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Assisted Reproductive Technologies and Medically Assisted Reproduction in the Context of the European Convention on Human Rights

Legal and Social Perspectives

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Abstract: In this study assisted reproductive technologies (ART) and medically assisted reproduction (MAR) have been studied in the context of the European Convention on Human Rights (ECHR). The study has been done by examining the case-law of the European Court of Human Rights (ECtHR) in connection to ART and MAR. The aim of the study was twofold: to define legal frames of ECHR in the issues connected to ART and MAR, and analyse the social values which can be found and which have affected to the reasoning of ECtHR in studied cases. The analysis has been done from legal doctrinal perspective and from socio-legal perspective. In socio-legal analysis feminist legal theory was applied as a theoretical background. The results of the doctrinal analysis show that ART and MAR are related strongly to article 8 (private and family life) in ECtHR's case-law. ART and MAR are not regulated widely by ECtHR as the Court has given the states wide margin of appreciation to decide about MAR and ART related issues. Socio-legal analysis indicated that some social and gendered values are found in the reasoning of the Court in the studied cases. The wide margin of appreciation the Court has given to the states creates also a wide range of cases which are connected to the rights under ECHR but which are not regulated in consistent way. This may also increase the amount of inequality and gendered practises as the national practises may differ greatly with each other under given wide margin of appreciation.

Key words: assisted reproduction, assisted reproductive technology, medically assisted reproduction, European Convention on Human Rights, European Court of Human Rights, margin of appreciation

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1. Introduction

John Robertson argues that "reproductive revolution" has been visibly going on since the first child conceived in petri dish in 1978.[1] He claims that the revolution can be divided into four main categories: 1) contraception and abortion, 2) treating infertility, 3) controlling the quality of the offspring, and 4) using reproductive capacity for nonreproductive ends (e.g. stem cell research).[2]

In my thesis I will analyse and discuss the second and third categories of Robertson's list in context of the case-law of the European Court of Human Rights (ECtHR or the Court). The research aims to understand the current development of ECtHR´s case-law in connection to medically assisted reproduction (MAR) and assisted reproductive technologies (ART), and discuss the development from legal and social perspectives. In order to understand the development of reproductive issues in the best possible way its different sectors need to be evaluated and analysed constantly. This study tries to clarify and discuss ART and MAR in the context of human rights – and, more precisely, focus on the frames of European Convention on Human Rights. By observing the interpretation of ECtHR about ART and MAR the legal frames in European human rights' sphere can be clarified.

Medical technology and inventions which affect on humans, family relations and the existence of people are constantly developing. While these inventions and the development of medical knowledge may bring huge advantages to people, they are also changing and modifying the society in larger ways. New reproductive opportunities and ways to modify and change prenatal life and stages may have strong impacts on societies and the way we understand reproduction. ART and MAR are in the crossroad of many different fields: they are, at the same time, full of medical, social, political, legal, ethical and economical questions. ART and MAR are also issues which have many connections to human rights: right to life, right to private and family life, and even right to property. The field of biotechnology is constantly evolving and providing us new ways to treat, modify, and cure people.

This development does not happen in similar ways or at the same time around Europe. The survey of International Federation of Fertility Societies (IFFS) shows that there are big differences between European states between allowed ART.[3] The differences exist between allowing different kind of techniques, between different kind of regulations, but also in some states

[1] Robertson, J. *Children of Choice: freedom and the new reproductive technologies*, Princeton University Press, 1994, p. 4.
[2] Robertson, 1994, p. 6
[3] International Federation of Fertility Societies (IFFS), "Surveillance 2016" in https://journals.lww.com/grh/Fulltext/2016/09000/IFFS_Surveillance_2016.1.aspx (accessed 11.05.2018), 2006, p. 32.

between different sexes.[4] For instance, according of IFFS's survey Germany, Norway, and Switzerland allow sperm donation for IVF but not egg donation.[5]

These differences exist, among other reasons, because different kind of legislative decisions, historical events which have affected to the legislative decisions,[6] and differently evolving national laws. Deflem notes that culture and social aspects may impact to the development of legislation.[7] Legal norm exist in the cultural and social settings, and not in some isolated entity.[8]

Despite different national laws, human rights should secure the very basic rights which – at least the majority – would agree everyone should have. ECHR and ECtHR were created to provide effective control mechanism for human rights – and, as Cameron notes, they have become much greater deal than just that.[9] Nowadays, the Court is one of the most effective human right courts in the world.[10] The development and flexibility of the interpretation of ECHR provides a fertile ground to analyse MAR and ART in the context of the Convention. The Court's importance for European legal development and ECHR's evolving nature make the Court's and the Convention's observation needed and crucial for the understanding of legal frames in Europe.

1.1. Aim and Purpose of the Study

The aim of the first part of the analysis is to clarify and understand the current stage and interpretation of ECHR in connection to ART and MAR by analysing the case-law of ECtHR. In this part, legal frames of ECHR in cases of ART and MAR are analysed and examined.

In the second part of the analysis, more critical approach to law is applied: ECtHR´s judgments are studied critically from socio-legal perspective. The specific aim of this part is to discuss the social values which are found in the judgments of the Court, and which have affected to the reasoning of the rulings. Feminist legal theory is used as a theoretical background and analytical tool in the socio-legal analysis. The theory is applied to understand the connection of law and other parts of the society. The theory provides also analytical tools to examine the cases and the judgments in order to understand underlying social values in the judgments.

These two parts have been chosen to support and fulfil each other. It is acknowledged that with only doctrinal analysis of ART and MAR in ECtHR's judgments some important questions of social structures could be left unanswered. On the other hand, ECHR's legal nature and

[4] IFFS, Surveillance 2016, pp. 32-34.
[5] IFFS, Surveillance 2016, p. 33.
[6] E.g. Mullaly about Ireland, Mullaly, S. "Debating Reproductive Rights in Ireland", Human Rights Quarterly, Vol. 27:1, 2005. pp. 82-84.
[7] Deflem, M. *Sociology of Law: Visions of a Sholarly Tradition,* Cambridge University Press, 2010, pp. 6, 199.
[8] Deflem, 2010, p. 6.
[9] Cameron, I. *An Introduction to the European Convention on Human Rights,* Iustus Förlag, 2006, p. 38.
[10] Smith, R. *International Human Rights,* 5th Edition, Oxford University Press, 2012, p. 96-97

ECtHR's role as an international court require certain legal analysis and interpretation of the rulings before any further analysis of ART and MAR can be provided. The goal with this double perspective of the study is to provide wider analysis of the issue and understand the relation and interaction of social and legal factors of ART and MAR in the context of ECHR. Law functions in societies, and in order to understand legislation in the best possible way, social features which affect to legislation must be taken into account.

1.2. The Nature of Human Rights

Convention for the Protection of Human Rights and Fundamental Freedoms – or, European Convention on Human Rights - is an important tool not only for the development of European human rights, but for the development of European legal sphere. The European Convention on Human Rights is part of the Council of Europe's (CoE).[11] The Convention was drafted in 1950 and entered into force 1953.[12] Currently CoE has 47 member states (the states) which have all signed ECHR. The Convention reflected the concerns and values which could be found in Europe after the Second World War. ECHR was supposed to provide rules and peace to the global community, and to individuals.[13] Since then, the Convention has continued the cooperation between its member states and the protection of human rights in Europe.[14] The Convention has changed over the time as the societies in which is applied have changed and developed. Although the text of the Convention has not changed, its scope and interpretation has evolved over the years.[15] The flexibility and adaptability of the Convention make it efficient and useful legislation even 65 years after it has been drafted.

Human rights are seen as a special part of law and international law. Although human rights are talked and discussed a lot, they still have characteristics which may differ strongly from other international treaties. Human rights represent legal frames in which moral and ethical questions are constantly asked. Human rights are, however, more than just legal framework which has a lot of connections to morally and socially important questions. Marie-Benedicte Dembour introduces in her research four different schools of thoughts which illustrate how differently human rights can be seen, understood, and used. The schools of thoughts vary from natural perspective to

[11] Ovey and White, *The European Convention on Human Rights*, 4th edition, Oxford University Press, 2006, p. 4.
[12] Ovey and White, 2006, p. 3.
[13] George Letsas, *Theory of Interpretation of the European Convention on Human Rights,* Oxford University Press, 2007, pp. 18-19.
[14] Ovey and White, p. 4.
[15] E.g. in Pellonpää, M., Gullans, M., Pölönen, P., Tapanila, A., *Euroopan Ihmisoikeussopimus,* Talentum, 2012, pp. 285- 289.

agreed idea of human rights, and from discussed power to activist perspective.[16] George Letsas, on the other hand, reminds that not all human rights carry the moral and normative role in the same way, and that there is different normative situation in each separate case. Therefore we need to be cautious when relying on the normative argumentation through human rights. [17]

The idea, structure, and understanding of human rights are nothing but clear: and still, human rights are many times treated as something which is "obviously moral" or has already a ethical consideration in it.[18] For this reason the study of ECtHR (and human rights in general) provides an interesting ground to study the connection of legislation and assisted reproduction. ECtHR is one of the most developed court of human rights in the world, and very important factor in the development of European legal sphere.[19]

The subject of this study – ART and MAR – is something the drafters of ECHR and other human rights treaties probably did not have in mind in 1950's. Still, these are some of the questions ECHR and ECtHR must reply as they are part of the current societies and part of the sphere human rights operates in. Critical analysis of the rulings of ECtHR helps not only to understand ECHR as such, but also provides information of socially constructed values.

1.3. Previous Research of MAR and ART

Human rights and biosciences have been studied by various different scholars, and from various different perspectives. In this section an overview of different perspectives and approaches are introduced in order to provide information of the research field. MAR and ART's various different connection and links make the presentation quite extensive. The previous research have been decided to introduce in-depth for two different reasons: first it provides a solid ground for understanding legal and socio-legal aspects of MAR and ART in deeper way. Second, by introducing previous research well, this study can be located to the research field which is multidimensional and interdisciplinary.

Previous research affecting to this study can be roughly divided into research of research of biotechnologies (e.g. Pottage), research of human rights and bioethics (e.g. Freeman, Ashcroft), research of law and MAR/ART (e.g. O'Connell and Grevers, Murphy and Ó Cuinn, Boussard), and feminist research of reproductive rights (e.g. Mullaly, Ginsburg, Rapp, and Wolf).

[16] Dembour, M-B, "What Are Human Rights? Four Schools of Thought", Human Rights Quarterly, Vol. 32, 2010, pp. 1-20.
[17] Letsas, 2007, p. 23.
[18] It reads, for instance, in the preamble of the International Covenant on Civil and Political Rights (ICCPR) that "these rights (of ICCPR) derive from the inherent dignity of the human person". The basis for human rights is found from the mere existence of human being. As such, they create one of the most powerful base of justification for human rights – but also make a claim of knowing what those rights are, and how they should be achieved.
[19] Smith, R. *International Human Rights*, 5th Edition, Oxford University Press, 2012, p. 96-97.

These research fields are partly overlapping, and many mentioned articles use interdisciplinary approaches and multidisciplinary argumentation in their texts. The division below has been chosen to systematise the presentation of the research field and make it easier to grasp different approaches the scholars have for MAR and ART.

Biotechnology

Alain Pottage discusses biotechnology's social and legal perspectives from more philosophical perspectives than other scholars.[20] Pottage refers to Habermas and Foucault when arguing on possible issues and problematic aspects of new biotechnologies. Pottage argues that Habermas divides (human) "made" and (naturally) "grown" subjects, and that in the case of biotechnology the division is not anymore clear.[21] In legal structures the organic has been separated from the manufactured, and new technologies challenge this division. Pottage discusses also about Michel Foucault's presentation of biopower, which proposes that "the action of norms replaces the judicial system of law as the code and language of power"[22] when it comes to biotechnical subjects. Pottage notes that in the field of biotechnology lawyers are in partly unknown territory, as biotechnology is in the crossroads of legal and scientific questions.[23]

Similar ideas of biotechnology as a multidisciplinary field can be found from other researchers as well. Therese Murphy and Gearoid O Cuinn discuss the "biocitizenship" and human rights in their article[24] and note, that laws regulation new health technologies (NHT) are not made only by lawyers. Murphy and O Cuinn argue that especially in the field of NHT law is not only used and understood by various different professionals (also outside of legal professions), but also produced outside the legal framework.[25] They note that information which is usually produced about human rights, MAR, and ART is quite one-sided, and different approaches would benefit the research of the connections of human rights, MAR, and ART.[26]

Human rights and Medically Assisted Reproduction

While Murphy and O Cuinn argue that different methods could bring more information about human rights and reproductive rights, Helena Boussard argues that seeing reproductive rights both

[20] Pottage, A. "The Socio-Legal Implications of New Biotechnologies", The Annual Review of Law and Social Sciences, Vol. 3, 2007.
[21] Pottage, 2007, p. 323.
[22] Ewald about Foucalt in Pottage, 2007, p. 331.
[23] Pottage, 2007, p. 322-323.
[24] Murphy, T. and O Cuinn, G. "Taking Technology Seriously: STS as Human Rights Method" in Flear, M, Farrell, A-M. Hervey, T & Murphy, T. (Eds.*), European Law and New Health Technologies*, Oxford University Press, 2013.
[25] Murphy and O Cuinn, 2013, p.307-308.
[26] Murphy and O Cuinn, 2013, p. 289.

as individual and collective rights could bring more clarity to the subject.[27] Boussard notes that MAR and ART are not only individual issues, but they have also strong collective aspect in them. Boussard explains the approach from genetic perspectives by noting that genetic issues are not just individual issues, but familial issues.[28] Boussard argues that because, in wide sense, genetics are shared with all there is a collective interest towards them. Genetics have highly predictive power in case of health and identity and this justifies the group interest in genetic research issues.[29] There is, of course, also the individual perspective on genetic research and Boussard does not underestimate it. However, the overall argumentation tends to emphasise the individual perspectives and Boussard provides discussion of the collective perspective of the issue. She also notes that the perspective depends partly on the field of research: human rights tend to value the individual, while biomedicine values the human body.[30]

Boussard notes that human rights were not designed to protect common good as such.[31] Human rights are seen as freedom-rights in the area of biomedicine, and are supposed to protect individuals' physical integrity – on the other hand, human rights may work also as claim rights, as everyone should be able to enjoy the benefits of science.[32] Boussard sees that human rights are now expanding to the new area, namely biomedicine and genetic practises. The situation creates unique regulatory context, with ethical and legal instruments involved. [33]

Michael Freeman and Richard Ashcroft have both studied the relation of bioethics and human rights as well, and share some of the ideas with Boussard when it comes to the tension between biomedicine, ethics, and human rights. Ashcroft goes as far as calling the relation of human rights and bioethics as "troubled" one.[34] Freeman, on the other hand, notes that although human rights and bioethics have developed around the same time and even share some of the starting points together, they have been quite separate for a long period of time.[35] This division has been treated quite differently by the authors. Freeman notes in his article that there is a globalisation going on in the area of health law, and human rights' perspective is therefore needed in the area of

[27] Boussard, H. "Individual Human Rights in Genetic Research: Blurring the Line Between Individual and Collective Interests" in Murphy, T. (ed.), *New Technologies and Human Rights*, Oxford University Press, 2009.
[28] Boussard, 2009, p. 260.
[29] Boussard, 2009, pp. 247-248.
[30] Boussard, 2009, p. 246.
[31] Boussard, 2009, p. 271.
[32] Boussard, 2009, p. 248.
[33] Buossard, 2009, p. 271.
[34] Ashcroft, R. "The Troubled Relationship Between Bioethics and Human Rights" in Freeman, M. (ed.), *Law and Bioethics*, Oxford University Press, 2008.
[35] Freeman, M. "Law, Human Rights, and the Bioethical Discourse" Freeman, M. (ed.), *Law and Bioethics*, Oxford University Press, 2008.

health legislation.[36] Ashcroft focuses in his article to the critique human rights has for bioethics and other way around. Ashcroft notes that much of the tension between human rights and bioethics is created because of the different needs of stability. Human rights are flexible and normatively "open-ended". Therefore they work quite well in the global arena, but are not as stable as bioethicists would hope.[37]

Overall, the perspectives mentioned above show the multidisciplinary field of biotechnology and human rights. As it can be seen, there is a strong focus on technological development, and human rights have been tied to that development quite strongly. Philosophical notions have been introduced as well, although they are many times not in the very centre of the research, but used more as a supporting methods and notions.

Legal frames of MAR and ART

On top of already presented perspectives, some of the authors have also analysed more the current legal frameworks, and social aspects of current legislation. This has been done especially by Rory O'Connell and Sjef Gevers[38], and Mark Flear et al.[39] Both of their articles aim to describe and analyse the way new heath technologies are seen and treated in European legal frameworks. O'Connell and Gevers focus on Council of Europe and ART, and describe five different aspects which describe the approach Council of Europe has for ART. Authors see that the approach has a) multiple layers which recognise local, national, international, and EU-specific aspects, b) flexibility and variety, which can be seen from the cases of ECtHR, c) framed through human rights, meaning that human rights give the minimum for ART, and provide information of what needs to be addressed in national legislation, d) showed difference of Oviedo Convention and ECHR when it comes to the meaning of work "dignity" in contexts of these treaties, and e) encouraged the public debate about human rights and ART.[40]

While O'Connell and Gevers focus on Council of Europe's perspective in ART, Flear et al. take wider approach and describe features of European Law in context of NHT. Authors see that there are four (interlinked) features which affect on European legal features: a) markets (and the fact that NHT market is not traditional consumer led market, but that customers are actually

[36] Freeman, 2008, p. 109.
[37] Ashcroft, 2008, p. 42.
[38] O'Connell, R. and Gevers, S. "Fixed Points in a Changing Age? The Council of Europe, Human Rights, and the Regulation of New Health Technologies" in Flear, M, Farrell, A-M. Hervey, T & Murphy, T. (Eds.), European Law and New Health Technologies, Oxford University Press, 2013.
[39] Flear, M. et al. " A European Law of New Health Technologies" in Flear, M, Farrell, A-M. Hervey, T & Murphy, T. (Eds.), European Law and New Health Technologies, Oxford University Press, 2013.
[40] O'Connell and Gevers, 2013, p. 69.

national health systems),[41] b) risk (and law as regulating risks in connection to NHT),[42] c) human rights (treating human rights as the bridge between theoretical and emotional),[43] and d) ethics (which the authors see as "supportive" notion to other features)[44]. The authors see that each of the features bring something to the European legislation: market feature brings efficiency, risk features bring safety, human rights bring freedom and dignity, and ethics bring freedom, dignity, justice, and fundamental morality.[45]

Flear et al. also note that when it comes to the NHT, what is seen as "new" health technology is not necessarily so much about science as such, but about human perception.[46] By this the authors describe, again, one aspect of the multidisciplinary field of human rights and developing biotechnology: NHT are not affected only by scientific, legal, social, economical, or ethical facts, but by combinations of all of these. Murphy and O Cuinn note in their analysis that time plays also an important role when "allowed" or "consented" practises are defined in European sphere.[47]

Feminist perspectives on medically assisted reproduction

Reproductive rights are in the centre of feminist research field as well. Reproductive rights have been analysed from international perspective (e.g. Waldby and Cooper;[48] Ginsburg and Rapp[49]) and from regional perspectives (e.g. Ginsburg's study of Romania;[50] Hole's study of Poland;[51] and Mullaly's study of Ireland[52]). The studies have been conducted from various different perspective: e.g. from political, legal, cultural, and ethical approaches can be found from feminist research of reproductive rights.

Catherine Waldby and Melinda Cooper note that medicalisation of reproduction have affected largely to the way reproduction is treated as a part of societies.[53] "Reproductive revolution"[54] did change the way reproductive issue were seen in some societies, but other social issues, events, and changes have affected to the changes as well. Siobhan Mullaly argues that Irish

[41] Flear et al., 2013, pp. 396-398.
[42] Flear et al., 2013, pp. 398-400.
[43] Flear et al., 2013, pp. 400-403.
[44] Flear et al., 2013, pp. 403-406.
[45] Flear at al, 2013, p. 411.
[46] Flear et al. 2013, 390.
[47] Murphy and O Cuinn, 2013, p. 296.
[48] Waldby, C and Cooper, M. "The Biopolitics of Reproduction", Australian Feminist Studies, Vol 23:55, 2008.
[49] Ginsburg, F. and Rapp, R. "The Politics of Reproduction", The Annual Review of Anthropology, Vol. 20, 1991.
[50] Ginsburg, F. "The Politics of Reproduction in Ceausescu's Romania: A Case Study in Political Culture", East European Politics and Societies, Vol. 6:3, 1992.
[51] Hole, J.P. "The Purest Democrat: Fetal Citizenship and Subjectivity in the Construction of Democracy in Poland", Signs, Vol. 29:3, 2004.
[52] Mullaly, 2005.
[53] Waldby and Cooper, 2008, p.330.
[54] Robertson, 1994, p. 4

abortion policies have been kept as they are because the prohibition of abortion became a part of the national identity: Catholic Irish values divided the nation from Protestant England.[55] In Romania, "re-traditionalization" (as a national and political policy) changed the reproductive sphere in the state.[56] Political agenda affected and changed the sphere of reproductive rights.[57] These changes happened already before the wider medicalisation or revolutionary changes in the sphere of ART.

Feminist bioethical perspectives, on the other hand, widen the feminist discussion of reproductive issues from political and legal perspectives to more ethical direction. Reproductive issues have an unique role in the feminist bioethical research because, as Susan Wolf claims, these issues affect women first and most.[58] It has to be noted, however, that feminist bioethics is not interested in only reproductive issues, but medical field as whole.[59] Bioethical field covers all possible ethical questions raised in the medical and health care field. Feminist bioethics works and observes the whole field as well.

This very short summary shows that reproductive issues have been studied widely by feminist scholars. Their approaches to reproductive issues differ greatly: while other focus on political aspect of reproduction[60], other focus on nationalism and cultural perspectives[61]. Feminist legal research of reproductive rights[62] as well as ethical consideration[63] can be found from the feminist research field of reproductive issues. The common ground for all of mentioned researches is that they take gender into account in their researches.

Although MAR and ART are only one part of the discussion, it is important to link the research to the studies of reproductive issues in general. Reproductive issues have been politicised in many occasions, and they have cultural and social importance. MAR is not outside of this political, legal, ethical, and cultural importance, but also very much in the centre of that discussion. Multidisciplinary approach to reproductive issues inside feminist research shows – in similar way than previous discussion of biotechnology and human rights – that MAR and ART have connections to multiple areas of the society. They are also very much issues in which gendered power relations may become visible, as reproduction has been, as shown above, linked to political and nationalistic agendas.

[55] Mullaly, 2005, p. 82-84.
[56] Ginsburg, 1992, p.400.
[57] Ginsburg, 1992, p. 417.
[58] Wolf, S.M. *Feminism and Bioethics: Beyond Reproduction*, Oxford University Press, 1996, p. 12.
[59] Wolf, 1996, pp. 4-5, 7.
[60] Ginsburg, 1992.
[61] Mullaly, 2005.
[62] Hole, 2004.
[63] Wolf, 1996.

Location of this study

Most of the mentioned researches focus on wider area of study than this study will do. Instead of talking about biotechnology as whole, the focus in this study will be only on assisted reproductive technologies. ECHR will be in the centre of this study, and other European, national, or international legislation will not be analysed. ECtHR's cases are not used only as supportive documents, but this study uses the cases to analyse ECHR and ECtHR. This study will also focus only on medically assisted reproduction and its technologies, and does not address reproductive rights in wider sense.

What this study will try to do is to take into account wider scope of cases than other researchers have done: for instance, O'Connell and Gevers studied only cases of *Evans* and *Dickson* in their analysis, and Murphy and O Cuinn mention only *Evans* and *S.H. and others* cases. So far, the study which analyses mainly the case-law of ECtHR in connection to MAR and ART has not been done. Although many scholars have used the cases to support their analysis, the cases have not been systematically studied together to create overall frames of ECHR in the context of MAR and ART. This study aims to (in its first part of the analysis) do exactly that. This study will also focus on both, individual perspective of the issue (by focusing on MAR) and biotechnology as wider social practise (by focusing on ART) as these issues are highly interlinked and affect to each other.

Feminist legal analysis, which will be applied in the second part of the analysis, creates the ground for socio-legal analysis of the cases. Social values – which can also be gendered[64]– will be examined and discussed. When it comes to feminist research field of reproductive issues, this study focuses only on assisted reproduction and its technology. Although this study observes ART and MAR internationally, the scope is also limited to analyse only ECHR and its cases of MAR and ART. Used approaches to the issue are legal and socio-legal perspectives.

1.4. Main Concepts and Terms

Assisted Reproductive Technologies and Medically Assisted Reproduction

In this study, assisted reproductive technology and medically assisted reproduction are both analysed and discussed. Terminology in the field of ART and MAR is not entirely settled internationally so the terms are explained and discussed shortly in this section. The terms refer to same practises but their approach to assisted reproduction is a bit different.

World Health Organisation (WHO) defines ART as: "*all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of*

[64] Wolf, 1996, p. 8; Fletcher, R. "Feminist Legal Theory" in Banakar, R. and Travers, M. (eds.), *An Introduction to Law and Social Theory*, Hart Publishing, available from: SSRN e-book library (post-print version), 2002, p. 7.

establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor."[65]

MAR is defined as following by WHO: "*reproduction brought about through ovulation induction, controlled ovarian stimulation, ovulation triggering, ART procedures, and intrauterine, intracervical, and intravaginal insemination with semen of husband/partner or donor."*[66]

Although the terms are highly overlapping the ART refers to "all treatments and procedures" while MAR focuses more on reproduction through women's body. This division is also visible in the wording when referring to male partner in reproduction: in definition of ART the definition refers to "woman's partner or sperm donor" and in the definition of MAR the text refers to "husband/partner or donor". Although the division is quite small, there is an important approach difference with ART being more focused on medical procedures and MAR more focused on reproduction from women's and individuals perspective.

This difference in approach is also visible in this study. Assisted reproduction and used technology are studied to analyse wider technological and state-level approach to ART but also more individual perspective of MAR. Assisted reproductive technologies are studied in order to understand technological side of new reproductive practises. Medically assisted reproduction is studied to get better understanding of reproductive rights in more individual level. In other words, the approach with ART is more focused on wider public perspective on reproduction and human rights, while MAR focuses on the relation of human rights and individual.

WHO's definitions are based on medical understanding of MAR and ART. The definitions have been chosen to this study, however, because they present the key elements of what ART and MAR mean: they are, in the end, medical and technological procedures. Although this study does not focus on medical side of assisted reproduction it seemed appropriate to define the term first through medical definition.

As this study focuses on legal and social perspectives of assisted reproduction the discussion takes into account wider circle of issues than the WHO's definitions define. Instead of

[65] Zegers-Hochschild, F., Adamson, G.D., de Mouzon, J., Ishihara, O., Mansour, R., Nygren, K., Sullivan, E., and Vanderpoel, S., for ICMART and WHO, "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology", Fertility and Sterility, Vol, 92:5, 2009, p. 1521.
[66] Zegers-Hochschild et al., 2009, p. 1522.

focusing only on medical procedure as such (as the definitions do) legal regulations and social context in which assisted reproduction is made are taken into account. This choice reflects the fact that MAR and ART are not created and practised in isolation but individual choices and collective goals affect on medical practises of ART and MAR.

Human rights are seen and treated many times as the rights of individual. However, the wider social aspects and effects are taken into account in the actions of the states and in the judgments of ECtHR. Therefore these both, collective and individual aspects, are studied and ART and MAR as terms and study subjects reflect this way of analysis.

In Vitro and In Vivo Fertilisation

"In vitro" fertilisation (IVF) refers to ART in which ova and sperm are combined *in vitro,* outside the body, and transferred then to the uterus of a woman. The used gamete can be placed into fallopian tubes (inside a woman) in different stages of fertilisation.[67] In "traditional" IVF the fertilisation happens outside the body but, for instance, in gamete intrafallopian transfer (GIFT) the sperm and ovum is just mixed together and placed directly into fallopian tubes[68]. Zygote intrafallopian transfer (ZIFT) is a practise between these two, as "pre-embryos" (which are zygotes, fertilised gametes) are transferred into the body.[69]

In Vivo fertilisation refers to fertilisation which happens inside the body. The term can refer to assisted reproduction which happens inside the body of a mother or fertilisation without medical assistance.

Homologous and Heterologous Fertilisation

Homologous and heterologous fertilisation methods refer to the used genetic origin of ovum and sperm. In the homologous fertilisation method there are no other parties in the fertilisation process than the ones who are trying to conceive the child – in other words, used genetics are coming from the couple who wants the child (gametes come from the couple). In heterologous fertilisation, used genetic material is coming from someone else than the couple/ individual who wants to have a child. In heterologous technique ovum, sperm, or both can be given by a donor (gametes come from external sources).[70]

[67] Robertson, 1994, p. 9.
[68] Zegers-Hochschild et al., 2009, p. 1522.
[69] Zegers-Hochschild et al., 2009, pp. 1523-1524.
[70] ECtHR (Grand Chamber), S.H. and others v. Austria, 57813/00, 2011, para. 21.

1.5. Research Question

As noted previously, this study focuses on legal and socio-legal perspectives of ART and MAR in the context of ECHR. The research questions reflect the division of different approaches to the subject. In the first part of the analysis the question focuses on defining the legal field of ART/MAR under ECHR:

What are the legal frames of ECHR in the issues of ART and MAR?

In the second part of the analysis the cases of ECtHR will be examined to study possible underlying values and social elements leading the reasoning and judgment. The main question of the second part of the analysis is:

What kind of value-based reasoning can be found from the studied cases?

The main question will be examined by seeking answers for three sub-questions. The sub-questions reflect some key elements in which social values could be visible:

How are motherhood and fatherhood defined in the studied cases?
How does ECtHR regulate family in studied cases, and how does the Court justify the regulation?
How is equality defined and applied in family planning issues by the Court in the studied cases?

1.6. Theoretical Framework

In this section theoretical frames in which presented research questions are analysed will be introduced. Theoretical frames reflect the double approach (legal and socio-legal) of this study and help to understand the context in which the questions have been decided and in which they will be analysed.

Doctrinal legal study

The "traditional" legal studies understand law as an autonomous and official system of rules.[71] The main aim of the researcher in this kind of legal examination is to analyse and systematise legislation. Law is seen as full, independent set of rules which can be examined and understood by its own terms. Although the relations of law with other subjects is recognised, doctrinal studies of law does not place these relations to the centre of legal studies.

Hutchinson describes Van Gestel and Micklitz's description of three main features of doctrinal understanding of law. First, when it comes to research material, doctrinal legal studies use official (legal) documents, legislation, and official regulations as a main source of information.

[71] Alvessalo, A. and Ervasti, K, *Oikeus yhteiskunnassa – näkökulmia oikeussosiologiaan,* Edilex Libri, 2006, p. 1.

Second, law itself is understood as a system of rules which creates coherent entity. This entity is partly built and partly understood by legal doctrines and theories. Third, when an individual case is analysed and interpreted by this coherent set of rules, the interpretation is done in a way that the coherency of legislation is not compromised or breached. In other words, the case is placed to the language and limits of law, as legislation is assumed to be full and coherent system of rules.[72]

The presumption of coherency provides a basis for fuller interpretation of law, case-law, and regulations than in the case coherency is not presumed. In this study, the doctrinal understanding of law is used to provide systematic understanding of MAR and ART in the context of ECHR. Although textual understanding of ECHR and case-law do not provide information of every possible case which could happen in the field of MAR and ART, the presumption of law's (ECHR's) coherency is used to systematise ECHR in connection to ART and MAR. Doctrinal approach is used in the first part of the analysis while the second part of the analysis has socio-legal approach.

Socio-legal studies

Socio-legal studies place law into social context and focus on researching the relations and tensions between law and other areas of societies. Law is seen as a part of society and law is seen to be in interaction with other areas of societies. Socio-legal studies can be researched by various different kinds of methods. Whatever the research uses the methods of social or legal studies, the research subject is connected to the understanding of law as a part of society – or sociological factors as a part of law and its construction.

There are many ways to distinct the different ways and theories within studies of social and legal subject. Banakar offers a distinction between sociology of law, law and society, sociological jurisprudence and socio-legal studies.[73] Banakar's division is based on the idea that some methods and approaches are more based on tools used in the sociological analysis (first two concepts above), while others are more based on methods used in traditional legal analysis (two latter concepts).[74]

Alvessalo, on the other hand, focuses on the tension socio-legal studies may have between legal and social sciences. She notes that – depending on whom you ask – socio-legal studies may be seen as "too" social sciences or "too" legally approached. This tension, however,

[72] Hutchinson, T. "Doctrinal Research: Researching the jury" in Burton, M., Watkins, D. (eds.), *Research Methods in Law*, Routledge, 2013, p. 10.
[73] Banakar, R. *Normativity in Legal Sociology*, Springer International Publishing, 2015, p. 48.
[74] Banakar, 2015, p. 42.

also reflects how important good interdisciplinary research is in the area of law and society. [75] Alvessalo describes socio-legal studies as a subject which observes law in social context and in relation with other areas of life. Socio-legal studies explain and critically observe legislation instead of assuming internal coherency in law.[76] Coherency or objectivity of law are not sought or "forced" in socio-legal studies, and possible inconsistencies in law are accepted as a part of legislation.

Law – as we understand it currently – is built in a way that it functions fully only when there is this assumption of neutrality. If one group is favoured over another without a reason, the legitimacy of the law is ruined.[77] Law develops through dominant powers of the society[78], and between those who have access to power. Law is also a source of power – but as Romero claims, law is many times "the embodiment of dominant social values", and therefore it rather follows than leads the development in societies.[79] Law includes a notion of something which is bigger than an individual or a single situation: law creates a common base for all, with shared rights and obligations. Law's promise of equality is exactly what gives it its power. Without the promise of equality there would be no reason to follow law.

The main problem is not the idea of law's objectivity or neutrality as such, but problems may arise when (subjective) law achieves the role of objective law.[80] As Mansell et al. note, the law has a capacity to present itself as neutral, although it might not be it.[81] Aims for objectivity are desirable, but the aim should not be used as a synonym for the outcome of law. This illusion of objectivity may really well be the justification for the legitimacy of law – but at the same time it gives power to subjective and dominant values. Subjectively built laws do not take into account possible obstacles and difficulties the law may set to certain individuals or people, as there is the presumption of objectivity. I am not claiming that this is done (necessarily) on purpose by legislator or judge who sets judgments: but that when the legislator or judge has done their best to aim for the objectivity, the outcome of ruling or law is not under similar scrutiny anymore than the draft legislation.

It is good to note that socio-legal studies do not, necessarily, want to replace traditional ideas and methods which are used in legal, social, and sociological studies but provide

[75] Alvessalo and Ervasti, 2006, p. 5.
[76] Alvessalo and Ervasti, 2006, p. 7.
[77] Hunter, 2013, p. 2.
[78] Romero, A. "Methodological Descriptions: "Feminist" and "Queer" Legal Theories" in Fineman, M.A., Jakcson, J.E., Romero, A. (eds.), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations*, Routledge, 2009, p. 186.
[79] Romero, 2009, p. 186.
[80] Fletcher, 2002, pp. 2-.
[81] Mansell, W., Meteyard, B., Thomson, A. *A Critical Introduction to Law*, 3rd edition, Cavendish Publishing, 2004, preface, vi.

wider and more interdisciplinary approach to social, sociological, and legal studies. Socio-legal theory does not discharge other lines of thinking, but considers alternative models and ways to observes and study law and legislation.[82] This way of thinking is also in the centre of this study: instead of limiting the study to only doctrinal or socio-legal study, the study has interaction between doctrinal and socio-legal approaches.

As noted, there are many different ways to do socio-legal analysis. In this study feminist legal theory will be used as a theoretical basis and partly as an analytical tool to analyse the cases from socio-legal aspects. In the following section feminist legal theory will be introduced and its connection to socio-legal study in general will be discussed.

Feminist Legal Theory

Feminist legal theory – like socio-legal studies in general – analyse the relation law and other parts of the societies. As noted in the previous section, law has a presumption of neutrality. Hunter notes that law is built also on the assumption of non-gendered legal subject – and this assumption fails to acknowledge the effect of gender, or recognise gendered realities people are living in.[83] Gender's effects in a society may also reflect to legislation.[84] Feminist legal theory analyses ways gender is seen and defined in legislation, and the legislation's effects in other areas of societies.

Feminist legal theory is a wide field of research. In general, the common feature of feminist research is that it analyses gendered power relations and possible biased practises. Wolf argues that "(i)n law, central task of feminist work have been to uncover gender bias in the law as written and as applied; to show how gender bias is a means of domination; to debate the preferability of equal treatment versus special treatment for women; to discover the way gender and gender bias are manifested in the language and constructs law; to challenge the traditional distinction between public and private spheres..."[85] Mansell et al. noted, on the other hand, that feminist perspective is one of the approaches on law which may help to show peculiarities in our societies as it observes legislation from different perspective than traditional legal research.[86]

The claimed objectivity of law is questioned by feminist thought, and especially the issues connected to gender and gender's role in realities which law regulates are in the centre of observation. Ruth Fletcher argues that law became a feminist issue when law presented obvious

[82] Schifft in Alvessalo and Ervasti, 2006, p. 1.
[83] Hunter, 2013, p. 207.
[84] Hunter, R. "The Gendered "Socio" in Socio-Legal Studies" in Feenan, D. (ed.), *Exploring the "Socio" of Socio-Legal Studies*, Palgrave, 2013, p. 206.
[85] Wolf, 1996, p. 9.
[86] Mansell et al, 2004, preface, vi.

barriers to free and equal participation of women.[87] Fletcher introduces three different paradigms which have been widely studied in feminist legal studies. These paradigms aim to study and analyse the law from socio-legal perspectives and broaden the understanding of law's role and influence in societies.

The paradigms Fletcher introduces are sex and gender, private and public, and sameness and difference.[88] When it comes to the paradigm of sex and gender, Fletcher makes a distinction of biological and social status of an individual.[89] Feminist legal theory is interested in how womanhood is defined in particular context, and by which characteristics or notions the definition is made.[90] In this study, ECtHR's reasoning in studied cases is observed to analyse the way the Court defines motherhood and fatherhood in the cases.

Discussion of private and public is also an important part of feminist legal theory. Fletcher notes that in feminist analyses these realms have not always been used in consistent way.[91] In general it can be said that in feminist studies "private" has referred to domestic and familial sphere, while "public" refers to the sphere outside of domestic and familial.[92] Fletcher notes that instead of addressing private and public sphere as such, the analysis can be also done through norms related to private and public. "By identifying public and private in terms of the normative expectations they impose, feminist critique can develop a more complex account of the relationship between public and private."[93] In this study, special focus is given to the regulations and justifications of regulating family under ECHR. The key question is not *whatever* family is regulated, but *how* family is regulated[94] and the ways the Court reasons family regulation.

With sameness and difference Fletcher notes that equality should not be understood as sameness because similar kind of treatment does not necessarily provide equality.[95] In the context of law the problem comes with conflicts in "law in books" and "law in action". Even if something would look as equality or similar treatment on paper, the issues in reality may differ greatly from presented facts. If equality is tried to be achieved mainly by means of sameness the system will fall into favouring small set of ways and means. Other point Fletcher makes about equality is that difference should not automatically mean hierarchy.[96] Even if people, issues, or solutions are

[87] Fletcher, 2002, p. 1.
[88] Fletcher, 2002. p. 4.
[89] Flecther, 2002, p. 8.
[90] Fletcher, 2002, p. 7.
[91] Fletcher, 2002, p. 12.
[92] Fletcher, 2002, p. 12.
[93] Flethcer, 2002, p. 16.
[94] Fletcher, 2002, p. 16.
[95] Fletcher, 2002, p. 19.
[96] Fletcher, 2002, p. 24.

different there is not automatically better or worse person, issue, or solution. Unnecessary hierarchy may increase inequality, and works as a way to support the dominant social values which are already embedded into legislation.

In the scope of this paper ECtHR's idea of equality will be studied in connection to family planning. ART and MAR are highly linked to forming a family and planning one's family life. By observing the values which affect on the Court's understanding of equality in planning a family possible sameness or difference in treatment can be studied. The analysis will also observe possible hierarchies between differences.

1.7. Methodology

In the previous sections the information for the study has been introduced. Previous research, research questions of this study, main concepts, and theoretical frames for the study have been introduced and discussed. In this section the methodological decisions for the study are explained. The used material is shortly commented with an explanation of how the material is analysed in this study.

Methodologically the study has been separated into two different parts. This is done in order to find the best and the most suitable methodological ways to analyse ART and MAR from both, doctrinal and socio-legal perspectives. Studied material (the cases of ECtHR) was same in both parts. Studied material is from the official webpage of the Council of Europe (CoE). The main material – the cases of ECtHR – has been chosen based on the cases presented in the fact sheet of CoE.

The fact sheets of the cases of ECtHR present thematically short summaries of the cases related to the given theme. Each fact sheet provides information of different theme, for instance about domestic violence, right to privacy, data protection cases, and so on. In this case, the fact sheet called "reproductive rights"[97] was evaluated. Based on the summaries of the fact sheet, the most relevant cases were read entirely. After the chosen cases were read, the cases were narrowed even more to find out which cases provided most information about MAR ant ART. The facts, which were seen as indicating the information of MAR and ART were a) the issue the case dealt with and b) the reasoning of the Court. In other words, the framing of the legal issue in the case[98], and the way ECtHR reasoned its judgments[99] were the main features to define if a case had information about MAR and ART. The selection narrowed following cases to this study: Evans v.

[97] CoE, "Reproductive Rights" in https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf, (accessed 17.05.2018), 2018.
[98] Did the case and legal problem deal with ART or MAR?
[99] Did ECtHR justify its reasoning with, through, or by rights and obligations related to ART or MAR?

UK, Dickson v. UK, S.H. and others v. Austria, Parrillo v. Italy, Costa and Pavan v. Italy, Nedescu v. Romania, and Knecht v. Romania.

In the first part of the analysis doctrinal research of the cases is done. Doctrinal approach interprets and understands legislation through official documents and legal texts. Doctrinal research method is therefore greatly based on textual interpretative method.[100] Law and case-law are analysed to understand and systematise current interpretation of MAR and ART in relation to ECHR. In the first part of the analysis CLEO-method[101] is used as it provides good ground to clarify the case-law. CLEO (Claim, Law, Evaluation, Outcome) is usually preferred in the law essays and exams[102] but as methodologically clear and useful way to exam legislation it provides good basis for this study as well. Although there was no "claim" as such, "claim" in this case is the need to define legal frames of ART and MAR under ECHR.

In the second part of the analysis the cases are studied based on the reasoning of the Court. Parties' argumentation and claims are used to support the analysis. By comparing the argumentation of the parties and the Court it can be observed with which arguments of the parties the Court agrees or disagrees with. Focus will be in the social values found in the argumentation, and in values' effect on judgments. Material for this analysis consists the texts of the cases, and information gotten from the first part of the analysis.

Feminist legal theory supports the analysis of possible risks and obstacles the Court's reasoning may bring to the achievement of neutral or objective understanding of ECHR. The theory has also been in important part when defining the research questions in the second part of the analysis. In this way, feminist legal theory has been used as an analytical tool to define what kind of questions can be and should be asked to research social and possibly gendered values in the judgments. The coherency of ECHR is not aimed, assumed, or created, and possible contradictions are pointed out and discussed.

In the second part human rights are connected and seen in relation with other parts of the society. Especially in the field of family and private life there can be many different approaches and ideas of how the relation between an individual and a state should be organised. Examination of "allowed" reasons and social values clarifies the standpoint of the Court in the matter of private and family life (and especially in connection to MAR and ART related issues).

It is important to note that as the studied texts are legal cases, the socio-legal analysis has also quite much legal terminology. The aim of the study is not to read the cases in out of their

[100] Alvessalo and Ervasti, 2006, p. 15.
[101] Strong, S.I., *How to Write Law Essays and Exams,* Oxford University Press, 4th Edition, 2014, p. 4.
[102] Strong, 2014, p. 4.

context but understand the texts from socio-legal perspective. In other words, it is acknowledged that the studied cases are case documents of the Court. The nature of the documents is recognised in the way the cases are analysed and dealt also in the socio-legal analysis.

To sum up, this study has two different analytical perspectives and a conclusion which discusses both parts of the analysis together. In the first part the cases are studied from doctrinal perspective. Case-law will be examined to interpret and understand the current legal frames of ECHR in connection to ART and MAR. In the second part of the analysis the content analysis of ECtHR's reasoning will be done to define social values which are found in the reasoning of the judgments. Feminist legal theory is used a theoretical background is the analysis, and the theory has motivated the research questions in the second part of the analysis. In the conclusion chapter the analyses are shortly summarised and discussed together.

1.8. Delimitations

In this section the limitations to the study are presented. In order to define and understand the scope of the study in the best possible way the limitations to the study are explained as well.

As noted before, ART, MAR and ECHR in the crossroads of many different subjects and fields of study. This study is built on legal and social perspectives of the issue. Wider discussion and analysis of MAR and ART's economical, medical, ethical or technical aspects have been excluded from this study. This has been done in order to narrow and limit the subject which otherwise would be very wide. This limitation also reflects the fact that this study focuses on legal and socio-legal aspects of the issue. Although these fields are highly related and depending on medical and technological development of ART and MAR the study will not analyse medical and technical development as such. It has been kept in mind that social and legal changes in the subject field are depending on other areas of science – and that this study can offer, even in its best – just one side of the issue.

When it comes to the selected cases of ECtHR it has to be noted that cases considering surrogacy has not been included in the study although surrogacy can be seen (at least by some definitions) as a MAR method. The cases of surrogacy in ECtHR have considered mostly the legal relation of child and their parents in case of surrogacy,[103] the validity of the surrogacy contract and the importance of biological ties with the child,[104] and, in general, the issues of international surrogacy.[105] Although some of the aspects in the cases do touch the subject matters

[103] ECtHR (Chamber), Mennesson and others v. France, 65192/11, 2014, and ECtHR (Chamber), Labasse v. France, 65941/11, 2014.
[104] ECtHR (Grand Chamber), Paradiso and Campanelli v. Italy, 25358/12, 2017.
[105] ECtHR, (Chamber), D. and others v. Belgium, 29176/13, 2014.

which are relevant in this research (e.g. the importance of the biological ties) the cases have been excluded because the legal sphere they operate in is very unique and different from other MAR methods. These, together with the limited scope of the study, are the main reasons surrogacy cases have not been analysed or included to the study.

The analysis of family regulations by ECtHR is limited to the situations connected to assisted reproduction. Family is regulated by many different means by the Court, and, for instance, deeper analysis of the development of same-sex couple's right to family life under art. 8 of ECHR could be studied to get better understanding of current interpretation of ECHR.[106] In this study the analysis of family regulation is limited to observe the cases of ART and MAR. This is done because of the limited scope of the study, and because the main focus is in MAR and ART, not in family relations in general. It is hoped, however, that even this limited analysis of regulations of family in connection to MAR and ART may clarify the ways ECtHR regulates and justifies the regulations of family.

In the legal sense this study has been limited to study the cases, legislation, and rulings of ECHR and ECtHR. It is acknowledged that in reality ECHR plays only one part of the legislative framework in which the decisions are made. National legislation, as well as globally agreed treaties and recommendations, and other human rights' conventions play roles as well when it comes to the legal and social issues of MAR and ART. This study will not provide "ready-to-go" answers for those who look solutions for ART and MAR connected issues in legal and social sense. The study focuses on small fracture in the wide legal field – and even to smaller section in the field of social studies.

This limitation has been chosen, however, to provide much needed information about the relation of ECHR and ART and MAR. The world is developing fast, and human rights have been and will play a role in the international politics and legal field. Human rights - and especially ECHR – play a big role in the development of Europe, and through legal decisions have effects on social level as well. The understanding and discussion of ECHR and MAR and ART is therefore needed: not only as a small part of legislation, or as a side note about moral perspective of the issue, but as a deeper understanding of the context and direction of European human rights and developing reproductive practises.

[106] E.g. in the case Schalk and Kopf v. Austria, (ECtHR, Chamber, 30141/04, 2010), paras. 93-95.

2. Doctrinal Analysis

2.1. Introduction of the Issue and Cases

This section of the analysis aims to define current legal frames of ECHR when it comes to the MAR and ART. The frames are studied and defined through articles of ECRH by the case-law of ECtHR.

In this section the studied cases are shortly introduced and in the following section the relevant legislation is presented. After this, the evaluation and analysis of the legislation will be done in connection to the case-law of ECtHR. ECtHR's cases reflect the current understanding of ECHR[107] and by analysing them in connection to ECHR's articles more stable and logical introduction of them can be made. In this way, the general principles guiding the interpretation and limitations of certain articles (e.g. allowed limitations) can be also taken into account.

It has to be noted that many of the introduced cases are complex issues with many different points. Therefore, the following introduction cannot be considered as full summary of the cases, but a collection of relevant points which take into account the aims of this particular study.

Following cases will be in the centre of the discussion and analysis: Evans v. UK, Dickson v. UK, S.H. and others v. Austria, Parrillo v. Italy, Costa and Pavan v. Italy, Nedescu v. Romania, and Knecht v. Romania. Some other cases will be mentioned as well, but the study focuses on analysing these cases.

Evans v. UK and Parrillo v. Italy are cases connected not only to MAR but to the status of embryos as well. In the case of *Evans*, the applicant claimed that her rights under ECHR were violated when she could not use her fertilised embryos after her ex-partner had withdrawn his consent to use the embryos they had created together.[108] The Court ruled that the states had wide margin of appreciation when it came to allowing IVF and deciding about its regulation.[109] The right to not become a parent is right just as the right to become a parent under art. 8 of ECHR.[110] Based on these reasons, the Court did not find a violation of art. 8 in the case.[111] ECtHR did not find violation of art. 2[112] or art. 14 in conjunction with art. 8[113] either.[114]

[107] As, it was noted in the case of Tyrer v. UK (ECtHR, 5856/72, 1978), para 31: (the Convention is a) "*living instrument which must be interpreted in the light of present-day conditions* "
[108] Evans v. UK, paras. 13-23.
[109] Evans v. UK, para. 82.
[110] Evans v. UK, para. 72.
[111] Evans v. UK, para. 92.
[112] States have wide margin of appreciation when it comes to the legal status of embryos, Evans v. UK, paras. 54,56.
[113] This was because in the case the claimed violation of art. 8 and violation of art. 14 in conjunction were "inextricably linked", and therefore, as there was no violation of art. 8, there could be no breach of art. 14 in conjunction with art. 8. Evans v. UK, para. 94.
[114] Evans v. UK, paras. 56, 96.

In the case of *Parrillo*, the applicant wanted to donate her embryos to the scientific research, but the national legislation prohibited the donation of embryos for scientific purposes. In the case ECtHR stated that there had been not a breach of art. 8 because Italy had not overstepped given margin of appreciation in the issue.[115] The Court also noted that the embryos cannot be understood as something which can be possessed, and are not therefore covered by the art 1 of the Protocol 1 of the ECHR.[116]

Nedescu v. Romania and Knecht v. Romania consider events in same fertility clinic in Romania. In both of the cases the applicants had had embryos obtained in the same clinic. The clinic became involved to criminal investigation and all genetic material was seized.[117] Both of the applicants claimed that their right to private and family life was breached.

In the case of Knecht v. Romania the applicant complained that the state had failed to transfer the embryos to another clinic, and this violated her rights under art. 8 of ECHR.[118] The Court found that the state had balanced the individual rights and collective goals in fair way. The state has worked in accordance with law in this case and was able to reason the interference of individual's private sphere, so there was no breach of art. 8.[119] The Court referred to the legitimate aim of protection of morals, health, and prevention of crime in the balancing factors which justified the interference in the case of *Knecht*.[120]

In Nedescu v. Romania the applicant complained not only about the impossibility to access embryos but the fact that judicial requests to access embryos were not follow by administrative authorities.[121] Court agreed with the claim, noting that the reason for the violation of art. 8 was the refusal of administrative authorities to transfer the embryos of the applicant to another clinic despite the orders of the judicial authorities.[122] The issue was not handled in accordance with the national law so there had been a breach of art. 8.[123]

The case of Dickson v. UK dealt with the question if long-term prisoners should have access to MAR, and by which regulations. In the case, the Court stated that UK had breached art. 8 because they had not provided efficient access to ART and MAR to a long-term prisoner who wanted to use the facilities with his wife.[124] ECtHR did not examine the applicability of art. 12

[115] Parrilo v. Italy, paras. 197-198.
[116] Parrillo v. Italy, paras. 215-216.
[117] ECtHR (Chamber), Nedescu v. Romania, 70035/10, 2018, paras. 6-11; ECtHR (Chamber), Knecht v. Romania, 10048/10, 2012, paras. 7-11.
[118] Knecht v. Romania, para. 51.
[119] Knecht, v. Romania, paras. 63-64.
[120] Knecht v. Romania, para. 57.
[121] Nedescu v. Romania, paras. 56-59.
[122] Nedescu v. Romania, paras. 50, 54, 71-72.
[123] Nedescu, v. Romania, paras. 85, 87.
[124] Dickson v. UK, paras. 82-85.

(which was also claimed to be breached by the applicant) as there were no separate issues raised by art. 12 (the Court state that everything was examined already under art. 8.).[125]

S.H. and others v. Austria considered the questions of different assisted reproductive technologies, and the applicants' (two couples) possibilities to access to these technologies under Austrian restrictions to use certain ART. One of the couples would have needed a donated sperm, and other couple needed donated ovum.[126]Austrian legislation prohibited the use of donated sperm or ovum for IVF.[127] In the case ECtHR concluded that art. 8 had not been violated because Austria had not overstepped the margin of appreciation it had about regulating IVF.[128] The Court noted, however, that there is raising consensus of allowing the use gamete donation in ART.[129]

Costa and Pavan v. Italy dealt with the couple who claimed their right to private and family life had been breached because they could not access ART which could help them to choose embryos which were not carriers of genetic disease (cystic fibrosis) they were both health carriers of.[130] In the case ECtHR found a violation of art. 8 and based its reasoning on the inconsistencies in the Italian legislation.[131]

2.2. Relevant Legislation and Concepts

2.2.1. Allowed Limitations to the Rights of ECHR

ECHR's articles from 8 till 11 include not only the named right, but also some restrictions to that right. The "allowed" restrictions – accommodation clauses[132] or express limitations[133] – provide possible limitations to the use of these rights. Certain prescribed conditions may allow the authors to interfere with the protected rights.[134] The reason for this can be found from the nature of the named rights (right to privacy and family life; freedom of thought, conscience, and religion; freedom of expression; and freedom of assembly and association)[135]. These rights are "particularly dynamic and variable concepts"[136]. Societies have different ways to deal with these rights, and the accommodation clauses create a sphere for the states to limit or restrict the rights as far as the interference does not "injure of the substance of the rights".[137]

[125] Dickson v. UK, para. 86.
[126] S.H. and others v. Austria, paras. 11-14.
[127] S.H. and others v. Austria, para. 14.
[128] S.H. and others v. Austria, paras. 115-116.
[129] S.H. and others v. Austria, paras. 117-118.
[130] Costa and Pavan v. Italy, para. 3.
[131] Costa and Pavan v. Italy, paras. 62-64, 71.
[132]Cameron, 2006, p. 104.
[133] Ovey and White, 2006, p. 220
[134] Ovey and White, 2006, p. 220.
[135] European Convention on Human Rights, articles 8-11.
[136] Cameron, 2006, p. 104.
[137] Belgian Linguistics case, 23.7.1967, A/6, p.32 in Cameron, 2006, p. 104.

Although the allowed limitations differ slightly between the articles of 8-11, the main idea of the allowed restrictions to the rights of ECHR is to provide public order, protect health, public safety, or morals in the state, or other mentioned aims in the articles.

In the case of articles which contain accommodation clauses, Cameron defines four different steps the Court has to take when it considers the possible breach of the article.

1) ECtHR must consider whatever complained action falls within the scope of the right mentioned in ECHR.

2) The Court must examine if state has acted according the allowed accommodation clauses (so, if there are some allowed restrictions for the article).

3) ECtHR must define if the breach has been in accordance with law. In this context "law" refers to national legislation (both statutes and common law) which has to be precise enough so that a person can know what they are expected to do to comply with the law.[138] In other words, in order for a state to justify interference to individual's rights, the interference (allowed restriction) must be made by law, and in accordance with law.[139]

4) ECtHR must decide if the breach was "necessary in a democratic society".[140] With this notion the Court refers to certain "pluralism, tolerance, and broadmindedness", as well as to flexibility when it comes to the actions and outcome in the scope of said articles of ECHR.[141] As Cameron explains it, "any restriction (to the right set in ECHR) must be proportionate to the public interest served..."[142]. These proportionate restrictions in the actions of the member-states can be called also the margin of appreciation the Court gives to the states in the cases. Margin of appreciation will be looked more detailed in the next section, as it is one of the most influential elements in the cases considering ART and MAR judgments.

To sum up, in order to find a breach of some action, the action must be in the scope of the said article of ECHR. It also has to either a) be without allowed accommodation clause, or b) the interference is not justified by law, or c) it is not necessary in a democratic society.

2.2.2. Margin of Appreciation

Margin of Appreciation, in the context of ECHR and ECtHR, is the scope or space the Court may give a state to fulfil its obligations under ECHR. By granting or ruling about the margin of appreciation in the case, ECtHR recognises and acknowledges that there are more than one way to follow ECHR and its rights and obligations. In other words, ECtHR recognises the flexibility which

[138] Cameron, 2006, pp. 105-106.
[139] Cameron, 2006, pp. 105-106.
[140] Cameron, 2006, p. 105.
[141] Cameron, 2006, p. 107.
[142] Cameron, 2006, p. 107.

is needed when it comes to the fulfilment of the rights under ECHR in different states, nations, and cultures.

Cameron, as noted previously, describes margin of appreciation as something which is "necessary in a democratic society".[143] He sees the margin of appreciation as one of the essential elements for the Court because it provides flexibility to the Court in the rulings of the cases. George Letsas notes, however, that this "freedom" and flexibility brought by the use of the margin of appreciation works also as a limitative power for the judicial reviews of the Court.[144] Letsas defines two different ways ECtHR is using the margin of appreciation in its judgments: substantive and structural.[145] These concepts of the margin of appreciation refer to two different reasons to use the margin in the cases. Although the term used is the same, the reasons for the use are quite different depending on the situation, argues Letsas.[146]

Substantive use of the margin of appreciation refers, according to Letsas, to those situations in which the relationship of individual's freedoms and collective goals is in the centre of the case. This tension between and individual and collective goals has political morality aspect in it. In this situation, interference of the rights of an individual can be justified based on the collective goals the interference protects.[147] The substantive use of the margin of appreciation refers therefore for the more "classical" proportionality reasons which were also introduced by Cameron.

Structural use of the margin of appreciation is based on the status of the Court as an international court. Letsas claims that ECtHR may use the margin of appreciation doctrine when the judicial review power of the Court should be somehow limited. This is based on the idea that national authorities are better placed to decide about the implementation of the rights of ECHR nationally than ECtHR itself. This is the case especially when there is no European consensus of certain practise.[148] This does not mean that the freedom of the states to decide about the implementation measures of ECHR is unlimited. It does mean that in certain cases in which various different practises across Europe can be found, the Court may use the doctrine of the margin of appreciation to give the states more and wider freedom to decide about the implementation measures than if there was no margin of appreciation.

[143] Cameron, 2006, p. 107.
[144] Letsas, G. "Two Concepts of the Margin of Appreciation", Oxford Journal of Legal Studies, Vol. 26:4, 2006, p. 721
[145] Letsas, 2006, p. 706.
[146] Letsas, 2006, p. 706.
[147] Letsas, 2006, pp. 709-710.
[148] Letsas, 2006, pp. 709-710.

2.2.3. European Convention on Human Rights

In this section the articles which have been claimed in the studied cases will be introduced. Article 8 of ECHR will be discussed first as the article is an article which have been claimed in all studied cases. After this other articles are presented in numerical order.

*"**Article 8: Right to 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."

Ovey and White describe the article 8 of ECHR as one of the most open-ended articles the Convention.[149] The article protects a) private life, b) family life, c) home, and d) correspondence.[150] The idea of privacy and family take different forms and models in different states, and, although the protection of human rights may be the overall aim in the member states, the ways and mean may differ widely.

When article 8 of ECHR is looked in systematic way, the right to private life and the right to family life can be separated. In both of these rights the positive obligation of the state (obligation to protect) and negative obligation of the state (obligation not to interfere) can be found. Negative and positive obligations can be also found to the rights individuals under the article 8: individuals have a right to the protected by the state, and they have also the right to expect non-interference of the state.

Pellonpää et al. state that the definition of private life under art. 8 is a wide and open-ended concept. Private life under art. 8 can include physical and mental integrity, identity, name, reputation, individual development, sexual identity and orientation and decisions of becoming a parent.[151] The authors note that in family life two main categories can be defined: 1) issues which are connected to children, the status of marriage in connection to family relations, and 2) foreign policies' impact on the right to family life. Family relations under art. 8 are defined by *de jure*

[149] Ovey and White, 2006, p. 241.
[150] Ovey and White, 2006, p. 242; Pellonpää et al, 2012, p. 652.
[151] Pellonpää et al. 2012, pp. 656-657.

family relations, but the Court has shown that also d*e facto* family relations can be protected by art. 8. [152]

"Article 2: Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

ECtHR has noted that art. 2 has a supreme value in the hierarchy of human rights.[153] Article 2 creates both, positive and negative obligations to the state.[154] The state must not kill (negative obligation) but it must also protect individuals' lives by law (positive obligation). The positive obligation includes, among others, effective procedural system for criminal investigation, administrative and effect guidelines for police and army forces, and standards for health care to avoid negligence.[155]

"Article 12: Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

The article states that the right to marry and to found a family can be exercised according the national laws. The article does not give direct right to divorce or right to adopt.[156] There are no similar limitations and accommodation clauses in art. 12 than articles 8-11 have.[157] Both, art. 8 and art. 12 mention family. Ovey and White note that the wording "this right" applies that although the

[152] Pellonpää et al. 2012, p. 670-671.
[153] Pellonpää et al., 2012, p. 316 – referring to the case of Calvelli and Ciglio v. Italy, para. 48.
[154] Pellonpää et al. 2012, p. 317.
[155] Cameron, 2006, p. 76; Pellonpää et al., 2012, pp. 317-323.
[156] Cameron, 2006, p. 131.
[157] Ovey and White, 2006, p. 250.

right to marry and right to found a family are two separate rights they are closely connected under art. 12.[158]

ECtHR does not require the national laws to acknowledge same-sex marriage[159] but the Court has noted that in case of difference in treatment between individuals, the difference must have legitimate aim and it has to be proportionate.[160]

"Article 14: 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."

As Ovey and White state (quoting directly the judgment of Haas v. Netherlands): "(a)rticle 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter"[161] The article is not a general article protecting one from discrimination but just in conjunction with other articles of ECHR and its protocols.

The art. 14 cannot be claimed alone but there can be, in some cases, a violation of art. 14 (in conjunction with other article) even if the article it was used with was not breached or examined separately in the case.[162] In other words, the possible breach of art. 14 is always read in conjunction with other article of ECHR, but the possible breach of art. 14 in conjunction of other article is not always in direct relation with the judgment made just based on the other article. The situation differs case-by-case. For instance, in the case of Evans v. UK, the Court did not examine the claimed breach of art. 14 in conjunction with art. 8 because the claims (of violation of art. 8 alone and art. 14 in conjunction with art. 8) were "inextricably linked" and the Court had not find a

[158] Ovey and White, 2006, pp. 251-252.
[159] Schalk and Kopf v. Austria, paras. 61-64.
[160] Schalk and Kopf v. Austria, paras. 96-97.
[161] Ovey and White, 2006, p. 413 referring to Haas v. the Netherlands, 36983/97, 2004, para. 41.
[162] Pellonpää et al., 2012, p. 810.

violation of art. 8.[163] In the case of Pla and Puncernau v. Andorra the Court examined and found a violation of art. 14 in conjunction with art. 8 but did not examine art. 8 separately in the case.[164]

Cameron has analysed ECtHR's understanding of discrimination (and equality) and mentions that "real equality may require unequal treatment"[165]. He uses day fines as an example, as the amount of day fines depends on the income of the person. Cameron refers to substantive theory of equality as defining factor of who and which groups are entitled to different kind of treatment (to achieve the real equality).[166] Cameron notes that ECtHR has granted the states the margin of appreciation in the matter – it is up to the states to define what are "objective and reasonable" reasons for the existence of discrimination.[167]

"Article 1 of the Protocol 1 of ECHR: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Three sections can be separated in the article 1 of the Protocol 1. 1) Everyone has a right to peaceful enjoyment of one's possession, 2) deprivation for this right can be made based on public interest by conditions provided by law, and 3) state has still the right to control the use of property if it is done because of the general interest or other allowed reasons. Cameron notes that "possession" should be understand as a broad concept in the meaning of art. 1 of Protocol 1.[168] "The Convention organs have established that it (possession) encompasses all forms of property, including contractual rights of economic value such as intellectual rights... But while the Convention organs take a wide view of what constitutes "possession", the article only protects a person's right to retain his or her e*xisting* possession."[169] The Court has also noted in its case-law that whatever something can be seen as a possession in the meaning of art. 1 of Protocol 1 depends on the circumstances of the case, and

[163] Evans v. UK, para. 94.
[164] Pla and Pancernau v. Andorra, 69498/01, 2004, paras. 63-64.
[165] Cameron, 2006, p. 150.
[166] Cameron, 2006, pp. 150-151.
[167] Cameron, 2006, pp. 150-151.
[168] Cameron, 2006, p. 132.
[169] Cameron, 2006, pp. 132-133.

must be examined as whole.[170] In the case of state interference there must a fair balance between the individual's rights and the public interest.[171]

2.2.4. Oviedo Convention

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, or shortly, Oviedo Convention, is an international instrument which "draws on the principles established by the European Convention on Human Rights".[172] Oviedo Convention was established to set some international rules about human rights in the area of biomedicine. The Convention entered into force 1.12.1999.[173] The Convention is legally binding on the states which decide to sign and ratify it. So far 29 states have ratified the Oviedo Convention, and 6 states have signed the Convention but not ratified it. The Convention is also open for those states which are not member-states of the CoE. So far all the state which have ratified and signed the Convention have been the members of CoE.[174]

At least the following articles of the Oviedo Convention are connected to MAR and ART: art. 2 (primacy of the human being; the interest of human being prevails the interest of society or science), art. 5 (respect of individual's consent on medical procedures and right to withdraw consent), art. 6 (protection of persons who are not able to consent), art 12 (predictive genetic tests should be carried out only for health purposes and subject to proper counselling), art. 13 (prohibition to intervene human genome unless it is for preventive, diagnostic or therapeutic purposes), art. 14 (ART should not be used to select a sex of a child unless the selection is done to prevent some serious hereditary sex-related disease), and art. 18 (research of embryos *in vitro* shall adequately protect embryos, and embryos should not be created only for research purposes).

The Committee on Bioethics (DH-BIO) observes and monitors the Oviedo Convention. The Committee is a subordinate body of the Steering Committee for Human Rights (CDDH) except in the cases which consider directly the Oviedo Convention (in this case the Committee of Bioethics works as the main body).[175] The Committee has representatives from the member-states of CoE (and the representatives of non-member states in case some non-members ratify the Convention).[176]

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[170] ECtHR, (Grand Chamber), Parrillo v. Italy, 46470/11, 2015, para. 211.
[171] Cameron, 2006, p. 134.
[172] Council of Europe, Oviedo Convention, 2017, in https://www.coe.int/en/web/bioethics/oviedo-convention, (accessed 03.04.2018).
[173] ibid.
[174] The situation in 14.12.2017 – CoE, "Committee of Bioethics; Chart of signatures and ratifications" in https://rm.coe.int/inf-2017-7-rev-etat-sign-ratif-reserves/168077dd22, 2017, (accessed 15.04.2018).
[175] CoE, "Information Document Concerning DH.BIO" in https://rm.coe.int/inf-2017-5-e-info-doc-dh-bio/168077c578, 2017, (accessed 13.04.2018), p.2.
[176] ibid, p. 4.

Oviedo Convention's legal status is different than ECHR's. While ECtHR may give judgments and rulings based on established rights in ECHR, ECtHR does not have similar power with articles and rights given in the Oviedo Convention. If the rights established in ECHR are violated, and the case considers also rights under the Oviedo Convention, ECtHR may take Oviedo Convention into account it its judgment.[177] In the scope of studied cases ECtHR has referred to the Oviedo Convention in *Costa and Pavan*, *Parrillo*, and *Evans*[178] as well as in *S.H. and others*[179] and *Nedescu*[180]. In the cases, the Court referred to the Oviedo Convention either to introduce the relevant legislative frames, or to refer to the reports of DH-BIO.

The article 24 of the Oviedo Convention states that: "*The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law."*[181] As it can be seen, much emphasis is given to the signatory states to follow and fulfil the obligations of the Convention. The Government of a Party (to the Oviedo Convention) or the Committee may, however, request an advisory opinion on legal interpretation of the Convention from ECtHR. There does not need to be any specific reference to the case in order to request the opinion.[182]

Even if advisory opinions can be asked from ECtHR there is no international judgmental body which can rule only about the breaches of the Oviedo Convention. The Convention works therefore mostly as a framework treaty for the signatory states. However, as noted above, biomedical human rights' issues do operate partly in the field than any other human rights' issues. Oviedo Convention's overlap with ECHR gives ECtHR some power to judge cases considering biomedical issues as well. As both conventions are part of the CoE's legal frames and established on same principles, the development of both conventions should happen hand in hand.

2.3. Evaluation of Law and Cases

2.3.1. Case-law Connected to Article 8 of ECHR

Article 8 is, without a doubt, most important article in the cases connected to MAR and ART. This can be explained by the strong connection of ART and MAR to private and family life. ECtHR has also defined and used the article in very broad sense in its case-law. This broadness has allowed many different kind of arguments and cases to fall under the scope of the article 8 – and MAR and

[177] CoE, "The Explanatory report of the Oviedo Convention" in https://rm.coe.int/16800ccde5, (accessed 18.02.2018), 1997, para. 164-165.
[178] CoE, "Research Report: Bioethics and the Case-Law of the Court" in https://www.echr.coe.int/Documents/Research_report_bioethics_ENG.pdf, 2016, (accessed 10.05.2018), pp. 113-114.
[179] S.H. and others v. Austria, para. 42.
[180] Nedescu v. Romania, para. 42.
[181] The Oviedo Convention, art. 24.
[182] The Oviedo Convention, art. 29.

ART are no exceptions. It would be still misleading to say that all issues of MAR and ART are automatically issues of private and family life. There link between private and family life and ART and MAR differs case by case. ECtHR has linked MAR and ART private life, family life, or private and family life depending on the case.

In the following analysis the way the Court has linked ART and MAR to art. 8 will be observed. The scope of art. 8 in issues of ART and MAR will be also discussed.

ECtHR has referred to the right to private life especially in the issues which are in connection to the individual's right to decide about the use of the embryos. In the case of *Evans* and *S.H. and others*, ECtHR noted that private life is a broad concept including aspects of physical and social identity, personal development, right to personal autonomy, right to self-determination (including but not being exclusive of sexual orientation and sexual life) and the right to establish and develop relations with other humans and with the world around us.[183]

ECtHR has also noted that the right to become or not to become a parent in genetic sense is in the scope of the article 8.[184] The Court did not directly specify if they referred to private and/or family life but the Court's reasoning of the issue indicated that they see the issue falling more under private life.[185] The access to ones' embryos falls also under art. 8 (private life) although the right might be interfered by some collective interests (e.g. criminal investigation).[186] In Parrillo v. Italy ECtHR noted also that the conscious choices about the fate of one's embryos is an issue connected to one's private life.[187]

Article 8 is also applicable in the case of respecting one's right to become a parent, even when one of the parents is located in the closed facility of the state (e.g. in prison).[188] In the case of *Dickson* the Court noted that the issue (having access to MAR) considers both, the right to private and family life.[189] In the ruling of S.H. and others v. Austria the Court connected MAR also to both, private and family life. "The right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life."[190]

In Costa and Pavan v. Italy, the Court's ruling indicates that not only the family as such is protected, but more special form of the family may be also protected by art. 8. As noted

[183] ECtHR (Grand Chamber), Evans v. UK, 6339/05, 2007, para. 71; ECtHR (Grand Chamber), S.H. and others v. Austria, para. 80.
[184] Evans v. UK, para. 72.
[185] Evans v. UK, para. 75.
[186] Nedescu v. Romania, para. 75; Knecht, para. 54.
[187] Parrillo v. Italy, para. 159.
[188] ECtHR (Grand Chamber), Dickson v. UK, 44362/04, 2007, para. 66.
[189] Dickson v. UK, para. 66.
[190] S.H. and others, v. Austria, para. 82.

previously, the parents were health carriers of gene causing cystic fibrosis and they wanted to have an access to ART to choose embryos which were not carries of cystic fibrosis.[191] The Court noted that the choice (to have ART to define health embryos) was "a form of expression of their private and family life"[192]. ECtHR ruled that the measures of the Italian state were not proportionate, and there was indeed a breach of art. 8 when the parents had been denied the access to needed ART.[193]

Based on the findings above it seems that when it comes to ART and MAR, ECtHR considers both, private and family life issues, but from different – although overlapping – perspectives. When it comes to private life and assisted reproduction, the Court has emphasised the right to choose about creating genetic relations in general (as seen in Evans v. UK) and the right to have access to one's embryos (like seen in Knect v. Romania and Nedescu v. Romania). The Court has also noted that the fate of one's embryos touches the sphere of one's private life (as stated in Parrillo v. Italy). The dealt issues present both, negative and positive obligations the states have under art. 8: obligation to protect one's private life and obligation not to interfere unnecessarily to private life. Cases of *Dickson* and *S.H. and others* show that when it comes to planning a family the issue is seen to fall under both, private and family life. Although *Nedescu, Knecht,* and *Evans* dealt with family planning as well, some differences between their situations can be seen: in the first cases the issue focused more on possession and use of embryos as such while in the latter cases the family life in general was taken into account in wider way. This "planning a family instead of the use of embryos" was even more visible in Costa and Pavan v. Italy, in which the question of choosing the kind of family one could have was seem to be an issue of family life.

2.3.2. Case-law Connected to other Articles of ECHR and its Additional Protocols

Article 2

Article 2, in the context of ART and MAR, has been discussed when the embryos' status under art. 2 have been in question. In the studied cases the art. 2 was claimed in the case of Evans v. UK. Also the case of Vo v. France has a high importance when legal status of embryo is discussed in the context of ECHR. In the case of *Vo* ECtHR noted that the beginning of life is in the margin of appreciation and the states have the power to decide about it.[194] The Court could not answer to the question whatever the unborn was a person in the meaning of article 2[195] and therefore the obligation to protect the right to life could not be directly granted to the unborn under ECHR. In other words, the legal status of unborn, foetus and embryo are in the margin of appreciation of the

[191] ECtHR, Costa and Pavan v. Italy, 54270/10, 2012, paras. 9-10.
[192] Costa and Pavan v. Italy, para. 57.
[193] Costa and Pavan v. Italy, para. 71.
[194] ECtHR (Grand Chamber), Vo v. France, 53924/00, 2004, para. 82.
[195] Vo v. France, para. 85.

states when it comes to the scope of article 2. This was also confirmed in the case of Evans, in which ECtHR noted that the embryos the applicant created with her partner did not have right to life in the meaning of article 2.[196]

Article 12

Article 12 of ECHR was discussed in connection to Dickson v. UK, and the possible breach of the applicant's right to "marry and found a family" by the prohibition to access medically assisted reproduction while the applicant was in prison.[197] In the case, the Court examined only article 8 (and found a violation of it), and stated that there is no reason to examine article 12 individually as it is in direct connection with the findings of article 8.[198]

The right to marry and found a family has connection to the access to MAR and ART. However, when the family life is in question, the article 8 seems to have stronger position than art. 12. The articles are partly overlapping: while both of the articles protect the right to form and found a family, art. 12 connects it to the marriage (and sees the foundation of a family as possible part of married life). Art. 8, on the other hand, connects family to the private sphere and protects the family sphere from unnecessary interference of the state. Although both of the articles should functions separately the case of *Dickson* showed that when a couple is married they have more grounds to argue to their right to form a family.

Article 14

In cases of ART and MAR article 14 has been examined in conjunction with article 8 in the cases of Evans v. UK and S.H. and others v. Austria. In the case of *Evans* the applicant claimed that she has been discriminated against women who did not need medically assisted reproduction. She based her claim to the fact her embryos were observed and regulated in much higher sense (she could not use her fertilised, frozen embryos after her partner withdraw his consent of using them) than those women's who were able to get pregnant by natural means.[199] The ECtHR did not, however, see that there was a breach of article 8 in the case, and therefore there was no justification for claims under art. 14 either.[200]

In *S.H. and others* the applicant's claimed that the prohibition to use heterologous procreation techniques for *in vitro* fertilisation breached their rights under the art. 14 in conjunction

[196] As the national legislation did not grant the right to life for the unborn and embryos; Evans. v. UK, para. 56.
[197] Dickson v. UK, para. 37.
[198] Dickson v. UK, para. 87.
[199] Evans v. UK, para. 93.
[200] Evans v. UK, para. 94-95.

with art 8.[201] ECtHR ruled that they will not examine the case separately, as the issue has been addressed enough in the examination of art. 8.[202] The Court stated that there has been no violation of art. 8 as Austria has not breached the given margin of appreciation in its legislation.[203]

The rulings of the Court show that discrimination based on article 14 in conjunction with other articles of the Convention have been ruled by quite strict requirements in ECtHR. Or, at least this has been the case with studied cases connected to ART and MAR. One explanation for this is because art. 14 is linked to other articles already, the Court has usually evaluated the case under articles already – and this has been the situation in all studied cases. Other explanation for the strict interpretation of art. 14 is that as ECtHR has given wide margin of appreciation to the states in many of the issues linked to ART and MAR and has also given the states wide margin of appreciation to define the actions which constitute discrimination.[204] This "double sphere" of margin of appreciation in the issues connected to art. 14 and assisted reproduction issues give the states very wide freedom to decide about reproductive actions in national level.

These notions present the complexity of art. 14. The article is very wide in the sense that rights under ECHR are very broad. Possible grounds of discrimination, example, under art. 8 may take many different forms. At the same time, however, the states are given a lot of freedom and space to define discrimination and the scope of art. 14 in national levels. In this way, the article is very limited and strictly interpreted.

Article 1 of Protocol 1

Article 1 of Protocol 1 has been discussed in the case of Parrillo v. Italy. In the case of *Parrillo*, the applicant claimed that the state's prohibition to donate one's own embryos to science that violating art. 1 of Protocol 1. The applicant argued that because embryos were not "individuals", they were – from legal perspective – possessions.[205] The Court did not share this view, as it noted that – keeping in mind economic and financial aspects – embryos cannot be "reduced" to be possessions.[206] ECtHR concluded that *ratione materiae* of the case and the article was not compatible.[207]

ECtHR gives wide margin of appreciation to the states to decide about the legal status of embryos but it also sets some (wide) frames to the treatment of embryos in general. The Court's notion follows also the line of other European decisions. In the case of Oliver Brüstle v. Greenpeace

[201] S.H. and others v. Austria, para. 119.
[202] S.H. and others v. Austria, para. 120.
[203] S.H. and others v. Austria, paras. 115-117.
[204] As noted by Cameron, 2006, pp. 150-151.
[205] Parrillo v. Italy, para. 203.
[206] Parrillo v. Italy, para. 215.
[207] Parrillo v. Italy, para. 216.

e.V. from European Court of Justice ruled that embryos[208] cannot be patented[209]. ECtHR's ruling in the case of *Parrillo* shows an effort to harmonise and keep the harmony between different European legal frames.

2.3.3. Margin of Appreciation in the Studied Cases

General application of the margin of appreciation

Margin of appreciation has been mentioned already in the previous sections but it will be presented separately for two reasons. First, as seen from previous discussion, the scope of the margin of appreciation defines greatly which issues are ruled by ECtHR and which are not. Second, as a much used doctrine of the Court in the issues of ART and MAR the analysis of the margin of appreciation helps to systematise the overall interpretation of ECHR in ART and MAR related issues.

Margin of appreciation, as noted previously, refers to the scope of freedom ECtHR can give to the member-states when it comes to the implementation actions which have connection of rights and obligations mentioned in ECHR. In Evans v. UK the Court noted that when the issue in questions is an important part of individual's right or identity the margin of appreciation given to the states should be narrow and limited.[210] In the following cases, the given margin of appreciation can be wider:

a) There is no European consensus of the issue. This includes both, consensus about the issue itself, and the consensus about how the issue should be addressed or protected.

b) State must balance between important private and public interests.

c) State must balance between the rights established in the Convention.

d) The issue raises sensitive moral or ethical issues.[211]

Embryos

When it comes to the status of embryos under ECHR, the Court has noted that the states have the margin of appreciation to define when the right to life (art. 2) begins.[212] The Court based its reasoning to the fact that there is no European consensus, or specific scientific or legal definition about the issue.[213]

[208] Later in the case of C-364/13 ECJ noted that in order to an embryo to be considered "human embryo", it has to "have inherent capacity to of developing into a human being", (ECJ, the judgment).
[209] European Court of Justice, C-34/10, Oliver Brüstle v. Greenpeace e.V.
[210] Evans v. UK, para. 77.
[211] Evans v. UK, para. 77.
[212] Vo v. France, para. 82.
[213] Vo v. France, para. 82.

ART and MAR

The Court has noted that there is no consensus of MAR and ART between the member-states, and therefore the member-states are in better place to decide about the restrictions of MAR and ART in national level. This notion of needed restrictions includes also the Court's notion that "the exact content of the requirements in morals" is better to be decided in national level than by ECtHR in the case of MAR and ART. [214] In other words, ECtHR stated that the Court is not the one to define which practises are the best ones in the issues of MAR and ART.[215] However, although ECtHR noted that the states should be the ones to decide at this point about MAR and ART (both about interference and the detailed regulation of it), the regulations as such are still under the scope of ECHR.[216]

Most of the arguments the Court presented to justify wide margin of appreciation reflect the structural understanding of the margin.[217] The structural use of the margin of appreciation is based on the limitations in the Court's judicial review because of, for instance, lack of consensus between the states. The Court does refer to the substantive characteristics as well in some cases; for instance, in *Evans* ECtHR referred to the public interests which had to balanced[218] and the Court balance the public and private interests in general when it evaluates the given margin of appreciation.[219] Structural and substantive use of the margin can be therefore found from the issues of ART and MAR.

The states have the margin of appreciation to regulate MAR and ART currently, but the regulations can be observed and evaluated by the Court (according to same scrutiny than with any other cases under art. 8). The legislation has to meet same requirements about accommodation clauses, accordance with law, and be necessary in a democratic society. The states have the freedom to decide about the legislation and most suitable policies of MAR and ART – but all the legislation can be observed by ECtHR and by its requirements.

The requirements of legitimacy were not breached in *S.H and others, Evans, Parrillo*, or in *Knecht* but they were breached in the cases of *Costa and Pavan, Dickson*, and *Nedescu*. The breach happened in first two cases because of the disproportionate legislation which interfered to the private life of the applicants.[220] In *Nedescu* the breach happened because of the administrative

[214] S.H. and others v. Austria, para. 94.
[215] Knecht v. Romania, para. 59.
[216] S.H. and others v. Austria, para. 97.
[217] Letsas, 2006, p. 706.
[218] Evans v. UK, para. 74.
[219] E.g. in Evans v. UK, para. 77.
[220] Costa and Pavan, v. Italy, para. 69-71; Dickson v. UK, para. 85.

authorities fail to comply with judicial decisions about the transfer of embryos.[221] As seen, the breaches in the cases which with dealt with ART and MAR were based on legitimacy of the actions of the states and not to the issues connected directly to states' practises of MAR or ART.

As a conclusion it could be said that at the moment ECtHR's role to regulate MAR and ART directly is quite small. The Court has given the states wide margins in the assisted reproductive issues. The Court has, however, also noted that there is a evolving trend to allow gamete donations for *in vitro* fertilisation in member-states.[222] The notion, together with Court's emphasis on underlying the lacking consensus, may indirectly effect on the legislative decisions of ART and MAR in national levels. ECtHR observes the issue surrounding ART and MAR constantly (e.g. legitimacy of the practises) so assisted reproduction is not out of the scope of the ECHR. It is not, still, highly regulated by ECtHR.

2.4. Conclusion of the Legal Aspects of ART and MAR in the Context of ECHR

In this section a short overview of the legal frames of ECHR in the cases connected to ART and MAR is given. The analysis shows that the right to private and family life are in the centre of the cases connected to assisted reproduction. Other factors which have been connected to ART and MAR are (embryo's) right to life, embryo's legal status (as a possession or living thing), role of marriage in MAR, and equality in assisted reproduction.

Article 8 of ECHR is a common factor with the presented cases connected to ART and MAR. The Court has given strong emphasis on both, private and family life in the issues of assisted reproduction and reproductive technologies. Art. 8 includes the right to form a family (as noted in *Dickson*) but the right to private life also protects the right to to not to become a parent (as noted in *Evans*). Art. 8 provides also at least some rights to decide about the features of the family – in other words, some freedom to choose what kind of family one wants is also protected right under art. 8 (as *Costa and Pavan* showed).

MAR has overlaps between individuals' rights and collective goals. Although ECtHR respects one's right to private and family life it also places importance to the collective goals the states have in mind when they regulate access to MAR and allowed ART. This can be seen from wide margin of appreciation the Court has given in the cases of defining the legal status of embryo (like seen in the cases of *Evans, Vo,* and *Parrillo*), and defining allowed ART in the state (as *S.H. and others* indicated). The Court has noted that there is emerging consensus between European

[221] Nedescu v. Romania, para 87.
[222] S.H. and others v. Austria, para. 96.

states when it comes to allowing heterologous *in vitro* fertilisation.[223] This notion did not, at this point, affect to the given margin of appreciation.

As the legal status of embryo under ECHR was not defined by ECtHR, article 2 does not automatically include unborn (but the states may rule about the issue as they prefer). Although ECtHR did not define the status of embryo under ECHR and in connection to art. 2 the Court noted that embryos cannot be understood as possession either. Therefore, based on incompatible *ratione materiae,* embryos are not covered by article 1 of Protocol 1 of ECHR.[224] The ruling shows that the Court may give some wide limits in the cases they have not wanted to rule otherwise. Case of *Parrillo* shows that even wide margin of appreciations have their limits.

In the case of *Dickson* it was shown that art. 12 (the right to marry and form a family) could, in some cases, work as a supportive argument for art. 8 when the access of MAR is in question. The articles are partly interlinked and have similar ground and claims of right to form a family. As the Court has placed the right to form (or not form) a family also under art. 8 (like cases of *Evans* and *S.H. and others* showed) more research should be done on relation of art. 8 and art. 12 and possible similarities or differences the articles have in the case of family formation.

Article 14 has showed its complexity in the studied cases. The Court has given the states wide margin of appreciation to regulate ART and MAR as well as wide margin of appreciation to define if there are "objective and reasonable reasons" for the existence of discriminatory action.[225]

In the studied cases ECtHR rejected the claims of discrimination when the applicants compared women who can and cannot reproduce on natural means,[226] and by the applicants who claimed discrimination between individuals who need and do not need heterologous fertilisation methods.[227] At the same time the Court ruled in *Costa and Pavan* that it was the couple's right to have access to ART although the case could have been seen as a discriminatory practise against those with cystic fibrosis. The Court has even pointed out in other cases that the states may have to compensate applicants if the case prenatal tests fail to indicate genetic diseases and the applicants have not been given the opportunity to decide about the termination of the pregnancy.[228]

It must be noted that in the *Costa and Pavan* other facts were also taken into account than just the right to access ART to have embryos which did not have cystic fibrosis. The Court

[223] S.H. and others v. Austria, 96.
[224] As noted in the case of Parrillo v. Italy, para. 216.
[225] Cameron, 2006, pp. 150-151.
[226] Evans v. UK, para. 93.
[227] S.H. and others v. Austria, para. 3.
[228] E.g. the cases of Draon v. France, (ECtHR, Grand Chamber), 1513/13, 2006; Maurice v. France, (ECtHR, Grand Chamber), 11810/03, 2006; A.K. v. Latvia, (ECtHR, Chamber), 33011/08, 2014.

strongly pointed out the inconsistency in the Italian legislation as whole in the case: while the applicants were refused the access to ART which would define if the embryo was a carrier of cystic fibrosis, the applicants could have claimed a termination of pregnancy if prenatal tests indicated that the foetus was a carrier of cystic fibrosis.[229] Direct links between Court's reasoning and its understanding of genetic diseases cannot be therefore made.

The situation reflects the complicated nature and use of article 14 – and the actions the Court takes to achieve equality. The development of the interpretation of art. 14 in the Court's case-law should be continued to be observed also in the future.

3. Socio-Legal Analysis

3.1. Feminist Legal Theory and European Convention on Human Rights

Feminist legal theory, as noted previously, questions the objectivity and neutrality of law. The theory focuses especially on gender's influence on legislation, and the way legislation may create barrios to different genders. In the context of human rights the feminist legal theory provides a good starting point and theoretical ground to evaluate the evolving and changing human rights. Case-law is an important aspect of human rights as the human rights treaties and conventions are – taken into account their great importance in international and national legislations - quite simple and short. Changing and evolving nature of human rights gives also a need to constantly observe the judgments of the human rights' courts.

The analysed material consist studied cases in ECtHR. Special focus will be given to the reasoning of ECtHR, and claims and arguments of the parties have used. The studied texts tell, in the official form and by legal means, about the arguments, values, and social notions which are "allowed" in the context of ECHR. They also help to understand by what kind arguments actions are and can be justified. As noted previously, the analysis takes into account the legal nature of the cases but links the reasoning to wider social context.

But can social values even be found from the cases? When it comes to the articles from 8 till 11 in ECHR the values are not only "invisible" values found between the lines of the reasoning of judgments, but actual and recognised reasons for certain amount of interference to the rights of individuals. Accommodation clauses, and the notion of "necessary in a democratic society", can be found from the wordings of the articles. As the allowed restrictions are quite vague (protection of morals, health, public order, and so on) there is a decent amount of space for social values to appear in the judgments.

[229] Costa and Pavan v. Italy, para. 64-71.

The wording of the articles allows the interference based on these aspects, but there are no guidelines of how and what kind of aspects or social values should be considered as a threat to morals or public order (which has been separated also from public security in the articles' accommodation clauses). This flexibility allows the changes in the case-law and interpretation of ECHR: on the other hand, it also allows argumentation of "right" or wrong" values be added to the outcome of the cases. This is problematic especially because of the European and international sphere of the functioning of the Court. Establishment of "European values" which would guide the interpretation of ECHR has not been easy, and probably never will be.[230]

Based on these notions, and relying on the feminist legal theory as a theoretical ground, sex and gender, private and public, and sameness and difference are discussed in following sections. Questions relating to motherhood and fatherhood, regulations of family under ECHR and equality in family planning are observed and studied. The cases and especially the reasoning of the Court – as well as some arguments of the parties – are looked trough to understand the social constructions and values in the judgments of ECtHR.

3.2. Sex and Gender

Fletcher claims that feminist analytical focus is not on women *per se,* but on gender – and the question is not about women as such, but about how womanhood is defined in particular context.[231] The focus of feminist legal theory is on the legal definition of gender (and different gendered roles) and that definition's impacts in social and legal spheres. Fletcher makes a division between sex and gender by noting that sex refers to the biological status of a person, and gender to the social status of a person.

Clear division between sex and gender is not always done although the terms refer to different dimension in one's life. An example of different perspectives on sex and gender can be given through fatherhood: biological issue of fatherhood would be the paternity test to define the father of a child. In this case biological facts are the one's defining fatherhood. Social issue would be to define the role of a father in child's life, in which case the social reality defines fatherhood. Legal issue of fatherhood would be to assume the father based on marriage of the mother and her spouse. In this case, the legal reality (marriage) reflects to other relations and creates new realities (legally recognised fatherhood).

Although the example above is very simplified picture of possible different realities, it describes well the different levels of realities in which the role of sex and gender may play very

[230] E.g. in Cameron, 2006, p. 111; Pellonpää et al, 2012, pp. 290-294; Letsas, 2006, pp. 725-729.
[231] Fletcher, 2002, pp. 7-8.

different kind of roles. The way legislator emphasises different dimensions may have legal consequences and wider social impacts. As shown by the example above, these realities and different perspective can be found also from family relations and especially from the realities of parenthood.

Motherhood and fatherhood are social, legal, and biological realities – or it could be also said that motherhood and fatherhood are valued by biological, social, and legal means.[232] One example of linking different realities and dimensions with each other is given by feminist researchers on women's role as mothers. Feminist scholars have argued that women's role as a mother may create a social burden on women if motherhood is seen as "natural" role of women. Seeing biological feature of some women (being a mother) as a feature which defines the whole group (of women) by social means causes unnecessary burden on all women. [233]

Motherhood and fatherhood are, at the same time, very private but also public concepts. Both, mother- and fatherhood are concepts which have been discussed and addressed in the cases of ECtHR. In the following section the arguments of the applicants and the states will be analysed together with the reasoning of the Court to observe how, and what kind of value-based reasoning is used in the cases in connection to ideas of motherhood and fatherhood. Although the main focus will be kept in the Court's reasoning, the arguments are looked into to see which arguments get support from the Court in its decisions.

3.2.1. Motherhood and Fatherhood

In the studied cases *Evans* and *S.H. and others* discussed about the motherhood and fatherhood, while Dickson touch the subject of parenthood in general. In the case of *Evans* ECtHR recognises the existence of different dimensions of parenthood as they note that "the applicant does not complain that she is in any way prevented from becoming a mother in a social, legal, or even physical sense, since there is no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes."[234] The notion shows that the Court recognizes different dimensions of parenting. This becomes also visible in *S.H. and others*, as ECtHR comments the ways motherhood is understood by the state and third party interveners.

[232] E.g. Murphy, 2013, p. 301; Velleman, J.D. "Family History", Philosophical Papers, Vol. 34:3, 2010, pp. 376-378; Neyer, G. and Bernardi, L. "Feminist Perspective on Motherhood and Reproduction", Historical Social Research, Vol. 36:2, 2011, p. 165.
[233] E.g. Neyer and Bernardi, 2011, p. 165.
[234] Evans v. UK, para. 72.

In *S.H. and others*, the state and third party commentators[235] were worried of the collapse of biological and social motherhood if heterologous ART were allowed. Austria argues that "*(i)n vitro* fertilisation also raised the question of unusual family relationships in which the social circumstances deviated from the biological ones, namely, the division of motherhood into a biological aspect and an aspect of "carrying the child", and perhaps also a social aspect"[236]. Austria also argued that allowing *in vivo* artificial insemination was based on the fact that it was easily applicable method and could not be monitored effectively.[237]

Austria pointed also that child's legitimate interests to know their "actual descent" was protected by the restrictive access to heterologous ART. [238] German Government – who was one of the third party interveners in the case pointed out that similar restrictions in Germany intend "to protect the child's welfare by ensuring the unambiguous identity of the mother... Split motherhood was contrary to the child's welfare because the resulting ambiguousness of the mother's identity might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity"[239]. Fatherhood was not mentioned in the arguments, but third party interveners pointed possible problems with multiple parenthood in general and the increased risk of exploitation of women in case of increased ovum donation.[240]

The Court did not totally agree with Austria's and Germany's notions of the dangers of split motherhood. "Having regard to the risk referred to by the Government of creating relationships in which the social circumstances deviated from the biological ones, the Court observes that unusual family relations in a broad sense, which do not follow the typical parent-child relationship based on a direct biological link, are not unknown in the legal order of Contracting States... However, the Court cannot overlook the fact that the splitting motherhood between a genetic mother and the one carrying the child differs significantly from adoptive parent-child relations and had added a new aspect to this issue."[241] The Court also noted that while donating sperm or ova for IVF, sperm donation for *in vivo* was not prohibited based on the practise being tolerated for long period of time and being accepted by society.[242] ECtHR stated that this is "rather

[235] Third parties may submit written comments or intervene at the hearing in certain occasions. Uusually the third parties are non-governmental organizations who have expertise on the field which is dealt in the case. Also other governments and even individuals can function of interveners. (Ovey and White, 2006, p. 480). Third-party intervention is established right under art. 36 of ECHR.
[236] S.H. and others v. Austria, para. 67.
[237] S.H. and others v. Austria, para. 68.
[238] As Austria claimed in the case, para. 67.
[239] S.H. and others v. Austria, para. 70.
[240] Aktion Leben, in S.H. and others v. Austria, para. 77.
[241] S.H. and others v. Austria, para. 105.
[242] S.H. and others v. Austria, para. 114.

the careful and cautious approach adopted by Austrian legislature seeking to reconcile social realities with its approach of principle in this field".[243]

ECtHR's notions reflect the Court's cautious interpretation of motherhood and parenthood in the cases of MAR. While the Court recognises the unique settings of MAR it does not recognise dangerous or unusual family relations in cases of MAR. ECtHR recognises the aim to reflect the reality and law's limits in the legislative decisions – as it can be seen in the Court's comments on Austrian decision to prohibit donation of sperm and ovum for IVF but not sperm donation for *in vivo.* Although the Court does not agree with the arguments of Austria and German Government, the arguments of the states show clear and strong social dimension the idea of motherhood. The arguments illustrate gendered understanding of the role of a mother in the development of a child. While the states argue that "split" motherhood could be a risk to the welfare of a child, similar worry has not been carried out in the case of "split" fatherhood.[244] Although these arguments were not agreed by the Court they are still arguments presented to the Court – and by granting Austria a wide margin of appreciation in the case ECtHR did not find the practise to violate art. 8.

The studied cases show that ECtHR acknowledges legal, social, and biological dimensions of both, motherhood and fatherhood. The Court also recognises that some states make a distinction between biological, genetic, and social motherhood. Some of the member states have very strong opinions on how motherhood should be treated legally based on social characterisation of motherhood. ECtHR sees the unique dimension MAR has to parenting – and notes that the legislation in national levels is constantly evolving. As a conclusion it could be argued that even though the Court does not make strong distinction between different dimensions of motherhood it allows the states to do it. Motherhood and fatherhood are treated partly differently in the judgments, and the Court justifies this by different practices genetic and biological motherhood or fatherhood require.[245] The lack of common values of the subject is visible in the Court's reasoning, and this gives room for national level values when defining motherhood and fatherhood. These values may vary greatly and establish the ground of motherhood and fatherhood for different social, biological and legal characteristics.

[243] Ibid.
[244] It is good to keep in mind that the arguments as such may be even provocative because they are defense argument in the Court. The used logic and routes of argumentation illustrate, however, the social values behind the legislative decisions.
[245] S.H. v. Austria, para. 68, in which it was argued that donating sperm for *in vivo w*as hard to legally control and the practice was therefore legal.

3.3. Private and Public

As noted previously, private and public can be understood as different spheres of life, but also as spheres which are regulated differently and by different set of norms. Although the division of private and public has changed over the years also in the area of human rights the division is still also a key element of human rights. Article 8 protects the private life of individuals – both from state's unnecessary interference and state's lack of protection in case one needs protection in the area of private life.

MAR is located between the spheres of private and public. Although the decision about MAR is very much private and family issue, access to MAR and use of different ART is decided very much on the state-level. As noted previously, if MAR is thought as a market area, the consumers are a combination of individuals and national health systems. This leads to the market which is very politically constrained and legally observed.[246]

In the cases of ECtHR this double sphere of MAR and ART is seen by the fact that although the issues have been greatly dealt in connection art. 8 the Court has also given the states a wide margin of appreciation in many of MAR and ART related issues. Court has also connected the wide margin of appreciation to the issues in which the state must take private and public interests into account.[247] This seems to be the case even when there are both, private and public issues dealt in the case.

Family has traditionally been seen very private sphere: this is also reflected by the fact that article 8 combines the right to private and family life. The analysis of the cases also showed that in many if the cases even the Court did not make a clear division between the protection of private and family life.[248] Especially in the cases of family planning the Court has not separated the conclusions or arguments connected to private and family life by large means. In the cases which are more focused on handling embryos the separation of family and private life has been wider.[249]

In the previous section social features which guide state's regulations of motherhood and fatherhood were discussed together with the reasoning and rulings of ECtHR. In the following section regulation of family by ECtHR will be discussed. As the context will be in MAR and ART the focus is not in the existing family relations as such, but individual's right to form and have a family. Special focus will be given to the width of "private and family life" under art. 8.

[246] Flear et al. 2013, p. 397.
[247] E.g. in S.H and others v. Austria, para. 94.
[248] See pp. 34-36 in this study.
[249] ibid.

3.3.1. Regulation of Family under ECHR

In the case of *Costa and Pavan* the Italian Government tried to justify the restriction to access ART which would define which of the couple's embryos were carriers of genetic disease by "the protection of rights of others and morals"[250]. The restriction protected the conscience of medical professionals and prevented eugenic selection of embryos.[251]

The Court stated that "(i)n the present case the Court considers that the applicants' desire to conceive a child unaffected by the genetic disease of which they are healthy carriers and to use ART and PGD to this end attracts the protection of Article 8, as this choice is a form of expression of their private and family life."[252] ECtHR reasons its judgment by noting that the Government failed to show why mentioned balancing interests were better protected when ART to define healthy embryos was prohibited but the couple was allowed to have abortion in case of embryo's genetic disease.[253]

The Court's ruling illustrates that although balancing interests (e.g. collective goals, lack of European consensus,[254] legitimate aim, and protection of morals[255]) are taken into account when evaluating the allowed regulations in the sphere of family planning the restrictions must be consistent. Italian situation shows also how emerging field of MAR and new ART may create illogical situations when national law's are followed. ECtHR's ruling shows that although it has not ruled about MAR as such, it does rule about the inconsistencies of legislation.

Another perspective to family life was offered in the case of *Dickson*. In the case the Government of UK justified their Policy about access to MAR in prison by different principles: "(t)he Policy's justification was to be found in three principles… (third principle being) the inevitable absence of one parent, including that parent's financial and other support, for a long period would have negative consequences for the child and for society as a whole. This latter point was indeed a complex and controversial one, underlining why the State authorities were best placed to make this assessment."[256] ECtHR did agree that when the states apply art. 8 welfare of child should be taken into account but "that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the

[250] Costa and Pavan v. Italy, para. 45.
[251] Costa and Pavan v. Italy, para. 46.
[252] Costa and Pavan v. Italy, para. 57.
[253] Costa and Pavan v. Italy, para. 62.
[254] For instance, in S.H. v. Austria, paras. 95-96.
[255] For instance, in Parrillo v. Italy, para. 167.
[256] Dickson v. UK, para. 60.

second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released."[257]

The reasoning strengthens the Court's approach in which family relations cannot be restricted or modified in wide sense just because of traditional ideas of the form of the family. As noted in the previous section, the Court recognises different ways to become a mother (social, biological, genetic).[258] This indicates – with the notions about ECtHR's understanding of motherhood and fatherhood in the previous section – that ECtHR understands family (and its relations and forms) in quite wide way. This is reflected also to the formation of family as the Court recognises different situations, ways, and needs in family planning. Wide understanding of family life means also, however, that the Court does not see traditional family as an only way to form a family – and that this could also mean that methods to form a family in traditional ways may not be in the central right under art. 8.

As a conclusion is seems that planning and forming a family are understood to be part of "family life" in ECtHR. However, when family life is in the phase of "planning" there is wide balancing with public interests and collective goals. Family planning is not so much just "private" than existing family life is. This is visible, for instance, in the wide margin of appreciation which is given to the states to regulate the access to IVF and detailed laws how it is used.[259] The states' have more freedom to regulate family planning than family life under art. 8.

On the other hand, right to private life is highly linked to assisted reproduction and family relations as the Court has linked art. 8 to the freedom to decide about one's family. The Court has established that the freedom to choose about (genetic) family relations is stronger argument than the right to have (genetic) family relations.[260] The Court's judgments indicate that the Court places strong importance on genetic relations and the freedom to choose about them. Although the Court recognises the variety of different kind of family relations (e.g. social, biological, legal, genetic)[261] the diversity of family forms have not affected to ECtHR's view about the importance of genetic family relations.[262]

Even though collective goals are taken into account in forming a family (and the public sphere is visible in the studied cases) the freedom to decide about one's own family relations is very (private) factor as well. Therefore, although family sphere is balanced between public and

[257] Dickson v. UK, para. 76.
[258] Evans v. UK, para. 72.
[259] See pp. 39-40 in this study.
[260] Evans v. UK, para. 72-73.
[261] E.g. Dickson v. UK, paras. 66, 70.
[262] As seen in Evans v. UK.

private interests in the phase of forming a family, the freedom to decide about family is seen as an important individual right even in the decisions considering the formation of family.

3.4. Equality: Sameness and Difference

Sameness and difference are key elements when equality between individuals and groups is defined. In general, the situation is discriminatory if similar people or situations are treated differently, or if different kind of people or different situations are treated similarly.[263] Equality can be tried to be achieved by regulations and legislation, but it is important differ *de jure* equality and *de facto* equality.[264] In the scope of ECHR substantive theory of equality is (or at least should be) used: this theory refers to the idea that equality should be measured in reality not in paper. [265]

The issue which is making the aim of "real equality"[266] or d*e facto* equality more complex is the fact that two situations, individuals, or groups are merely never identical. Therefore, the principle of (*de facto*) equality is based on set parameters which together create "similar" or "different" situations, groups, or individuals. By comparing different characteristics and defining some person, situation, or feature as "different" or "similar" the legal reality of sameness or difference can be created. This is, of course, necessary in order to systematise the way similar or different situations are defined: without any parameters it would be difficult to define and compare situations and individuals. The system does, however, also place importance on the used parameters. "Reality", in the context of law and regulations, may differ greatly when different kinds of parameters to define similarity or difference are used.

Fletcher's notions of hierarchical idea of differences add another dimension to the consequences of used parameters. Systematising reality in order to legally observe it and justify decisions require not only parameters but hierarchy between parameter as well. Comparison between different parameters and the way they are placed in relation with each other (and different situations inside a parameter) may reflect the ideas and values of that parameter. Differences between individuals will always exist but the legislation should provide the best possible ground for equal treatment of those individuals.

Ovey and White claim that when it comes to family relations The Court has adapted a hierarchy between different relations. "At the top of the hierarchy is the traditional heterosexual relationship of married couples, moving through parenting between non-married heterosexual

[263] Smith, 2012, p. 196.
[264] Smith, 2012, p. 196.
[265] Cameron, 2006, 150-151.
[266] As it is called by Cameron, 2006. p.150.

couples down to more removed family relationships at the bottom of the hierarchy".[267] The hierarchy reflects the textual interpretation of ECHR (as marriage and finding a family are protected rights under art. 12) but also the values the Court applies to the cases (as family and private life in general should be protected under art. 8). This was also visible in the analysis of Pellonpää et al. as they noted that the protection of same-sex or polygamy family relations have not been as protected by the Court than "more common" family relations.[268]

In the previous section regulation of family was analysed from the perspectives of public and private interests. The scope of art. 8 seemed to include also (at least partly) the formation and planning of family life, and the freedom to decide about family relations was a key factor in planning a family.

In the next section ECtHR's reasoning on different factors in family planning will be examined from the perspective of equality. The focus will be kept on medically assisted reproduction but some other situations (termination of pregnancy and artificial insemination, which is not ART by medical definition) will be discussed to give context to the discussed issue. The Court's idea of equality will be examined by discussing how the Court reasons similar treatment, or different treatment, between individuals or groups. Two main subjects in family planning are specially under observations: the status of ovum and sperm (under ART and MAR) and parents' status in family planning.

3.4.1. Equality in Family Planning

In the case of *S.H. and others* the Chamber[269] stated that "...concerns based on moral considerations or on social acceptability were not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique in general…" and there had been a violation of art. 14 in conjunction with art. 8 when the couple could not use donated ovum.[270] The Court found similar violation in the case of prohibiting sperm donation for IVF.[271]

The Grand Chamber, although sharing the Chamber's view about mentioned reasons not being sufficient for complete ban of ART, reasoned the case differently. The Grand Chamber

[267] Ovey and White, 2006, p. 249.
[268] Pellonpää et al., 2012, p. 672.
[269] ECtHR is divided into Sections in which Chambers examine and rule the cases. The cases can be referred to Grand Chamber in two ways; either the Chamber may relinquish the jurisdiction to Grand Chamber (if the parties do not object this) or one of the parties may request the case to be referred to the Grand Chamber after the judgment has been given by the Chamber (Ovey and White, 2006, p. 473-474). In *S.H. and others* the Government requested the case to be referred to the Court after the Chamber had found a violation of art. 14 in conjunction with art. 8. in the case. (S.H. and others v. Austria, paras. 4-5.).Grand Chamber's (also referred just as "the Court's) reasoning presents the final judgments and reasoning while Chamber's reasoning presents the overruled reasoning of the Chamber.
[270] S.H. and others v. Austria, para. 54.
[271] S.H. and others v. Austria, para. 55.

stated that "the prohibition of the donation of gametes involving the intervention of third persons in a highly technical medical process was a controversial issue in Austrian society, raising complex questions of a social and ethical nature on which there was not yet a consensus in society and which had to take into account human dignity, the well-being of children thus conceived and the prevention of negative repercussions or potential misuse."[272] Therefore, the prohibition of using donated ovum was in line with art. 8.

The Court stated that the prohibition of donating sperm for IVF was in line with art. 8 as well but it reasoned the case differently than with ovum donation. The difference in reasoning was done because sperm donation for *in vivo* fertilization was not prohibited under Austrian legislation. In the case, the government had noted that sperm donation for *in vivo* fertilization was not prohibited because "it was such an easily applicable procreation method, compared with others, it could not be monitored effectively. That technique had also already been in use for a long time. Thus, a prohibition of this simple technique would not have been effective and, consequently, would not constitute a suitable means of pursuing the objectives of the legislation effectively."[273] The Court noted that "when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework of which it forms a part must be taken into consideration and the prohibition must be seen in this wider context."[274]

The ruling reflects the Court's pragmatic interpretation of law: difficulties to monitor sperm donation for *in vivo*, with the notions of the practise being socially acceptable seem to be reasons to enough to allow a certain practise. Difference between ovum and sperm donation is created and used by the Court, and the difference is justified between different medical procedures and social acceptance of practises. It seems that ovum and sperm are also put to slightly different hierarchy based on medical procedure and social acceptance. While ovum is regulated on higher level – practical reason being medical procedures needed and value-based reason being social acceptance – sperm has lower level regulation on place.

The case of *Evans* rises interesting questions on whatever the Court treats genetic parents (mother and father) in similar or different way. The Court noted in the case that "(the Court) does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to

[272] S.H. and others v. Austria, para. 113.
[273] S.H. and others v. Austria, para. 68.
[274] As the Chamber had taken only account a smaller section of the legislation when ruling about the violation of art. 14 in conjunction with art. 8, S.H. and others v. Austria, paras. 111-112.

have a genetically related child with her."[275] Because of this, the states have a wide margin of appreciation to decide about IVF in general and about detailed rules guiding the use of it.[276] It would be tempting to think that the Court would have decided the case in similar way even if the one not wanting to become a genetic parent was a woman. However, in the case of A, B and C v. Ireland the Court stated[277] that "(a)ccordingly, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life… exceeds the margin of appreciation accorded in that respect to the Irish State… the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn."[278]

The main differences between these two cases seem to be the following: a difference between embryos and foetuses,[279] certainty of becoming a parent,[280] and different national legislative frame. The cases reflect very different national legislative decisions and ways to regulate family planning. The legal status of unborn should be, according to ECtHR's rulings, in the wide margin of appreciation so it should not have high importance in its rulings – although the Court does take the national legislative decisions about the status into account. Certainty of becoming a parent and differences in national legislation play roles in the judgments: margin of appreciation was discussed in both cases, and the Court referred directly to the possibility to travel abroad to get abortion.[281]

The Court did not place a high importance on differences in possibilities to travel abroad; this was visible in the stated comment on *A, B and C* but also in *S.H. and others*, in which ECtHR stated that "the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parents".[282] This view places high importance on protecting the (claimed) values within a country (and provides grounds to give wide margin of

[275] Evans v. UK, para. 90.
[276] Evans v. UK, paras. 91, 81-82.
[277] About the prohibition of abortion in Ireland.
[278] ECtHR (Grand Chamber), A, B and C v. Ireland, 25579/05, 2010, paras. 241-242.
[279] And the fact that in A, B and C pregnancies had already started while in Evans the pregnancy had not yet started.
[280] As in Evans the ex-partner knew that he would become a father and in A, B and C the applicants still had a chance for abortion as long as they travelled abroad.
[281] A, B and C v. Ireland, paras. 241-242; S.H. and others v. Austria, para. 114.
[282] S.H. and others v. Austria, para. 114.

appreciation in the case) while individuals may be set on different positions based on their ability to travel abroad for medical services.

As it was noted in previous discussion about regulating family in general, the Court seemed to give high importance on freedom to decide about family relations.[283] If the issue is looked from the perspective of equality it seems that the freedom to decide is not symmetrical or entirely consistent between a (genetic) mother and father. Asymmetry is not created by ECtHR as such, but allowed by granting wide margin of appreciation in the cases.

It must be emphasised that the cases of *Evans* and *A, B and C* cannot be compared directly. They have been judged based on different situations and by different national legislative point kept in mind. The cases show, however, the wide diversity of actions and practises which are possible because of the wide margin of appreciation given by ECtHR. The cases illustrate that even when ECtHR may refuse to give direct judgments, the given margin of appreciation may lead for hierarchy between different individuals. In other words, the coherency and equality between individuals under ECHR may be compromised with wide use of the margin of appreciation. At the same time, this may compromise the rights under ECHR – like, for instance, the freedom to decide about one's family relations.

As a conclusion it can be said that certain hierarchical elements in family planning can be seen based on studied cases. When it comes to the donation of sperm and ovum, the ECtHR stated in the case of *S.H. and others* that the need for medical procedures and social acceptance are reasons to regulate sperm and ovum differently. Difference of procedures justified difference in treatment. In the case of family planning (before and after pregnancy has started) ECtHR has given wide margin of appreciation to the states to regulate ART and legal status of embryo. However, wide margin of appreciation in these areas have lead to the situation in which national practises differ greatly and may allow even controversial practises in the issues which are connected to the rights under ECHR.

3.5. Social Values in the Studied Cases

In the second part of the analysis the social values in the studied cases were examined and discussed. The motivation for the analysis was to observe the social values which may affect to the legislative decisions. Law's presumption of objectivity was questioned and the presented sub-questions helped to demonstrate the underlying values which affected to the used (social) arguments and rulings in the cases.

[283] See p. 49 in this study.

ECtHR reflects the values of the member states to the Court's own understanding of consensual values in Europe, and reasons its interpretation based on those points. In the case there is no European consensus of the subject the states have more space to act as they feel most appropriate – like, for instance, in the case of legally defining motherhood and fatherhood, defining the exact balance of collective goals and individuals' rights in family planning, or regulating the freedom to decide about pregnancy. This approach is in line with the subsidiary principle but it places a strong emphasis on understanding the used (social) reasoning of the Court.

Argumentation of controversial or moral values in the society may affect to the way ECtHR balances individual rights and collective goals. The problem with this is, as seen in the arguments in *S.H. and others*, that the used arguments may be very gendered. Socially constructed idea of motherhood or the importance of two-parent families (like seen in *Dickson*) place the social idea of mother, father, and family in general, to the centre of legal discussion. Even if ECtHR does not reason its own judgments based on these arguments the mere fact that the Court does give a margin of appreciation to the states to decide affect to the realities in which people are living in

While motherhood and fatherhood were seen as issues which had no common ground on the European sphere, the Court had taken more solid and manifold perspective on regulation of family and family planning. ECtHR recognised different ways and dimensions of family as a part of the scope of art. 8. Diverse approach on family relations did not decrease the importance of genetic relations. ECtHR's approach was that private and family life included not only family life as such, but planning a family as well. In family planning the public interests were, however, balanced strongly with private interests. Freedom to choose about (genetic) family relations (and, therefore, the importance of genetic family relations) was seen even stronger argument than forming a family. Public interests and collective goals were balanced in the issues connected to the formation of family planning but freedom to decide from one's family relations was seen as important part of one's right to privacy.

Although the freedom to decide about one's family relations was an important private right, the right was not limitless in the cases. This became visible especially when the family planning and formation of family were analysed from the perspective of equality. Differences and similarities were observed from the perspectives of used genetic material (sperm and ovum) and equality in family planning. The Court differentiated ovum and sperm donation based on different social acceptance level and different medical procedures. The Court has also given wide margin of appreciation to the states to decide about practises which affect to the family planning in the state; wide margin of appreciation has been given, for instance, to regulate IVF and abortion policies.

The wide margin of appreciation and multiple purposes to which it is used seem to cause very diverse field of practises which are allowed under ECHR and by ECtHR. Although the studied cases do create quite coherent legal framework for ART and MAR[284] the issues which are left to the margin of appreciation are not a coherent legal entity. The margin of appreciation provides the Court an opportunity to give the states a freedom to decide about their practises in the wide limits – but as the studied cases illustrate, the limits are so wide that the allowed practises under given margin of appreciation do not provide any systematic idea of the rights of ECHR. Wide margin of appreciation may also maintain power relations within a state. For instance, Austria and Germany's perspective on motherhood place high burden on social features of motherhood. This – as discussed by Neyer and Bernardi - may affect on assumed roles of women in societies.[285]

Problems may also arise when the Court review the dealt issue only in the scope of one nation. Social ideas and thoughts may differ between the states, and the given margin of appreciation may be affected by the national social context in which the Court evaluates the case.[286] Would the given margin of appreciation in the case of donating sperm and ovum have been as wide if the case was dealt in the country in which "split motherhood" was not seen as a risk? This perspective illustrates the unpredictability of the margin of appreciation although – as noted above – it is also one of the key elements which support the flexibility of the Court.

This study has focused mostly on the social values found in the judgments of ECtHR. More research should be done, however, about the states' argumentation in ECtHR. By comparing national argumentation in domestic sphere to argumentation used in the Court more information about the social values in national and international sphere could be gained. Margin of appreciation's role and impact on interpretation of ECHR should be also researched more and by wider amount of cases. This would help to systematise the role and power of the Court in better ways.

4. Conclusion

In this study the cases of ECtHR connected to medically assisted reproduction and assisted reproductive technologies have been analysed. The aim of the study was to understand current legal frames of ECHR in the issues connected to ART and MAR. The analysis has been done from doctrinal legal perspective and from socio-legal perspective by using feminist legal theory as a theoretical background.

[284] See pp. 40-42 in this study.
[285] Neyer and Bernardi noted the unnecessary linkage between mothers and women in general. Neyer and Bernardi, 2011, p. 165.
[286] Pellonpää et al., 2012, p. 310.

The legal observations in the study are multidimensional and one could even argue that they are partly controversial. While the doctrinal approach of law assumes the coherency of law, socio-legal and feminist legal theory does not make such an assumption. Doctrinal legal study aims for systematising and interpreting law, while socio-legal studies of law focus on describing and explaining law and society.[287]

The approaches have been combined to provide not only understanding of legislation in general but also about the social reality in which the law functions. In order to understand law, the reality in which it functions must be also known – and in order to understand how law is produced and used, its social context must be known. The study will hopefully find its audience from both, social and legal scientists, and illustrate how variety of methods and perspectives benefits the research and the understanding of the topic.

In the first part of the analysis it became clear that the right to private and family life (article 8 of ECHR) are in key role when discussing and evaluating ART and MAR cases under ECHR. The freedom to decide about the reproductive matters, and the right to expect respect for the individual decisions considering MAR were highly protected rights in the judgments of ECtHR (e.g. in *Evans* and *Dickson*). On top of this, the legitimacy of the actions of the states was highly important factor when evaluating the possible breach of the articles (e.g. as seen in *Nedescu*).

However, when it came to the issues considering access to (different kinds of) ART, the Court allowed wide margin of appreciation to the states. In the cases which considered more the allowed methods of MAR, (like in *S.H and others*) and the issues relating to the treatment of embryos (cases of *Parrillo, Evans, Knecth,* and *Nedescu*) the states had also more space to decide their approach on the matters. In general, in all issues of assisted reproduction the states were given some kind of margin of appreciation. Only when the other requirements were breached (e.g. the practise of the state not being in accordance with law) there was a violation found in the case.

The findings are in line with Murphy and O Cuinn's notion of time being an important factor when allowed practises are defined.[288] The right to decide about one's own private life and family are "old" and established rights, while issues relating to developing biotechnological issues are "newer" issues which do not have similar European-wide ground for justification. The Court' notion of "evolving legislation"[289] in the areas of ART and MAR shows also that the time may change the reasoning of the Court in ART and MAR.

[287] Alvessalo and Ervasti, 2006, p. 7.
[288] Murphy and O Cuinn, 2013, p. 296.
[289] S.H. and others v. Austria, para. 118.

The judgments of the Court are not created in isolated space. The current understanding of the Convention, previous case-law, and individual facts of each case affect to the way ECtHR interprets and reasons their judgments. The notion of evolving European legislation is an excellent example of the fact that ECHR is not steady and unchangeable set of rules. The Convention reflects the values and ideas of the societies in which the Convention is applied, ratified, and used. ECHR is interpreted by ECtHR's current understanding of European human rights.

Used and accepted values in the cases of ECtHR have an impact on the overall development of the understanding and interpretation of ECHR. This is especially important notion in the context of human rights, as part of the articles already mention and take into account the possible impacts of the society. These accommodation clauses and the margin of appreciation represent the fact that human rights, alone, do not provide all necessary tools to decide about cases – and this is the case with all legislation. Other aspects, perspectives and features have to be taking into account. Law, and human rights, do not work in the isolated space – and that is why the social values effecting to the judgments of the Court has been studied also in this study.

Feminist legal theory was used as a theoretical ground for the socio-legal analysis of the cases. Three different sub-questions were chosen to research the possible social values in the cases of ECtHR. The question of motherhood and fatherhood focused on possibly gendered reasoning paths of the Court. The question of norms regulating and justifying the regulation of family analysed the relation of private and public in the context of discussed cases of ECtHR. And, finally, the question of equality in the sphere of family planning emphasised the different dimension of family planning and the ways ECtHR defines and reasons equal treatment.

The ways to define motherhood and fatherhood were, according to ECtHR, very diverse in different states. Wide margin of appreciation allows state-level argumentation and decision-making about the nature of motherhood and fatherhood. With the regulations of family ECtHR has taken stronger stand. The Court recognised diverse ground for family relations. Genetic family relations were treated as important part of one's private and family life, and one's freedom to choose about own genetic relations were seen crucial. When it comes to equality in family planning the issues of ovum and sperm donation and possible differences of mother and father were discussed. With ovum and sperm donation the Court took practical approach and differentiated the practises based on medical grounds and social acceptance.[290] When possible different treatment of

[290] S.H. and others v. Austria, paras. 111-112.

mother and fathers in relation to family planning were discussed wide margin of appreciation was visible in the studied cases.

The wide margin of appreciation in studied cases allows diverse set of practises in the spheres of ART, MAR, and family planning. These practises are not consistent, and may allow gendered practises within states. Although the Court does not directly create gendered practises in the states, its decision to give wide margin of appreciation in family planning allows the gendered practises to exist in state level (e.g. in the case of *S.H. and others* and arguments on the risks of split motherhood).

The overall aim of this study was not to study margin of appreciation as such. During the writing process it did, however, rise to be one of the most influential doctrines in doctrinal and socio-legal approaches on MAR and ART. From doctrinal perspective the margin framed very much the overall interpretation of ART and MAR in the Court's judgments. From socio-legal perspective the margin created a group of inconsistent practises in national levels in the issues which are connected to human rights, but which are not ruled in consistent way.

The analysis as whole, and especially the study of the margin of appreciation showed that although the social values of ECtHR have a great importance, the social values of member states influence to the Court as well. The wide use of margin of appreciation creates very diverse space for different national practises. The different and controversial practises decrease the unity and harmonisation of European human rights as seen in ECHR. Although the fair balance between individual rights and collective goals must be kept in mind, the Court should also keep in mind the practises it allows when they grant wide margin of appreciation to the state in certain issue.

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