A New Approach to Sex-Based Classifications in the Context of Procreative Rights: 
S.H. & Others v. Austria in Context

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Abstract
A critical discussion of the recent First Section and Grand Chamber judgments of the European Court of Human Rights in the case of S.H. and Others v. Austria, which upheld an Austrian ban on in-vitro fertilisation (IVF) using donor gametes (ova and sperm). The author argues that the regulatory regime adopted by Austria is overbroad insofar as the regime it adopts fails to accurately reflect the legitimate interests of the state. This is not a conventional “controversial morals” case where, in the absence of a clear moral and/or policy consensus among the Council of Europe member states, states are properly accorded a wide margin of appreciation. The regime adopted by Austria embodies a clear sex bias (with their respective gametes standing as near perfect proxies for the sex of the applicants) with exceptions being made to address male infertility while leaving women without medical remedy. As such, the margin of appreciation should be significantly restricted and the classifications embodied by the regime subject to the highest possible scrutiny.

Keywords
in-vitro fertilisation IVF; artificial conception; sex discrimination; strict scrutiny; ECHR; Article 8; Article 14; Austria

1. Introduction
S.H. and Others v. Austria represents an important step in the development of the jurisprudence of the European Court of Human Rights (ECtHR) on procreative rights and, in particular, access to artificial conception services. Prior judgments such as Evans v. UK and Dickson v. UK concerned access to services generally (in the former case where the male partner had withdrawn his consent for the use of an embryo fertilised with his sperm and, in the latter, where the male partner was prevented from accessing otherwise available artificial conception services due to a term of imprisonment). However, S.H. and Others is the first case to evaluate the provisions of a national legal regime regulating access to particular

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2) Evans v. United Kingdom Application No. 6339/05 (7 March 2006).
artificial conception procedures, in this case access to in-vitro fertilisation (IVF) using donor gametes (ova and sperm). As such, it provides valuable guidance as to the approach that will be taken by the court when evaluating future regimes of this type.

I begin my paper with a critical discussion of the judgments of the First Section and the Grand Chamber of the court. There are significant problems with the judgment of the First Section, perhaps most notably the alarming suggestion by the lower chamber that access to artificial conception services could be restricted altogether in member states. While it was correct to overrule the judgment of the First Section I suggest that the Grand Chamber ultimately fails to confront the overbroad nature of the Austrian regulatory regime and, in particular, the degree to which the regime adopted fails to reflect the interests of the state.

In defence of their regulatory regime the respondent state raised a series of policy concerns related to, among other things, the certain identification of mothers (where donor ova was used for artificial conception) and the commercialisation of ova donation. However, and while the couples in the case are each in a somewhat different position, I suggest that the interests raised by the state did not in fact relate (or did not relate only) to their restrictions on the use of either donor gametes in the context of IVF or donor ova in the context of in-vivo fertilisation (the two key restrictions affecting the applicants in the case). As such the regime adopted is overbroad and does not meet the test of being “necessary in a democratic society”. It neither properly addresses the “pressing social needs” identified by the state nor does so in a properly proportionate (that is to say, minimal) manner.

However, the judgment of the Grand Chamber is not determined by their analysis of the proportionality of the measures adopted by the respondent state but by what the court takes to be the continuing moral controversy represented by the facts of the case. As a result, the court grants an extremely wide margin of appreciation to the respondent state and lets pass a regulatory regime with significant implications for the Article 8 rights of the applicants. I suggest that the court has mis-identified the relevant margin. When isolated from their effect on the couple as a whole (that is, the restrictions on the male and female partner

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4) Article 8(2).
6) I note in this context the recent work of George Letsas who has distinguished two uses of the concept of “margin of appreciation” by the court, see George Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford: OUP, 2007) ch4; I am here (and throughout) relying on the second use identified by Letsas, which relates to the intensity of review adopted by the court in a particular case. As explained by White and Ovey, this use is ‘typified by those cases where the Strasbourg Court refuses to intervene because there is no European consensus’ — as appears to be the view of the court in the instant case, see White and Ovey, ibid., p. 332, at fn 147.
taken together) the Austrian regime discloses an evident sex bias. While the regime makest consistent exceptions for the steps required to address male infertility (e.g., the use of donor sperm) the regulations are tightly drawn in respect of women (i.e., the use of donor ova is always forbidden). As such, the facts in S.H. are best understood not as a case of “moral controversy” but of sex discrimination, with the associated gametes standing as near-perfect proxies for the sex of the applicants. The classifications inherent in the regime should therefore be subject to the strictest possible scrutiny in line with the court’s finding in Abdulaziz, Cabales and Balkandali v. United Kingdom7 with the margin of appreciation restricted accordingly.

2. Factual Background

This case concerns two married couples, all resident in Austria, who despite their evident desire for children are sadly infertile, albeit for somewhat different reasons. While in the judgment itself they are referred to individually (first applicant, second applicant, ad seriatim) for simplicity’s sake I will refer to them here only as couple 1 and couple 2.

2.1. Couple 1 and Couple 2

The infertility of couple 1 results from a combination of an occlusion to the wife’s fallopian tubes with the infertility of the husband.8 While it is possible to correct occluded fallopian tubes surgically (tuboplasty) it was for some time the settled medical position that IVF and embryo transfer was indicated in such cases as this was a less invasive procedure and established more certain reproductive outcomes.9 This would have most likely been the medical advice given to couple 1 at the time their claim was lodged with the court in 2000. Indeed, it was the submission of couple 1 that ‘...the only way open to her and her husband would be in vitro fertilisation using sperm from a donor’.10 Although current medical opinion has now shifted towards endorsing falloposcopic tuboplasty for the treatment of tubal infertility either in preference to, or in combination with, conventional IVF treatment11 this is a comparatively recent development and certainly occurred after the facts of the case were established for the purposes of the court.

8) S.H. (Grand Chamber) supra note 1, ¶11.
10) S.H. (Grand Chamber) supra note 1, ¶14.
The wife in couple 2 suffers from agonadism\(^{12}\) (the absence of ovaries)\(^{13}\) and, as such, is unable to produce ova. However, her husband is able to produce sperm of good procreative quality. So, one possible option for the couple would be to attempt an embryo transfer using an embryo conceived \textit{in vitro} using donor ova\(^{14}\) and sperm from the husband and then implanted into the wife’s uterus (or the uterus of a surrogate mother) for normal delivery.\(^{15}\)

2.2. Heterologous Techniques

Significantly, both options for fertility treatment suggested to the court (IVF using donor sperm for couple 1; embryo transfer using donor ova for couple 2) rely on heterologous procreation techniques. That is, techniques that rely to some degree on gametes (ova or sperm) introduced from donors outside of the couple.\(^{16}\) This is opposed to homologous techniques, which rely only on gametes from within the couple.\(^{17}\) This is important because the basic feature of the Austrian legislation regulating medically-assisted procreation is the restriction of such techniques to those ‘. . . not too far removed from natural means of conception . . .’\(^{18}\) and, in particular, to homologous methods only.\(^{19}\)

2.3. The Artificial Procreation Act 1992

Medically-assisted procreation undertaken in Austria is regulated by the 1992 Austrian \textit{Artificial Procreation Act}.\(^{20}\) While it permits medically-assisted procreation to be undertaken within the context of marriage or a ‘. . . relationship similar to a marriage . . .’\(^{21}\) it sharply delimits the techniques available. It forbids most heterologous techniques (those involving donor gametes) and, in particular, any procedure which entails the use of \textit{in vitro} (external to the body, literally “in glass”) fertilisation.\(^{22}\) There is one notable exception to these restrictions: where

\[^{12}\] S.H. \textit{(Grand Chamber) supra} note 1, ¶12.
\[^{14}\] While I refer to donor “ova” throughout this paper for reasons of simplicity, in fact, the procedure more accurately involves the donation of oocyte cells (immature ova cells).
\[^{15}\] S.H. \textit{(Grand Chamber) supra} note 1, ¶14.
\[^{16}\] Ibid., ¶21.
\[^{17}\] Ibid., ¶19.
\[^{18}\] Ibid.
\[^{19}\] Ibid.
\[^{21}\] S.H. \textit{(Grand Chamber) supra} note 1, ¶29.
\[^{22}\] \textit{Fortpflanzungsmedizingesetz, supra} note 20 s3.
the male partner is infertile donor sperm may be used to artificially inseminate
the female partner, but only where this is done in vivo.\textsuperscript{23} In vitro fertilisation may
only be performed using gametes (sperm and ova) obtained from the couple.\textsuperscript{24}
Further, section 3(3) of the act explicitly forbids all use of donor ova for the pur-
poses of medically-assisted procreation.\textsuperscript{25}

2.4. Finding of the Austrian Constitutional Court

The implications of this law for couples 1 and 2 were dramatic: both couples were
forbidden by law from seeking the medically-indicated treatment for their infer-
tility. They sought to challenge these restrictions before the Austrian Constitu-
tional Court\textsuperscript{26} as a violation of their rights under Article 8\textsuperscript{27} of the ECHR.\textsuperscript{28}
Although the Austrian court took little guidance from the case-law of the ECtHR\textsuperscript{29}
it found that it was apparent on the face of both the Austrian federal statute and
the wording of Article 8 that the decisions taken by the couples attendant to the
use of medically-induced procreative techniques fell clearly within the protec-
tions afforded by Article 8.\textsuperscript{30} Section 3 of the federal act ‘…interfered with the
exercise of this freedom insofar as [it] limited the scope of permitted medical
techniques…’.\textsuperscript{31}

However, the court also found that the use of medically-assisted procreative
techniques, such as IVF, raised serious ethical and moral questions with implica-
tions for the health and well-being of children so conceived.\textsuperscript{32} Although a total
ban on medically-assisted techniques would almost certainly be disproportio-

\textsuperscript{23)} Ibid., s3(2).
\textsuperscript{24)} Ibid., s3(1).
\textsuperscript{25)} Ibid., s3(3).
\textsuperscript{26)} S.H. (Grand Chamber) supra note 1, ¶15.
\textsuperscript{27)} ‘Right to Respect for Private and Family Life: 1. Everyone has the right to respect for his private and
family life, his home and his correspondence; 2. There shall be no interference by a public authority with
the exercise of this right except such as is in accordance with the law and is necessary in a democratic
society in the interests of national security, public safety or the economic well-being of the country, for
the prevention of disorder or crime, for the protection of health or morals, or for the protection of the
rights and freedoms of others.’
\textsuperscript{28)} Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222.
\textsuperscript{29)} While, prior to the ruling in S.H. and Others, there was no specific authority of the court on the
acceptable structure of a regulatory regime for artificial conception there have been a number of import-
tant decisions by the court which have identified the right to have children as being of utmost impor-
tance. See, e.g., Evans supra note 2, concerning the right of a woman to use frozen embryos to conceive
following withdrawal of consent by her partner, and; Dickson supra note 3, concerning the right of a
prisoner and his female to access artificial conception facilities during the term of his imprisonment.
\textsuperscript{30)} S.H. (Grand Chamber), supra note 1, ¶18.
\textsuperscript{31)} S.H. and Others v. Austria (First Section) Application No. 57813/00 (1 April 2010), ¶17.
\textsuperscript{32)} Ibid., ¶18.
\textsuperscript{33)} Ibid., ¶19.
Article 8(2) of the ECHR did allow the domestic legislature to tailor such restrictions ‘... for the protection of health or morals, or for the protection of the rights and freedoms of others.’. In the instant case the Constitutional Court found that the restriction on heterologous procreation techniques found in section 3 of the federal act was properly tailored to prevent the development of “unusual personal relationships” (such as where a child has more than one biological mother), prevent the commercialisation of reproduction and the closely related risk of the increased exploitation of women, while respecting the basic right to procreation. As such, and given the wide disparity in European practice in respect of these techniques, the legislative scheme embodied in the federal act lay within the margin of appreciation permitted to states.

Intriguingly, while the Constitutional Court addressed the question of discrimination, they did so only in respect of ‘...the difference in treatment between the two techniques...’ and did not consider further heads of potential discrimination, including sex.

3. Finding of the Lower Chamber (First Section)

The case was then appealed to the lower chamber of the ECtHR. The court, relying on Dickson v. UK (a case concerning a claim by a prisoner and his wife for the provision of artificial insemination facilities) found, and with the agreement of both the applicants and the respondent government, the applicability of Article 8 insofar as the state regulation of medically-assisted procreation techniques implicated the right to private and family life. Further, as the applicants complained of a ‘...difference in treatment which lacks objective and reasonable justification...’ it found, again with the agreement of both the applicants and the respondent government, Article 8 read in conjunction with Article 14 to be applicable to the facts of the claim.

[notes]
34) Supra note 28.
35) S.H. (First Section), supra note 31, ¶17.
36) S.H. (Grand Chamber), supra note 1, ¶35-38.
37) S.H. (First Section), supra note 31, ¶22.
38) Dickson, supra note 3.
40) S.H. (First Section) supra note 31, ¶60.
41) Ibid., ¶62.
42) ‘Prohibition of Discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’
3.1. The Correct Margin of Appreciation

The First Section, in common with the Austrian Constitutional Court, pointed to both the diversity of state practice in respect of the regulation of medically-assisted procreation43 and the moral and ethical sensitivities surrounding the use of such techniques.44 It accepted the submissions of the government and, in reliance on its own judgment in X, Y and Z v. UK,45 found the margin of appreciation available to the respondent government to be a wide one. It made clear, however, that despite this finding the government was still required to undertake a careful examination of any proposed differential treatment and, in particular, to determine ‘…whether the arguments advanced by the Government for justifying the difference of treatment in issue are relevant and sufficient.’.46

More striking is a closely related finding of the court, wherein it notes that ‘…there is no obligation on a state to enact legislation of the kind and to allow artificial procreation.’47 This is contrary to the finding of the Austrian Constitutional Court which assumed in their own ruling that just such a ban would be a disproportionate interference with an individual’s Article 8 rights.48 While the jurisprudence of the ECtHR on artificial procreation remains extremely limited, the judgment of the Grand Chamber in Dickson v. UK49 found a violation of Article 8 where the respondent state failed to provide IVF facilities to a prisoner and his wife. Further, the court in the instant ruling acknowledged that artificial procreation directly engaged the right to private and family life provided for in Article 8.50 It seems difficult to reconcile this with the suggestion by the court here that an absolute ban on such methods would be consistent with Article 8. While it is rhetorically effective51 to suggest that the decision to permit a particular category of private conduct lies with the state (and, thus, any heightened administrative burden in respect of its regulation is the result of their own decision to permit said conduct) in this case such suggestions are misplaced.
invites states to absolutely prohibit medically-assisted procreation techniques. While it is unlikely that any Council of Europe state would enact such a draconian regime to admit the possibility seems to needlessly tempt fate.

Ultimately the court concluded, in reliance upon their similar finding in Evans v. UK,52 that the desire for a child is a ‘…particularly important facet of an individual’s existence or identity…’ and, accordingly, the margin of appreciation allowed to a respondent state is “restricted”.53

3.2. The First Section: Couple 1

It will be recalled that couple 1 suffered infertility as a result of the occlusion of the wife’s fallopian tubes and the infertility of the husband. As such, the medically-indicated fertility treatment was IVF using ova obtained from the wife and donor sperm54 with subsequent embryo implantation. As this was a heterologous procreation technique (i.e., using gametes from outside the couple) the use of IVF was forbidden by s3(1) of the Austrian Artificial Procreation Act. Significantly for the chamber the technique at issue combined two methods for artificial procreation which, taken alone, were permitted under the Austrian law. The use of donor sperm is permitted (as an exception to the general rule against heterologous techniques)55 in the context of in vivo fertilisation, while in vitro fertilisation is permitted where only gametes from within the couple are used in keeping with the general rule permitting homologous procreation techniques.56 As such, the chamber found that “particularly persuasive” arguments were required to justify its continuing prohibition.57

Although this is consistent with submissions made by the applicants58 it is difficult to see why this should be the case. In principle there is nothing suspect or even unlikely about the combination of two permissible elements of treatment to produce one which is impermissible. For example, both abortion services and foetal anatomy surveys conducted for the purposes of diagnosing congenital abnormalities (and, by virtually unavoidable extension, to determine the sex of the foetus) may be widely available. However, if these two elements of treatment are combined the result is abortion for the (impermissible) reason of sex selection.59 It does not follow that because the individual elements of this treatment

52) Evans, supra note 2, ¶77; see also X & Y v. Netherlands Application No. 8978/80 (26 March 1985) at, ¶24 and, ¶27; Dudgeon v. United Kingdom Application No. 7525/76 (22 October 1981) at, ¶52; Goodwin v. United Kingdom Application No. 28957/95 (11 July 2002) at, ¶90.
53) S.H. (First Section) supra note 31, ¶93.
54) Ibid., ¶86.
55) Fortpflanzungsmedizingesetz, supra note 20 S3(2).
56) Ibid., S3(1).
57) S.H. (First Section), supra note 31, ¶89.
58) Ibid., ¶44.
are separately legal that the government should be held to a higher standard when justifying their prohibition of the combined result.

While the chamber acknowledged the wide variety of arguments enlisted by the state in support of their policy it found that they did not engage with the particular technique at issue in respect of couple 1. While ‘Some relate to concerns against artificial procreation . . . there is no complete ban under Austrian law. Some, like preventing the exploitation of women . . . do not apply. Some . . . are directed against sperm donation, which . . . is allowed for the purpose of in vivo fertilisation.’60 In short, the measures adopted by the state, while taken in response to legitimate public interests, were overbroad and thereby unnecessarily infringed the Article 8 rights of the applicants.61

3.3. The First Section: Couple 2

It will be recalled that the wife in couple 2 suffers from agonadism (the absence of ovaries) and, as such, is unable to produce ova. However, her husband is able to produce sperm of good procreative quality. As such, the medically-indicated treatment for assisted conception is IVF (with subsequent embryo transfer) using sperm from the husband and donor ova. While the chamber acknowledged ‘. . . the risks associated with new techniques in a sensitive field like medically-assisted procreation must be taken seriously . . .’62 it concluded that ‘. . . a complete ban on the medical technique at issue would not be proportionate unless . . . it was deemed to be the only means of effectively preventing serious repercussions.’63 While the commercialisation of gamete donation, and associated exploitation of female donors, may be a risk this has already been largely addressed by Austrian law which prohibits remuneration for gamete donation.64 Similarly, while the use of donor ova brings with it the possibility of unusual family relationships where ‘. . . social circumstances deviated from the biological ones . . .’65 this could be regulated through the ordinary family law of the state in much the same way as the


60) S.H. (First Section), supra note 31, ¶90.

61) What Justice Brennan referred to as “the vice of over broadness”, see Freedman v. Maryland 380 US 51, 56 per Brennan J.; The analysis adopted by the court mirrors that of the US Supreme Court in Skinner v. Oklahoma ex. rel. Williamson 316 US 535, a case concerning the forced sterilization of convicted felons in Oklahoma. The court found that this policy infringed a fundamental right and, as such, was subject to strict scrutiny. As explained by Justice William O. Douglas on behalf of the court, ‘. . . strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.’ at 541 per Douglas J.

62) S.H. (First Section) supra note 31, ¶76.

63) Ibid., ¶76.

64) Ibid., ¶77.

65) Ibid., ¶79.
rights of sperm donors already are. Due to the possibility of addressing the most important of the state's concerns through the use of ordinary legislation the court found that the regime adopted by the state was a disproportionate interference with the rights of couple 2 as found in Article 8 read in conjunction with Article 14 of the ECHR.

4. Finding of the Grand Chamber

The Grand Chamber, again in reliance on Dickson v. UK, found the right of a couple to “conceive... and to make use of medically assisted procreation for that purpose...” was protected by Article 8 as an element of private and family life. The court acknowledged that, further to the doctrine in Evans v. UK and where a key element of an “individual's existence or identity is at stake,” the relevant margin of appreciation for the respondent state should be considerably restricted. However, while there was a “clear trend” among member states toward the legalisation of gamete donation (i.e., the use of heterologous procreative techniques) in the context of IVF treatment, the facts of the instant case raised moral and ethical issues of which there was ‘...not yet clear common ground...’. As such, the correct margin in the instant case must necessarily be a “wide one”. This does not, however, exempt the legislative regime as adopted by the state from scrutiny by the court altogether. The court found that it must still examine the regime to ‘...determine whether a fair balance has been struck between the competing interests of the state and those affected...'

4.1. Finding of the Grand Chamber: Couple 1

The judgment of the court in respect of couple 1 is one of apparently contrary impulses. While it begins by suggesting that the interests in question are of a kind to attract quite close scrutiny by the court it ultimately adopts a highly deferential attitude with respect to the state. Importantly, this manifests itself in relation to both the degree of scrutiny, which as interpreted by the Grand Chamber is quite light, and the manner in which this scrutiny is applied. As explained by the court

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66) According to Article 163 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch) where a mother has undergone medically-assisted procreation using donor sperm the father of the child is the person who has given their consent for the treatment. In no circumstances can the sperm donor be recognised as the father of the child; S.H. (Grand Chamber), supra note 1, ¶34.

67) S.H. (First Section), supra note 31, ¶85.

68) S.H. (Grand Chamber), supra note 1, ¶81.

69) Ibid., ¶82.

70) Ibid., ¶94.

71) Ibid., ¶96.

72) Ibid., ¶97.

73) Ibid.

74) Ibid.
‘...it is not contrary to the requirements of Article 8... to enact legislation governing important aspects of private life which does not provide for the weighing of competing interests...’.75

This is not only true of the regulatory regime as adopted by the state but the manner of review adopted by the court as well. So, while the Grand Chamber concedes, in line with the submissions of the applicants, that ‘...some of the arguments raised by the Government in defence of the prohibition of gamete donation for in vitro fertilisation can refer only to the prohibition of ovum donation...’ (and not, as in the case of couple 1, donor sperm used in the course of IVF), it concludes that ‘...there remains the basic concerns relied on by the Government... the intervention of third persons in a highly technical medical process was a controversial issue in Austrian society, raising complex questions... of which there was not yet a consensus...’.76 This is presented by the court as if it is one of a number of interests to be analysed. In reality this is simply another way of saying that the instant case is one that attracts a wide margin of appreciation. This is the court’s excuse for the absence of meaningful, individualised analysis rather than an element of that analysis.

When considering what the lower chamber found to be one of the most compelling arguments for the applicants, namely, the fact that the procedure sought by couple 1 (IVF using donor sperm) combined two procedures which, taken separately, were lawful under the Austrian act (IVF and sperm donation) the court explains only that ‘...when examining the compatibility of a prohibition of a specific artificial procreation technique... the legislative framework of which it forms a part must be taken into consideration and the prohibition must be seen in this wider context.’77 It concludes that ‘...the decision not to allow the donation of sperm or ovum for in vitro fertilisation... is a matter that is of significance in the balance of the respective interests... It shows rather the careful and cautious approach adopted by the Austrian Legislature.’78 The First Section found, without argument, that the combined technique (using donor sperm for the purposes of IVF) to be a “particularly persuasive” indicator that the measures adopted by the state were disproportionate to regulatory ends which the state (legitimately) sought to serve. The Grand Chamber found, again without meaningful argument, that reference should more properly be made to the whole legislative scheme of which this peculiarity is only a minor part. Neither conclusion is self-evident, both must be argued for and yet neither one is. There is no reason on its face why complexity per se should demonstrate informed reflection rather than simple disorganisation.

75) Ibid., ¶110.
76) Ibid., ¶113.
77) Ibid., ¶112.
78) Ibid., ¶114.
While such findings may appear to mark the descent by the court into obvious subjectivity it is in fact better understood as the ascent from the specificity of individual interests (as protected by Article 8) to the high generality inherent in margin of appreciation analysis. Consider on the basis of their judgment in respect of couple 1 what the court will not do: it will not require the state to weigh “the competing interests in the circumstances of each individual case” nor will it, in fact, weigh such interests itself. It will not consider the individual elements of an administrative regulation apart from “the legislative framework of which it forms a part”, no matter how apparently irrational. It will not dismiss arguments manifestly irrelevant to a given procedure where there remain questions on which “there is not yet a consensus in society”. All rhetoric to the contrary, once the court has concluded that the state enjoys a wide margin of appreciation it has shown by its present judgment that it will defer to the regulatory regime adopted by the state even where the interests protected by that regime are largely irrelevant to its application, as they appear to be in the case of couple 1. As such, it has manifestly failed to discharge its self-acknowledged obligation to “determine whether a fair balance has been struck between the competing interests” even applying the much diminished standard of review that results from the application of a wide margin of appreciation.

4.2. Finding of the Grand Chamber: Couple 2

The situation of couple 2 is somewhat different in that, as the wife is unable to produce ova, the couple requires IVF using donor ova in order to conceive. The implications for the court are that, whereas the procedure sought by couple 1 (IVF treatment using donor sperm) did not obviously engage the public policy concerns raised by the respondent government, the use of donor ova more directly relates to the concerns of the state. The importance of the relationship between state interests and the measures adopted is emphasised by the court at the outset of its judgment in respect of couple 2. As it explains, ‘Notwithstanding the wide margin of appreciation… the legal framework devised… must be shaped in a coherent manner which allows different legitimate interests involved to be adequately taken into account.”

5. Proportionality and Regulation

There is also no question that the donation of ova raises a series of compelling public policy concerns. While the procedure itself (albeit substantially more

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79) Ibid., ¶110.
80) Ibid., ¶112.
81) Ibid., ¶113.
82) Ibid., ¶100.
invasive than sperm donation) has a comparatively low level of associated morbidity and mortality in jurisdictions where ova donation and the use of donor ova is legal the market quickly becomes commercialised leading to concerns in respect of the exploitation and autonomy of female donors and the potential misuse of donated ova for purposes of “sex selection”. Of particular concern to the Austrian authorities was the potential for donor ova, when implanted, to produce “unusual family relations” and, in particular, where two different women (the ova donor and the birth mother) could both claim to be the biological mother of a child in apparent violation of the civil law maxim mater semper certa est. In this respect the measures taken by the state in respect of ova donation are better tailored to addressing the actual interests of the state and are, therefore, apparently less arbitrary than the measures taken in respect of donor sperm to be used for IVF.

This does not, however, address the underlying problem of proportionality in any meaningful way. Bearing in mind that the actual measure adopted by the respondent state was an absolute ban on such donations it is likely that other,
More modest, measures have the potential to achieve similar aims with less interference with the enjoyment of the Article 8 rights of the applicants. While the legalisation of ova donation suggests a rich variety of ethical concerns this is, in fact, no different from practically any other form of medical intervention. There is practically no element of medical practice, from access to patient information, the delivery of therapeutic treatments and, perhaps most obviously, access to pharmaceuticals, which does not invite abuse. Rather than forbidding these practices altogether (unpalatable because of the degree to which this would affect the population at large and the real suffering that would result) they are, instead, highly regulated. This is not unusual or impractical in a profession that by its very nature is a highly-regulated one. If state authorities can effectively control the use of narcotic drugs it is difficult to see why the control and regulation of, say, the advertisement and payment for donor ova would be any less feasible. Indeed, and as noted above, the current Austrian law already forbids remuneration for gamete donation which effectively prevents the commercialisation of the gamete “market”.

6. “Unusual Family Relations”

The same can be said in respect of the regulation of maternity. It is true that to permit the use of donor ova (for use in the course of either in vitro or in vivo fertilisation) raises the prospect of an unusual family relationship. Where donor ova is used for the purposes of artificial conception it introduces a distinction between the biological/birth and genetic/donor mother. Where donor ova is used the woman who ultimately gives birth to a child may not, in fact, be genetically related to it. However, apart from the act of birth itself, this relationship is no more peculiar or remote than between a father and his child where donor sperm has been used for procreation. Indeed, it seems only common-sense that the act of birth would bind the biological (non-genetic) mother more closely to the child. Of course, neither relationship taken alone is as remote as ordinary adoption, where a heretofore unknown and genetically unrelated child is welcomed into the home of new parents. It is difficult to imagine a more peculiar or remote relationship yet this is one that we now (quite properly) accept without hesitation.

89) S.H. (First Section), supra note 31, ¶77.
90) See e.g. X v. United Kingdom Application No. 7626/76 (11 July 1977); 11 DR 160; Wagner and JMWL v. Luxembourg Application No. 76240/01 (28 June 2007); A and A v. Netherlands Application No. 14501/89 (6 January 1992); The Court observed that ‘…the Court cannot overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations…’ S.H. (Grand Chamber) supra note 1, ¶105. In fact, the relationship between an adoptive parents and child is significantly more remote than the relationship between a mother who has given birth to a child conceived with the use of donor ova.
In fact, in respect of maternal identity, the regulatory problem is a straightforward one. At Austrian law the father is defined as the male who has had sexual intercourse with the mother within 300 days of the birth of the child.91 Where artificial conception techniques have been used the father is defined as the person who has given his consent to the treatment in question.92 In no circumstances can a sperm-donor (despite their genetic link to the child) be considered the father.93 The position with respect to the mother is similarly clear. According to Article 137b of the Austrian Civil Code the mother is always the woman who has given birth to a child.94 This is despite any other genetic relationship (such as between the ova donor and the child) that may exist. In no circumstances can an ova donor be considered the mother. As such, there is no potential for uncertainty with respect to the identity of the mother.95

It is not the case, as appears to have been suggested by the court,96 that an alternative regulatory framework could have been designed to address public concerns associated with heterologous conception techniques. In fact, a wholly adequate and appropriately tailored regulatory regime already exists as a part of Austrian law. Maternal identity is clear and in no circumstances can an ova donor be identified as the mother. Gamete donation may not be remunerated97 and, hence, there is no potential (legal) market for such donations. As such, the two key concerns of the state have already been addressed by the ordinary provisions of Austrian civil law.

7. Sex as a Specially Protected Status

Even if it is conceded that the regime adopted by the Austrian state is overbroad in relation to the stated aims of the government it may still be argued that such

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91) Austrian Civil Code, Article 163(1) Hat ein Mann der Mutter eines unehelichen Kindes innerhalb eines Zeitraums von nicht mehr als 300 und nicht weniger als 180 Tagen vor der Entbindung beigewohnt, so wird vermutet, daß er das Kind gezeugt hat. Ist an der Mutter eine medizinisch unterstützte Fortpflanzung innerhalb dieses Zeitraums durchgeführt worden, so wird vermutet, daß der Mann, dessen Samen verwendet worden ist, der Vater des Kindes ist.

92) Austrian Civil Code, Article 163(3) Ist an der Mutter eine medizinisch unterstützte Fortpflanzung mit dem Samen eines Dritten durchgeführt worden, so wird vermutet, daß der Mann, der dieser medizinisch unterstützten Fortpflanzung in Form eines gerichtlichen Protokolls oder eines Notariatsakts zugestimmt hat, der Vater des Kindes ist, es sei denn, er weist nach, daß das Kind nicht durch diese medizinisch unterstützte Fortpflanzung gezeugt worden ist.

93) Austrian Civil Code, Article 163(3); S.H. (Grand Chamber) supra note 1, ¶34.

94) Austrian Civil Code, Article 137b: Mutter ist die Frau, die das Kind geboren hat.


96) '. . . a legal framework satisfactorily regulating the problems arising from ovum donation could also have been adopted.' S.H. (Grand Chamber) supra note 1, ¶105.

97) S.H. (First Section), supra note 31, ¶77.
measures, however inaccurate or disproportionate, fall within the margin of appreciation allowed to the state (although not, as I have suggested above, in relation to the manifestly irrelevant reasons put forward in relation to the restrictions on couple 1). Indeed, this is the conclusion of the Grand Chamber as it explains, ‘...the central question... is not whether a different solution might have been adopted... but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it. ...’98 ‘This is well within the mainstream of the court’s jurisprudence on the margin of appreciation and particularly so where there is a lack of consensus on a particular aspect of public policy within Council of Europe states. As the court explained in Evans v. UK, ‘Where... there is no consensus... as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.’99 If properly applied the breadth of this margin largely shields respondent states from allegations of irrationality or over-breadth of the type I have discussed.

However, the court’s application of the margin of appreciation doctrine to the facts of the instant case is mistaken because of what should be the specially protected status100 of the applicants in the case. The difference in treatment affecting the applicants is not merely between themselves and other applicants able to access relevant artificial conception treatment but, in fact, is very largely determined on the basis of sex. The court appears to have been distracted from a consideration of the status of the individual applicants in the case by the fact that the applicants approached the court both as couples and in the context of claims that largely turned on their relationship as a couple. As a result, the court is primarily interested with the transactional nature of their relationship (the exchange and use of ova and sperm), and the hindrances to it, rather than the degree to which the Austrian state regime impinged on the rights of the individuals concerned. Nevertheless, Articles 8 and 14 of the European Convention do not protect particular transactions (economic, personal or biological) or even couples per se, it affects the individuals concerned by those relationships.101 As such, the relevant

98) S.H. (Grand Chamber), supra note 1, ¶106.
100) See Baroness Hale’s discussion of this concept in AL (Serbia) v. Secretary of State for the Home Department (2008) UKHL 42. In fact, Baroness Hale (with whom the rest of the court agreed) concludes that the standard of review under Article 14 should always be higher than the standard scrutiny of the US Constitution as ‘...Strasbourg grounds, largely focusing on the personal characteristics of the individual which he cannot or should not be asked to change, are more likely to require more than just a rational explanation.’ AL (Serbia) v. Secretary of State for the Home Department (2008) UKHL 42, ¶31 per Baroness Hale; see also Ben Emmerson and Jessica Simor, Human Rights Practice (London: Sweet and Maxwell, Looseleaf) p. 14.015; Harris and O’Boyle, supra note 102 590.
101) This point was well-made by Justice Brennan in Eisenstadt v. Baird 405 US 438 (when discussing the holding of the Supreme Court in the case of Griswold v. Connecticut 381 US 479) ‘It is true that,
comparator\textsuperscript{102} for the purposes of discrimination analysis is not other, differently situated, couples but individuals affected by only sex-neutral regulation.

In this context we should once again examine the specific biological and regulatory constraints on the individual applicants. In the case of couple 1, infertility results from a combination of an occlusion to the wife’s fallopian tubes and the infertility of the husband. While the general principle of the Austrian regulatory regime is to restrict heterologous reproduction techniques there is an exception made to permit sperm donation.\textsuperscript{103} This is regardless of either the obvious prospects for an “unusual family relationship” to result from the divergence between the genetic and the legal father or the potential for the commercialisation of male gamete donation (both reasons that were cited by the respondent state as reasons not to permit female gamete donation).\textsuperscript{104} So, while there is a clear remedy for male infertility in this context the procedure required to address the female infertility (in this case, IVF) is made illegal. In the case of couple 2 the wife is unable to produce ova while her husband is able to produce sperm of good procreative quality. Once again, the treatment require to address female infertility (in this case the use of donor ova) is forbidden by Austrian law. The relevant comparator here is not another couple but between an infertile woman and a similarly infertile man.\textsuperscript{105} In each case the Austrian law makes an exception for the therapies necessary to address male infertility while restricting those (in particular, the use of donor ova) necessary for the treatment of female infertility.

What is particularly striking is the use of arguments by the respondent state (and apparently accepted by the Grand Chamber) which apply equally to both

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\textsuperscript{102} For good discussions of the criteria for determining the relevant comparator see Emmerson and Simor, \textit{supra} note 100 p. 14.016-14.017; Harris and O’Boyle, \textit{supra} note 99 p. 583; White and Ovey, \textit{supra} note 5 p. 558.

\textsuperscript{103} \textit{Fortpflanzungsmedizingesetz, supra} note 13, ss(2).

\textsuperscript{104} \textit{S.H. (Grand Chamber)} \textit{supra} note 2, \&67 and \&66.

\textsuperscript{105} A very similar point was made in respect of abortion by Guido Calabresi, ‘For me, the essence of the argument in favour of abortion is an equality argument. It is an equal protection rather than a due process argument. It is a women’s rights versus fetal life debate. It is based on the notion that without a right to abortion women are not equal to men in the law. They are not equal to men with respect to unburdened access to sex — with respect, that is, to sexual freedom. It assumes that what makes anti-abortion law suspect is the fact that they put the burden of fetal life saving (given sexual freedom) solely on women, and that if men bore an equal burden such laws would be constitutional.’ Guido Calabresi, \textit{Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem}, (Syracuse: Syracuse University Press, 1985) p. 101; in this context see also Sylvia Law, ‘Rethinking Sex and the Constitution’, \textit{University of Pennsylvania Law Review} 132 (1984) 955; the significance of both articles are well-described by Garrow, \textit{supra} note 101, pp. 613-614.
men and women as if they apply particularly or only to the treatments relevant for women. It is no more likely that permitting gamete donation (whether ova or sperm) will result in the commercialisation of ova donation than sperm donation. Yet this is presented by the respondent state as a particular risk for women. Again, it is no more difficult to define who the mother is in law than who the father is. Yet, again, this is suggested by the respondent state to be a particular difficulty affecting women. In each case male reproduction (and the role of men as defined in law) is assumed to be simple and easily controlled while female reproduction (and the role of women as defined in law) is assumed to be complex and easily confused. Similarly, while the state appears unworried as to the prospects of a male biological market (in sperm) the control of a female biological market (in ova) is of particular concern. Each argument applies equally to men and women but is enlisted here to support a restriction on ova donation only.

This form of discrimination analysis should control in the instant case because of what the court has repeatedly found to be the particularly serious nature of discrimination on the basis of sex. As it explained in Abdulaziz v. United Kingdom, ‘...the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference in treatment on the ground of sex could be regarded as compatible with the Convention.’106 The difference in scrutiny that results has been well-explained by Lord Hoffmann (here relying on the US Supreme Court case Massachusetts Board of Retirement v. Murgia);107 Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, case, noble birth, membership of a political party and... gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that art 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation... it is therefore necessary, as in the United States, to distinguish between those ground of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification.108

It is the former, heightened, standard, wherein sex is a prima facie suspect classification for the purposes of the court (in-line with the “strict scrutiny” standard of the US Supreme Court),109 that should control in such cases. I have already

106) Application No. 92114/80, ¶78 (emphasis added); for similar statements see also Schuler-Zgraggen v. Switzerland Application No. 14518/89, ¶67; Burghartz v. Switzerland Application No. 16213/90, ¶27; Unal Tekeli v. Turkey Application No. 29865/96, ¶53.


109) More precisely, the US Supreme Court applies (at least) three levels of constitutional scrutiny: “rational basis”, “intermediate scrutiny” and “strict scrutiny”. Strict scrutiny is most closely associated with racial classification (see e.g., Yick Wo v. Hopkins 118 US 356; Korematsu v. United States 323 US 214), while classification on the basis of sex has traditionally been regarded as a ground for intermediate
suggested that the Grand Chamber has failed to properly discharge their obligation of review in respect of couple 1 given what is the manifestly irrational nature of the restrictions that affect them. At first blush the more complex determinations made in respect of couple 2 appear to be protected by the enhanced margin of appreciation relevant to cases of “moral controversy”. However, I suggest it is evident that when the appropriate, heightened, standard of review is applied the facts in both cases amount to a violation of Article 8 (read in conjunction with Article 14). Partially this is due to the problems of over-breadth and irrationality already discussed. In addition, however, as sex is a highly suspect classification the state must properly be under a heavy burden to show that regulations enacted on this basis are strictly necessary to serve a compelling state interest. In neither case, because of the availability of both alternative sex-neutral regulatory options and pre-existing legal protections (particularly in respect of maternal identification and the commercialisation of the gamete donation) in the Austrian civil law, can this burden be made out.

8. The Grand Chamber was Right to Overrule the Lower Chamber

There is no question that the Grand Chamber was right to overrule the finding of the lower chamber. In particular, the suggestion by the lower chamber that artificial procreation techniques could be forbidden altogether,\textsuperscript{110} while rhetorically effective in context, was a foolhardy invitation to draconian regulation of this sector by member states and flew in the face of the court’s well-established jurisprudence in this area in cases such as Dickson\textsuperscript{111} and Evans.\textsuperscript{112} Both cases have identified the choice to become a genetic parent as ‘. . . a particularly important facet of an individual’s existence or identity . . . ’\textsuperscript{113} However, by failing to analyse the interests of the individuals affected by the Austrian regulations in terms of sex the court failed to apply the appropriately heightened standard of review for specially protected categories of discrimination as consistent with their judgment in Abdulaziz and the associated line of cases. As a result it gave undue deference to

\textsuperscript{110} See text accompanying note 47.
\textsuperscript{111} Dickson, supra note 3.
\textsuperscript{112} Evans, supra note 2.
\textsuperscript{113} Dickson, supra note 3, ¶78.
the respondent state and overlooked a clear pattern of unequal treatment. This is embodied in a regulatory regime that is both irrational and overbroad insofar as it fails to address legitimate (sex neutral) state interests in an appropriately tailored manner, utilise alternative sex-neutral regulatory options or properly take into account protections already found in the Austrian civil law.

Artificial conception, in both science and law, is a fast-moving area of human knowledge. It is easy to forget that the first “test-tube baby” was born only as recently as 1978\(^{114}\) and what was then remarkable is now a common-place medical procedure.\(^{115}\) It is already 13 years since the applicants in the instant case lodged their suit with the Constitutional Court of Austria and in that time medical science has made significant advances. In particular, our understanding of the treatments appropriate to address infertility as a result of occluded fallopian tubes have now advanced considerably.\(^{116}\) It may well be that the applicants in this case have in the intervening period either availed themselves of one of these new treatments or, as was always an option acknowledged by the court,\(^{117}\) gone abroad to a jurisdictions such as the UK or the US where the regime controlling artificial conception are substantially more liberal. However, either of these options, whether advanced private medical treatment or obtaining artificial conception services abroad, is likely to be considerably more expensive that standard IVF treatment in the applicant’s home country. In practice the most powerful discriminatory factor is not sex or fertility-status but wealth. Regardless of how restrictive a particular regime may be the wealthy can easily circumvent it by seeking treatment abroad. Those most seriously affected are likely to be (where they refuse to act in a manner inconsistent with the laws of their own state) the principle and the poor.


\(^{115}\) According to one particularly striking description ‘Since the HFEA was created in 1991, nearly 170,000 babies have been born as a result of the IVF treatment we license. These babies now form almost 2% of the babies born in the UK.’ Human Fertilisation and Embryology Authority Fertility Treatment in 2010: Trends and Figures 4: http://www.hfea.gov.uk/docs/2011-11-16_-_Annual_Register_Figures_Report_final.pdf (accessed 25 September 2012).

\(^{116}\) See text accompanying note 11.

\(^{117}\) S.H. (Grand Chamber), supra note 1, ¶114.