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INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

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Redefining Family

Queer Families' Access to Reproductive Rights and Legal Recognition before the ECtHR

Legal traditions are formed by deeply rooted assumptions about social realities. Who legally counts as a parent and what relationships count as kin are primary examples of how law embeds those assumptions. Yet social practices have always varied, and *de facto* families have taken diverse forms throughout human history (see e.g., here and here), demonstrating that parenting and family formation are multilayered and multifaceted.

This plurality becomes more visible than ever in light of developed reproductive technologies. However, law and legal traditions were built in ways that often disregard it. With the increase in the usage of reproductive technologies (such as assisted reproductive technologies (A.R.T.)), the gap between the realities of parenthood and the law has reached an all-time high. In this context, the European Court of Human Rights (ECtHR), although a trailblazer in many aspects of human rights protection, exhibits significant shortcomings in recognizing and accommodating family structures formed through the use of reproductive technologies. Beginning with Kerkhoven and Hinke v the Netherlands (1992), one of the first cases to raise questions of legal recognition for lesbian co-parenting, this post thus traces how the ECtHR has engaged with queer families' use of reproductive technologies over the past three decades. It asks how the Court has framed family formation during this period, and whether its reliance on doctrines such as the margin of appreciation has functioned to preserve a traditional understanding of family. By addressing these questions, the blogpost offers a critical analysis of the Court's jurisprudence and argues for a shift that aligns legal interpretation with social realities and contemporary developments in reproductive technologies.

Hierarchy in Familial Relationships and a Flawed Equality Framework

A.R.T. have been used to procreate for more than four decades (see here). In fact, it is a highly regulated area of medical intervention, especially on the European level. Research shows that, out of 43 European countries, 24 prohibit A.R.T. access for lesbian couples. In the absence of a unified European approach to access or public funding for A.R.T., many cases involve cross-border travel to obtain reproductive technologies. The fragmentation also creates opportunities for discriminatory practices against queer families seeking these technologies. These dynamics have reached the ECtHR in several cases, where the Court seems to fall short in grasping family units outside heteronormative and patriarchal structures (Hodson, p. 2). Although the ECtHR has recognized different forms and dimensions of family within the scope of Article 8 (see *Schalk and Kopf v Austria*, *Oliari and Others v Italy*, *Fedotova and Others v Russia*), it has so far clung to the primary importance of genetic relations (Nieminen, p.56).

One early example is the decision of the European Commission of Human Rights in Kerkhoven and Hinke v the Netherlands, where a non-biological "social parent" sought parental authority over a child conceived through artificial insemination by her lesbian partner. The Commission ruled that the state had no obligation under Article 8 to grant this request, stating that "as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living

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together" (section 2). Jackson argues that law's principal stumbling block is the persistence of an exclusive model of parenthood, namely one that assumes a child can only have two legal parents, one mother and one father (pp.59-66). Hodson further argues that there are layers of hierarchy within the recognition of different types of queer families by the Court. This is particularly apparent in cases involving lesbian applicants, where the Court accepts their marriages only if they conform to specific, traditional structures. The author (p.11) contends that the Court implicitly presumes an inherent inadequacy in lesbian relationships, thereby undermining their legitimacy as 'real marriages'. This is evident not only in the recognition of marriage but also in the recognition of family ties. More than 30 years have passed since that judgment. However, this hierarchy, whether intentional or not, appears to persist within the European human rights discourse, particularly in the prioritization of certain familial relationships.

This prioritization became apparent in the Court's development of a flawed equality framework. In Gas and Dubois v France, the applicants – a same-sex couple who entered into a civil partnership in 2002 – claimed discrimination after French authorities rejected their application for simple adoption of their daughter under French law, which distinguishes between simple adoption (preserving the child's ties to their biological family) and plenary adoption (severs those ties) (Art. 360 French Civil Code). The child had been conceived via donor insemination in Belgium and raised in their home. The Court acknowledged the evolving consensus on the benefits of legal recognition for same-sex parents, but found no evidence of discriminatory treatment, noting that heterosexual couples in civil partnerships were also denied simple adoption under French law (para. 69). The issue lies in the Court's justification: it denied rights to the lesbian family by relying on the fact that similar rights were also withheld from heterosexual couples in civil partnerships. The comparison is flawed in two ways. First, although the Court implicitly acknowledges the unavailability of same-sex marriage in France, it fails to recognize the importance of the fact that the couple lacked legal access to the status (marriage) that confers the right to simple adoption. By ignoring this inaccessibility, there is no proper basis for comparison in the first place. Second, the Court misses the opportunity to reaffirm the importance of access to A.R.T. and simple adoption for the applicants' situation, which differs fundamentally from that of a heterosexual civil partnership or heterosexual marriage. This is particularly significant as only a few years before the French judgment, the Court had explicitly emphasized the importance of establishing genetic and familial ties in its case law.

Where the Court failed to recognize the importance of queer family formation, it took the opposite approach in Dickson v the United Kingdom. The case concerned the refusal to provide a heterosexual couple – a prisoner and his wife – with facilities for artificial insemination. The Court found Article 8 applicable. Given the prisoner's earliest possible release date and his wife's age, it was improbable they could have a child without access to artificial insemination facilities (para. 12). The Court thus held that the refusal affected their private and family lives, including respect for their decision to become genetic parents. Through this judgment, the Court thus protected a couple's access to A.R.T. by treating becoming a genetic parent "a particularly important facet of an individual's existence or identity" (para. 78).

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As a result, in the Dickson case, the Court underlined the importance of parenthood at the individual level and defined it as part of one's identity, framing its formation as relevant to any person's life regardless of marital status. Yet, in the case of Gas and Dubois v France, it chose to assess the matter within the context of the couple's marital/partnership status. On its own reasoning in Dickson, the Court could, in principle, have recognised a queer couple's genetic or legal family ties without treating civil partnership status, or access to same-sex marriage, as determinative.

Becoming a Genetic Parent: Not as Important as State Sovereignty?

Yet this emphasis on genetic parenthood has limits. Despite treating parenthood in heterosexual family-making as important, the Court does not extend the same consideration to all other forms of family-making, including heterosexual couples, when family formation goes beyond the traditional ties. In S.H. and Others v Austria, the applicants – two married couples – sought A.R.T. exchanging donor sperm and eggs due to infertility, but these methods were prohibited under the Austrian Artificial Procreation Act. The Act only allowed certain assisted procreation methods involving gametes from married couples. The Constitutional Court of Austria acknowledged that this restriction interfered with the applicants' family life, but deemed it justified to prevent unusual family structures and the exploitation of women (paras 13-24). According to the Austrian Government, the unusual family structure at issue concerned the inclusion of a third person in the process of procreation – someone who is not socially part of the family formation but only biologically contributes to it (see para. 19). Yet, this family formation is not materially different from that of a queer family, where a third person, although not part of the family, contributes sperm or eggs, as in the first two cases discussed above. In S.H. and Others v Austria, the Court specifically emphasizes "the fact that the splitting of motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and [adds] a new aspect to this issue" (para 105). Rather than establishing a precedent on heterologous A.R.T. and clarifying how different forms of motherhood should be treated, the Court left such distinctions to the states, stating that "In respect of […] the creation of unusual family relationships by splitting motherhood between a genetic mother and a biological mother, these problems could be overcome by enacting appropriate legislation" (para. 54).

This deference to domestic choices is reinforced by the broader regulatory landscape. Across Europe, domestic laws differ significantly regarding access to A.R.T., and most do not offer adequate access to enable people to fully benefit from these technologies (see here). This diversity, in turn, pertains to the Court's margin of appreciation approach. The doctrine is highly visible in cases related to private and family life involving A.R.T. However, reliance on a wide margin of appreciation leads to inconsistencies in access to A.R.T., the right to have a child, and the right to become genetic parents for both queer and heterosexual families. This asymmetry is not created by the ECtHR itself, but is enabled by the broad margin of appreciation afforded in these cases (Nieminen, p. 55).

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The same dynamic emerges in the Court's approach to legal recognition of parenthood. In X, Y and Z v the United Kingdom, a trans man (X), his partner (Y), and their child (Z), born through artificial insemination by a donor, argued that the lack of legal recognition of X as Z's father violated their right to respect for family life under Article 8 of the ECHR. The Court held that the UK's law on trans existence was in a transitional state, and that the respondent country must therefore be afforded a wide margin of appreciation (para 44). The dissenting opinions of Judges Vilhjálmsson, Foighel, and Gotchev illustrate how the Court missed an opportunity to establish a precedent on recognizing trans parenthood. They contended that the Court failed to adequately respect the applicants' family life, and that such respect should extend to Z no less than to X and Y. Judge Vilhjálmsson emphasized that in a jurisdiction where a male partner of a mother who conceives through artificial donor insemination can be legally recognized as the father, the legal system acknowledges the importance of family ties. Vilhjálmsson saw no reason why this principle should not apply to cases involving a trans partner. Similarly, Judge Gotchev asserted that there had been a violation of Article 8, which safeguards *de facto* family relationships, noting that such relationships existed in the current case. By applying a broad margin of appreciation, the Court thus missed the opportunity to recognize the *de facto* familiar realities of the case.

Conclusion

As technology advances and new reproductive methods emerge, there is no assurance that the Court will readily embrace the fast-paced innovations. In fact, the decisions discussed above indicate that certain forms of family-making may be deemed unacceptable regardless of the sexual orientation of the parents of the family, as long as they do not conform to traditional models of family-making. Consequently, the Court's recognition of the diverse possibilities evident in queer family formation could therefore have broader, inclusive effects, benefiting all families, who may rely on future technological advancements.

Therefore, the issue of parental rights and the right to have a child cannot be subordinated to domestic law, given the Court's own recognition of the significance of becoming a genetic parent. Different forms of family-making, whether queer families or those formed through heterologous reproduction, must be understood beyond the margin of appreciation analysis. The Court's failure to recognize one form of non-traditional family today can later translate into further rights violations for other non-traditional families tomorrow.

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