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# STUDIES IN BIOPOLITICS

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edited by **JUDIT SÁNDOR**

Center for Ethics and Law in Biomedicine

2013

STUDIES  
IN BIOPOLITICS

Studies in Biopolitics  
edited by Judit Sándor

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# FOREWORD

This book is a collection of multidisciplinary case studies on biopolitical practices and discourses that have been contributed by political scientists and public policy experts, anthropologists and philosophers, biologists and bioethicists, legal scholars and human rights activists, as well as advanced graduate students at the Central European University (CEU). The majority of the authors have participated in graduate courses in political science, gender studies, and legal studies at CEU, focusing on the human rights aspects of biopolitics and the various forms of commercializing the human body. Some of the case studies have emerged from these courses and thus the chapters of this book are not only thematically interrelated but also share similar analytical perspectives. This is the result of long hours of discussion during the classes, following film screenings or emerging after public lectures on biopolitics organized by the Central for Ethics and Law in Biomedicine (CELAB).

The cultural diversity and the multilingual academic environment that characterize CEU have made it possible to develop a pool of unique cases on biopolitics from Armenia, Georgia, Germany, Egypt, Hungary, India, Israel, Poland, Romania, Russia, Serbia, Tunisia, and Turkey. For several contributors to this volume, this is their first publication: a first step in their academic career—while for others it is a new case explored within the multidisciplinary scholarly network developing around CELAB. We hope that this collection of essays will not only reflect the lively discussions we had during the CEU courses or CELAB events, but also provide interesting cases for further comparative studies on biopolitics.

The chapters in this book are therefore written by established scholars, young experts, and graduate students on biopolitical cases selected mostly from their own countries. Some of the essays focus on deeply ingrained cultural norms related to reproduction, others on the developing regulation of newly emerging technologies of assisted reproduction. There are chapters that discuss new, innovative forms of old population control policies, while others explore the consequences of emerging biotechnologies, including stem cell research. Some of the texts in this book analyze the biopolitical discourses of the state, while others seek to understand the ‘biopractice’ of traditional communities.



The book is intended to contribute to the already existing comparative studies in various fields of biopolitics and generate further research on the traditional norms, legal policies, and state practices related to biomedicine. Thus, the chapters discuss the regulation of assisted reproductive technologies in the Arab states (Orio Ikebe), Israel (April Hovav), Romania (Enikő Demény), and Serbia (Slavica Karajičić, *et al.*); the biopolitics of abortion in Poland (Joanna Różyńska and Weronika Chańska) and Hungary (Sára Vitrai); abortion used as a method of sex selection in Georgia (Mariam Gagoshashvili), Armenia and India (Shushan Harutyunyan), and sex selection used to avoid abortion in the Arab states (Ikebe) and in Germany (Anna Borbála Bodolai).

Other chapters explore local cases in a global biopolitical context: virginity tests conducted in order to humiliate women in Egypt, Tunisia, and Turkey (Anna Mondekova); transnational surrogacy commercializing the bodies of women in India (Attila Sepródy, Debjyoti Ghosh); stem cell research abused in the lack of regulation in Russia (Yuliya Pleshakova); and the representation of Roma as research subjects in human genetic research in Hungary (Barna Szamosi). Some of the essays discuss novel and unique reproductive policies, such as the pronatalist measures of a local municipality in Serbia (Ljiljana Pantović), or the utilization of pronatalist policies by originally not targeted groups, such as gay and lesbian couples in Israel (Hovav). There is also a set of case studies in the book that focus on reproductive tourism and procreative exile and analyze the practices of escaping the restrictive reproductive policies in one country and utilizing reproductive services in another (Ioana Petre, Różyńska and Chańska, Vitrai).

## Acknowledgments:

I thank my colleagues and the graduate students at CEU for the long discussions and exciting presentations that we had on contemporary cases of biopolitics, either in the classroom, or at workshop meetings, or following public events of the Center for Ethics and Law in Biomedicine. Furthermore, I am grateful for the help offered by John Harbord and Eszter Timár to consult with the authors and for their contribution to the polishing of some of the chapters in this volume. And, as usual, I thank Miklós Vörös for his invaluable work of editing this book without which the publication of *Studies in Biopolitics* would not have been possible.

*Judit Sándor*  
Director

Center for Ethics and Law in Biomedicine

# INTRODUCTION: ENGENDERING BIOPOLITICS

JUDIT SÁNDOR

## Biopolitics, Population Control, and Reproduction

This book is an unusual collection of case studies on biopolitics that provides a wide range of geographically specific examples of policymaking in the fields of population management, human reproduction, and stem cell research. These policies, along with certain long-standing cultural traditions on which they are based, should be viewed critically as there is a widespread tendency in the world to regulate the most private sphere of our individual lives: reproduction. Thus, there are many states where population control is exercised through regulatory means—often diminishing the respect for bodily integrity, the intimacy of reproduction, and the confidential nature of personal genetic information. The concept of privacy does not simply refer to the right to be let alone but it also encompasses the individual's need to have an influence on what information is kept on his or her life, body, health, and thoughts.

Friendship and marriage, parent–child relationships, and even the experience of maternity carry certain elements of privacy that deserve protection. It is quite striking that even though the meaning of ‘private sphere’ has been expanded from the archaic concept of the inviolability of material things (such as private home and personal correspondence) to include the protection of personal decisions (such as those on reproduction), the law still prefers to cover the tangible aspects of privacy. This is why professional reputation, the secrecy of correspondence, or the sanctity of home enjoys well-established recognition, and data protection is (fortunately) flourishing—but much less legal respect is granted for privacy in the field of reproduction.

Still, human reproduction is perhaps the most intimate, most personal niche of the private sphere. Yet, we could quote a number of cases in the history of law in which emperors, kings, or states have attempted to bring this aspect of

life under their own control. According to Michel Foucault, the French historian and social theorist who was the first to explain the institutional development of modernity in terms of the emergence of 'biopower', or the systematic control of the modern state over life, sexuality, and reproduction, "the ancient right to *take* life or *let* live was replaced by a power to *foster* life or *disallow* it to the point of death."<sup>1</sup> In other words, "the old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life."<sup>2</sup> This modern power over life emerged in two distinct, although strongly related forms. The first focused on the body as a machine and its integration into systems of efficient control: the aim was to create disciplined and docile bodies useful for expanding production. The second considered the body as an embodiment of biological processes and this perspective gave rise to the regulatory controls of births, sexuality, longevity, and mortality institutionalized in the disciplines of medicine, demography, and pedagogy.<sup>3</sup>

This book focuses mainly on the latter form of power over life: the biopolitics of population control targeting the 'Malthusian couple', as Foucault put it.<sup>4</sup> As discussed below, controlling the size and composition of the population by legal means is not only problematic due to the fact that since the 1960s there has been a general understanding that reproduction and birth control belong to the private sphere but also because there has never been a population control measure without discriminating certain groups to the advantage of others—and in most cases it is women who have been discriminated against. From this it follows that—even if we accept that there are cases in which it may be in the interest of society to increase or decrease the population—the tools available for the state are rather limited due to the general respect for privacy, and enforcement methods must pay very close attention to the issues of human dignity. As a result of the legal developments over the past 20–30 years in Europe, it is not only the respect for privacy but also the prohibition of discrimination that constitute legal obstacles to the state's desire for population control. Women and couples choose to have children for the sake of their individual happiness and do not consider the state's need to ensure the optimum number of subjects or citizens when producing or raising their children. All this is now evident, yet it seems that population control attempts somehow consider the individual's happiness, choice, and her or his own vision of human life as issues of secondary importance. The same is true for the principle of equal treatment and the hard-earned right of women to self-determination over their bodies, which seems to be forgotten whenever the state decides to deploy population control measures.

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1 Michel Foucault, *The History of Sexuality, Volume I: An Introduction* (New York: Vintage Books, 1990), 138.

2 *Ibid.*, 139–140.

3 *Ibid.*, 139.

4 *Ibid.*, 104–105.

## Pronatalist Reproduction Control

Population increase is, without doubt, the most popular form of population control. Policies to accelerate economic growth have, on a number of occasions, been supported by an appropriate legal framework to reverse unwelcome demographic trends. Applying measures to increase birth rates has been an equally favored method to intervene into the private sphere by both absolutist monarchies and totalitarian dictatorships. These measures, however, indirectly led to a high rate of maternal deaths due to frequent childbirths and banned abortion. The repressive form of this pronatalist politics carries a strict punishment for abortion, while the motivating version honors childbirth. The gentlest method is a welfare system of social benefits and allowances that may only be non-discriminative against women if the maternity allowances are coupled with labor protection and it is up to the individual to select the preferred path. This is the only way that women do not suffer from legal prejudice and are considered as valuable members of society even if they decide not to have any children or if they are infertile.

In addition to the contemporary examples of pronatalist policies, it is worth taking a look at a French royal decree from the 17th century, designed to motivate male reproduction. In the age of Louis XIV, le Roi-Soleil, it was generally accepted that the greatness of the king increased in direct proportion with the growing number of the population. The subjects of the French pronatalist reproduction control in 1666 were primarily men. If a man married before the age of 20, he received a tax discount up to the age of 25. Single males, however, had to pay a tax as soon as they turned 21. Those who fathered 10 legitimate children received a number of benefits including a special pension for the members of the nobility. The profession of the grown child also determined who was taken into account when deciding the father's eligibility for such benefits: soldier sons killed in action were eligible while those becoming priests were not.<sup>5</sup>

Since the second half of the 20th century, pronatalism has been often mixed with nationalism: after wars or in times of other crises (e.g. the Cold War), the state used both the 'carrot' and the 'stick' to encourage citizens to have more children. Ceaușescu's Romania emphasized its pronatalist policy by firmly prohibiting abortion and implementing a strict system of physical examinations for women of reproducing age.<sup>6</sup> During the Stalinist period of state-socialism in Hungary the so-called Ratkó era (between 1953 and 1956, named after the minister of health of that time) introduced anti-abortion policies, only to be followed by a sharp decline in birth rates due to the increase of abortions beginning in the late 1950s—so much so that researchers talked about a virtual "abortion

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5 Leslie Tuttle, *Conceiving the Old Regime, Pronatalism and the Politics of Reproduction in Early Modern France* (Oxford: Oxford University Press, 2010), 8.

6 For a detailed discussion of the Romanian state policy on reproduction, see Gail Kligman, *The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania* (Berkeley: University of California Press, 1998).

epidemic" in the late 1960s and early 1970s.<sup>7</sup> The price was paid by women in the case of both the anti-abortion policies and the one-child family model of the Kádár era (regardless of the resulting slightly increasing living standards): women's reproductive and mental health deteriorated in both periods. Whether we consider illegal abortion or the series of abortions used as a means of conscientious family planning, women were left alone in coping with the consequences.

Nowadays, pronatalist politics often involves funding for artificial reproduction procedures. A good example is Israel where childbirth is supported by social benefits and a multitude of laws.<sup>8</sup> Apparently, the desire to make up for the heavy losses of the Holocaust also plays a significant role, in addition to religious and nationalist arguments. Israel is a unique mix of traditionalism and the acceptance of and funding for the latest reproductive technologies.<sup>9</sup> The most well-known example of pronatalist discourse in Israel is the case of *Nahmani v. Nahmani and others*<sup>10</sup>, in which the court authorized the implantation of embryos even after the couple had separated, because the mother was determined to raise the children and thereby increase the population. In this particular case, pronatalism is expressed by allowing the implantation of the embryo in the surrogate mother. In similar European or US legal cases the court did not authorize such continuation of the reproduction process, even at the cost of destroying the embryo. In the European case of *Evans vs. the United Kingdom*<sup>11</sup>, for instance, 'the genetic mother' asked in vain for being allowed to have her embryos carried to term, because the 'genetic father', even though initially in support of the mutual reproduction process, later changed his mind. The court decided to rather favor the father's rights to privacy, and thereby approved the destruction of the embryos due to the parents' lack of agreement.

## Anti-Natalist Biopolitics and Birth Restriction

State measures designed to limit population increase intervene in couples' lives even more drastically and may severely affect the intimacy and even the health and integrity of the female body when the woman is obliged to

7 In 1970 the number of abortions performed reached 192,000 compared to half of that figure in 1956. See Tiborné Pongrácz and Edit S. Molnár, *Terhességmegszakítások a statisztikai adatok és a közvélemény tükrében* [Abortions as Reflected by Statistical Data and in Public Opinion], in Andorka Rudolf, Kólosi Tamás, and Vukovich György (eds.), *Társadalmi riport 1992* [Social Report 1992] (Budapest: TÁRKI, 1992), 289–317.

8 This topic has an extensive literature; see, for instance, Nitzá Berkovitch, *Motherhood as a National Mission: the Construction of Womanhood in the Legal Discourse in Israel*, *Womens' Studies International Forum*, September–December 1997, 20(5–6): 605–619; and Jacqueline Portuguese, *Fertility Policy in Israel: The Politics of Religion, Gender, and Nation* (Westport, CT and London: Praeger, 1998).

9 Daphna Birenbaum-Carmeli, *Contested Surrogacy and the Gender Order in Israel*, Daphna Birenbaum-Carmeli and Marcia C. Inhorn (eds.) *Assisting Reproduction, Testing Genes: Global Encounters with New Biotechnologies* (New York: Berghahn, 2009), 201.

10 *Ruth Nahmani v. Daniel Nahmani and Others*; F. H. c 2401/95, Civil Appeal 5587/93.

11 *Evans v. the United Kingdom*; ECtHR, application no. 6339/05, judgment of March 7, 2006.

use abortion or contraception, despite her will, not to mention the even more drastic and inhumane measure of forced sterilization.

Perhaps the most well-known example for state intervention designed to limit childbirth is found in China. The need for birth control first emerged in China in the 1950s to slow down the population influx to the cities from the starving countryside. This anti-natalist policy reached its peak during the rule of Deng Xiaoping.<sup>12</sup> The official campaign slogan was “later, farther and fewer” and, if the authorities saw it fit, it was enforced fully. Only few exceptions from the one-child family model were granted—for example, to peasant families living in the countryside. Moreover, since Chinese society did not consider girls equal to boys in value, the measures led to selective abortions and, in extreme cases, even to the murder or neglect of the female child.

As a result of this birth control policy, the number of induced abortion cases in the 1980s was four times higher than 10 years before, and in 1983 reached as high as 14 million.<sup>13</sup> The number of female infants killed especially increased during the aggressive population policy campaigns from the early 1980s to the early 1990s. Girls constituted the overwhelming majority of abandoned children. Millions of women were sterilized between 1970 and 2001.<sup>14</sup> All this upset the sex ratio in China, and the disparity continued to grow up to the point that for each 100 girls under the age of four there were 128 boys in Guangdong in 1999.<sup>15</sup> This policy, together with the culturally ingrained prejudice against women, resulted in a significant gender disproportion in China with lots of women missing from society.

In addition to abortion, several new technological solutions may be at the service of sex selection today, such as ultrasound examinations, prenatal and even pre-implantational genetic tests. Although the Chinese sex selection is the most well-known example because the one child policy made it more visible, there is a strong preference for baby boys in many other regions of the world, including South Caucasia, as the contributions to this volume show.

## Biopolitics and Eugenic Birth Control

In addition to the general practice of increasing or decreasing birth rates, a number of countries have attempted to limit or encourage the reproduction of specific social groups. These regulatory efforts are primarily eugenic, often complemented by other cases of discrimination, such as racial and gender discrimination. Under the veil of science, the eugenic approach was

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12 Susan Greenhalgh and Edwin A. Winckler, *Governing China's Population* (Stanford, Stanford University Press, 2005).

13 *Ibid.*, 260.

14 See the 1971–1983, 1982–1998, 1999–2001 editions of *China Health Yearbook* (Beijing: People's Health Press House, Ministry of Health).

15 Greenhalgh and Winckler, *op. cit.*, 266.

widely accepted and, contrary to common belief, was not limited to Nazi Germany. The earliest known American legal case was *Buck v. Bell*<sup>16</sup> in 1927, which authorized forced sterilization of a young woman declared mentally handicapped. As Judge Oliver Wendell Holmes phrased it notoriously, “three generations of imbeciles are enough.” According to the prevalent eugenic approach of the time, the *right to life* must be distinguished from the *right to reproduction*, which may be limited even to the extent that forced sterilization is ordered if it does not cause any health damage to the individual. The court actually used the term ‘sexual sterilization’, implying that the intervention had sexual-moral content. Amidst the increasing spread of eugenic thinking, certain concrete cases of degeneration played a decisive role. What constituted ‘degeneration’ at the time was affected not only by mental disability and assumed or actual genetic traits but, for instance, also by gender-related social norms: thus, the ‘liberal sexual behavior’ of a woman or an extramarital child could easily be taken as such a characteristic.<sup>17</sup> In other words, eugenic categories were based not only on science but, either explicitly or implicitly, on moral content.

With regards to disabilities, the forms of reproduction regulation changed after World War II, and the decision of the expectant mothers was increasingly more recognized, without discounting the influence of society and the family. Mandatory diagnostic tests of the fetus, the genetic and medical control over maternity and, in certain cases, mandatory pre-marital genetic counseling still can be quoted as a mild form of eugenic type regulations. As a result of the mandatory testing, significant drop in  $\beta$ -thalassemia cases in Cyprus can be documented.<sup>18</sup>

## Biopolitics and the Medicalization of Childbirth

Prior to World War II, very few infants were born in hospitals, and the majority of childbirths were not conducted by medical doctors but by midwives. Later, hospital childbirths were not only encouraged by the improving conditions and technologies of the medical profession but also promoted by health insurance. The primary appeal for women in delivering their children in hospitals was safety, as well as the availability of analgesic. But this led to the medicalization of childbirth, so much so that in Hungary, for instance, those still preferring home birth have had to start a nationwide movement to secure legal protec-

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16 *Buck v. Bell*, 274 U. S. 200 (1927).

17 Alexandra Minna Stern, *Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America* (Berkeley: University of California Press, 2005), 13.

18 Cyprus: How One Nation’s Culture Influences Its Genes, *Gene Letter*, January 26, 2010; available at [www.geneletter.com/cyprus-how-one-nations-culture-influences-its-genes-16/](http://www.geneletter.com/cyprus-how-one-nations-culture-influences-its-genes-16/), last accessed on June 10, 2013.

tion for their decision. Medicalization<sup>19</sup> of childbirth, however, has become an unparalleled success story not only in Hungary but also in the majority of European countries. In Germany, for example, half of the children were born at home in 1954, whereas in 1970, 99 percent of all women delivered their children in hospitals. Up until the 1960s, midwives in Germany worked as independent freelancers with a special relationship to the women in childbirth as friends, fellow women or attendants at birth.<sup>20</sup> As the use of analgesic was the physicians' monopoly, midwives tried to ease the pain of labor with massage, bottles of hot water, joint housework projects, knitting or even playing cards. Grantly Dick-Read's book on natural birth was very popular among women in England as well as in Germany.<sup>21</sup>

The rules for the medical procedures of childbirth have by now become so prevalent that powerful civic movements have been started to fight for women's rights to home birth. This conflict has become especially sharp in Hungary, most probably because of the conditions of the patriarchal health sector and the almost exclusive male dominance in the obstetrician profession. A number of court cases were heard in Hungary in the course of the fight for home birth. In *Ternovszky v. Hungary*, for instance, the Strasbourg Court ruled that privacy rights had been violated in Hungary because there were no laws ensuring the right to home birth.<sup>22</sup>

Even though there is still a hot debate on this issue, there may be many reasons why someone would intentionally opt for home birth or unintentionally deliver the baby outside hospital premises. Women sometimes oppose medicalized childbirth exactly because of their previous bad experience with the health care system. In addition to the special nature of medical training, the dominance of male doctors in the obstetrician–gynecologist profession may significantly influence or even amplify the possible conflicts during childbirth. In many countries, while midwives and pediatricians are mainly female, the overwhelming majority of obstetricians and gynecologists are male doctors. Obstetricians are primarily surgeons and are not trained to monitor natural childbirth closely. As a result, gender based power inequalities are expressed in the relationship between the obstetrician and the patient. The reproductive power of women is unquestionably huge, and the only 'antidote' is regulated childbirth assisted by male doctors using surgical methods or even artificial removal of the fetus.

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19 Emily Martin, *The Woman in the Body A Cultural Analysis of Reproduction* (Boston: Beacon Press, 1987), 156–165.

20 Marion Schumann, From Social Care to Planning Childbirth, in Kathrin Braun (ed.), *Between Self-Determination and Social Technology* (Bielefeld: Transcript Verlag, 2011), 31.

21 Grantly Dick-Read, *Revelation of Childbirth: The Principles and Practice of Natural Childbirth* (London: Heinemann, 1942).

22 *Ternovszky v. Hungary*; ECtHR, application no. 67545/09, judgment of December 14, 2010.



## Delay or Restriction of Medical Services as a Means of Regulation

In addition to legal restrictions, delaying or preventing the use of medical service may also act as means of reproduction control.

In 2011 in the case of *R.R. v. Poland*, the European Court of Human Rights (ECtHR) dealt with the complaint of a young Polish mother of several children<sup>23</sup> who, for a month, had to travel from one medical institution to the next between Łódź and Kraków to confirm or dismiss the possibility of a severe fetal disorder, suspected at a previous ultrasound exam, and consequently allow her to request an abortion. In a number of cases her request was denied because genetic exams required a special doctor's referral. After long delays, the genetic test that finally took place in April 2002 confirmed that the fetus did in fact suffer from Turner syndrome and, in accordance with a 1993 Polish law, the request for abortion could be granted. But then fulfillment of her request was denied on the grounds that her pregnancy was way too far ahead. Thus, on July 11, 2002, the plaintiff gave birth to a girl diagnosed with Turner syndrome. The young woman went to several Polish courts and in her claim she wanted recognition that her doctors prevented her from the timely completion of the genetic test and an application for abortion based on Polish laws. The peculiarity of the case is that the Strasbourg Court not only found the violation of privacy rights based on information restraint, involuntary pregnancy, and living in fear but also ruled that the inhuman and degrading treatment shown towards the complainant violated Article 3 of the European Convention on Human Rights (ECHR).<sup>24</sup>

With regards to the specific case, as the Court has pointed out, it is irrelevant how certain the doctors were in their diagnosis based on the ultrasound test. As already stressed in the case of *Glass v. United Kingdom*,<sup>25</sup> the Court was not to review the doctors' decision. However, it was also stated that abortion is a decision where time is a key factor. Therefore, the medical doctor or a family protection agency, granted with the power to provide medical opinion, is capable of obstructing a right by a simple delay if they do not want to respect a right (of privacy or dignity) granted by law. Even if the doctor or the agency is unwilling to openly oppose the law, their omission or slow response may still infringe women's rights. Freedom of conscience could be used as grounds for refusal only in the case of performing an abortion. However, the refusal to perform a prenatal examination based on the request by another doctor and the patient cannot be judged by the same standard as abortion.

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23 *R.R. v. Poland*; ECtHR, application no. 27617/04, judgment of May 26, 2011.

24 "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Official English title of the Convention: *European Convention of Human Rights*; full text available at [www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention\\_ENG.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf), last accessed on June 10, 2013.

25 *Glass v. United Kingdom*; ECtHR, application no. 61827/00, judgment of March 9, 2004.

A similar Polish case was *Tysic v. Poland*<sup>26</sup>, in which the applicant claimed of not having received a supporting medical opinion on the likelihood of deterioration of her eyesight, if she continues her pregnancy. The medical opinion is a requirement under Polish law to initiate the abortion procedure. The Court held that it was a violation of privacy rights. The applicant's repeated requests for medical certificate were denied and thus the abortion was not authorized, and the mother suffered permanent and severe deterioration of her sight after childbirth. In the other Polish case<sup>27</sup> mentioned above the applicant did not get access to the necessary genetic tests and she gave birth to a baby with Turner syndrome. A special aspect of the *R.R. v. Poland* case is that while ultrasound was available, the latest technology (genetic testing) that could have confirmed the suspect raised by the ultrasounds was not available, only when it was too late to request for abortion.

## Regulations on Infertility Treatment and on the Selection of the Embryo

Although reproduction should belong to the individual's most private and intimate sphere that cannot and should not be regulated in details, the legislator seems to be overcome sometimes by some missionary zeal when approaching this issue and tries to solve many social, demographic, and other problems all at once. A number of ethical and legal questions of the new procedures, commonly referred to only as the "test tube baby" technology, have drawn into the realm of regulation such essential elements of private life, like issues of fatherhood and motherhood, human relationships and ancestry. Legislators finding themselves in this field have only a few months to find somewhat acceptable solutions to debates dating back thousands of years and probing basic moral, ethical and philosophical issues. What, for instance, should enjoy more legal recognition: inherited or learnt characteristics? What is to be considered a family? Where is exactly the borderline between medical therapy and eugenic enhancement?<sup>28</sup>

Contrary to the often voiced opinion that law always lags behind science and scientific advances, in certain cases law has actually started to regulate new reproductive technologies *before* those are subjected to public debate. Even though the options offered by liberal eugenics—for example, improving the child's characteristics prior to birth or even before the embryo is implanted—are utilized by future parents not under pressure from the state, the decision to choose them may be influenced by social expectations. From the perspective of bodily integrity and health these methods cannot be considered neutral as they subject the female body to intense medicalization and a long series of medi-

26 *Tysic v. Poland*; ECtHR, application no. 5410/03, judgment of March 21, 2007.

27 *R.R. v. Poland*, *op. cit.*

28 Jrgen Habermas, *The Future of Human Nature* (Cambridge: Polity Press, 2003).

cal, genetic, and infertility treatments. There are, of course, cases when these procedures save the woman from a lot of suffering by finding the genetic reasons for years of unsuccessful pregnancies and ultimately selecting the healthy embryo.<sup>29</sup>

Among the European countries, a number of completely different and mutually inconsistent rules have reacted to the available artificial reproduction procedures. In some countries egg donation is forbidden; in some others the ban applies only to embryo donation. National laws also differ as to whether such procedures are open only to infertile couples—or also to others, even single individuals. There is a lot of inconsistency in the legislation procedures even within specific countries; some of these have also been addressed by the European Court of Human Rights. In the case *S.H. and Others v. Austria*<sup>30</sup>, for instance, the Court highlighted the contradictions in the laws of Austria regulating reproduction.<sup>31</sup> In line with the traditionalist approach, Austrian law distinguishes between egg and sperm donation, confirming the Roman law principle: *mater semper certa est, pater est, quem nuptiae demonstrant* (“the mother is always certain, while the father is to whom marriage points”). The rules require that the donor and the surrogate mother are the same person. However, the biological origin of fatherhood was considered less important. Austrian law also restricted infertility treatment for married couples if a third-party sperm donor was needed, even though this rule meant the violation of privacy and the prohibition of discrimination.

Population increase and birth control in one part of the world and fight against infertility on the other not only authorized new medical treatments and implanted them in the public mind but also introduced new methods for influencing birth control. Since Aldous Huxley, literary representations contribute to the strengthening of the belief that intervention in human reproduction may result in different types of social control ranging from determining the quality of embryos, through the selection of parents, to the creation of human copies or clones, and to the enhancement of human capacities. In reality, of course, there is a sharp difference between these apocalyptic visions and the everyday struggles of infertile couples. These men and women simply want healthy children and consider the series of procedures as a medical treatment rather than evil experiments in Frankenstein’s style.

Assisted reproduction technologies (ARTs) are seen today not simply as technical solutions for infertility problems. ARTs give control to people over

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29 Ruth Schwarz Cowan, *Heredity and Hope: The Case for Genetic Screening* (Cambridge, MA: Harvard University Press, 2008).

30 *S.H. and Others v. Austria*; ECtHR, application no. 57813/00, judgment of November 3, 2011.

31 Fortpflanzungsmedizingesetz (FMedG) [Act of June 4, 1992 on Reproductive Medicine]; available at [www.ris.bka.gv.at/Dokumente/BgblPdf/1992\\_275\\_0/1992\\_275\\_0.pdf](http://www.ris.bka.gv.at/Dokumente/BgblPdf/1992_275_0/1992_275_0.pdf); amended by Fortpflanzungsmedizingesetz-Novelle (FMedGNov) on December 30, 2004, available at [www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA\\_2004\\_I\\_163/BGBLA\\_2004\\_I\\_163.pdf](http://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2004_I_163/BGBLA_2004_I_163.pdf), last accessed on June 10, 2013.

their reproductive choices and allows for enhancing the health of the offspring: it is a means for those who want to postpone childbirth, it creates new bonds that was not possible before the emergence of *in vitro* fertilization techniques, and it can be used even to cure sick children within the family. With each case of extending the use of technology it has become possible to conceive an even wider scope of applying assisted reproductive technologies.

As Lemke stated in his work on biopolitics, "The growing significance of genetic and reproductive technologies raised concerns about the regulation and control of scientific progress. If the results of biological and medical research and its practical applications demonstrated how contingent and fragile the boundary between nature and culture is, then this intensified political and legal efforts to reestablish that boundary. It was deemed necessary to regulate which processes and procedures were acceptable and under what conditions. There was also a need to clarify what kind of research would be supported with public fund and what would be prohibited."<sup>32</sup>

From the birth of the first test-tube baby in 1978, the technologies of assisted reproduction have been repeatedly transformed in significant ways and now serve many other purposes besides helping the infertile. Today, pre-implantation genetic testing and genetic diagnosis are often requested in conjunction with many reproductive procedures, making it possible to assess the well-being of future offspring by a variety of different and controversial criteria. Should he or she be physically healthy, as similar as possible to the parents, or endowed with the best possible genetic make-up? These conflicting yardsticks have provoked public debates and have already resulted in legal cases where embryo selection and genetic testing were rejected on basis of concerns for the protection of unborn life even while granting abortion subsequent to prenatal diagnosis at a later stage of pregnancy.

The need for pre-implantation genetic tests originates from the desire to avoid abortion following the unwanted results of prenatal genetic examinations and the physical suffering and emotional distress that comes with abortion. It provides help primarily to families where hereditary diseases may be screened before the embryo is implanted in the uterus. The technology of pre-implantation genetic tests has undergone numerous changes since 1989 when Alan Handyside and his team successfully screened for a birth defect related to the X chromosome on embryos and this could result in the birth of a healthy child in England. As far as the regulatory environment is concerned, very little consensus exists on this field. Two of the articles of the 1997 Oviedo Convention contain some reference to the topic: Article 14 prohibits the selection of sex and says "the use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-linked disease is to be avoided." In other words, selection of the sex is permitted to screen for serious,

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32 Thomas Lemke, *Biopolitics: An Advanced Introduction* (New York: New York University Press, 2011), 26.

sex-linked disorders, but this applies only to some of the pre-implantation genetic tests. Article 18 of the Convention, on the other hand, specifies that “where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited.” It was in 2012 when the human rights aspects of pre-implantation genetic tests were brought before the European Court of Human Rights in a petition submitted against Italy<sup>33</sup> by parents who wanted to avoid the birth for another child with disability and wanted pre-implantational embryo selection instead of a later stage abortion. As the technology develops, it can be envisaged that more and more cases will reach the courts and with more and more complex choices.

In reflecting on and regulating these developments, law has proven to be a double edge sword: on one hand, it has repeatedly made attempts to restrict the application of certain contested techniques and, on the other hand, it has provided a tool to remove existing obstacles to a wider ranging use of other technologies that had been available to a select few and thus involved some form of discrimination. As a result, new groups of individuals can claim access to assisted reproduction and to the use of pre-implantation diagnostics. So the question emerges: can the law still shape the contours of legitimate uses of these technologies? What kind of ethical principles can guide lawmakers and judges to develop grounded responses to the new demands for technology?

## Biopolitics of the Cell

Biopolitics in the 21st century does not exert power only on the human body, on sexuality and human reproduction; ‘biopower’ has now started to influence the molecular level. Thus, human gametes, DNA cells, or stem cell lines of human origin have become subjects of various legislative policies. In *Politics of Life Itself*<sup>34</sup> Nikolas Rose identifies the main elements of the twenty-first century biopolitics: the shift from molar to molecular biopolitics; the development of technologies of optimization (especially because the term ‘healthy’ is now rather hard to define in the new age of technosciences); the emergence of new subjects (such as DNA groups) and new citizenship projects; the appearance of new expertise on life and new professions (such as those working in the fields of reprogenetics, neuroscience, molecular gerontology, or bio-informatics); and the spread of bioeconomics. Consequently, not only patients but people with certain genetic characteristics or presymptomatic diagnosis may form new social groups, and define themselves as health care consumers. The new, but already widely used notions of biovalue<sup>35</sup> and biocapital delimit the contours of a new field in which

33 *Costa and Pavan v. Italy*; ECtHR, application no. 54270/10, judgment of August 28, 2012.

34 Nikolas Rose, *The Politics of Life Itself* (Princeton: Princeton University Press, 2007).

35 Catherine Waldby, *Stem Cells, Tissue Cultures, and the Production of Biovalue*, July 2002, *Health*, 6(3): 305–323.

certain elements and vital properties of the human body, such as human cells and tissues, can be transformed into commodities.

One of the new promising fields of capitalizing on vitality is stem cell procurement and stem cell research. But even during the relatively short history of stem cell research the race between scientists has led to several legal disputes, and cases of fraud, such as the scandal of a prominent Korean researcher, Woo-Suk Hwang.<sup>36</sup> In 2006 Hwang was condemned as it became proven that in 2004 and 2005 he had fabricated the data on his alleged success on creating human embryonic stem cells. Nevertheless, in a purely scientific light, embryonic stem cell research provides hopes for various kinds of new diagnostic models and therapies for the future.

Stem cell research is now a part of a new medical paradigm called *regenerative medicine*. In the legal, ethical and political field much debate has been given to the issue of embryonic stem cell research and whether scientists should be allowed to conduct research using these specialized cells that are harvested from embryos. Current legal models differentiate between harvesting embryonic cells, producing embryonic stem cell lines, or simply using or importing already existing stem cell lines.

Ethical and legal questions are multi-layered: Where do the embryos come from? What is the legal status of the *in vitro* embryo? What are the guarantees of avoiding exploitation of women in the use of human eggs? Can embryos be 'created' for research purposes? Can hybrids be considered as alternatives? There are still many unanswered questions with regard the use of stem cells and stem cell lines: since the *Bristle case*<sup>37</sup>, for example, even the patentability of embryonic stem cell lines has been challenged.<sup>38</sup>

## Closing Remarks

As seen above, the legislative drive has not slowed down in the case of regulating traditional forms of reproduction nor in relation to artificial methods of reproduction and the connected genetic tests. This regulatory reaction is not trivial if you look at the issues related to the development of biotechnology. Namely, there is a false assumption that any time a new scientific discovery is made or new technical opportunities are found, the law has to react to those with new regulations. Actually, law should not regulate science *per se* but, instead, the areas where scientific paradigms, methods, and techniques are applied and where they have controversial influences on human relationships.

36 Péter Kakuk, Cloning and Research Misconduct: The Woo-Suk Hwang Case, in Judit Sándor (ed.) *Perfect Copy? Law and Ethics of Reproductive Medicine* (Budapest: CELAB, 2009), 35–52.

37 *Oliver Brüstle v. Greenpeace e.V.*; ECJ, Case C-34/10, judgment of October 18, 2011.

38 Judit Sándor and Márton Varju, The Multiplicity of Norms: The Bioethics and Law of Stem Cell Patents, in Andrew Webster (ed.), *The Global Dynamics of Regenerative Medicine: A Social Science Critique* (New York: Palgrave Macmillan, 2013), 169–194.

If you take a look at the early examples of reproduction and birth control, you can see that regulation created the opportunity to knowingly interfere with the private sphere by offering advantages to certain groups of people while threatening other social groups with sanctions. In the second half of the 20th century this trend turned around and right to privacy and individual human rights have been strengthened against the instruments of population control. However, in each case when a new technology appeared in the fields of reproduction and biomedicine, it required the reinterpretation so that right to privacy, bodily integrity, and information can be reinforced. Even though these rights have gained clearer meanings through the interpretation of successive court cases, due to the increasing medicalization of many spheres of life, they still need to be constantly reexamined as new regulations are negotiated between the stakeholders. And even though the means of influencing social relations have become more refined, reproduction and population control continue to be favored subjects of regulation. If we compare them to contemporary legal principles, especially those related to equal treatment and the prohibition of discrimination, these are the last standing fortresses of the patriarchal regulatory tradition that still appear to be impossible to overcome.