

*S.H. v. Austria*: European Court of Human Rights Holds That the Rights to Family Life and Sexism Trump Governmental Limitations on Artificial Procreation

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I. OVERVIEW

Two married Austrian couples suffering from infertility issues sought to have biological children through *in vitro* fertilization (IVF) using donor sperm and ova.<sup>1</sup> The first couple suffered from male infertility and fallopian-tube-related infertility; while viable ova could be harvested from the female for IVF, the couple required use of donor sperm to complete the procedure.<sup>2</sup> The second couple suffered from total female infertility due to agonadism and desired to use the male’s sperm on donor ova.<sup>3</sup> The Austrian government regulates IVF and other artificial procreation procedures through the Artificial Procreation Act (APA).<sup>4</sup> The APA allows IVF through homologous methods involving reproductive tissues from spouses or cohabitating couples, but sections 3(1) and 3(2) prohibit the use of donor sperm and donor ova for the purposes of heterologous embryotransfer in IVF.<sup>5</sup> The couples were thus barred by the government from implementing their procreative plans;

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1. *S.H. v. Austria*, App. No. 57813/00, paras. 9-10, 12 (Eur. Ct. H.R. Apr. 1, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “57813/00”).

2. *Id.* paras. 9, 12.

3. *Id.* paras. 10, 12. Agonadism is a medical condition in which a female cannot produce ova for reproduction. *Id.* para. 10.

4. *Id.* paras. 11-12.

5. *Id.* paras. 11-12, 17, 21.

after exhausting options in other countries, both couples ultimately abandoned their respective quests and turned to adoption.<sup>6</sup>

Both couples filed complaints with the Austrian Constitutional Court in 1998 and challenged the constitutionality of the applicable sections of the APA.<sup>7</sup> Applicants claimed that by barring them from using the only means available to produce biological children, the APA both violated their right to family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and created a difference in treatment from other IVF users that amounted to discrimination under article 7 of the Austrian Federal Constitution, which guarantees equality.<sup>8</sup> The Austrian Constitutional Court ruled that the APA did not violate article 8 of the European Convention on Human Rights because the government's purported purposes of preventing unusual personal relations (such as more than one biological mother), commercialization of donation, and exploitation of women were legitimate governmental concerns that did not go beyond the limit of permitted governmental intervention on citizens' family life.<sup>9</sup> The European Court of Human Rights *held* that the Austrian government failed to provide any reasonable or objective justifications for treating persons in relevantly similar situations differently and therefore violated article 14; thus, the APA's limitation on artificial procreation violated the right to family life guaranteed under article 8 of the Convention. *S.H. & Others v. Austria*, App. No. 57813/00, paras. 94, 96 (Eur. Ct. H.R. Apr. 1, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "57813/00").

## II. BACKGROUND

### A. *European Social and Legislative Context*

After the scientific breakthrough of the first "test tube baby" in 1978, medically assisted procreation became a mainstream occurrence in international societies, spurring widespread public concern over ethical and social issues and prompting the creation of over one hundred special commission reports worldwide.<sup>10</sup> As more European governments

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6. *Id.* paras. 12-13, 98.

7. *Id.* paras. 11-13.

8. *Id.* paras. 13, 42. The argument of equality under the Austrian Constitution would later become the article 14 assertion by the applicants in the ECHR.

9. *Id.* paras. 17-22.

10. See Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 329-33, 358-60 (1991).

attempted to address concerns through national legislation, the Council of Europe conducted a large-scale 1989 survey on medically assisted procreation and hoped to establish a comprehensive supranational policy from the results.<sup>11</sup> The survey determined that while European national legislations address the same areas of concern, no coherent or unified approaches emerged.<sup>12</sup> Additionally, fundamental differences in opinion on central issues precluded the emergence of any comprehensive European policy in the near future.<sup>13</sup>

The span of legislative solutions in Europe is especially broad.<sup>14</sup> European countries tend to enact narrower restrictions on artificial procreation than the United States. For example, some European countries ban IVF for single women, forbid cryopreservation of embryos, and formally regulate the number of fertilized ova that can be utilized for medical assistance.<sup>15</sup> While countries that are more liberal allow third-party donation of reproductive materials and establish government agencies to handle embryonic study and storage, enactment of extremely restrictive law holds steady in other countries, most notably Germany, Austria, and Switzerland.<sup>16</sup>

### B. Austrian Social and Legislative Context

Worried about medical advances in artificial procreation, the Austrian government passed the APA in 1992 to regulate all medically

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11. *Id.* at 330-33; *see also* COUNCIL OF EUROPE, MEDICALLY ASSISTED PROCREATION AND THE PROTECTION OF THE HUMAN EMBRYO: COMPARATIVE STUDY ON THE SITUATION IN 39 STATES: CLONING COMPARATIVE STUDY ON THE SITUATION IN 44 STATES (June 4, 1998) (comparing laws regarding medically assisted procreation amongst European nations and finding a lack of consistent natural policy).

12. Knoppers & LeBris, *supra* note 10, at 332-33. Knoppers and LeBris note that the 1989 survey by the Council of Europe on medically assisted procreation found that legislation addressed twelve common areas of concern. *Id.* Procedural safeguards to artificial procreation emerged in several of these areas, focusing on which doctors can perform such procedures and how the procedures would be documented and then disseminated to inquirers. *Id.* The survey also found that most legislation banned commercialization of gamete donation, as well as any form of genetic engineering or eugenic selection. *Id.*

13. *Id.* at 333. Basic systems encompassed fundamental differences in such areas as allowance of donor tissues, remuneration of donors, confidentiality of donors, genetic ancestry information, and quantity limitations on donor tissue. *Id.*

14. Erwin Bernat, *A Human Right To Reproduce Non-Coitally? A Comment on the Austrian Constitutional Court's Judgment of 14 October 1999*, 21 U. TASMANIA L. REV. 20, 22-24 (2002) (reviewing legislative controls throughout Europe and Austria regarding IVF).

15. Norbert Gleicher, Andrea Weghofer & David Barad, *A Formal Comparison of the Practice of Assisted Reproductive Technologies Between Europe and the USA*, 21 HUMAN REPROD. 1945, 1945-46 (2006).

16. Bernat, *supra* note 14, at 22-23. Liberal countries include the United Kingdom, Israel, and the Netherlands. *Id.* In particular, the United Kingdom set up the Human Fertilisation and Embryology Authority in 1990 to facilitate artificial procreative techniques. *Id.* at 23.

assisted procreation achieved outside of copulation.<sup>17</sup> Emerging efforts at producing children through techniques such as IVF raised countless social, ethical, and moral questions in Austria; furthermore, as the scientific community innovated additional artificial procreation methods, these questions continued to raise greater concerns.<sup>18</sup> A committee of experts advised the government in 1986 on possible dangers of medically assisted procreation and suggested legislative guidelines that became the basis of the APA's officially adopted text.<sup>19</sup> Over the next four years, the legislature completed an initial draft of the APA and attempted to effectively balance procreative rights and human dignity.<sup>20</sup>

The APA strives to keep children tied as closely as possible to natural conception methods while at the same time, it attempts to balance individual interests such as welfare and health of mothers and children, right to procreate, and society's general ethics.<sup>21</sup> In order to strike this equilibrium, the APA permits IVF for couples struggling with infertility, but only when all other possible and reasonable treatments fail to produce the desired pregnancy and when specialized physicians in specific medical centers perform the IVF procedures.<sup>22</sup> Additionally, all children retain the right to request full disclosure of their genetic roots from the age of fourteen, providing hereditary background for the psychological development of children.<sup>23</sup>

Beyond limiting the availability of IVF, the APA bars all use of donor ova and only permits use of donor sperm in exceptional circumstances.<sup>24</sup> These prohibitions prevent the government's worst fears of "selective reproduction," unusual family relationships, and exploitation of women.<sup>25</sup> The APA also limits artificial procreation to more simplistic and not overly complicated medical procedures that adhere to a "homologous" nature, involving only the reproductive tissues

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17. *Id.* at 24-25. For details on the APA, see Erwin Bernat, *Austria: Legislating for Assisted Reproduction and Interpreting the Ban on Corporal Punishment*, 32 U. LOUISVILLE J. FAM. L. 247 (1993-1994).

18. Erwin Bernat & Erich Vranes, *The Austrian Act on Procreative Medicine: Scope, Impacts, and Inconsistencies*, 10 J. OF ASSISTED REPROD. & GENETICS 449, 449-51 (1993).

19. *See* Bernat, *supra* note 14, at 24.

20. *Id.*

21. *Id.* at 24-27.

22. *Id.* at 28-30.

23. *See* Bernat & Vranes, *supra* note 18, at 451.

24. *See* Bernat, *supra* note 14, at 26-27, 29 (citing the Austrian government's concerns regarding eugenic selection, exploitation of women, and commercialization of donation markets).

25. *See id.* at 29. The Austrian government also bars the use of donor sperm for fertile men who have hereditary diseases that they do not wish to pass onto children, stating that the country desires to avoid any possibility of eugenic selection. *Id.* at 27.

of spouses or couples in relationships.<sup>26</sup> Sections 3(1) and 3(3) of the APA specifically address the requirement of homologous IVF techniques.<sup>27</sup> Section 3(1) stipulates that only ova and sperm from spouses or persons in a marriage-like relationship may be used for IVF, and that donor sperm is prohibited.<sup>28</sup> However, section 3(1) also sets forth a caveat that in exceptional circumstances, third-party donor sperm may be used in artificial fertilization of a female undergoing IVF.<sup>29</sup> Section 3(3) outright prohibits donation of ova via specifications that a woman can only use her own personal ova in artificial procreation.<sup>30</sup>

In 1999 the Austrian Constitutional Court, relying on the APA's purpose as gleaned from legislative history and documents, replied to the current petitioners' complaints in national court and held that Austria considers heterologous forms of IVF to be "unnatural" for three major reasons.<sup>31</sup> First, medically assisted procreation creates an enormous possibility of unethical eugenic selection by parents, who could use the process to specify gender and other physical characteristics.<sup>32</sup> Second, use of donor materials opens up the IVF market to commercialization, which could lead to exploitation of women.<sup>33</sup> Third, banning the use of donors in IVF prevents unusual family relationships; donor ova used for implantation into a different female create biological ambiguity regarding motherhood, which would psychologically harm a child's well-being and sense of personal identity.<sup>34</sup>

### C. *European Court of Human Rights and Article 8*

Complicating medically assisted procreation is the necessary adherence to the European Convention on Human Rights. Adopted in 1950 and formally known as the Convention for the Protection of Human Rights and Fundamental Freedoms, the treaty aims to secure fundamental civil and political rights for citizens of all signatory

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26. *See id.* at 28.

27. Bernat, *supra* note 17, at 250.

28. *See* Bernat, *supra* note 14, at 26-27; Bernat & Vranes, *supra* note 18, at 450.

29. *See* Bernat, *supra* note 14, at 27; Bernat & Vranes, *supra* note 18, at 450.

30. Bernat, *supra* note 14, at 26.

31. *Id.* at 27-32 (referring to the Austrian Constitutional Court (*Verfassungsgerichtshof*) Judgment of 14 October 1999, G91/98 and G 116/98). Austrian Constitutional Court judgments are only available in German; however, Bernat provides reliable case summaries on German and Austrian national court decisions, which are used in this case note.

32. *Id.* at 29.

33. *Id.*

34. *Id.* at 29, 33-34.

nations.<sup>35</sup> The Convention established the European Court of Human Rights (ECHR), a supranational court of recourse for citizens from signatory countries.<sup>36</sup> Any citizen can allege that a state's policies or actions violated their rights under the European Convention on Human Rights and the ECHR ruling will be binding and fully enforceable.<sup>37</sup> Unlike any other international court, the ECHR focuses on protecting the human rights of individual citizens, allowing them to appeal directly to the ECHR and enforcing judgments against nations themselves for transgressions against single residents.<sup>38</sup>

In many cases appearing before the ECHR, the petitioners allege violations of article 14 read in conjunction with article 8.<sup>39</sup> Article 8 of the Convention is divided into two parts: the first part (article 8.1) focuses on a citizen's right to "his private and family life, his home and his correspondence," while the second part (article 8.2) stipulates that governments cannot limit or interfere with these rights unless demanded by law and necessary for public or economic safety, protection of social security and morality, or equality among citizens.<sup>40</sup>

In ruling on article 8 claims, the ECHR developed a three-part test.<sup>41</sup> The first prong determines the applicability of article 8 to the case at hand, ensuring that the applicant's legal challenge falls into the realm of "family life" defined by article 8.1.<sup>42</sup> If article 8 is applicable, the ECHR moves on to the second prong of determining whether or not the state's

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35. R.L. Gottsfield, *International Courts To Know*, AZ ATTORNEY, Mar. 2010, at 16, 20, 22.

36. *Id.*

37. *Id.*

38. EUROPEAN COURT OF HUMAN RIGHTS, THE COURT IN BRIEF (2010). Upon the 1998 revision of Protocol No. 11, the ECHR has acted as the full-time enforcer of the European Convention on Human Rights and allows individual applicants to submit their cases directly to the court. *Id.*

39. *See* URSULA KILKELLY, COUNCIL OF EUR., THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE: A GUIDE TO THE IMPLEMENTATION OF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 41, 49 (2003), <http://www.echr.coe.int/NR/ronlyres/77A6BD48-CD95-4CFF-BAB4-ECB974C5BD15/0/DG2ENHRHAND012003.pdf> (explaining that article 8 cases are often considered in conjunction with article 14).

40. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

41. *See* KILKELLY, *supra* note 39, at 9 (explaining the three-prong test).

42. *Id.* Note that this test includes the search for a positive obligation of the state, meaning that the state failed to enact a law protecting the right. *Id.* The ECHR often declines to spell out distinct definitions for article 8 rights and leaves terms ambiguous to offer greater protection to privacy. *See, e.g.,* Gaskin v. United Kingdom, App. No. 10454/83, paras. 36-39, 42, 49, 52 (Eur. Ct. H.R. July 7, 1989), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "10454/83") (holding that private life encompasses a broad range of activities and rights).

interference actually violates an article 8.1 right.<sup>43</sup> Lastly, the ECHR will decide whether the interfering law justifiably encroached upon the article 8 rights under article 8.2 through three components: legality of state action, legitimacy of a state's objectives behind the measures, and social and democratic necessity.<sup>44</sup>

Regarding the first prong, the ECHR claimed that the term "private life" under article 8 cannot be exhaustively defined and consequently created a broad umbrella for considering any controversy under article 8, including identity, personal development, human relationships, and self-determination.<sup>45</sup> In *Dudgeon v. United Kingdom*, the ECHR established that article 8 definitively included a right to private sexual conduct and cemented the broad concept of "private life" under article 8.1.<sup>46</sup> In *Pretty v. United Kingdom*, the ECHR noted this right of sexual freedom and expanded article 8 rights by including the entitlement to create and foster

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43. See *Campbell v. United Kingdom*, App. No. 13590/88, paras. 32-34 (Eur. Ct. H.R. Mar. 25, 1992), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "13590/88") (holding that seizure of prisoners' correspondence interferes with article 8 rights); see also *Chappell v. United Kingdom*, App. No. 10461/83, 10 Eur. H.R. Rep. 503 (1989) (ruling that illegal search of a citizen's home violates article 8 rights). Note that both cases clearly state that the applicant maintains the burden of proving that the government interfered with article 8 rights. *Campbell*, App. No. 13590/88, paras. 32-33, 43; *Chappell*, App. No. 10461/83, para. 49.

44. See KILKELLY, *supra* note 39, at 9.

45. See, e.g., *Bensaid v. United Kingdom*, App. No. 44599/98, paras. 46-47 (Eur. Ct. H.R. Feb. 6, 2001), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "44599/98") (reiterating that the ECHR interpreted article 8's "private life" to involve any right to human relationships, including mental health, gender identity, and sexual orientation issues); see also *Pretty v. United Kingdom*, App. No. 2346/02, paras. 61, 63, 65, 67 (Eur. Ct. H.R. Apr. 29, 2002), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "2346/02") (reiterating the wide variety of issues falling under article 8 and declaring that the right to self-determination was also included under article 8 due to the importance of personal autonomy); *Niemietz v. Germany*, App. No. 13710/88, paras. 28-31 (Eur. Ct. H.R. Dec. 16, 1992), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "13710/88") (holding that business correspondence could not be seized by the government because "private life" encompasses business and personal activities and because both contributed to the building of human relationships, allowing governmental interference violated article 8 of the Convention).

46. *Dudgeon v. United Kingdom*, App. No. 7525/76, paras. 40-41 (Eur. Ct. H.R. Oct. 22, 1981), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "7525/76"). The ECHR applied the three-part test and held that Northern Ireland's laws criminalizing male homosexual behavior violated article 8 because the laws did not fulfill a necessary higher social or security purpose as required by the three-prong test. *Id.* paras. 43-45, 47-48, 54, 57, 60-61. The ECHR noted that prohibition of sexual acts between two consenting males within the privacy of their own lives was an area exempt from governmental regulation because while the general community held an unambiguously negative opinion on the morality of such acts, community sentiment cannot on its own criminalize those acts when viewed through a lens of balanced proportionality. *Id.* para. 60.

any relationship with another human being.<sup>47</sup> Building on this definition, the ECHR in *Evans v. United Kingdom* plainly stated that choosing to become a parent was a vital right under article 8.<sup>48</sup> Thus, in the later case of *Dickson v. United Kingdom*, it declared that IVF was an article 8 right due to its inherent involvement in choosing parenthood.<sup>49</sup>

In deciding the second prong, the ECHR takes into account the “margin of appreciation” of a state, a concept introduced in 1976 that determines whether a state’s laws and actions affecting family life are acceptable discretionary acts under article 8.<sup>50</sup> To determine the margin of appreciation for article 8 cases, the ECHR relies on a case-by-case analysis of the circumstances, subject matter, and background of a challenged law.<sup>51</sup> For example, in both *X, Y & Z v. United Kingdom* and *Evans*, the ECHR ruled that the United Kingdom retained a wide margin of appreciation in regulating parental rights because a lack of consensus among the European community regarding IVF indicated that a specific country was better suited to handle complex social issues at a domestic level than international authorities.<sup>52</sup>

The last prong essentially creates a balancing test in which the state must prove that the measures taken have a legal and nonarbitrary basis, pursue a legitimate state aim that falls under article 8.2, and are necessary to sustain a democratic society.<sup>53</sup> These evaluations are unique to each case and resist the creation of cumbersome bright-line rules, although prior ECHR decisions provide guideposts for future court decisions.<sup>54</sup> For example, in *Malone v. United Kingdom*, the ECHR stated that a state action usually fails the legal basis requirement when

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47. *Pretty*, App. No. 2346/02, para. 61.

48. *Evans v. United Kingdom*, App. No. 6339/05, paras. 71-72 (Eur. Ct. H.R. Apr. 10, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “6339/05”).

49. *Dickson v. United Kingdom*, App. No. 44362/04, para. 66 (Eur. Ct. H.R. Dec. 4, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “44362/04”).

50. *See Handyside v. United Kingdom*, App. No. 5493/72, paras. 47-49 (Eur. Ct. H.R. Dec. 7, 1976), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “5493/72”). The case itself concerned an article 10 dispute that reiterated a state’s right to regulate human rights, but also created a limitation on state control by declaring that the margin of appreciation is not unlimited. *Id.* The ECHR also claimed a supervisory role and retained the right to pass judgment on whether a state interfered with article 8 rights. *Id.* para. 50.

51. *See Evans*, App. No. 6339/05, paras. 77-81; *X, Y & Z v. United Kingdom*, App. No. 21830/93, paras. 36-39 (Eur. Ct. H.R. Apr. 22, 1997), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “21830/93”).

52. *Evans*, App. No. 6339/05, para. 77; *X, Y & Z*, App. No. 21830/93, para. 44.

53. *See KILKELLY*, *supra* note 39, at 25-32.

54. *See id.*



the action is regulated under administrative practice and not a statute or law.<sup>55</sup> The ECHR also mandated that laws relating to article 8 must include a foreseeability requirement and give reasonable notice to citizens about the existence of regulation and consequences.<sup>56</sup> In *Dudgeon*, the ECHR formally retained the ability to define what is socially necessary for a democratic society, as illustrated by its ruling that the antihomosexuality laws in that case could not be part of a democratic society because the laws were contrary to essential social ideals of tolerance and broadmindedness.<sup>57</sup>

#### D. European Court of Human Rights and Article 14

Article 14 of the European Convention on Human Rights ensures that all rights and freedoms provided by the Convention will not be interrupted or denied through discrimination.<sup>58</sup> In *Sahin v. Germany*, the ECHR noted that article 14 is unique because it does not stand alone in the ECHR; it is merely a complement to other substantive provisions of the Convention itself.<sup>59</sup> In *D.H. v. Czech Republic*, the ECHR stated that article 14 discrimination existed when persons in similar situations experienced substantially different treatments.<sup>60</sup> Using this line of

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55. See *Malone v. United Kingdom*, App. No. 8691/79, paras. 67, 79 (Eur. Ct. H.R. Aug. 2, 1984), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “8691/79”) (holding that the United Kingdom’s telephone-tapping practice violated article 8 because ruling through administrative regulation created an ambiguous scope and was susceptible to arbitrary changes by government officials).

56. The foreseeability requirement is vital because it allows states to justify those laws that would otherwise be found to violate article 8. For example, in *Olsson v. Sweden*, administrative laws gave the state a right to take children from parents and place them in public care. App. No. 10465/83, paras. 60-66 (Eur. Ct. H.R. Mar. 24, 1988), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “10465/83”). The ECHR found that while the laws were vague and not ruled by statute, the foreseeability of consequences stemming from child abuse was clear and the laws’ ambiguity afforded children a greater degree of governmental protection; thus, the state’s measures did not violate article 8. *Id.* para. 62; see also *Leander v. Sweden*, App. No. 9248/81, paras. 50-51 (Eur. Ct. H.R. Mar. 26, 1987), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “9248/81”) (reiterating that laws granting a state the power to encroach on private life must give sufficient indication of when the state may act and what the consequences will be, citing the example of random police checks for drugs).

57. *Dudgeon v. United Kingdom*, App. No. 7525/76, paras. 57-61 (Eur. Ct. H.R. Oct. 22, 1981), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “7525/76”).

58. European Convention on Human Rights, *supra* note 40, art. 14.

59. *Sahin v. Germany*, App. No. 30943/96, para. 85 (Eur. Ct. H.R. July 8, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “30943/96”).

60. *D.H. v. Czech Republic*, App. No. 57325/00, para. 175 (Eur. Ct. H.R. Nov. 13, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “57325/00”); see *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, para. 26

reasoning, in *Salgueiro Da Silva Mouta v. Portugal*, the ECHR noted that a difference in treatment constitutes discrimination under article 14 if no objective and reasonable justification existed that reflected a legitimate aim or reasonably proportional relationship between measures taken and the state's goal.<sup>61</sup>

In *Stec v. United Kingdom*, the ECHR softened this restriction and stated that a country enjoyed a wide margin of appreciation and could determine whether a difference in treatment existed.<sup>62</sup> In *Petrovic v. Austria*, the ECHR used this logic to determine that Austria's decision to deny paternal leave allowance was not discriminatory because the difference in treatment had a legitimate aim and purpose that fell into the state's allowable margin of appreciation; namely, that Austria's attempts to implement a liberal paternal leave allowance policy were not discriminatory, but merely a gradually evolving process.<sup>63</sup>

### III. THE COURT'S DECISION

In the noted case, the ECHR held that Austria violated article 14 read in conjunction with article 8 because the government lacked reasonable and proportional justifications for the differences in treatment regarding couples' rights to procreate and have a family.<sup>64</sup> The ECHR first considered the government's purported rationale of preventing unusual family relationships, eugenic selection, and exploitation of women.<sup>65</sup> Finding logical inconsistencies and unconvinced that the government exhausted all other regulatory options, the ECHR ruled that Austria violated article 14 because no reasonable and proportional government justification existed for a difference in treatment between fertile and infertile couples addressing infertility issues through artificial

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(Eur. Ct. H.R. Dec. 21, 1999), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "33290/96").

61. *Salgueiro da Silva Mouta*, App. No. 33290/96, paras. 27-29, 35-36 (holding that Portugal's denial of child custody based on sexual orientation was discriminatory because the state's negative views on homosexuality conflicted with the admitted aim of protecting child health, consequently destroying all justification for their actions).

62. *Stec v. United Kingdom*, App. Nos. 65731/01 & 65900/01, paras. 51-52 (Eur. Ct. H.R. Apr. 12, 2006), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Numbers "65731/01 & 65900/01").

63. *Petrovic v. Austria*, App. No. 20458/92, paras. 38-43 (Eur. Ct. H.R. Mar. 27, 1998), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "20458/92").

64. *S.H. v. Austria*, App. No. 57813/00, paras. 85, 94 (Eur. Ct. H.R. Apr. 21, 2010), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "57813/00").

65. *Id.* paras. 45-55, 74-78, 90-93.

procreation.<sup>66</sup> Using the same logic, the government's purported rationales of preventing unusual family relationships, eugenic selection, and exploitation of women failed to provide a legitimate bridge between the government's aim and the enacted measures, failing the last prong of the article 8 right's test.<sup>67</sup>

The ECHR found that the current claims qualified as article 8 rights and constituted a valid case based on prior ECHR decisions regarding family life.<sup>68</sup> The ECHR also outlined the legitimacy requirements of article 14, citing past decisions and rulings.<sup>69</sup> After establishing the requirements for each article, the ECHR reiterated that moral opinion, social acceptability, or possibility of exploitation could not constitute a rational basis for legislation, even in the face of social and moral concerns of citizens.<sup>70</sup> Accordingly, social fears or opinions regarding IVF and eugenic selection did not justify a complete ban on medically assisted heterologous procreation.<sup>71</sup> The ECHR further narrowed the role of moral consideration or social acceptability and stated that such opinion-based rationale should be raised only during the government's decision-making process on whether to allow artificial procreation at all.<sup>72</sup>

Upon dismissal of the state's arguments based on moral and ethical grounds, the ECHR evaluated the government's concerns about exploitation of women and found lethal inconsistencies in the argument.<sup>73</sup> First, the ECHR again stated that fear of potential exploitation equaled a social and opinion-based fear, which could not support legislation.<sup>74</sup> Conversely, the ECHR reasoned that the fear of female exploitation was a logical argument, but the argument applied to artificial procreation as a whole; therefore, concerns of exploitation could only place limitations on the allowance of artificial procreation and not on a particular technique

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66. *Id.* paras. 82-85, 92-94.

67. *Id.* paras. 70-85, 90-94.

68. *Id.* paras. 56-62 (relying on *Dudgeon v. United Kingdom*, App. No. 7525/76, para. 41 (Eur. Ct. H.R. Oct. 22, 1981), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "7525/76"); *Dickson v. United Kingdom*, App. No. 44362/04, para. 66 (Eur. Ct. H.R. Dec. 4, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "44362/04"))).

69. *S.H.*, App. No. 57813/00, paras. 64-65 (citing *Petrovic v. Austria*, App. No. 20458/92, paras. 30, 38 (Eur. Ct. H.R. Mar. 27, 1998), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "20458/92"))).

70. *Id.* para. 74; *see also Dudgeon*, App. No. 7525/76, paras. 46-49, 60-61.

71. *S.H.*, App. No. 57813/00, para. 74.

72. *Id.*

73. *Id.* paras. 77-78, 90.

74. *Id.* para. 77.

(in this case, ova harvest for heterologous IVF).<sup>75</sup> Lastly, viewed within the framework of the APA, the ECHR found the government's stated objective to protect women from risky ova harvest was invalid because the APA openly allowed ova harvest in women undergoing homologous IVF procedures, despite the fact that ova harvest poses the same health threats to women in any situation.<sup>76</sup> If all women experienced similar health risks, then no difference in treatment can rationally exist.<sup>77</sup> Taken as a whole, prevention of female exploitation did not justify a difference in treatment between a medically fertile couple using IVF and an infertile couple using IVF, and therefore the government violated article 14.<sup>78</sup> By discriminating against infertile couples and denying their choice to parenthood, Austria also violated the article 8 right to parenthood through the same APA provisions.<sup>79</sup>

Regarding the issue of unusual family relations, the ECHR acknowledged the universal principle of *mater semper certa est* ("the mother is always certain"), but pointed out that since the acceptance of adoption, uncertainty of maternal parentage was not a new issue and had a long history of manageable standards.<sup>80</sup> Moreover, the ECHR was unconvinced that parental ambiguity posed any threat to the well-being or formative capabilities of a child, and stated that legislation could balance the interests of children and parents in a manner more fair and accommodating to article 8.<sup>81</sup> Overall, the ECHR concluded that heterologous IVF would not pose any insurmountable obstacles to family law that did not exist beforehand, and as a result Austria cannot use the argument to support the prohibition of heterologous IVF.<sup>82</sup>

The ECHR also evaluated Austria's distinction between sperm donation and ova donation.<sup>83</sup> Sperm donation did not relate to

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75. *Id.*

76. *Id.* para. 78.

77. *Id.*

78. *Id.* para. 85; see also *D.H. v. Czech Republic*, App. No. 57325/00, paras. 175-77, 195-96, 204, 209-10 (Eur. Ct. H.R. Nov. 13, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "57325/00") (holding that difference in treatment must be support by a legitimate aim).

79. *S.H.*, App. No. 57813/00, paras. 85, 94. As stated in *Sahin*, article 14 violations cannot stand alone and must accompany a violation of another Convention-guaranteed right. *Sahin v. Germany*, App. No. 30943/96, para. 85 (Eur. Ct. H.R. July 8, 2003), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "30943/96").

80. *S.H.*, App. No. 57813/00, paras. 80-82.

81. *Id.* paras. 83-84.

82. *Id.* paras. 81-85 (finding no legitimate and effective state aim to justify the measures taken for either article 8 or 14 tests).

83. *Id.* paras. 90-92.

exploitation of women, riskiness of ova donation, or maternal ambiguity.<sup>84</sup> As a result, in order to justify the use of sperm donors in the face of an absolute prohibition of ova donors, the government's sole argument focused on the common and widespread use of donor sperm in artificial insemination prior to the APA.<sup>85</sup> Because the use of donor sperm did not require specialized doctors and was a common practice that had existed long before the APA came into effect, regulation would be nearly impossible.<sup>86</sup> The ECHR concluded that while logical, this argument could not stand when balanced with the desire for children and the right to parenthood under article 8.<sup>87</sup> The ECHR in particular focused on the first couple that sought the use of sperm donation in IVF.<sup>88</sup> Weighing their desire to reproduce against the government's arguments of efficiency, the ECHR looked to the balancing tests conducted by *Evans* and *Dudgeon* and concluded that while Austria has a wide margin of appreciation regarding IVF due to a lack of European consensus on medically assisted procreation, this margin must be balanced with the broad scope of "private life" afforded under article 8, including the right to bear children.<sup>89</sup> The lack of proportionality between measures and consequences violated requirements of both article 14 and article 8.<sup>90</sup>

The ECHR found violations on behalf of both couples under article 14 read in conjunction with article 8, and awarded 10,000 Euros to each couple for nonpecuniary damages and 18,333 Euros to divide among the two couples for costs and expenses incurred by applicants in the proceedings, plus three percent interest.<sup>91</sup>

Judge Steiner submitted a partial dissent regarding the judgment for the couple seeking to use donor ova, opining that the legislative intent of the Austrian government fell within the margin of appreciation afforded by such a dynamic and ethically sensitive field as artificial procreation.<sup>92</sup> Austria's intent to prevent eugenic selection and exploitation of women could not be compared to adoption by the ECHR because adoption's

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84. *Id.*

85. *Id.* paras. 91-92.

86. *Id.*

87. *Id.* para. 93.

88. *Id.* paras. 86-94.

89. *Id.* paras. 92-93 (citing *Evans v. United Kingdom*, App. No. 6339/05, para. 77 (Eur. Ct. H.R. Apr. 10, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "6339/05"); *Dudgeon v. United Kingdom*, App. No. 7525/76, para. 52 (Eur. Ct. H.R. Oct. 22, 1981), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "7525/76"))).

90. *S.H.*, App. No. 57813/00, paras. 93-94.

91. *Id.* paras. 85, 94, 100, 103-104.

92. *Id.* (Steiner, J., dissenting in part).

long-standing legal framework could not resolve the deeper, more fundamental problems that artificial procreation posed regarding genetic and parental rights.<sup>93</sup> Given the lack of general European consensus on ova donation and the nature of the government's concerns, Austria had a very wide margin of appreciation and could freely ban the use of donor ova in section 3(1) of the APA.<sup>94</sup>

Judge Jebens also submitted a dissenting opinion and argued that no violation existed to articles 14 or 8 because the ECHR has no right to interfere with a state's carefully legislated regulations in an area lacking a common legal consensus.<sup>95</sup> Furthermore, the couples in the noted case are not similar to couples seeking to engage in homologous IVF because the methods used are entirely different, as reflected in the APA.<sup>96</sup> Additionally, in regards to the APA's inconsistencies between allowance of sperm donation and prohibition of ova donation, Judge Jebens concluded that donor sperm use in artificial insemination was widespread and common and any attempted ban of such a practice would result in impractical and cumbersome legislation.<sup>97</sup> Because governments work best as an efficient machine, Austria's refusal to engage in a sperm donor ban was a wise policy decision.<sup>98</sup>

#### IV. ANALYSIS

The decision of the ECHR in the noted case is significant because in rejecting Austria's arguments based on moral or social concerns, the ECHR placed limitations on a government's ability to regulate in areas where wide margins of appreciation exist.<sup>99</sup> In prior cases such as *X, Y & Z* and *Evans*, the ECHR construed the lack of general European consensus as a "blank check" for national legislation in the area of private rights such as parenthood and IVF.<sup>100</sup> In relegating social and moral considerations to only general issues of allowance and requiring more than moral considerations or social acceptability to justify procreative IVF prohibitions, the ECHR created an outer edge to the

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93. *Id.*

94. *Id.*

95. *Id.* para. 1 (Jebens, J., dissenting).

96. *Id.* para. 2.

97. *Id.*

98. *Id.*

99. *Id.* paras. 74-75 (majority opinion).

100. See *X, Y & Z v. United Kingdom*, App. No. 21830/98, paras. 36-39 (Eur. Ct. H.R. Apr. 22, 1997), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "21830/98"); *Evans v. United Kingdom*, App. No. 6339/05, paras. 59-60 (Eur. Ct. H.R. Apr. 10, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow "HUDOC Database" hyperlink; search Application Number "6339/05").

margin of appreciation regarding artificial procreation and curbed governmental ability to micromanage emerging procreative technologies.<sup>101</sup> The rejection of Austria's numerous and varied arguments also proved the ECHR's dedication to supporting artificial procreation under article 8, a growing trend seen in recent cases on surrogacy, transgender parenthood, and IVF.<sup>102</sup>

While the judgment struck a blow to governmental control over IVF and opened the door for couples suffering from infertility, the ECHR's decision in the noted case contained logical gaps that make way for future confusion. First, the ECHR ruled that a complete ban on heterologous IVF could only be justified if the legislature could not find any other way of preventing serious repercussions.<sup>103</sup> The ECHR stated a belief that Austria did not exhaust all avenues for regulation before instituting the ban and interpreted this dissatisfaction as a violation of articles 14 and 8.<sup>104</sup> However, in the same paragraph, the ECHR held that the ban was not the "least intrusive means" available as the reason for rejecting of the law.<sup>105</sup> The glaring differences between "no other avenue" and "least intrusive means" available muddy the waters of logic and create an ambiguous and incongruous test for regulations on artificial procreation. Until a future case clarifies these threshold issues, the ECHR sends a mixed message to any national legislature drafting legislation on artificial procreation.<sup>106</sup>

Secondly, the ECHR made an odd parallel to adoption regarding unusual family relationships, reasoning that adoption posed the same threats to family life as heterologous IVF.<sup>107</sup> The actual reasoning utilized by the ECHR to reject the argument is logical but the illustrative adoption analogy is flawed. In arguing the right of *mater semper certa est* ("the mother is certain"), Austria strove to avoid a situation in which two separate people could claim biological maternity.<sup>108</sup> The ECHR dismissed this claim and rationalized that adoption posed similar possibilities of unusual family possibilities and yet maintained a legally acceptable status. The ECHR also suggested that regulations and laws created through the history of adoption could create guidelines and

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101. See *S.H.*, App. 57813/00, paras. 67-69, 71, 74-76.

102. See Knoppers & LeBris, *supra* note 10, at 330-33, 357-60.

103. *S.H.*, App. 57813/00, para. 76.

104. *Id.*

105. *Id.*

106. For a list of countries without major legislation, see COUNCIL OF EUROPE, *supra* note 11, at 17.

107. *S.H.*, App. 57813/00, paras. 50, 79-82.

108. *Id.* para. 80; see also *id.* (Steiner, J., dissenting in part).

solutions for any forthcoming maternal ambiguities.<sup>109</sup> However, heterologous IVF using donor ova raises a completely distinct question of maternity at the actual moment of birth. With adoption, the maternity question arises from “nature or nurture,” biological mother and childrearing mother, and adoption proceedings rely on national law to govern disputes.<sup>110</sup> In surrogacy, the surrogate claims no biological stake in the child because no genetic materials are shared.<sup>111</sup> In contrast, heterologous IVF creates a situation where an infertile woman delivers a baby who does not share genetic material with the birther, while the donor maintains genetic connections but gives up the rights connected to the reproductive tissue in donation. While easily regulated by creation of new laws, reliance on the situations and laws surrounding adoption creates unnecessary haziness.

Lastly, the ECHR's unexplained dismissal of the government's arguments regarding exploitation of women conveys an aura of sexism that has no place in the biological and legal arena of artificial procreation. The ECHR defined exploitation in IVF by highlighting the health risks involved and humiliation associated with women selling off their biological parts for profit.<sup>112</sup> The ECHR stipulated that the issue of exploitation belonged in discussions about allowing artificial procreation generally and not regarding specific techniques, and failed to inspect more closely the possibility of exploitation.<sup>113</sup> More pointedly, however, the ECHR failed to raise the same argument when discussing sperm donations and refused to recognize that men can be exploited and humiliated as sperm donors.<sup>114</sup> By only considering exploitation of women donors, the ECHR denied male sperm donors any governmental consideration or protection and assumed that men will not have the same response to exploitation of their sperm, while at the same time typecasting women as a weaker and more vulnerable sex. This patriarchal viewpoint contradicts the ECHR's disdain for the Austrian government's distinctions between male and female genetic donations, which is stressed by the ECHR's emphasis on individuality and right to

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109. *Id.* paras. 81-82 (majority opinion).

110. *See, e.g.*, Kathryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, 59-61 (1997) (explaining that single adoptive parents must rely on state law governing parental rights, which may ban linkage to paternal heritage to protect male donors or relegate adoptable children to state care due to a lack of two parents (to use two examples)).

111. *See* Knoppers & LeBris, *supra* note 10, at 356-57.

112. *S.H.*, App. 57813/00, paras. 43, 75-78, 90.

113. *Id.*

114. *See id.* paras. 90-93.



identity.<sup>115</sup> Overall, this judgment is indicative of an immense sexist bias that reinforces gender stereotypes and continues to ignore important social and ethical concerns.

Additionally, the ECHR completely missed the opportunity to address issues of class; it persisted in using the Austrian government's immediate assumption that lower-class women will be exploited through egg donation<sup>116</sup> when in fact, men of lower socioeconomic status often perform riskier jobs (such as coal mining) than egg donation for lower financial payoffs. Yet this injustice rarely raises criticism as fervent or articulated as criticism of ova donation. Moreover, ova donors are often recruited for having high education levels and socioeconomic status, decreasing the chances that underprivileged women will be exploited.<sup>117</sup> The ECHR lacked the foresight to address these issues in an international forum and draw attention to legal and policy weaknesses.

## V. CONCLUSION

The ECHR's opinion in the noted case further opens the door to the many couples that desire children and seek to utilize medical technology to achieve that goal. Prior cases show that the ECHR places the utmost importance on family life and right to procreate under article 8, and only policies ensuring the welfare of children overpower these rights. However, the ECHR also gave a wide margin of appreciation that provided exceptions to article 8 rights, most likely to maintain the cooperation and support of signatory states. In the recent decision in *Evans*, a newly infertile woman lost her only ability to reproduce biologically when her partner withdrew his consent for fertilized embryos to be implanted into her uterus.<sup>118</sup> The ECHR considered the history of margin of appreciation and concluded that the margin regarding public rights and policies allowed for the destruction of fertilized embryos, implying that state control and social opinion could overpower the right to life under article 8.<sup>119</sup>

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115. *Id.* paras. 82-84.

116. *See, e.g., id.* para. 49 (“In the discussion in Parliament it had been pointed out that ova donation might lead to problematic developments such as exploitation and humiliation of women, in particular of those from an economically disadvantaged background.”).

117. For an opposite argument regarding “jurisdiction shopping” for ova donors resulting from narrower regulations, see June Carbone & Paige Gottheim, *Markets, Subsidies, Regulation, and Trust: Building Ethical Understandings into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 514-15, 522-23 (2006).

118. *Evans v. United Kingdom*, App. No. 6339/05, 43 Eur. H.R. Rep. 21, paras. 58-65 (Eur. Ct. H.R. Apr. 10, 2007), <http://www.echr.coe.int/echr/en/hudoc> (follow “HUDOC Database” hyperlink; search Application Number “6339/05”).

119. *Id.* paras. 5-6, 73, 77-81.

The *Evans* shift away from absolute rights under article 8 produced anxiety and trepidation vis-à-vis emerging medical technologies for procreation and the increasing focus on the parental rights afforded to homosexual and/or transgendered persons. However, the ECHR made a strong statement about their support for article 8 in the noted case by rejecting a myriad of governmental justifications and emphasizing the importance of the right to parenthood. Even with imperfect logic, the ECHR's unqualified message reverberates clearly within the European community and hopefully will cultivate broader and more profound evaluations on artificial procreation leading to a general agreement in Europe.

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