European Societies

ISSN: 1461-6696 (Print) 1469-8307 (Online) Journal homepage: http://www.tandfonline.com/loi/reus20

Anthropology of kinship meets human rights rationality: limits of marriage and family life in the European Court of Human Rights

Linda Hart

To cite this article: Linda Hart (2018): Anthropology of kinship meets human rights rationality: limits of marriage and family life in the European Court of Human Rights, European Societies, DOI: 10.1080/14616696.2018.1473625

To link to this article: https://doi.org/10.1080/14616696.2018.1473625

Published online: 31 May 2018.

EUROPEAN SOCIETIES
https://doi.org/10.1080/14616696.2018.1473625

Anthropology of kinship meets human rights rationality: limits of marriage and family life in the European Court of Human Rights

Linda Hart

Department of Social Research, University of Turku, Turku, Finland

ABSTRACT

The question of what kinds of constellations of personal relationships are recognised as family life by Member States of the Council of Europe has been under intense litigation in recent years in the European Court of Human Rights (ECtHR). This article examines the ECtHR as an arena where different realms of knowledge come together and produce interpretations of human rights norms according to historically contingent and sometimes conflicting attempts to produce decisions that reflect 'human rights rationality'. By analysing five judgments from the 2000s and 2010s, this article focuses on State-argued cultural understandings of limits of acceptable forms of marriage and family life. The cases concern marriage between former in-laws, sexual relations between genetically related siblings and understandings of maternity in contexts of egg donation and surrogacy. The judgments offer examples of legal arguments and extra-legal knowledge that have been applied by States and the ECtHR itself when arguing for, or against, giving particular understandings of family life legal protection in interpreting the European Convention on Human.

ARTICLE HISTORY Received 1 March 2017; Accepted 14 August 2017

KEYWORDS Human rights; family life; marriage; incest; egg donation; surrogacy

1. Introduction

How is family defined from a legal point of view in Europe? What kinds of limits do European States set to the recognition of personal relations as family life? What does the protection of family relations mean in international human rights law, either from the perspective of litigants arguing for their individual rights or of States responsible for

CONTACT Linda Hart linda.hart@alumni.helsinki.fi Department of Social Research, University of Turku, Turku, Finland

implementing and protecting these rights? The case law of the European Court of Human Rights (ECtHR), based in Strasbourg, provides a treasure trove not just for lawyers to study legal doctrine, but for social and political scientists as well. Its judgments are binding on Member States of the Council of Europe (an intergovernmental organisation separate from the European Union) and have been accumulated from the 1950s to the present day. Legal norms concerning family life is just one of the areas being developed as the ECtHR interprets the European Convention on Human Rights (ECHR) (Ovey and White 2006; Choudhry and Herring 2010).

In this article, relevant ECHR case law[1] acts as empirical evidence on how marriage and family life are defined in the European legal culture of human rights (Hart 2016: 24; see also Arold 2007), created and maintained by the Council of Europe. Topical themes in recent years in the sphere of marriage and family life have included different forms of legal recognition of same-sex couplehood (civil partnerships, other forms of civil unions, same-sex marriage) and how different forms of assisted reproduction may be benefited from both within States and between States to give birth to children and to create parental relations (egg and sperm donation, surrogacy). In case law, these issues have culminated in questions such as whether offering same-sex marriage is a duty that States must fulfil according to the ECHR (see *Schalk and Kopf v. Austria*; *Vallianatos and others v. Greece*; *Oliari and others v. Italy*; *Chapin and Charpentier v. France*) and how States should recognise the legal identities of children born of transnational surrogacy arrangements (see *Mennesson v. France*; *Labassee v. France*; *Paradiso and Campanelli v. Italy*).

The ECtHR has been subject to academic study both as an area of jurisprudence and as an institution. A great deal of this research focuses on legal doctrine, but political scientists (see Arold 2007) and socio-legal scholars (Dembour 2006, 2015; Johnson, 2013, 2014) have analysed ECHR case law as well. The ECtHR began as a part-time institution after the Second World War but has been growing in legal and political importance and in the number of cases processed, which grew after the breakdown of the Soviet Union and the accession of many East European and Eurasian States to the Council of Europe (Johnson 2013: 21). As it is possible to complain to the ECtHR only when the case has been examined by all levels of the national legal system where it originates from, a legal

[1]ECHR case law is openly available in the Hudoc online database at http://www.hudoc.echr.coe.int.

process within the ECtHR might take several years (Dembour 2006; Ovey and White 2006).

Article 8(1) of the ECHR states that 'everyone has the right to respect for his private and family life, his home and his correspondence'. According to Article 8(2), this is a conditional right that can be curtailed 'in accordance with the law' and if 'necessary in a democratic society' for the sake of security, safety and what concerns the themes addressed in this article, 'for the protection of health or morals' and the 'rights and freedoms of others' (European Convention on Human Rights). Analysing the protection of private and family life under the ECHR brings one to a certain paradox. On a conceptual level, the classic subject of international law is in many ways an individual pitted against a State, stripped of gender, ethnicity and many other identity markers that may affect the standing of this subject in many ways when her or his rights are examined (Hart 2016: 12). However, in the field of family relations, the rights of an individual in relation to other individuals are under scrutiny. These relations of dependency and relatedness are in many ways in conflict with the idea of a free-floating and detached liberal subject. Feminist legal theorists such as Nedelsky (2011) and Leckey (2008), both Canadian legal scholars, have been grappling with this paradox and developing 'relational theory' that builds on feminist political and legal theory and feminist ethics of care (see Gilligan 1982; Kittay 1999). In this article, it is argued that there is a tension between taking the relational concerns of individual applicants into consideration and state-centred rationalities on what kind of public policy and legislation to profess. ECHR case law provides an ideal corpus of case law for analysing and discussing this kind of a tension.

International human rights law acts as an interesting point of reflection for how the limits of family relations are constituted in different societies, as it represents both rationality and impartiality in the guise of positivist, human-made law (see Campbell 1999), but also politico-moral evaluation in trying to interpret and develop temporally shifting definitions to age-old questions such as who may marry whom and who may be counted as someone's parent or child. What kinds of relations between individuals merit the legal privileges and protection accorded to state-recognised families? What human rights adjudication finally rests on in individual cases is how the norms expressed in an international and widely ratified human rights convention are interpreted in a certain point in time in light of earlier judgments where the substance of these agreed norms has been developed.

From a sociological viewpoint, case narratives of individual applicants make up a body of ethnographic examples that are evaluated in the light of principles that a widely accepted set of norms such as the ECHR stands for. In this article, it is argued that from the perspective of knowledge production, the examination of these historically and culturally specific individual narratives contributes to developing a 'human rights rationality' (Langlois 2005: 381) or various, perhaps conflicting, 'human rights rationalities'. According to Langlois, the concept of 'human rights rationality' provides a philosophical narrative of what humans are and what we share in the context of a universal set of principles and norms:

> … within the mainstream of Western political theory, human rights justifications are sought on the basis of an impersonal and autonomous rationality … This human rights rationality is always applied in a certain time, at a certain place – it is in the end always particular. (: 381)

Langlois emphasises that the interpretation of human rights norms in light of specific cases is always historically contingent. In case law, attempts towards this kind of a rational mode of arguing for human rights tend to be backed up by extra-legal empirical knowledge. However, these attempts tend to fall short of an impartial and positivist ideal of decision-making as they may collide with deeply held moral and historical cultural understandings of 'family', for example. From the perspective of empirical analysis, judgments given by the ECtHR make it possible to analyse what striving for rational and logical decision-making in the area of family life and human rights looks like.

First, this article briefly addresses the question of what 'family life' consists of according to the interpretation of Article 8 (right to respect for private and family life, the home and correspondence) in the interpretation of the ECHR. Second, it analyses what happens when cases that display questions of key importance from an anthropological point of view (incest prohibitions, the use of human gametes and capacities) are examined in the context of a human rights complaint made to the ECtHR. The cases analysed here deal with the limits of the right to marry and the protection of family life as argued by respondent Governments in order to preserve the existing legal order in a Member State.[2] Third, this collision of historico-anthropological knowledge and international human rights adjudication is discussed as a process which

[2]In the cases examined, the States in question are United Kingdom, Germany, Austria and France.

produces manifestations of human rights rationalities, where empirical, scientific, ethical and cultural understandings intersect.

2. Socio-legal perspectives to family life in the ECtHR

The ECtHR offers a huge corpus of case law with judgments given for about 18,000 cases between 1959 and 2016[3] as well as a wealth of other material. As texts, judgments are structured so that they proceed from a legal narrative summarising the facts of the case to a presentation of the legislation in question in the respondent State. This is followed by arguments of the applicant(s), the Government of the respondent State and the ECtHR itself. Finally, the outcome of the case is pronounced by the ECtHR, arguing which rights enshrined in the ECHR, if any, have been violated. If a violation of the ECHR is found, the processual examination and the outcome of the case are expected to be a considerable reward for the applicant(s). The State in question might also be ordered to pay financial compensation to the applicant(s). Also, if the legislation discussed in the case is seen by the ECtHR as incompatible with the European Convention of Human Rights, a State might be obliged to amend its legislation.

As an international human rights treaty, the ECHR does not give a specific definition of what 'family' means. Article 8 of the ECHR, comprising the right to respect for private and family life, has been subject to judgments in almost 1700 cases during 1959–2016. About 600[4] judgments have been given concerning the right to respect for 'family life', a sphere of its own compared to 'private life'. Only some judgments under Article 8 concern the limits of acceptable forms of family life, as infringements to respect for family life may be examined in various situations, such as family reunification, expulsion from a State, criminal investigations or imprisonment. Article 12 of the ECHR on marriage is also relevant to family relations. It says that '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'. Article 12 has been subject to a judgment in only 30 cases in 1959–2016.[5] It is historically grounded in protecting the right of men and women to marry each other regardless of nationality, religion and similar differences. In recent years, it has been challenged to argue for same-sex or gender-neutral marriage, such as in

[3]See Hudoc database, www.hudoc.echr.coe.int. Case count as on 31 December 2016.
[4]As on 31 December 2016.
[5]As on 31 December 2016, Chamber and Grand Chamber judgments. See Hudoc database.

the judgments of *Schalk and Kopf v. Austria* (2010) or *Hämäläinen v. Finland* (2014).

In its case law, the ECtHR has given its own definition of what constitutes a family. This definition was given in 1997 by the Grand Chamber (highest instance of the ECtHR system) judgment of *X, Y and Z v. the United Kingdom*[6]:

> … [T]he notion of 'family life' in Article 8 … is not confined solely to families based on marriage and may encompass other *de facto* relationships … When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means. (*X, Y and Z v. the United Kingdom*, para 36)

In this case, it was examined whether a female-to-male post-operative transgender person could be legally recognised as the father of a child born to him and his female partner with the help of donated sperm. Regardless of the gender-neutral linguistic formulation of the definition above, the case of the applicants was unsuccessful and no violation of Article 8 was found. However, the ECtHR found that Article 8 applied and that the applicants shared *de facto* family life (*X, Y and Z v. the United Kingdom*; see also Hart 2009, 2016). In turn, in its case law on same-sex relations, the ECtHR stuck for a long time on the view that same-sex relations were protected under Article 8 by respect for private life, but not as family life. Since the judgment of *Schalk and Kopf v. Austria* in 2010, same-sex relations have also been included in *de facto* family life (*Schalk and Kopf v. Austria*, para 91).

The cases analysed in this article are *B. and L. v. the United Kingdom* (2005), *Stübing v. Germany* (2012), *S.H. and others v. Austria* (2011) and *Mennesson v. France* (2014) analysed together with *Labassee v. France* (2014). They have been selected due to how respondent Governments argue axiomatic views of 'family' and its place in society as well as making references to extra-legal expert reports.[7] The first two, *B. and L.* and *Stübing*, deal with prohibited degrees of relationships in the context of cohabitation, marriage, producing offspring and raising children.

[6]All case titles include first the individual applicant or applicants known by name or initials, (anonymised or not), followed by the respondent State. When cases are quoted, reference is made to paragraphs (para) in case texts, not pages.

[7]References to extra-legal expertise are not made in all ECHR cases, so this makes it relatively easy to select the cases for this analysis from a larger pool of case law on the constitution of family relations in ECHR case law (see Hart 2016).

From an anthropological perspective, the first case deals with incest of the second degree, sexual relations between in-laws, and the second case with incest of the first degree, sexual relations between consanguineous siblings (see Héritier 1993). *S.H. and others* and *Mennesson/Labassee* deal with assisted procreation, focusing on egg donation and surrogacy. In these cases, what is at stake is the use of female reproductive cells and reproductive capacities. All five cases pose the question of where limits to what is seen as legitimate and acceptable in establishing family relations are drawn, and these limits are embodied in the legislation of the respondent States (United Kingdom, Germany, Austria, France) which Government representatives argue for in the ECtHR.

In cases such as these, references to extra-legal expert knowledge, if they appear, tend to be made to expert reports produced outside the ECHR case law machinery. Sometimes, these have been commissioned during the legal process itself, such as in *Stübing v. Germany*, or during a deliberative political process, as in *B. and L.* and *Mennesson/Labassee*. In *B. and L.*, the case concerning marriage between in-laws in the United Kingdom, it was *No Just Cause* (1984) by a commission of experts led by the Archbishop of Canterbury regarding the possibility of lifting legal obstacles to second-degree incest in English law. In the case of sibling incest, it was a multi-disciplinary report from a Max Planck research institute specialising in criminal law (Albrecht and Sieber 2007). In the cases concerning egg donation and surrogacy, references were made to comparative legislative and policy data in *S.H. and others v. Austria* (IFFS 2007) and State-commissioned French expert reports in *Mennesson* and *Labassee* (Conseil d'Etat 2009; Théry and Leroyer 2014).

I argue that in all five cases the substance of the cases presented and argued by the individual applicants and the respondent Governments was met by a 'human rights rationality' that the judges of the ECtHR contribute to, develop and convey in the judgments they give when interpreting the ECHR. Following Langlois (2005), this rationality is historically contingent and malleable. It may even be conflicting and paradoxical at times rather than strictly based on scientific findings, such as in the physical effects of sibling incest, or ethical arguments taking power relations or human vulnerability into consideration. This is partly due to an established doctrine developed by the ECtHR itself, where the Member States have been given a certain 'margin of appreciation' to decide what kind of legislation needs to be in place in a specific society (see Johnson 2013: 69–79). This can be seen especially in cases dealing with sensitive issues such as relating to family life, religion and morals. However, the

margin of appreciation, i.e. cultural differences between states in defining questions such as 'family values', is merely one component in making human rights adjudication in the ECtHR axiomatic and conflicting. What remains to be investigated is what kinds of statements and knowledge are produced and under which conditions when emic 'anthropological' understandings of family are evaluated against the contemporary notions of justice, proportionality and fairness.

3. Cultural understandings of incest in a human rights court

The judgment of *B. and L. v. the United Kingdom* from 2005 deals with a theme that is at the heart of classic anthropological studies of kinship: culturally variable rules on the prohibition of incest and their codification into systems of knowledge that govern people's lives (see Héritier 1993). In its time in the late 1990s and early 2000s, this case collided with ideals of individual choice in choosing one's intimate and marital partner, as the applicants, B (a man) and L (a woman), wanted to marry despite formerly being daughter-in-law and father-in-law to each other. In this case, the human rights principles that B and L evoked when complaining to the ECtHR were a tool for arguing that the prohibitions of sexual relations between former in-laws in English law were outdated and illogical. These restrictions emanate from the Old Testament and Leviticus (18: 6–18), where the prohibited degrees of sexual relationships covered several categories of consanguineous relatives and affines, including step-parents, half-siblings, children of one's siblings and siblings of one's parents. In English law, these rules were developed into ecclesiastical law and codified in English law in the nineteenth century (see Héritier 1993; Cretney 2003). Prohibitions of second-degree incest in English law were later amended in a piecemeal fashion responding to historically particular situations, such as the shortage of men of marriageable age in the population after the First World War (Cretney 2003).[8]

B, the man, had been married twice. L, the woman, had been married to B's son C. In 1995, L and C separated and their divorce was finalised in 1997, as was B's second divorce, too. L and C had a child together. After L and C separated, L and her child began to live with B. Thus, when B and L began cohabiting, L was both B's cohabitee and former daughter-in-law and her child was B's grandchild. In 2002, B asked the

[8]The case of B and L, regardless of being a regular Chamber judgment in the ECtHR, has drawn some commentary from both legal scholars and anthropologists (see Simpson 2006, Schäfer 2008, Roffee 2014).

authorities whether he and L could marry. According to English law in those days, the Marriage Act 1949 amended in 1986, this was not possible unless B's former spouse (C's mother) and C himself (B's son) were both dead (*B. and L. v. the United Kingdom*, paras 7–12). In England, small-scale legislative procedures, 'Personal Bills', had made it possible for couples in their position to marry. Personal bills were proposals made to the Parliament of England to contravene the Marriage Act. This kind of a procedure required time, money and legal expertise and was not possible for them (para 23).

In the ECtHR, B and L addressed their claim under Article 12 of the European Convention, the 'right to marry and to found a family'. They argued that the law prohibiting them from marrying because of their former relationship as in-laws 'denied them the very essence of the right to marry' (para 28) and was 'disproportionate and unjustified' (para 28). They also argued that passing Personal Acts to contravene the law undermined the existence and the rationale of the prohibition of marriage between former in-laws. In the ECtHR, the Government of the United Kingdom argued that the ban was not absolute, as it was possible for B and L to marry if C and his mother were both dead. Personal Bills provided another way. Furthermore, the UK Government argued that '[t]hese requirements were proportionate having regard to the complexity of relationships, the harm to others that was potentially involved in such marriages and the requirements of the protection of morals' (para 31).

To support its position, the UK Government referred to the potential confusion of making B, a grandfather, a stepfather to his grandson. This was 'an issue of general public importance with wide moral implications' (para 31). Most importantly, the UK Government argued that:

> … [T]he legislature considered that the restriction was necessary given *the risk of such marriages undermining the foundations of the family* and altering relationships between affines; public views on the moral limits of permissible relationships within the family and the risk of public outrage; and the role of law in defining and reinforcing family relationships'. (para 32, emphasis added)

The UK Government also referred to other Member States of the Council of Europe having similar restrictions, as twenty-one States had banned marriages between affines either completely or with certain conditions (para 33).

The ECtHR admitted that the disputed legislation 'aimed at protecting the integrity of the family', referring to 'preventing sexual rivalry between parents and children' (para 37). In turn, the ECtHR stressed the margin of

appreciation, meaning that the authorities of each State are the most competent ones to assess what kinds of limitations are needed and that the United Kingdom was not alone in restricting marriage between affines. However, the ECtHR noted that the majority of a group of representatives in the House of Lords, the upper chamber of the UK Parliament, had adopted the view that 'the bar should be lifted as it was based on tradition and no justification had been shown to exist' (para 39). According to the ECtHR, there was inconsistency between the aims of the measure and the possibility of Personal Bills for contravening the law and thus the '*rationality and logic* of the measure' were undermined (para 40, emphasis added). The ECtHR found a violation of Article 12.

Indeed, the ECHR judgment on *B. and L.* contains a brief historical note on proposals to reform English law on marriage between affines (paras 17–19). A commission of experts from various fields such as theology, philosophy and law had produced a report in 1984 called on needs to review the legislation on bars to marriage between affines (*No Just Cause* 1984). The report makes brief reference to the existence of the ECHR as a legal basis for the freedom to marry a person of one's choice (*No Just Cause* 1984: 46), where a distinction is made between 'granting a right' and 'protecting the freedom' to marry, which the ECHR stands for. In the conclusions and recommendations of the report, it is argued that '… [t]o marry is a fundamental human liberty which should be protected. A couple wishing to marry should not be prevented from doing so unless there is some compelling reason or logical impediment' (*No Just Cause* 1984: 91). In light of this, it was the ECHR that had to review the 'rationality' and 'logic' of barring marriage between former in-laws somewhat twenty years later.

A different angle to prohibited degrees of relationships was discussed in the judgment of *Stübing v. Germany* in 2012. In this case, a man had been taken into state care when he was only a few years old. As a young adult, he re-established contact with his birth family. After the death of his mother, he and his younger, genetically related sister developed a sexual relation and four children were born. The sister was sixteen years old when the relationship began, and in the judgment she is described as not having been fully responsible for her actions due to her personal characteristics and aptitudes (*Stübing v.* Germany, para 12). Both the brother and the sister were convicted of a criminal offence due to committing sibling incest, and the brother spent time in prison for this (para 11). Their three eldest children were in state care and living in foster families (para 8).

The recognition of legal family relations was not at issue here, as the legal paternity or maternity of the sibling couple were in question. This was about if it was proportionate to maintain a legal norm which made (supposedly) consensual sibling incest between adults a criminal offence. Before the ECtHR, the case was examined by the Federal Constitutional Court of Germany, which commissioned the Max Planck Institute for Foreign and International Criminal Law to compile a comparative study on sibling incest, its status as a criminal offence and its effects on the physical health and fitness of the children born (see Albrecht and Sieber 2007). In *Stübing*, the ECtHR held that it was acceptable for Germany to maintain criminal liability for sexual relations between genetic relatives and that Article 8 had not been violated. According to the case material, Stübing was represented in the ECtHR by two different lawyers and three professors (para 2).[9] Thus, Stübing had strong support from experts who acted to have the criminalisation of sibling incest overturned.[10]

What is of interest in the ECHR judgment of this case is the argumentation of the Federal Constitutional Court of Germany cited on how incest by some individuals is a threat to the entire society and the symbolic kinship positions that family members are supposed to inhabit. The Federal Constitutional Court had noted that protecting marriage and family were the primary reason for criminal punishment on sibling incest. Furthermore, it argued:

> Empirical studies had showed that the legislature was not overstepping its margin of appreciation when assuming that incestuous relationships between siblings could seriously damage the family and society as a whole. Incestuous relationships resulted in overlapping familial relationships and social roles and, thus, could damage the structural system of family life. (*Stübing v. Germany*, para 16)

In turn, the German Government argued in the ECtHR that

> The report by the Max Planck Institute had confirmed that incestuous relationships were liable to deepen and exacerbate existing problematic socio-psychological relationships within a family. The damaging effect on the family structure would have a direct negative effect on society. (*Stübing v. Germany*, para 47)

[9]'The applicant was at first represented by … a lawyer practising in Dresden, and by Mr K. Amelung, Mr S. Breitenmoser and Mr J. Renzikowski, university professors teaching in Dresden, Basel and Halle … ' (*Stübing v. Germany*, para 2).

[10]For example, German Ethics Council (Ethikrat) gave a statement in 2014 based on a report (Deutscher Ethikrat 2014) calling for lifting the criminal ban on consensual sibling incest.

Unlike *B. and L. v. the United Kingdom*, this judgment did not concern the right to marry, but the right to respect for private and family life under Article 8 of the European Convention. The ECtHR relied in its argumentation very much on the findings of the German Federal Constitutional Court and the expert knowledge solicited for the case (Albrecht and Sieber 2007). The ECtHR pronounced 'that the imposition of criminal liability was justified by a combination of objectives, including the protection of the family, self-determination and public health, set against the background of a common conviction that incest should be subject to criminal liability' (para 63). Further attention was given to the issue of sexual self-determination: the criminalisation of supposedly consensual sibling incest was seen to protect persons entangled in close and interdependent family relations from being taken advantage of sexually by a family member.

The case of *Stübing* presents arguments from the German Government and the ECtHR that articulate a cultural understanding of allowed degrees of sexual relationships. This is a State-argued ethnographic example of the rule of exogamy, marrying out of one's closest group of kin. The risks of genetic inbreeding backed up by knowledge from natural sciences (Albrecht and Sieber 2007: 112–117) and the physical repercussions of siblings having children together are just one among many reasons given for the prohibition. The notion of 'family structure' referred to above presents an order of genders and generations where one is not allowed to transgress and inhabit several, conflicting positions such as being both 'grandfather' and 'stepfather', or both 'mother' and 'aunt' or 'father' and 'uncle'. The projected effects of confusion in kinship roles and positions are given a lot of attention by both UK and German Governments in *B. and L.* and *Stübing*. Importantly, potential interpersonal and psychological strife, suffering, and the protection of vulnerable persons such as the woman accused of incents in *Stübing* are given attention, but none of this is backed with empirical evidence in the judgments.

4. 'Entire structure of society' at peril: egg donation and surrogacy

Argumentation similar to the defence of an axiomatic view of family relations in *Stübing* was put forward by representatives of German and Italian governments as third-party interveners in the Grand Chamber judgment of *S.H. and others v. Austria* in 2011. This case concerned different limits set for the use of donated eggs and donated sperm in

medically assisted reproduction in Austria. Artificial insemination with donor sperm was allowed, but *in vitro* fertilisation (IVF) was allowed only with gametes from the woman and man treated. Egg donation was banned in all circumstances. This case was somewhat exceptional in ECHR case law on family life as it is usually non-governmental organisations that provide third-party interventions, not Governments (see, for example, Hodson 2010). However, both Germany and Italy, along with other Member States, have a ban on egg donation, so they had an interest in arguing their case. There had first been a regular Chamber judgment of the ECtHR in this case, but due to the complexity and importance of the case, it was referred to the Grand Chamber, the highest instance of the Strasbourg Court, where 17 judges decided the case and sealed its final outcome.

In relation to egg donation, the German Government argued:

> This prohibition was intended to protect the child's welfare by ensuring the unambiguous identity of the mother. Splitting motherhood into a genetic and a biological mother would result in two women having a part in the creation of a child and would run counter to the established principle of unambiguousness of motherhood which represented a fundamental and basic social consensus. (*S.H. and others v. Austria*, para 70)

In the same case, the Italian Government defended its ban on egg donation:

> Medically assisted procreation … involved serious risks. Gamete donation might lead to pressure on women on moderate incomes and encourage trafficking of ova. Scientific studies also showed that there was a link between *in vitro* fertilisation treatment and premature births. Lastly, to call maternal filiation into question by splitting motherhood would lead to a weakening of the *entire structure of society.* (*S.H. and others v. Austria,* para 73, emphasis added)

In these arguments, the existence of both a genetic and a gestational relation between a woman and a child is seen as a relation around which all other family relations are built on. However, much like in the argumentation given by the German Government in *Stübing*, the risks are largely projected instead of being backed up with empirical knowledge. The ECtHR took note of the risk of 'exploitation of women in vulnerable situations' in egg donation, the possible physical effects and health risks of harvesting eggs and the 'creation of atypical family relations because of split motherhood' (*S.H. and others v. Austria*, para 113). However, also in the argumentation of the ECtHR the issue boiled down to gamete donation being a 'controversial issue in Austrian society' and giving rise

to 'complex questions of a social and ethical nature on which there was not yet a consensus in society' (*S.H. and others v. Austria*, para 113). The outcome of the case was that the Grand Chamber found no violation of the right to respect for private and family life in the gender-asymmetrical legislation on the use of gametes in assisted reproduction in Austria.

In *S.H. and others*, several sources were referenced for providing a comparative overview on legislation and clinical practice in different States regarding egg and sperm donation and their use in IVF treatments (para 35). However, many of them were from bodies functioning within the Council of Europe itself, of which the ECtHR is part of. A report from the International Federation of Fertility Societies makes an exception to this. The report (IFFS 2007) argues its position clearly from the point of view of its stakeholders: scientists and doctors wishing to make breakthroughs in fertility research, clinics wishing economic gain and patients wishing to be treated. However, in the 2007 report referred to in *S.H. and others* as a simple factual source, the final point made, bearing in mind the gains hoped for by the stakeholders, is that the legal regulation of a delicate issue such as the advisability of different forms of fertility treatments would be based on factual information and logical thinking (IFFS 2007: 67).

The judgments of *Mennesson v. France* and *Labassee v. France* in 2014 were almost identical cases where French married couples had had children through surrogacy arrangements in the United States. The children obtained US citizenship by simply being born on US soil, so they were not left stateless, which is a potential risk in some transnational surrogacy arrangements. The children in these cases were officially related to their French parents only under US law, as these parental relations were not recognised in France due to a ban on surrogate births in France. In the case, the French Government argued in the ECtHR that

> … in the interests of proscribing any possibility of trafficking in human bodies, guaranteeing respect for the principle that the human body and a person's civil status were inalienable, and protecting the child's best interests, the legislature – thus expressing the will of French people – had decided not to permit surrogacy arrangements. (*Mennesson v. France*, para 72)

Here, the French Government was arguing a position that seeks to protect a key characteristic of human rights: 'inalienability' means that rights cannot be given away or even negotiated by the persons that possess them.

In *Mennesson*,[11] reference was made to a report on the revision of French bioethics law by the Conseil d'Etat (2009), an institution that

[11] See full version of the judgment in French.

acts as the supreme administrative court and as a legal adviser for the government in France as well as a more recent expert report by Théry and Leroyer (2014), where they wish to contribute to a well-argued public debate regarding often emotion-provoking issues such as assisted reproduction and surrogacy (Théry and Leroyer 2014: 192). Regardless of the general advisability of surrogacy arrangements as a public policy issue, a very basic remedy in cases such as these two would be to allow the recognition of paternity on the basis of a genetic link between the father and the child, possibly followed by second-parent adoption by the social mother, which is what Théry and Leroyer argue. On a more future-oriented note, Théry and Leroyer call for a coordinated effort on the international level for an international agreement between States on the principles of how to safeguard the legal status of the children born of surrogacy arrangements (Théry and Leroyer 2014: 198). Indeed, some scholars call for a more lenient but regulated approach to surrogacy in the European context (Jackson *et al.* 2017).

The outcome of both *Mennesson* and *Labassee* in the ECtHR was that there had been no violation of the *family life* of any of the applicants (the commissioning parents and the children) but that there had been a violation of the right to respect for the *private life* of the children born of the surrogacy arrangement under Article 8 of the ECHR. Lacking French citizenship and having no recognised relations to the parents the children were living with made the children's status precarious in many ways, ranging from producing their passports and birth certificates as proof of identity in everyday encounters with the authorities and the threat of expulsion from the France when reaching adult age. However, the French ban on surrogate pregnancies was not criticised by the ECtHR, as it sought to protect, among other things, the inalienability of the human body.

5. Conclusion

In the five cases analysed, the ECtHR acts as an arena of knowledge production where cultural understandings of the limits of establishing legally recognised and valid forms of marriage and family life are evaluated in the context of human rights adjudication. In these cases, only the first one, *B. and L. v. the United Kingdom*, displays a set of legal rules so inconsistent and far removed from the principles of rationality and logic valued in the administration of values such as equality and individual choice today that the United Kingdom was ordered to yield to the demands of the couple. The main basis that emerges in favour of B and L is individual choice,

as they were only related through being former in-laws and couples in situations similar to their situation had been able to marry by asking special permission from the Parliament of England with Personal Bills. The rules prohibiting B and L from marrying dated back to rules of the Old Testament, but had lived on first in Canon law and then in English law, acquiring different meanings in different historical contexts. The rationalities behind the English legislation on prohibition of marriage between affines had been first based on Biblical tradition, and later on highly historically contingent situations, and when these rules had been amended this had not even been done in a logical or gender-symmetrical fashion to produce formally equal legislation (Cretney 2003).

The other cases analysed (*Stübing*, *S.H. and others*, *Mennesson/Labassee*) provide examples of situations where States (Germany, Austria and France, respectively) are allowed to maintain their legislation on the criminalisation of incest between blood relatives, the prohibition of egg donation for IVF and the prohibition of surrogate pregnancies. The arguments given by the Governments of these States for maintaining these limits to the protection of private and family life were only partially founded by scientific arguments, empirical evidence or bureaucratic and technological rationality. For the most part, the reasons given for maintaining the existing legal rules were axiomatic, relying on a symbolic image of different categories of kinship positions and speculated risks to the 'entire structure of society' if the rules were to be changed. The importance of holding up existing symbolic structures of kinship positions was in a central position in the arguments presented by the Governments in all of these cases. Protection for vulnerable persons such as sexually exploited children or surrogate mothers were articulated, but these relational concerns were not centre-stage in the arguments for criminalisation of supposedly consensual sibling incest in *Stübing* or benefiting from women's reproductive cells and capacities in *S.H. and others* and *Mennesson/Labassee*.

A contemporary kind of 'human rights rationality' (Langlois 2005: 381) emerges rather clearly when it comes to evaluating Biblical rules of affinity against modern-day principles of prohibited degrees of relationships (genetic relatedness) such as in *B. and L.*, but less clearly when it comes to defining a certain order of family relations as keeping society from falling into chaos as in the other cases discussed. The axiomatic statements on the imagined and symbolic place of 'family' in the structure of society argued by the German, Austrian and Italian Governments (in *Stübing* and *S.H. and others*) provide empirical examples on cultural understandings of family life in a European legal culture of human rights. The critique here is

that the Governments should engage more closely with scientifically rational and or at least empirically based ethical arguments instead of lofty, axiomatic statements with little actual substance to them. After all, scientific research and relevant extra-legal expertise is usually available, and these cases provide examples where references to such studies have even made it to the final text of the ECHR judgments. However, the cases analysed in this article do not really engage with cross-culturally available rational knowledge. This can be seen especially well in the case of the biological risks of procreation between genetically related persons. In the case of *Stübing*, protecting minors from sexual exploitation in complex family situations as the one in the case was given some attention. Unfortunately, this argument was in a secondary position to the axiomatic views of a certain image of the institution of family in German society and the German Constitution (*Stübing*, para 16). Decriminalising rare and individual-level acts was presented as a threat to society as a whole.

In the case of egg donation (*S.H. and others*) the possible exploitation of disadvantaged real-life women did surface, but likewise, the bone of the argumentation centred around unambiguous genetic motherhood as an essential structure of society. In contrast, the surrogacy cases (*Mennesson*, *Labassee*) contained a more sustained emphasis on the position of surrogates and the children to be born, supported by the outcome of the judgments that the rights of the children to private life had been violated, but not the rights of their commissioning parents to either family life or private life. What is at the heart of 'human rights rationality' as an outcome of socio-legal knowledge production is that both scientific knowledge and politico-moral perspectives produce new norms when applied on a case-by-case basis. This rationality is not a fully scientific rationality based on extra-legal expert knowledge, but a balancing act between individual freedoms and cultural understandings regarding what may be included within those individual freedoms.

Disclosure statement

No potential conflict of interest was reported by the author.

Notes on contributor

Linda Hart, D.Soc.Sc, is a University Instructor in Social Sciences doing postdoctoral research in Sociology at the Department of Social Research at the University of Turku, Finland.

References

Albrecht, H.-J. and Sieber, U. (2007) *Stellungnahme zu dem Fragenkatalog des Bundesverfassungsgerichts in dem Verfahren 2 BvR 392/07 zu para 173 Abs. 2 S. 2 StGB – Beischlaf zwischen Geschwistern*, https://www.mpicc.de/files/pdf1/05-08-inzest_gutachten.pdf

Arold, N. (2007) *The Legal Culture of the European Court of Human Rights*, Leiden: Martinus Nijhoff.

B. and L. v. the United Kingdom, no. 36536/02, 13 September 2005 (ECHR).

Campbell, T. (1999) 'Human rights: A culture of controversy', *Journal of Law and Society* 26(1): 6–26.

Chapin and Charpentier v. France, no. 40183/07, ECHR 2016.

Choudhry, S. and Herring, J. (2010) *European Human Rights and Family Law*, Oxford: Hart.

Conseil d'État. (2009) *La révision des lois de bioéthique*, Paris: La domentation francaise, http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/094000288.pdf

Cretney, S. (2003) *Family Law in the Twentieth Century: A History*, Oxford: Oxford University Press.

Dembour, M.-B. (2006) *Who Believes in Human Rights?* Cambridge: Cambridge University Press.

Dembour, M.-B. (2015) *When Human Become Migrants*, Oxford: Oxford University Press.

Deutscher Ethikrat (2014) *Inzestverbot: Stellungnahme*. 24 September, http://www.ethikrat.org/dateien/pdf/stellungnahme-inzestverbot.pdf

European Convention on Human Rights. Council of Europe, http://www.echr.coe.int/Documents/Convention_ENG.pdf

Gilligan, C. (1982) *In a Different Voice*, Cambridge, MA: Harvard University Press.

Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014.

Hart, L. (2009) 'Individual adoption by non-heterosexuals and the order of family life in the European court of human rights', *Journal of Law and Society* 36(4): 536–57.

Hart, L. (2016) *Relational Subjects: Family Relations, Law and Gender in the European Court of Human Rights*. Department of Social Research, University of Helsinki, https://helda.helsinki.fi/handle/10138/161283

Héritier, F. (1993) *Les deux soeurs et leur mère : Anthropologie de l'inceste*, Paris: Odile Jacob.

Hodson, L. (2010) *NGOs and the Struggle for Human Rights in Europe*, Oxford: Hart.

IFFS Surveillance. 2007, *Report by International Federation of Fertility Societies*, https://c.ymcdn.com/sites/iffs.site-ym.com/resource/resmgr/newsletters/surveillance_07.pdf

Jackson, E., Millbank, J., Karpin, I. and Stuhmcke, A. (2017) 'Learning from cross-border reproduction', *Medical Law Review* 25(1): 23–46.

Johnson, P. (2013) *Homosexuality and the European Court of Human Rights*, London: Routledge.

Johnson, P. (2014) 'Sociology and the European Court of Human Rights', *The Sociological Review* 62: 547–564.

Kittay, E. F. (1999) *Love's Labor: Essays on Women, Equality and Dependency*, New York, NY: Routledge.
Labassee v. France, no. 65941/11, 26 June 2014 (ECHR, in French).
Langlois, A. J. (2005) 'The narrative metaphysics of human rights', *The International Journal of Human Rights* 9(3): 369–387.
Leckey, R. (2008) *Contextual Subjects: Family, State and Relational Theory*, Toronto: Toronto University Press.
Mennesson v. France, no. 65192/11, ECHR 2014.
Nedelsky, J. (2011) *Law's Relations: A Relational Theory of Self, Autonomy, and Law*. New York, NY: Oxford University Press.
No Just Cause: The law of affinity in England and Wales. (1984). *Report by a Group Appointed by the Archbishop of Canterbury*. London: CIO Publications.
Oliari and Others v. Italy, nos. 18766/11 and 36030/11, 21 July 2015 (EHCR).
Ovey, C. and White, R. (2006) *Jacobs and White: the European Convention on Human Rights*, Oxford: Oxford University Press.
Paradiso and Campanelli v. Italy, no 25358/12, 27 January 2015 (ECHR).
Roffee, J. A. (2014) 'No consensus on incest?' *Human Rights Law Review* 14: 541–72.
Schäfer, L. (2008) 'Marrying an in-law? The future of prohibited degrees of affinity and consanguinity in English law' *Child and Family Law Quarterly* 20(2): 219–29.
Schalk and Kopf v. Austria, no. 30141/04, ECHR 2010 (ECHR).
Simpson, B. (2006) 'Scrambling parenthood: English Kinship and the Prohibited Degrees of Affinity'. *Anthropology Today* 22(3): 3–6.
Stübing v. Germany, no. 43547/08, 12 April 2012 (ECHR).
Théry, I. and Leroyer, A.-M. (2014) *Filiation, Origines, Parentalité*, Paris: Odile Jacob, http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf
Vallianatos and others v. Greece [GC], no. 29381/09 and 32684/09, 7 November 2013 (ECHR).
X, Y and Z v. the United Kingdom, 22 April 1997, Reports of Judgements and Decisions 1997-II (ECHR).