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## Case of *S.H. and Others v. Austria*: Practical Concern over Individual Rights

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# CASE OF *S.H. AND OTHERS v. AUSTRIA*: PRACTICAL CONCERN OVER INDIVIDUAL RIGHTS

DAVID KETE\*

**Abstract:** The European Court of Human Rights upheld the constitutionality of the Austrian Artificial Procreation Act in November 2011. The Court decided the case on procedural grounds, claiming that the wide margin of appreciation given to European Union member states when there is no consensus within the EU on an issue. In doing so, the Court applied Articles 8 and 14 of the European Convention on Human Rights, but found that the procedural deference owed to the member state, Austria, outweighed the protections afforded by these articles. This Comment argues that while the court reached the correct result, it did so on improper grounds, and left the state of the law unclear for future couples seeking to conceive children through artificial insemination. Future couples are left to debate whether enough states have changed their law to allow artificial insemination that the scales have tipped in their favor, and the margin of appreciation will allow the court to overturn member state law.

## INTRODUCTION

In November 2011, the Grand Chamber of the European Court of Human Rights (ECtHR) upheld the constitutionality of the Austrian Artificial Procreation Act (APA), a law designed to limit the use of certain means of artificial procreation.<sup>1</sup> The court held that this law, which prohibited any use of donated ova for *in vitro* fertilization, could survive a challenge under Articles 8 and 14 of the European Convention on Human Rights (ECHR), even though it forbade the two couples who brought the suit from any possible means of having children where the mother would physically carry the child.<sup>2</sup>

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<sup>1</sup> *S.H. v. Austria*, App. No. 57813/00, Eur. Ct. H.R. (2011) ¶¶ 115–116, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{"itemid":\["001-107325"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{).

<sup>2</sup> *Id.* ¶¶ 15, 119–120.

The ECtHR ruled that Austria could continue to enforce the APA because there was no consensus among member states as to whether ova donation for *in vitro* fertilization was an acceptable means of procreation.<sup>3</sup> Since European Union (EU) member states have not reached a consensus on whether ova donation is permissible, the ECtHR afforded a wide margin of appreciation to Austria.<sup>4</sup> In deciding the case based on the principle of margin of appreciation, the ECtHR found that the APA did not violate Article 8, which would otherwise apply to instances of procreation.<sup>5</sup> The ECtHR took the Austrian government's word that it had justified reasons for this interference, rather than applying a full Article 8 analysis.<sup>6</sup> It refrained from performing this higher level of analysis because of the lower standard due to the wide margin of appreciation.<sup>7</sup>

Part I of this Comment examines Article 8 of the ECHR, the lower court's decision, and justification for that decision. Part II focuses on the standards in Article 8 and the doctrine of margin of appreciation, and examines the ECtHR's holding in light of those provisions. Part III analyzes the concurring opinion and dissent, while pointing out possible problems in determining the law for future couples desiring to use artificial conception.

## I. BACKGROUND

On November 3, 2011, the ECtHR decided the case of *S.H. and Others v. Austria*.<sup>8</sup> The case was originally filed in Austria in 1999 by two couples, Ms. H., Mr. H., Ms. G. and Mr. G. who could not have children through natural means of procreation.<sup>9</sup> The couples contended that the APA violated Article 8 of the ECHR, as well as Article 8 in conjunction with Article 14.<sup>10</sup>

Mr. H. and Ms. H., and Mr. G. and Ms. G. initially filed the suit with the Austrian Constitutional Court for a review of the constitutionality of

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<sup>3</sup> *Id.* ¶¶ 106, 115–116.

<sup>4</sup> *Id.* ¶ 94.

<sup>5</sup> *Id.* ¶ 113.

<sup>6</sup> *See id.*

<sup>7</sup> *See S.H. v. Austria*, App. No. 57813/00 ¶¶ 94, 113.

<sup>8</sup> App. No. 57813/00 ¶¶ 119–120 (Eur. Ct. H.R. Nov. 3, 2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{"itemid":\["001-107325"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{).

<sup>9</sup> *Id.* ¶¶ 1, 11–12. , The court did not use the applicants' full names at their request. *Id.* ¶ 1. Ms. H. cannot conceive children naturally because of a blocked fallopian tube, and Mr. H., her husband, is also infertile. *Id.* ¶ 11. Ms. G. cannot conceive children naturally because she cannot produce ova, though her husband, Mr. G., is fertile himself. *Id.* ¶ 12.

<sup>10</sup> *Id.* ¶ 3.

sections 3(1) and 3(2) of the APA.<sup>11</sup> Ms. H. and Mr. H. could only conceive a child if an ova were to be removed from Ms. H., fertilized with donor sperm, and then implanted back in Ms. H.'s uterus.<sup>12</sup> This process violates the APA, which only allows *in vitro* fertilization if the egg comes from the mother and sperm comes from the father.<sup>13</sup> Ms. G. and Mr. G. can only conceive a child through a donor egg, which would be fertilized with Mr. G.'s own sperm, and then implanted in Ms. G.'s uterus.<sup>14</sup> This process also violates the APA since it involves egg donation.<sup>15</sup>

The Constitutional Court decided the case on October 14, 1999.<sup>16</sup> It determined that Article 8 protects the right of a couple to use artificial techniques to conceive a child.<sup>17</sup> However, the court recognized that Article 8 also allows for the restriction of a protected right if there were conflicting issues of human dignity and the rights of the child.<sup>18</sup> The court upheld the law, ruling that the potential problems that ova donation could cause for the child, as well as possible threats to the dignity of ova donors, were sufficient to justify a prohibition of ova donation, even under Article 8.<sup>19</sup>

The case was then admitted to the First Section of the ECtHR (First Section) and decided on the merits in 2010.<sup>20</sup> The First Section decided that the APA violated Article 14 read in conjunction with Article 8, in the cases of both Mr. and Mrs. H. and Mr. and Mrs. G.<sup>21</sup> The First Section also decided that since there was a violation of Article 14, there was no need to analyze whether there was also a violation of Article 8 alone.<sup>22</sup> The First Section thought all of the government's reasons

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<sup>11</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 13. The Austrian Constitutional Court is the court charged with determining whether Austrian law complies with the European Convention on Human Rights. AUSTRIAN FED. MINISTRY OF JUST., THE AUSTRIAN JUDICIAL SYSTEM § 3.2.2 (2009), available at [http://www.justiz.gv.at/internet/file/8ab4ac8322985dd501229ce2e2d80091.en.0/die\\_justiz\\_eng\\_05.09.pdf](http://www.justiz.gv.at/internet/file/8ab4ac8322985dd501229ce2e2d80091.en.0/die_justiz_eng_05.09.pdf); *EU Rights Charter Equal to Constitution: Austrian Court*, EU BUSINESS (May 4, 2012, 13:32 CET), <http://www.eubusiness.com/news-eu/austria-law-rights.gc4>.

<sup>12</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 14.

<sup>13</sup> FORTPFLANZUNGSMEDIZINGESETZ [ARTIFICIAL PROCREATION ACT] BUNDESGESETZBLATT [BGBl.] No. 275/1992, § 3(1)–3(3) (Austria); *S.H. v. Austria*, App. No. 57813/00, ¶ 27.

<sup>14</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 14.

<sup>15</sup> *Id.* ¶ 31.

<sup>16</sup> *Id.* ¶ 17.

<sup>17</sup> *Id.* ¶ 18.

<sup>18</sup> *Id.* ¶ 19.

<sup>19</sup> *Id.* ¶ 19–25.

<sup>20</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 4.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

for prohibiting ova donation (including avoiding exploitation of women, protecting the future child, preventing the selection of children) were insufficient to restrict the personal freedom that should be afforded to everyone in deciding whether to procreate.<sup>23</sup> The First Section thus overturned the Austrian Constitutional Court's ruling and held that Article 14 (prohibiting discrimination), when read in conjunction with Article 8, prohibited enforcement of the APA.<sup>24</sup>

The Austrian government then appealed the decision to the ECtHR, which decided the case in November 2011.<sup>25</sup> While the state had noted several concerns with *in vitro* fertilization, the ECtHR ruled that the case came down to a balancing between the highly important right of choosing to procreate and the fact that there was no consensus among the member states of the EU on the permissibility of *in vitro* fertilization.<sup>26</sup> The ECtHR noted that rights that are more fundamental should be fiercely protected from government interference.<sup>27</sup> But, the ECtHR also noted that governments are normally free to interfere on issues where there is a lack of consensus by other European states.<sup>28</sup> The ECtHR upheld the law due to the wide margin of appreciation afforded the Austrian government.<sup>29</sup> But, the ECtHR also acknowledged that the rapid advances of science could change public opinion, creating a consensus among member states to allow ova donation for artificial insemination.<sup>30</sup> If this were to be the case, the margin of appreciation for the APA would be much less, and the APA would probably violate Article 8.<sup>31</sup>

## II. DISCUSSION

### A. *The Artificial Procreation Act*

The APA regulates all means of conceiving a child outside of natural sexual intercourse.<sup>32</sup> The Austrian government passed the law in

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<sup>23</sup> *Id.* ¶ 55.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* ¶¶ 2, 119–120.

<sup>26</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶¶ 94, 113.

<sup>27</sup> *Id.* ¶ 94.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶¶ 112–118.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See FORTPFLANZUNGSMEDIZINGESETZ [ARTIFICIAL PROCREATION ACT] BUNDESGESETZBLATT [BGBl.] No. 275/1992, § 3(1)–3(3) (Austria) (regulating what reproductive material may be donated, the circumstances surrounding the donation of reproductive

1992, partially to deal with new methods of conception, including *in vitro* fertilization.<sup>33</sup> Among other things, the APA regulates the types of reproductive material that people may donate.<sup>34</sup> The main provision in this case prohibits ovum donation under any circumstances.<sup>35</sup>

The Austrian government justified the law for several reasons.<sup>36</sup> First, the government desired to avoid procreation that was too far removed from natural means of procreation.<sup>37</sup> Second, the government sought to avoid exploitation of poorer women who might feel pressure to donate ova for money.<sup>38</sup> Third, the government wanted to protect children from the trauma of having more than one mother (the ova donor and the birth mother).<sup>39</sup> Fourth, it desired to avoid parents seeking ova donors with particular qualities, amounting to selective reproduction, and because there is no consensus on acceptable techniques for artificial procreation.<sup>40</sup>

The applicants correctly pointed out that many of these same concerns could be applied to permitted means of artificial procreation, as well as adoption.<sup>41</sup> The applicants noted that there is no pressure on the women in this case to donate ova for money, so that consideration should be ignored.<sup>42</sup> Also, sperm donation is still permitted in some circumstances, indicating the government's belief that it is permissible for some children to grow up only genetically related to one parent.<sup>43</sup> Finally, there are other ways to avoid selective reproduction without a blanket prohibition on ova donation.<sup>44</sup> Since these concerns apply to permitted actions as well as the prohibited act of ova donation, they cannot be the only reasons causing the APA to prohibit ova donation.<sup>45</sup>

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material, and which physicians may be able to perform such procedures); S.H. v. Austria, App. No. 57813/00, ¶ 27 (Eur. Ct. H.R. Nov. 3, 2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{"itemid":\["001-107325"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{).

<sup>33</sup> See *S.H. v. Austria*, App. No. 57813/00, ¶¶ 27–31.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* ¶¶ 19, 64, 101.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *S.H. v. Austria*, App. No. 57813/00 ¶¶ 19, 64, 101.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.* ¶ 58. For example, an adopted child still has two mothers, a birth mother and adopted mother. See *id.* Sperm donation, which raises the same concerns about selective reproduction, is still allowed. See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> *Id.*

<sup>44</sup> See *id.* ¶ 105.

<sup>45</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶ 58.

### B. Procreation Laws in Other Nations

EU member nations have not reached a consensus as to whether ova donation should be allowed at all, including for *in vitro* fertilization purposes.<sup>46</sup> Italy, Lithuania, and Turkey completely prohibit *in vitro* fertilization.<sup>47</sup> Croatia, Germany, Norway, and Switzerland prohibit ova donation for *in vitro* fertilization.<sup>48</sup> Many countries also have these restrictions on family life, but there is no real consensus condemning these restrictions. In Cyprus, Luxembourg, Poland, Portugal, and Romania, for example, ova donation is allowed.<sup>49</sup> Since there is no consensus throughout Europe, the government is afforded a wider margin of appreciation in promulgating its own law.<sup>50</sup>

### C. Article 8

Article 8 of the ECHR establishes the right to privacy and says that the government cannot interfere with this right unless it is necessary for purposes of national security, public safety, the protection of morals, or the protection of freedoms.<sup>51</sup> The main argument of the applicants is that the APA violates this right because it interferes with family life and is not justified as being in the interest of national security, or any of the other possible justifications.<sup>52</sup>

First, the applicants established that the right to choose how to have a family is protected by Article 8.<sup>53</sup> To do so, they relied on the previous cases *Evans v. United Kingdom*, and *Dickson v. United Kingdom*.<sup>54</sup>

<sup>46</sup> See *id.* ¶¶ 35–40.

<sup>47</sup> *Id.* ¶ 95

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* ¶ 39.

<sup>50</sup> *Id.* ¶¶ 35, 95.

<sup>51</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

(1) Everyone has a 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.

*Id.*

<sup>52</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶ 59.

<sup>53</sup> See *id.* ¶ 61.

<sup>54</sup> *Id.* ¶¶ 80–81.

In *Evans*, the ECtHR held that “the notion of ‘private life’ incorporate[s] the right to respect for both the decisions to become and not to become a parent.”<sup>55</sup> In *Dickson* the ECtHR similarly held that “Article 8 is applicable to the applicants’ complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents.”<sup>56</sup> The ECtHR acknowledged that these cases established Article 8 protection for the right to have children.<sup>57</sup> Additionally, both sides agreed that the APA implicates Article 8(1), protecting private and family life.<sup>58</sup>

Once the ECtHR found that the APA implicated Article 8(1), it moved to an analysis of Article 8(2) because the APA had to implicate *both* sections in order to be prohibited under Article 8.<sup>59</sup> The ECtHR found that the APA did not implicate Article 8(2) because the APA fit under the exceptions stated in Article 8(2).<sup>60</sup> The Austrian government noted five main concerns with allowing ova donation for *in vitro* fertilization.<sup>61</sup> These were: to avoid procreation that was “too far removed from natural means of conception;” to avoid exploitation of women; to protect children from the trauma of having more than one mother; to avoid selective reproduction; and because of a lack of consensus on acceptable techniques for artificial procreation.<sup>62</sup> Here, the court decided that these concerns were all valid and sought to protect the health, morals and freedom of others.<sup>63</sup> Since these concerns are related to the protection of health, morals, and freedom, they fall under Article 8(2), and allow the government to regulate an area that would normally be protected.<sup>64</sup>

The ECtHR thus faced the problem of whether to give the individual interest, protected by Article 8(1), or the government’s interest, protected by Article 8(2), more weight.<sup>65</sup> The ECtHR noted that its task was to determine, in this particular situation, whether the law protected

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<sup>55</sup> *Evans v. United Kingdom*, App. No. 6339/05, 46 Eur. H.R. Rep. 728, 750–51 (2007).

<sup>56</sup> *Dickson v. United Kingdom*, App. No. 44362/04, 46 Eur. H.R. Rep. 927, 945 (2007) (citations omitted).

<sup>57</sup> *S.H. v. Austria*, App. No. 57813/00 ¶¶ 80–82.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* ¶¶ 82, 89–90.

<sup>60</sup> *See id.* ¶¶ 92, 113.

<sup>61</sup> *Id.* ¶¶ 19, 64.

<sup>62</sup> *Id.*

<sup>63</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 90.

<sup>64</sup> *Id.* ¶¶ 50, 90.

<sup>65</sup> *Id.* ¶ 92–94.



legitimate governmental interests, or whether it merely hindered individual freedom.<sup>66</sup> The concerns about the sale of ova, or about selective reproduction were irrelevant, because while those issues might arise in the future, they did not arise in this particular instance, and it is not the court's job to make policy considerations.<sup>67</sup> The court noted that this case arose from the individual application of the law and, as such, the decision must be confined to the facts.<sup>68</sup> In this case, concerns about the mother being pressured into selling ova, or of parents genetically engineering a child through selective reproduction, do not apply and thus are not points that can be considered, significantly weakening the government's position.<sup>69</sup> This leaves only the concerns for human dignity, concerns for the child's well-being, and lack of consensus of member states, as factors weighing in favor of the constitutionality of the law.<sup>70</sup>

The ECtHR could have used one of two different principles to weigh the individual interest of Article 8(1) against the governmental interest of Article 8(2).<sup>71</sup> These principles pull the court in opposite directions.<sup>72</sup> First, there is the principle that when a fundamental right is at stake, the government has a high burden of proof to show that it is necessary to interfere.<sup>73</sup> Contrary to this principle is that of the margin of appreciation.<sup>74</sup> The ECtHR must give a wide margin of appreciation, or wide latitude to member states in promulgating a law, when there is a lack of a consensus on a particular issue, especially when it involves a sensitive moral issue.<sup>75</sup>

#### D. Margin of Appreciation

Despite not being mentioned explicitly in the ECHR, the margin of appreciation doctrine was created by the ECtHR early in its existence.<sup>76</sup> It is, most simply, the degree to which the ECtHR will defer to

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<sup>66</sup> *Id.* ¶ 91.

<sup>67</sup> *See id.* ¶¶ 58–59, 92.

<sup>68</sup> *Id.* ¶ 92.

<sup>69</sup> *See S.H. v. Austria*, App. No. 57813/00 ¶ 58.

<sup>70</sup> *See id.* ¶¶ 19, 64, 101.

<sup>71</sup> *Id.* ¶ 94.

<sup>72</sup> *Id.* ¶¶ 93–94.

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* ¶ 94.

<sup>75</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 94.

<sup>76</sup> *See* Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 113, 117 (2005) (cit-

member states in carrying out the directives of the ECHR.<sup>77</sup> In the context of Article 8, it works in the following manner.<sup>78</sup> The first clause says that the government cannot interfere with anyone's private life.<sup>79</sup> However, the second clause qualifies this prohibition on interference by saying that a government may interfere with private life if it serves some greater purpose of protecting health, morals, public safety, economic well-being, the prevention of crime, or the protections of the freedoms of others.<sup>80</sup> The ECtHR has held that the right to procreate and the manner in which someone procreates are protected under the Article 8 right to privacy.<sup>81</sup>

Normally, the court would weigh whether the government's reason for interference was justified under the second part of Article 8.<sup>82</sup> However, the margin of appreciation doctrine alters the way that courts will weigh the various provisions of Article 8.<sup>83</sup> The fact that there is no consensus among member nations means that the court will afford the Austrian government a wider margin of appreciation, and in doing so accept the government's justification under Article 8 with much less scrutiny.<sup>84</sup> But, the court noted that when a particularly important right was being called into question, the court would afford the government a narrower margin of appreciation.<sup>85</sup>

In its analysis of the APA, the ECtHR first had to determine what margin of scrutiny to use.<sup>86</sup> The fact that the right to privacy is such an important right suggests that the court should use a narrow margin of appreciation and perform a strict Article 8 analysis.<sup>87</sup> The lack of consensus among member states as to whether ova donation should be allowed suggests a wider margin of appreciation.<sup>88</sup> Ultimately, the court

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ing *Greece v. United Kingdom*, App. No. 176/56, 1958–1959 Y.B. Eur. Conv. on H.R. 174 (using the term “margin of appreciation” for the first time)).

<sup>77</sup> Brauch, *supra* note 76, at 115–16.

<sup>78</sup> *See id.* at 116.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 82.

<sup>82</sup> *See Nada v. Switzerland*, App. No. 10593/08 ¶¶ 163–166 (Eur. Ct. H.R., Sept. 12, 2012), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118#\[\"itemid\": \[\"001-113118\"\]\]](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113118#[\).

<sup>83</sup> *See Brauch*, *supra* note 76, at 116.

<sup>84</sup> *S.H. v. Austria*, App. No. 57813/00 ¶ 94.

<sup>85</sup> *Id.* ¶ 93.

<sup>86</sup> *Id.* ¶¶ 91–97.

<sup>87</sup> *Id.* ¶ 93.

<sup>88</sup> *Id.* ¶ 94.

applied a wide margin of appreciation to the APA, and so it did not conduct a very rigorous Article 8 analysis.<sup>89</sup>

The ECtHR ultimately said that the lack of consensus among member nations weighed more heavily than the individual interest.<sup>90</sup> Therefore, the APA was permitted under Article 8.<sup>91</sup> The court, in doing so, said that that because of the lack of a consensus, it afforded the Austrian government a wide margin of appreciation in promulgating this law.<sup>92</sup> But, this decision also left the door open for changes in the law.<sup>93</sup> It seemed important to the decision that the science at issue had not been around for very long, yet, as the dissent pointed out, the science on which the decision was based was already nearly twenty years old.<sup>94</sup> This begs the question of whether a new case, with modern science, may be able to defeat this concern.<sup>95</sup> Additionally, the court did not define any clear standard for what would constitute enough of a consensus to overturn this decision.<sup>96</sup>

The concurrence<sup>97</sup> agreed that the APA did not violate Article 8, but rather than deciding based on granting the Austrian government a wide margin of appreciation, it decided the case based on the broader principles of protecting human rights.<sup>98</sup> It examined the principles behind the ECHR, mainly that its purpose was to protect human dignity.<sup>99</sup> While the concurrence acknowledged the importance of the right to have children, it noted that the second part of Article 8 holds that this right should not be upheld at any cost.<sup>100</sup> It concluded that divorcing procreation from a personal act between a man and a woman was offensive to human dignity, and was thus too high a price to pay for the personal right to have a child.<sup>101</sup>

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<sup>89</sup> See *id.* ¶ 106 (“[T]he Court attaches some importance to the fact that, as noted above, there is no sufficiently established European consensus as to whether ova donation for *in vitro* fertilization should be allowed.”).

<sup>90</sup> *S.H. v. Austria*, App. No. 57813/00 ¶¶ 106, 115–116.

<sup>91</sup> *Id.* ¶¶ 115–116.

<sup>92</sup> *Id.* ¶ 97.

<sup>93</sup> *Id.* ¶ 118.

<sup>94</sup> *Id.*; see *S.H. v. Austria*, App. No. 57813/00 ¶ 4 (joint dissenting opinion of Tulkens, J.).

<sup>95</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶ 6 (dissenting opinion of Tulkens, J.).

<sup>96</sup> See *id.* ¶ 11 (joint dissenting opinion of Tulkens, J.).

<sup>97</sup> At the ECtHR, opinions written by judges who vote with the majority are filed as a “separate opinion” rather than a concurring opinion, but I use the term “concurring opinion” or “concurrence” to avoid confusion. See *id.* (separate opinion of DeGaetano, J.).

<sup>98</sup> *Id.* ¶ 6 (separate opinion of DeGaetano, J.).

<sup>99</sup> *Id.* ¶ 2.

<sup>100</sup> *Id.*

<sup>101</sup> See *id.* ¶¶ 2–3.

The dissent pointed out that the majority seemed to weigh the wide margin of appreciation for issues that lack a European consensus more heavily than the fact that there is a very important right being interfered with by the government.<sup>102</sup> It noted that there is no reason for this, and that the science that the majority based its decision on is ten years old, and very well could have changed in that timeframe.<sup>103</sup>

### III. ANALYSIS

The ECtHR, in applying a wide margin of appreciation, not only failed to properly analyze the APA under Article 8, but also left the situation unclear for future couples who desire to use donated ova for *in vitro* fertilization in Austria.<sup>104</sup> The court said that it would be open to change as other nations change their laws, yet it gave no standard for how many nations would need to allow this practice of ova donation before the right to use this practice would be protected under Article 8.<sup>105</sup> The ECtHR should have applied a narrower margin of appreciation, conducted a more thorough Article 8 analysis, and found that the law was permitted because it was designed to protect the health and dignity of the parents.<sup>106</sup>

#### A. A Clearer Standard

The opinion of the ECtHR was less clear than it could have been because it became mired in its restrictions as a supranational body.<sup>107</sup> It tried to finesse the issue of *in vitro* fertilization by addressing the margin of appreciation question, as opposed to the substantive issue: Article 8.<sup>108</sup> In doing so, the court gave an unclear standard, leaving future

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<sup>102</sup> S.H. v. Austria, App. No. 57813/00 ¶¶ 6, 8 (joint dissenting opinion of Tulkens, J.).

<sup>103</sup> *Id.* ¶¶ 6, 8.

<sup>104</sup> Cf. Alexandra Timmer, *SH and Others v. Austria: Margin of Appreciation and IVF*, STRASBOURG OBSERVERS (Nov. 9, 2011), <http://strasbourgobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/> (noting that the feelings of member nations towards ova donation are changing rapidly, but not giving a clear standard for when enough change has taken place to narrow the margin of appreciation).

<sup>105</sup> See S.H. v. Austria, App. No. 57813/00, ¶ 8 (Eur. Ct. H.R. Nov. 3, 2011), [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{"itemid":\["001-107325"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107325#{) (joint dissenting opinion of Tulkens, J.).

<sup>106</sup> See *id.* ¶ 3.

<sup>107</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶106.

<sup>108</sup> See *id.* (“The central question in terms of Article 8 of the Convention is not whether a different solution might have been adopted by the legislature . . . but whether . . . the Austrian legislature exceeded the margin of appreciation afforded to it under that Article.”) (citations omitted).

couples to guess as to what point in time enough states have allowed *in vitro* fertilization for the margin of appreciation to no longer be wide enough to permit the APA.<sup>109</sup> The court was not bound to make such a limited ruling since, as the court of human rights, its responsibility is to protect human rights in all member nations and to be a watchdog over domestic courts.<sup>110</sup> In fact, some legal scholars have pushed to abolish the margin of appreciation doctrine altogether, suggesting that the courts should focus only on the issues under the ECHR.<sup>111</sup>

The concurrence correctly focused on the overarching purpose of the ECtHR.<sup>112</sup> It held that the court must be guided by the fact that it exists to carry out the main goal of the ECHR: to protect human dignity.<sup>113</sup> The concurring opinion noted that divorcing procreation from a natural act comes at a cost.<sup>114</sup> It claimed that this cost to human dignity might be even higher than the benefit gained by allowing personal choice.<sup>115</sup> In choosing to approach the issue in this way, the concurrence addressed the heart of this issue: whether ova donation for *in vitro* fertilization should be allowed.<sup>116</sup>

In *Evans v. United Kingdom*, the court held that while a woman's access to certain methods of artificial procreation is necessitated by Article 8, it is not an absolute right to access.<sup>117</sup> Here, the court weighed one person's right to have a child against another person's desire not to have a child, and ruled that the right to have a child was not more important than the right not to have a child.<sup>118</sup> Although the court con-

<sup>109</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶¶ 6–10 (joint dissenting opinion of Tulkens, J.).

<sup>110</sup> See generally Jan Rewers McMillan, *Sylvester v. Austria: American Father and Daughter Given Voice in European Court of Human Rights*, MICH. B.J., July 2003, at 24, 26 (defining the role of the ECtHR as protecting the rights guaranteed by the ECHR). In many nations, such as the Ukraine, citizens are pushing for a greater respect for the ECtHR's decisions, since it truly serves as a protector of human rights in place of the domestic courts. See Halyna Coynash, *The Future of the European Court of Human Rights: A View from Ukraine*, OPEN SOC'Y FOUNDS. (Apr. 17, 2012), <http://www.soros.org/voices/future-european-court-human-rights-view-ukraine>.

<sup>111</sup> Brauch, *supra* note 76, at 137–38.

<sup>112</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶ 2 (separate opinion of DeGaetano, J.) (“Human dignity—and the underlying notion of the inherent value of human life—is at the very basis of the Convention as a whole.”).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See *id.*

<sup>116</sup> See *id.*

<sup>117</sup> See *Evans v. United Kingdom*, App. No. 6339/05, 46 Eur. H.R. Rep. 728, 753–55 (2007).

<sup>118</sup> See *id.* at 755.

sidered the margin of appreciation, in this case it did weigh the rights of the two parties.<sup>119</sup> The ECtHR should have adopted the same approach in this case, balancing the right of a woman to have a child with the cost to human dignity of artificial procreation.<sup>120</sup>

### B. Future Cases

The court, in limiting its decision to a respect for Austrian law based on the wide margin of appreciation afforded to nations when there is no European consensus on an issue, created a confusing precedent.<sup>121</sup> The court said nothing about when a challenge to the APA under Article 8 might be successful.<sup>122</sup> Is it solely dependent on the number of states that allow or prohibit *in vitro* fertilization?<sup>123</sup> Are there other scientific concerns as well?<sup>124</sup> Must the court take into account new developments in technology?<sup>125</sup> The ECtHR's decision left these questions unanswered.<sup>126</sup>

The opinion correctly points out that many of the government's reasons for prohibiting *in vitro* fertilization could also be applied to sperm donation and even adoption.<sup>127</sup> For instance, an adopted child would encounter the same hardship of having two mothers (his natural mother and adopted mother), as a child who had one mother whose ova he came from and another mother who carried him.<sup>128</sup> These concerns are arguably merely post-hoc justifications for the law, as opposed to actually criteria for rejecting the possibility for *in vitro* fertilization.<sup>129</sup> It appears as though the only real justification for the prohibition of *in vitro* fertilization is the fact that there are many nations that also prohibit it, and so Austria is afforded a wide margin of appreciation to pass this law.<sup>130</sup>

The ECtHR should have weighed the first and second parts of Article 8 and found that while the right to have children is protected by the Article, the cost to human dignity resulting from divorcing the nat-

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<sup>119</sup> See *id.* at 752–53, 755.

<sup>120</sup> See *id.* at 755.

<sup>121</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶¶ 6, 8 (dissenting opinion of Tulkens, J.).

<sup>122</sup> See *id.*

<sup>123</sup> See *id.* ¶¶ 5–8.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See generally *id.* (explaining the various questions left open by the majority opinion).

<sup>127</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶¶ 58–59.

<sup>128</sup> See *id.* ¶ 105.

<sup>129</sup> See *id.* ¶¶ 104–106.

<sup>130</sup> See *id.* ¶ 113.

ural procreative act from conception is too high, and violates Article 8(2).<sup>131</sup> This would establish a clear rule that is not dependent on the consensus of member states, and one that EU citizens can easily follow in future cases.<sup>132</sup> The court should have taken its own advice from *Evans*, when it stated, “strong policy considerations . . . favour a clear or ‘bright line’ rule which would serve both to produce legal certainty and to maintain public confidence in the law in a sensitive field.”<sup>133</sup> By proclaiming a bright line rule, the ECtHR would have eliminated uncertainty and remained true to Article 8 of the ECHR.<sup>134</sup>

#### CONCLUSION

The ECtHR’s decision to uphold the APA based on giving Austria a wide margin of appreciation in this sensitive moral topic created a confusing environment for those who wish to use donated ova for *in vitro* fertilization in future cases. The court tried to justify its decision based on the protection of women, avoiding split motherhood, the protection of children, and the fear of selective reproduction, in addition to the margin of appreciation. But all of the reasons for prohibiting ova donation could also apply to permitted methods of artificial reproduction, so this reasoning fails, leaving the only the margin of appreciation.

By not giving any guidance as to how many nations would have to repeal their bans before the APA was no longer permissible under Article 8, the court left this question for future couples to decide. The court should have upheld the ban based on basic principles of human dignity and noted that the right to privacy in family life, while important, is not an absolute right, and must not be given at the expense of general human dignity. In so separating the personal act between a man and a woman from procreation, and by conceiving children outside the body, *in vitro* fertilization offends human dignity and violates the ECHR. By making a ruling based on this, the court would have truly upheld human dignity and given a clear standard for future couples to follow.

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<sup>131</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶ 2 (separate opinion of DeGaetano, J.).

<sup>132</sup> See *id.*

<sup>133</sup> *Evans v. United Kingdom*, 46 Eur. H.R. Rep. at 748.

<sup>134</sup> See *S.H. v. Austria*, App. No. 57813/00 ¶¶ 2–4 (separate opinion of DeGaetano, J.); *S.H. v. Austria*, App. No. 57813/00 ¶ 11 (dissenting opinion of Tulkens, J.).