Austrian Legislation and Jurisprudence on Medically Assisted Reproduction

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Introduction

This paper analyses the Austrian legal framework for the regulation ofmethods and technologies concerning medically assisted reproduction offering a brief summary of the legislation and its development. Additionally, the most significant current court decisions regarding the topic have been taken in account in order to sketch the rationale and the key aspects of the current legislation.

Timeline

Federal law with which regulations on medically assisted reproduction are made (Reproductive Medicine Act- FMedG) was introduced in Austria in 1992, offering rather surprisingly restrictive rules for a liberal Western Europe Country such as Austria. For the very first time in Austrian history the technologies of assisted reproduction and the circle of people, who should be granted access to it, had been regulated. The event had lead to many political discussions over the years, resulting in amuch-anticipatedliberalization in 2014. After more than 20 years conservative attitudes had been finally set aside now allowing in some cases also non- traditional family structuresaccess to methods of medically assisted reproduction what can be seen as a significant step for the modern society.

FMedG 1992

The non-reformed Reproduction Medicine Act regulated strict access only for married or co-habiting heterosexual couples. Therefore, it was discriminating against same sex couples. Moreover, all regulated methods were allowed as *ultima ratio* only and sperm donation was in general prohibited with one exception of heterologous insemination- when the husband or male partner was diagnosed as infertile. Accordingly, donation of egg cells, embryos and surrogacy were strictly prohibited without any further exception, which was meant as a tool to protect women from exploitation. In that way this law created inequality between different patient groups and technology needs and even lead to significant development of "*assisted reproductive technology tourism*".[1]

People, who were not granted access to medically assisted reproduction in Austria and had the means to do so, were heading to other countries with less

[1]Griessler E, Hager M. Changing direction: the struggle of regulating assisted reproductive technology in Austria. Reprod Biomed Soc Online. 2017 Feb 22

restrictive laws e.g. Slovakia, the Czech Republic, Bulgaria, and Romania. Some even went out of their way to find an illegal semen donor over the Internet.[2]

Changing direction

As stated above, the need of a more liberal legal act was more than clear and wished for over the years by numerous legal and medical experts. Some of the barriers for a quicker change were Catholicism, avoidance of political conflict and loyal voters. Finally, after a long period of expecting change, it came in a form of the FMedRÄG in 2015- the long awaited Reform of the FMedG 1992.
The Reform presents an obvious shift on the political scene and consequently the change of legal policy of the lawmaker (see Table 1).

Aspect	**FMedG 1992**	**FMedRÄG 2015**
Ultima ratio	Yes	Yes (exception: lesbian couples)
Access for lesbian couples	No	Yes
Access for single women	No	No
Surrogacy	No	No
Egg donation	No	Yes (but no commercialization)
Sperm donation	No (exception: insemination)	Yes
Embryo donation	No	No
PGD = Preimplantation genetic diagnosis	No	Yes (in limited cases)

Table 1: Comparison of the FMedG 1992 and FMedRÄG 2015[3]

Current legal framework

i. Firstly,the concept of the use of medically assisted reproduction as *ultima ratio* has been kept with one and only exception for lesbian couples who have no natural method at their disposal but as women are anatomically able to bear children.[4]Medically assisted procreation within the meaning of this federal law is the use of medical methods to induce pregnancy in a way other than sexual intercourse(§ 1[1] FMedG). Possible and permitted

[2]Bogensberger R. 2015. Vater gesucht: Die Samenspende aus dem Internet. Die Presse. (Retrieved March 2, 2017, from http://diepresse.com/home/leben/gesundheit/1504490/Vater-gesucht_Die-Samenspende-aus-dem-Internet, 14.12)

[3]Source: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5952810/#fn0005

[4]Male homosexual couples are excluded because surrogacy is still banned.

methods are the following: the introduction of semen into a woman's genital organs, the union of egg cell with sperm cells outside of a woman's body, the introduction of viable cells (which are the fertilized egg cells and then cells developed from them) into a woman's uterus or fallopian tubes and lastly the introduction of egg cells or egg cells with semen into a woman's uterus. All other methods are illegal and prohibited by law. Additionally, only when the couple fulfills one or more eligibility requirements,which allow the regulated procedures (§2[2]), the medical assistance can be considered. Firstly, all other procedures that can reasonably be expected from the spouse/partner to induce pregnancy through sexual intercourse have been unsuccessful or have no prospect of success. Further, a possible requirement can also be a serious risk of contracting a serious infectious disease during intercourse e.g. HIV. Final and last possible requirement is that a pregnancy is to be brought about in one of two women who are a lesbian couple.[5]When deciding about the realization of acertain condition, the current state of science, medicine *lege artis* and experience is at all means to be considered. Only in that way can a fair legal enforcement be assured.

ii. Secondly, with FMedRÄG 2015, medically assisted reproduction is made available for lesbian couples with a parenting wish.[6] The two women should live in a registered partnership or a civil community. After the birth of the child, the other woman, who did not get birth, will be seen as a legal parent of the newborn as well, which is legally named descent form father or "other parent" (§144 [2] of the General Civil Code- ABGB)[7]
That means that the child will have one legal mother and one legal "other parent".

iii. Thirdly, single women cannot make use of medically assisted reproduction to become a (single) parent.Freezing of eggs known as "social freezing" and artificial insemination with donated sperm are both prohibited. That leads to legal discrimination against single women with a family wish. Therefore there is an urgent need for political action in order to promote family growth in Austria, which has been decreasing drastically.[8]Egg freezing is only possible in Austria if there is a medical indication- a possibility of losing fertility due to an illness or its treatment like for example chemotherapy (§2b FMedG). Without such concerns egg freezing stays out of the picture. Ratio behind these prohibitions may be the predominant traditional view on concept of family and making sure

[5]See under ii)

[6]VfGH G 16/2013 (finding)

[7]Mother by legal defition is the woman who gave birth to the child (§143 ABGB)

[8]https://www.woman.at/a/kinderwunsch-oesterreichisch-gesetz-single-frauen

that a child is not only being taken care of by one parent, especially during adolescence. The fact that many have criticized this reasoningleaves room for more possible future liberalisations of the Austrian FMedG.

iv. Surrogacy is banned in Austria, which stays also in the way of gay couples becoming parents with use of their own genetic material.[9] As stated above, according to Austrian law the woman who gives birth is always being considered its mother. There are two types of surrogacy: partial (or straight) surrogacy where the surrogate mother and the commissioning father are the genetic parents of the child and conception takes place through artificial insemination and full (or host) surrogacy where the commissioning mother and father are the genetic parents and conception is achieved through in vitro fertilization (IVF). Both forms are not allowed, although fears about the impact of surrogacy on the well being of children and families appear to be unfounded, according to findings from the investigation of surrogate families by the European Society of Human Reproduction and Embryology in 2002. The study clearly shows that there should be no negative consequences, psychological or physical, for the child, surrogate mother or the parents. Nor do there seem to be problems when the surrogate mothers hand over the babies to the mothers who have commissioned the surrogacy.[10]In other words,the current Reproductive Medicine Act has a potential to be changed also concerning the topic of surrogacy.

v. FMedG made egg and sperm donation from a third person legally possible. But there are some requirements that need to be met in order to donate or receive donated cells (§3 FMedG). The semen of a third person may exceptionally be used when one of the partners of different sexes is not able to produce or in case of medically assisted reproduction carried out in a partnership of two women. The egg cell of a third person may be used, as well exceptionally, when the woman with a wish of carrying a child is not reproductive and this woman has not yet reached the age of 45 at the time of start of the treatment. The woman who is the donor should be of age between 18 and 30. Only then removal and donation of the egg cell are allowed.
Embryo donation is a form of third-party reproduction in which unused frozen embryos remaining from one person/couple's IVF treatment are donated to another person or couple.[11]Frozen embryos can be used only

[9]Adoption by gay couples in Austria is legally possible from 01.01.2016(VfGhG 119-120/2014-12)
[10]https://www.eurekalert.org/news-releases/550405
[11]https://www.embryodonation.org/

be the couple who is their "owner" in Austria what makes donation of embryos prohibited in Austria.

vi. Pre-implantation Diagnostics (PDG) is genetic profiling of embryos prior to implantation. One of the most important challenges for assuring a successful pregnancy is identifying genetically inconspicuous embryos. An increase in age also leads to an increase in the amount of genetically abnormal egg cells. This naturally leads to a decrease in the probability of having a successful pregnancy. Preimplantation diagnostics can be used to analyze the genetic material of the egg cell or fertilized embryo during IVF-treatment in order to select genetically inconspicuous embryos fortransfer.[12]According to 2a FMedG, PDG is only permitted in Austria after three or more transfers of viable cells, which resulted in no pregnancy, and there is a valid reason to assume that the cause lays in the genetic disposition of the child. PDG is also possible if three or more spontaneous miscarriages or stillbirths occurred or due to genetic disposition of one parent there is a high risk of miscarriage, stillbirth or hereditary disease of the child. A hereditary disease within the meaning of 2a FMedG is such a disease, which makes the child so severely ill during pregnancy or after birth that it can be only kept alive through the constant use of modern medical technology. A hereditary disease is also present if the child has severe brain damage or will suffer from severe pain that cannot effectively be treated and as result impairs its lifestyle. Moreover, the cause of such diseases cannot be treated. If, according to the state of medicine and experience, there are several examination methods to choose from in order to exclude serious risks, only the examination is to be carried out which is less invasive when compared to others.

Procedural rules

i. Only a specialist in gynecology and obstetrics who is authorized to practice independently in an approved hospital or facility may carry out procedures connected to medically assisted reproduction and PGD.
The medical director of such a hospital must apply to the governor for approval. Approval is to be granted, if due to human and material resources and existence of legal authorizations, the methods of medically assisted reproduction can be carried out in accordance with the state of the art in medical science and experience. Furthermore, the possibility of adequate psychological counseling and care must be given. The governor has the right to revoke the admission if the prerequisites are no longer met or there is a serious violation of this federal law (§§4,5 FMedG).

[12]https://www.wunschbaby.at/

ii. No doctor is obliged to carry out medically assisted reproduction and should never be discriminated in any way because of implementation accordingly to FMedG (§6 FMedG). At least 14 days before a medically assisted procreation, the doctor must inform and advise the spouse, partner or life companion or third person from whom the egg cells are removed, in a language that is understandable for medical laypersons, in particular about the circumstances regarding the cause of infertility, risks and dangers and possible after treatments connected to a certain procedure (§7 FMedG).
Medically assisted reproduction may only be carried out with consent of included persons. In the case of a partner or, if donated sperm or egg are used, a third person's consent requires form of a notarial act. To give consent, you must be able to make decisions. Consent to medically assisted reproduction can be revoked to the doctor until the sperm, egg cell or viable cell are introduced into the woman's body. Revocation does not require a specific form to be effective. The consent of both spouses or partners may not be older than 2 years at the time of the introduction of cells into the woman's body (§8 FMedG). In other case it is not to be considered.

iii. There are some special provisions for use of donated cells. For purposes of medically assisted production, third parties may only ever make their cells available to one hospital. Their cells may be used in maximum three foreign marriages or partnerships. Semen from different men and semen from different women may never be used. Cells in general can be stored in an approved hospital for maximum of ten years.

Commercialization and brokerage ban

There is a commercialization and brokerage ban, which prohibits that medically assisted reproduction becomes subject of legal transaction against payment. The mediation and advertising of treatments is not allowed as well (§16 FMedG).

Documentation and information obligations

FMedG regulates keeping records about used methods, processing data, information desk and statistics (§§18-21 FMedG). Records kept by doctors should be kept for 30 years. The doctor is responsible for the processing of personal data provided in a compliance with Regulation (EU) No. L 119 of April 27, 2016 and Data Protection Act.[13]

The records of donators are to be treated with confidentiality. A child conceived with donated cells shall, upon request, be given access to those records after having reached the age of fourteen.

[13] Hereinafter GDPR and DSG, Federal Law Gazette No. I 165/1999

Criminal Provisions

Criminal liability of a doctor and anyone working for the hospital that violates the FMedG is regulated in §22-25. Violations of obligationsand administrative offenses are being punished with fines and possible imprisonment. Any payment received for the offense is to be declared forfeited.
Next to criminal liability,liability of the hospital as a result of violation of the contract between the patient (couple) and the hospital is to be considered.

Post-mortem reproduction

Mary Shelley's Dr. Frankenstein created the first fictional human being from posthumous tissue. Shelley, like hero Frankenstein, was fascinated by the newly emerging idea in the 18th century that the transition from life to death could be reversed. Shelly's work also resulted in some people's instinctive repugnance towards radical scientific ideas such as cloning, genetic manipulation of organisms or posthumous reproduction.
Posthumous Reproduction (PHR) is commonly used to refer to the intentional application of advanced medical technologies (to collect sperm and egg cells from the corpse) to achieve conception, pregnancy and childbirth in a situation where one or both parents are declared dead.[14]
As stated above, use of procedures connected to medically assisted reproduction in Austria is allowed only for couples, married or in a (civil) partnership. Inducing a pregnancy using these methods after divorce or *post mortem*is therefore strictly forbidden.[15]Reasoning behind it is again thewell-being of a child that would be conceived in such a non-traditional way and numerous personal and social challenges that could possibly follow.

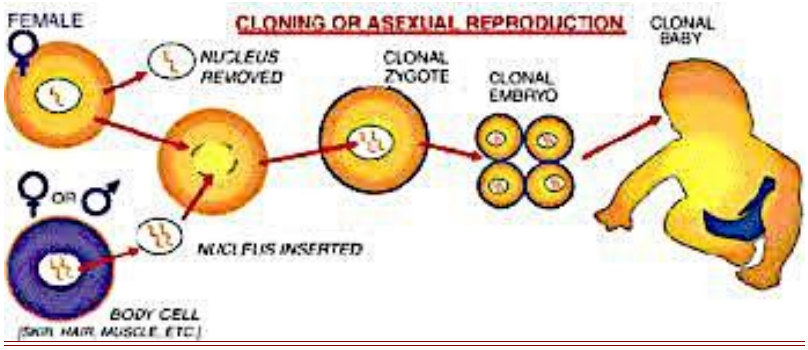
Reproductive Cloning

Reproductive cloning is defined as the deliberate production of genetically identical individuals. Each newly produced individual is a clone of the original.
In reproductive cloning, the newly created embryo is placed back into the uterine environment where it can implant and develop. Dolly the sheep (1995) is perhaps the most well known example, being the first living being ever cloned.
In Austria there is currently no individual legal basis for regulation of human cloning.Human reproduction cloning is a burning topic worldwide, which results in many still ongoing debates about its safety, benefits and possible violations of the law, which may occur by allowing it. It certainly threatens the very method in which a new life is brought into the world and may go against the human dignity and the ban of instrumentalization of humans, which are inviolable. Interfering

[14]Yael Hashiloni-Dolevund Silke Schicktanz, A cross-cultural analysis of posthumous reproduction: The significance of the gender and margins-of-life perspectives, Reproductive Biomedicine & Society Online, June 2017

[15]Hadolt, Reproduktionstechnologiepolitik in Österreich, 2005

in the creation of life itself by duplicating a human being may end up being a serious threat for the humankind and its fundamental values.
In light of these concerns human cloning as mean of reproduction is seen and interpreted as forbidden by the Austrian legal system. [16]
In contrast, human cloning for therapeutical purposes is seen as allowed by some legal experts in Austria. Therapy cloning is designed as a therapy for a certain disease, which is more than welcomed by the science, and no new human being (clone) is produced as the end result. But some other legal opinions strictly forbid therapy cloning as well, supporting their arguments with an interpretation of §9 FMedG- developable cells shall not be used for any other purpose than procedures of medically assisted reproduction, which are permitted and in accordance with FMedG. This may be seen as overgeneralizing of the imprecisely regulated terms and definitions. Some opponents of the therapy cloning prohibition interpret the "Dolly-Method" as no method forbidden by the FMedG. [17]To conclude,the lack of a precise legal regulation leaves the matter rather confusing. Therefore, whether therapy cloning is allowed or not stayscontroversial and is yet to be cleared.



Picture 1: The steps of human asexual reproduction[18]

[16]Miklos, das Verbot des Klonens von Menschenin der österreichischer Rechtsordnung, RdM 2000
[17]Kopetzki, Stammzellforschung in Österreich – Bestandaufnahme des geltenden Rechts
[18]https://web.stanford.edu/~cbross/albertrpdarft.html

Analyses of the most significant court decisions regarding medically assisted reproduction in Austria

i. Surrogacy abroad and the question of citizenship:

Hence, the Austrian law system doesn't allow the transfer of a fertilized egg in another woman's body and therefore bans surrogacy (see above- *Current legal framework, part iv*).

By this reason, many Austrian couples facing infertility problems turn to surrogacy overseas, namely in the countries allowing this method of fertility treatment. The question on status of the children born abroad as a result of international surrogacy programs sparked a lively discussion in Austria: whether the Austrian citizens are recognized in Austria as legal parents and if the children are consequently entitled to Austrian citizenship. Relevant embassies, social security authorities, and courts were involved in aforementioned disputes. Finally, in December 2011, the Austrian Constitutional Court has ruled that children born through surrogate motherhood contracts abroad are entitled to the Austrian citizenship (Case B13/11-10).[19]The Austrian Constitutional Court decided in a case involving an American surrogate mother who gave birth to two children whose genetic parents are Austrian citizen (a woman) and Italian citizen (a man) residing in Vienna. Because of removal of her uterus the Austrian mother could no longer bear children herself. The children became American citizens by birth in the USA and were recognized as the Austrian parents' children by American courts. They were subsequently raised by the genetic parents and registered as Austrian citizens by the City (so called "Magistrat") of Vienna. When the mother claimed child benefits, the Ministry of Interior asked the City of Vienna to withdraw the Austrian nationality of the children arguing that surrogacy was illegal under Austrian law and that the American Court's decision establishing parental rights of the Austrian mother could therefore not be recognized by Austria.

The Constitutional Court rejected this argument on four grounds:

a) It pointed out that the American decision establishing legal motherhood of the Austrian genetic mother was taken without any reference to Austrian law and was valid under norms of international private law.

b) The Court rejected the argument that the Austrian law prohibiting surrogacy was part of Austria's public order (*ordre publique*) thus overriding the American decision. The Court outlined that the federal law on Assisted Reproductive Technology does neither have constitutional status nor protects fundamental rights.

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[19]https://www.ukrainiansurrogates.com

c) The Court stated that the American surrogate mother couldn't be forced into the position of the legal mother against her will by Austrian law.

d)Finally, it was pointed out that the Ministry of Interior had decided arbitrarily by neglecting scholarly opinion and case law on *ordre publique* and by completely neglecting the welfare of the children as a key concern while determining their nationality.

ii. Artificial insemination and partnerships of women:

The Constitutional Court repealed provisions of the Reproductive Medicine Act upon application by the Supreme Court. The Supreme Court ruled in 3 Ob 224 /12f in accordance with §140 B-VGthe phrase "from persons of different sexes", in § 2 FMedG of the original version as unconstitutional. The reason behind it is the exclusion of women who live in a partnership with an another woman from medically assisted procreation and thus from the possibility of having and raising children, which goes against their right to private and family life (§ 8 ECHR) and against the principle of equality (§7 B-VG).
The Constitutional Court shares this legal opinion and repeals the aforementioned provisions at the end of 2014 (decision of December 10, 2013, G 16/2013-16, G 44/2013-14).There have to be particularly convincing and serious reasons in order to show a differentiation based on gender or sexual orientation as a violation of Art 14 MRK. The Supreme Court sets out its concerns on the matter as follows:

a) Violation in the opinion of the Supreme Court against §8 ECHR and §7 B-VG (see above)

b) The Constitutional Court has already ruled that the decision made by a spouse or partner to have a child and to use the necessary medical support is subject to the protection of § 8 ECHR (VfGH October 14, 1999, G91/98). The ECHR also emphasizes that the right to have a child and to make use of the achievements of reproductive medicine in order to fulfill the wish to have children is one of the rights protected by Art8 ECHR (ECHR 3.11.2011, 57813/00, SH and others against Austria). The desire for a child is therefore a particularly important aspect of the existence or identity of a private individual.[20]This right is restricted by the restriction of the reproductive medicine that is permissible per se under the Reproductive Medicine Act to couples of different sexes. The Supreme Court has concerns as to whether this can be justified on the basis of family protection or the best interests of the child.In the *Schalk und Kopf case against Austria*, the ECHR took into account the "rapid evolution of social behavior towards same-sex couples in

[20]RdM 2010/88 [Kopetzki]

many member states" and spoke with judgment of June 24, 2010 about the fact that the relationship of a same-sex couple falls under the term "family life" as well as under the term "private life" and therefore §14 in conjunction with §8 ECHRapplies. The ECHR therefore assumes that couples of the same sex, as well as couples of different sexes, are able to enter into stable, binding relationships –"family" in the constitutional sense. Austrian constitutional law does not have any special protection for marriage compared to other forms of cohabitation.

c)Even the argument with the impairment of the child's well-being will not work. First of all, it is inherent in our social understanding that it is (also) for a child - regardless of how it was conceived and the conditions of its life - to be at all than not to be.[21] Furthermore, according to the opinion of the Bioethics Commission obtained in the proceedings before the Constitutional Court, there are no valid studies according to which a child develops worse in a same-sex relationship between the two main caregivers ("parents") than in a different-sex relationship. On this basis, the Senate does not see any justification for restricting the possibility of two people of the same sex, theirs under Article 8 ECHRto fulfill the protected desire to have children by means of reproductive medicine that are permissible in themselves. The legal status of third parties (especially a "surrogate mother"), who may justify a restriction of this right in general (i.e. not only for homosexual couples), is not affected when two women are living together, one of whom can and wants to have the child, want to have children.

d)The Supreme Court has doubts about the restriction with regard to the principle of equality.On the one hand, for the reasons already given, there is no discernible justification for treating registered partners differently than spouses or partners of different sexes with regard to the fulfillment of their desire to have children. In this context, it should be noted that a registered partnership for a child (at least according to the legal framework) offers more stability than a mere cohabitation. From the point of view of the child's well-being, it seems all the less objectively justified to allow reproductive medicine in the legally less secure form of relationship of (heterosexual) cohabitation, but not in the legally secure form of life of the registered partnership, which is largely equivalent to marriage by the legislature.

On the other hand, there is a different treatment compared to the regulations on adoption. Children become part of a family relationship either through birth or through adoption.According to Austrian law, individual adoption is permitted with the consent of the partner in the case of a registered partnership. The single adoption by a registered partner does not in itself

[21]Bernat, glossary on OGH 3 Ob 147/10d, RdM 2011/81,97[98]

fundamentally contradict the best interests of the child. This corresponds to the case law of the ECHR: The refusal of adoption by a woman living in a same-sex partnership, mainly because of her sexual orientation, violates the prohibition of discrimination in Art14 in conjunction with §8 ECHR. This means that the creation of a parent-child relationship that cannot be traced back to a biological connection through (single) adoption is possible and permitted both for a single homosexual and in a registered partnership. Outside of marriage, individuals, regardless of their sexual orientation, are free to establish a parent-child relationship through adoption. The contractual relationship complements the ancestral family relationship.The achievements of reproductive medicine are also replacing a natural reproductive family relationship.

To conclude, in the opinion of the Supreme Court, there are constitutional concerns against §2(1) FMedG, insofar as this excludes medically assisted procreation for a woman living in a same-sex partnership and denies her the possibility of having children due to her sexual orientation.The Constitutional Court shares this legal opinion with the Supreme Court–as result the provisions of the FMedG named in its the ruling are therefore to be repealed as unconstitutional (see above).

iii. Single parenthood and medically assisted reproduction:

The Constitutional Court has rejected the individual application of a single woman for the repeal of provisions regarding the measures of reproductive medicine that are only permitted for couples because the scope of the contestation is too narrow (decision VfGH G 8/2016).According to her submission, the applicant is single and wishes "currently a biological child", in the absence of a partner by means of reproductive medical measures, which are provided according to the current version of the Reproductive Medicine Act (FMedG) [22] as amended by ReproductiveMedicine Law Amendment Amendment Act (FMedRÄG 2015), is only permitted for (homo- or heterosexual) couples, but not for single women.The applicant seeks more detailed word sequences of the regulations and applies to repeal them as unconstitutional. In her application she states that it is objectively not justifiable that according to the relevant civil law, adoptions by individuals are permitted but the same person is forbidden under threat of punishment from having a biological child with the aid of medically assisted reproductive techniques. Also, the aforementioned regulations could not be justified by the fact that in a family constellation with two parents, an advantage of two dependents and a higher total income

[22]Federal Law Gazette 275/1992

is automatically to be seen, because two parents do not automatically have a higher income than one person. After all, the availability of two parents can never be interpreted as being more beneficial to the best interests of the child.In her main application, the applicant requests the repeal of certain parts of the sentence of §7 FMedG (after FMedRÄG). However, the cancellation of the word sequence "spouses, registered partners or partners or third parties whose sperm or egg cells are removed", which the applicant is striving for, takes away from §7 Abs 2 FMedG its sense. In the event of a repeal, a meaningless part of the regulation would therefore remain, so that in this respect the entire regulation would have to be contested. Therefore, the application is to be rejected.

iv. *Post mortem* reproduction:

The life companion of the testator and now the applicant in this case applied to appoint her as curator for her unborn child and argued that she had agreed with the testator before his death to carry out artificial insemination, for which the testator also donated semen with the express determination to use them for the artificial insemination of the applicant. This has now taken place and embryo has been transferred. The appointment of a curator for the unborn child is therefore desired. The first court rejected these applications in March 1996 and found that the testator and the applicant had been unsuccessful for about two years to become pregnant with help of methods of medically assisted reproduction and the last try before death was also unsuccessful- the applicant is currently not pregnant. Further attempts were planned for the future. From a legal point of view, the first court took the view that proof of pregnancy is needed in order to name a curator for the child. [23]The applicant provided no such proof. Since the applicant is currently not pregnant, no curator for a *nasciturus* can be appointed.In addition, according to §8 FMedG any kind of medically assisted reproduction in case of a partner would have required a judicial protocol or a notarial act, which was not done in this case. No further attempts of conceiving are allowed after the death of the donator, since *post mortemvel divortium*reproduction is strictly forbidden in Austria without any exception, as confirmed in this court decision (OGH 1Ob 2259/96d).

Neither for an *in vitro*fertilized embryo, which led to no pregnancy, nor for cryopreserved sperms, which were provided for an artificial insemination is a curator to be ordered- §§22 and 274 ABGB.

[23]according to §§ 22 and 274 Austrian Civil Code (ABGB)

v. Medically assisted reproduction after divorce and lack of legal interest:

A child conceived through medically assisted procreation also has the choice between the (direct) determination of paternity through positive evidence of paternity and the presumption rule (corresponding to the presumption of presence) for the man whose semen was used to carry out medically assisted procreation on the mother during the time. If the legal paternity cannot conclusively be demonstrated, the necessary legal interest lacks for an action for a declaratory judgment relevant in the future.

In 2014, a future wife had an artificial insemination carried out in the outpatient clinic of the defendant with embryos from her egg cells and sperm cells of her future spouse. The transplant at the time did not result in pregnancy. On the occasion of this transplant, three embryos were frozen and stored with the defendant. In January 2019, the meanwhile divorced (former) wife came alone to the defendant and declared that she wanted to have the embryos frozen in 2014 inserted; the doctor did not ask whether her marriage to the owner of sperm was still going strong. As a result, the doctor carried out the ebryo transfer, which was successful and led to the birth of a healthy daughter on July 26, 2019. The ex-husband is not listed as a father on the birth certificate. The plaintiff sought the determination of the defendant's liability for all future claims against him arising from the embryo transfer in 2019. The lower courts granted the claim. The Supreme Court upheld the defendant's and the doctor's revisions and dismissed the request for a declaration.

The Supreme Court stated:

According to case law, an action for a declaratory judgment requires a legal interest in the immediate establishment of a right or legal relationship, otherwise the action must be dismissed. A legal interest in the immediate determination exists if there is a current cause for preventive clarification of the disputed legal relationship. This is particularly the case if the judgment between the parties to the dispute is suitable, beyond a possible claim for benefits, to be the basis for the further legal relationships between the parties. If the declaratory action is aimed at the defendant's liability for future damage, the ex-husband (the biological father) must conclusively explain specific circumstances.A man's maintenance obligation results from legal paternity.

This presupposes that the man:

a) is married to the mother at the time of the birth of the child or, as the mother's husband, died no earlier than 300 days before the child was born, or

b) has recognized his paternity or

c) his paternity in court is established

If necessary, the requirements for the presumption of marital status are not met-there is also no acknowledgment of paternity.

The judicial determination of the paternity of the man from whom the semen (for conceiving a biological child) originates comes either according to the presumption rule (corresponding to the presumption of presence) for the man whose semen is used to carry out medically assisted reproduction on the mother during the time of pregnancy or through direct (DNA) evidence of paternity. If necessary, the embryo transfer took place (as a reproductive measure "on the mother") outside the time relevant to conception, which is why only direct evidence of paternity would be conceivable. However, there is no effective consent from the ex-husband in this case, which is required for a legal medically assisted procreation (for conceiving a biological child).
The ex-husband has not conclusively shown that he can be established as the legal father. He therefore lacks the legal interest in the action for declaratory judgment, which is why the request for declaratory judgment had to be dismissed (OGH 4Ob/921h, 2021).

vi. EGMR-S.H. *et al.ver.* Austria 2011, Respect for family- and private life:

In the case of S.H. and Others v. Austria, the European Court of Human Rights originally condemned the prohibitions on egg donation and sperm donation for the purpose of IVF. The court judged the law to be incoherent and disproportionate. The applicants were two married couples. As they were infertile, they sought to have recourse to medically assisted procreation. The only means by which they could have a child of which one of them was the genetic parent was in vitro fertilization (IVF) using sperm from a donor (in the case of the first couple) or eggs (in the case of the second couple). Both methods were back then illegal under the Austrian Artificial Procreation Act, which prohibited the use of sperm from a donor for IVF treatment and egg donation in general. That Act did, however, allow other methods of assisted procreation, in particular IVF using eggs and sperm from persons married to each other or living together as man and wife (homologous procreation techniques) and, in exceptional circumstances, sperm donation for in utero fertilization.
The applicants lodged an application with the Constitutional Court, which held that there had been an interference with their right to respect for their family life, but that this was justified because it was designed to preclude both the creation of unusual family relationships (a child with two mothers, one the biological mother and the other a "surrogate" mother) and the exploitation of women.
In its judgment of 1 April 2010 the Chamber found a violation of Article 14 of the Convention in conjunction with Article 8 both in respect of the female applicants and the male applicants.
The right of a couple to conceive a child and to make use of medically assisted procreation was protected by Article 8, as such a form of expression of right to private and family life. Accordingly, that provision was applicable to the present

case. The Court noted that the applicants had been denied medically assisted procreation as a result of a legal provision that they had unsuccessfully challenged before the domestic court. The Court examined their complaint from the standpoint of an interference with the exercise of their right to use methods of artificial procreation. The impugned measure was prescribed by law and pursued the aims of the protection of health, morals and freedoms of others.Since the judgment of the Constitutional Court, developments in medicine and scienceoccurred to which some of Contracting States had responded in reforming their laws. However, the Court was not required to determine whether or not the prohibition of gamete donation was now justified under the Convention, but whether that measure was justified at the time in the past when the Austrian Constitutional Court had examined the case. Back then there here was now a clear trend in the legislation of other Contracting States towards allowing gamete donation for the purpose of IVF, which reflected an emerging European consensus. That consensus was not, however, based on settled and long-standing principles established in the law of the member States but rather reflected a stage of development within a particularly dynamic field of law and did not decisively narrow the margin of appreciation of the State. Since the use of IVF treatment had given rise then and continued to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was not yet clear common ground amongst the member States, the Court considered that the margin of appreciation to be afforded to the respondent State should be a wide one.[24]

In an area as sensitive as medically assisted reproduction, any moral concerns should be taken quite seriously. However, these are not alone enough for a complete ban of a certain procedure, for example egg donation. Austrian law was developed with an idea that artificial procreation should stay as close as possible to natural one. The central question in terms of Article 8 of the Convention was not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it had, the Austrian legislature had exceeded the margin of appreciation afforded to it under that Article. In determining that question, the Court attached some importance to the fact that there was no sufficiently established European consensus as to whether egg donation for in vitro fertilization should be allowed. The prohibition of egg donation by the Austrian legislature was therefore compatible with Article 8.

The same concern and reasoning was relevant for the prohibition of sperm donation. As stated in the final decision- neither in respect of the prohibition of egg donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilization under section 3 of the

[24]Council of Europe/European Court of Human Rights, Summary and Information note No. 146

Artificial Procreation Act had the Austrian legislature exceeded the margin of appreciation afforded to it at the relevant time.
Although the Court had concluded that there had been no violation of Article 8 in the present case, it observed that the area in question, in which the law appeared to be continuously evolving and which was subject to particularly dynamic scientific and legal developments, needed to be kept under constant review by the Contracting States.This decision of the European Court of Human Rights played a critical role for the future of legislation on medically assisted reproduction in Austria and Europe. It is concluded that legal diversity and cross-border reproductive care will persist and that the Court failed to protect European patients from arbitrary interference with their right to procreation.
Nowadays, sperm and egg donations are allowed in Austria within the scope of current regulations of FMedG.[25]

Conclusion

To conclude, the Austrian legislative on medically assisted reproduction has certainly evolved over the years and has made a significant step in direction of modernization since FMedG 1992 and today is offering methods of artificial reproduction to women in a partnership, makes egg and sperm donation possible in general and also methods of PGD in limited cases.
However, in certain aspects such as accessibility of artificial reproduction technology to gay couples or single women, questions of surrogacy and human reproductive cloning, there is definitely room for interpretation of the current legal framework and further adjustment and development of the law.
Hope remains that the Austrian lawmakers will soon react to the most modern developments of science and medicine, especially concerning human cloning,
by modernizing the current laws and keeping them up to date in the future.
Only in that way can a modern, liberal, efficient and just legal framework for technologies of medically assisted reproduction be offered and at the same time human reproductive and family rights be sufficiently ensured as well protected.

[25]Reprod Biomed Online, Van Hoof, Pennings - The consequences of S.H. and Others v. Austria for legislation on gamete donation in Europe: an ethical analysis of the European Court of Human Rights judgments