

**Abstract:**

The gradual abolition of sterilisation requirements for legal recognition of gender identity has enabled trans men, who wish to do so, to become pregnant and give birth to their own children. Whilst being able to *de facto* enter their fatherhood, many 'birthing fathers' face challenges in order to be recognised as their children's legal fathers. With few exceptions, national legal systems automatically connect childbirth with the attribution of legal motherhood (*mater semper certa est*). Taking a cue from a pending application (*O.H. and G.H. v Germany*), this paper will discuss potential avenues for the ECtHR to address the complaint of a trans father, who was designated as his child's mother in the birth register, under Article 8 alone and in conjunction with Article 14. Drawing on previous case-law, this paper will shed light on the interaction between doctrinal and moral forces which ultimately defines the contours of fatherhood as understood by the Court.

**Matilda Merenmies, PhD researcher, European University Institute, Florence, Italy**

**Presentation title: *Deference to 'Morals' and Majority: Reproductive Rights before the ECtHR***

**Abstract:**

This paper examines the ways in which the European Court of Human Rights defers to state authorities in cases involving reproductive rights through its use of the margin of appreciation doctrine. The Court will often refer to the 'moral and ethical' nature of the issue when it comes to reproductive questions, applying an almost automatic wide margin of appreciation. The Court will also rely on the state authorities' 'better position' in evaluating domestic circumstances and values. Focusing on a representative selection of cases involving reproductive rights, this paper will discuss the inconsistencies in the Court's use of doctrine and the problematics of deference in reproductive questions in particular. The paper highlights the Court's variable use of the margin of appreciation doctrine and the consensus test exploring also the implications of the Court's practice for the enforcement and development of reproductive rights in Europe.

**Elena Brodeala, Postdoctoral Researcher, University of Zurich**

**Presentation title: *Women's Reproductive Autonomy and Pregnancy Discrimination before the European Court of Human Rights***

**Abstract:**

This paper examines the first two judgements on pregnancy discrimination of the ECtHR (*Napotnik v. Romania* and *Jurčić v. Croatia*) and discusses their potential impact on women's reproductive autonomy and equality. In both cases, the Court developed important principles for protecting pregnant women from discrimination. Particularly, the Court held that unjustified different treatment due to pregnancy amounts to sex discrimination since "only women can be treated differently on grounds of pregnancy" and that no comparator is needed to find discrimination in these cases. However, despite resting on the same (laudable) general principles in both *Napotnik* and *Jurčić*, the Court came to completely opposite outcomes in these judgements. This paper endeavors to explain why this is the case and how the general principles applicable to pregnancy discrimination cases need to be further developed by the ECtHR in order to fully promote women's autonomy and equality.