A Human Right to Reproduce Non-Coitally? A Comment on the Austrian Constitutional Court's Judgment of 14 October 1999

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The Austrian *Act on Reproductive Medicine 1992* prohibits many techniques of medically assisted reproduction that are, for example, in England and America, part of the daily practice of the gynecologist who specialises in in vitro fertilisation ('IVF'). Under Austrian law, the gynecologist is permitted to offer parents-to-be IVF neither with third party donor sperm, nor by embryo transfer after egg/embryo donation. On the other hand, third party donor sperm may be used in the course of artificial insemination (ie introducing third party donor sperm into the uterus of the mother-to-be).

In 1999, the Austrian Constitutional Court ruled on the constitutionality of the above-mentioned prohibitions. As the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR')[1] is recognised in Austria as (domestic) constitutional law, the Court was charged with interpreting article 8(1) of the said Convention, which protects the basic right to privacy. Does article 8(1) of the ECHR also essentially protect a couple's desire to found a family by means of reproductive medicine? The Constitutional Court answered this question in the affirmative, but emphasised that a categorical right to non-coital reproduction cannot be derived from article 8 of the ECHR. The right to non-coital reproduction is, according to the view of the Court, open to restrictions that can be inferred from article 8(2) of the ECHR. An infringement of article 8(1) of the ECHR is permissible if the infringing law serves to promote, inter alia, 'the protection of health or morals, or ... the protection of the rights and freedoms of others'. The Austrian Constitutional Court took the view that article 8(2) of the ECHR does indeed provide a justification for domestic law to interfere with the basic right to privacy of the parents-to-be. The Court therefore held

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1 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

that there is good reason to uphold the domestic law's prohibition of IVF using third party donor sperm, as well as the prohibition of egg and embryo donation.

This article evaluates the inner logic and consistency of this judgment, which is, as far as I know, the first decision of a European national Constitutional Court explicitly dealing with the interpretation of article 8 of the ECHR within the context of reproductive medicine. The Austrian Constitutional Court's decision has been the object of much scholarly commentary in both Austria and Germany. The case is currently pending in the European Court for Human Rights (Strasbourg).

The Right Not to Reproduce

Rules governing the reproduction of the individual are not unique to modern law. On the contrary, deciding, for example, the question of whether or not to legalise abortion has been the task of lawmakers since time immemorial. In modern times in particular, such decisions have often created deep socio-political divides. On the one hand there is the proposition that a human foetus is entitled to the protection of the law from the moment of conception.[2] On the other there is the right of a woman to terminate her pregnancy.[3] In addition to the legal regulation of abortion, laws that determine the legality of sterilisation and castration, as well as those that determine the permissibility of the distribution of contraceptives, have led either to a further recognition of, or a limitation on, the right not to reproduce.[4]

In Austria, this right was clearly recognised with the adoption of the Austrian *Penal Code* (1974). Section 97(1) of this code legalises abor-

[2] 'Unborn children are protected by the law from the time of their conception': Austrian *General Civil Code* § 22 (*Allgemeines Bürgerliches Gesetzbuch* ('ABGB'), Official Gazette No 946/1811). This section can be traced back to the comprehensive Prussian *Legal Code* (*Preußisches Allgemeines Landrecht*) § 10, Part I, Title 1 (1794). For an English translation of the ABGB, see Paul L Baeck, *The General Civil Code of Austria* (1972).

[3] Cf Thilo Ramm, 'Die Fortpflanzung – ein Freiheitsrecht?' (1989) 44 *Juristenzeitung* 861; Daniel Callahan, *Abortion: Law, Choice and Morality* (1970). According to *Roe v Wade*, 410 US 113 (1973), the 'right of privacy ... is broad enough to encompass a woman's decision whether or not to terminate her pregnancy'.

[4] The right not to reproduce was first recognised in the United States in *Griswold v Connecticut*, 381 US 479 (1965), as the 'right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights'.

tion in broad terms, and section 90(1) of the *Penal Code* establishes permissive regulations with respect to consensual sterilisation.[5]

The Right to Reproduce

Advances in science and medicine have led to new questions concerning the right to reproduce.[6] It has always been a settled principle and it is set forth in article 12 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR')[7] that men and women 'have the right to marry and to found a family'. The question, however, remains: to what degree do individuals have a human right to reproduce non-coitally?[8] Formulated differently, may the state regulate or even prohibit individuals from employing certain means of medically assisted reproduction without infringing individual liberties?

Although this question arises all over the world, the answers given differ enormously, even in countries that belong to the European Union.

Some countries have adopted a laissez-faire approach, with minimal legislation, if any.[9] Others, like the United Kingdom,[10] Israel[11] and

5 See generally Erwin Bernat, 'Das österreichische Recht der Medizin – eine Bestandsaufnahme' (1999/2000) 10 *Juristische Ausbildung und Praxisvorbereitung* 110-2. For a comparative analysis, see Timothy S Jost, *Readings in Comparative Health Law and Bioethics* (2001) 243-50.

6 See generally Erwin Bernat, *Lebensbeginn durch Menschenhand. Probleme künstlicher Befruchtungstechnologien aus medizinischer, ethischer und juristischer Sicht* (1985). See also Anton Leist, *Eine Frage des Lebens. Ethik der Abtreibung und künstlichen Befruchtung* (1990).

7 The *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), was ratified by Austria in 1958. See Federal Law Gazette No 210/1958. It was retroactively recognised as constitutional law in 1964. See Federal Law Gazette No 59/1964. See also Herbert Hausmaninger, *The Austrian Legal System* (2000) 148. The Convention became domestic law in England in 1998 under the *Human Rights Act 1998* (UK) and came into effect on 2 October 2000. See Kurt Heller, 'Die Entwicklung der Grundrechte in England und im Vereinigten Königreich – Historisches und Aktuelles' (2002) 124 *Juristische Blätter* 293-9; S H Bailey, Jane Ching, M J Gunn and David Ormerod, *Smith, Bailey and Gunn on the Modern English Legal System* (2002) 525-77.

8 A right to employ non-coital methods of human reproduction has been broadly recognised in American law. See, eg, John A Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (1994) 22. See also *Goodwin v Turner*, 908 F 2d 1395 (8th Cir, 1990).

9 See Linda Nielsen, 'Legal Consensus and Divergence in Europe in the Area of Assisted Conception – Room for Harmonisation?' in Donald Evans (ed), *Creating the Child: The Ethics, Law and Practice of Assisted Procreation* (1996) 305, 309; Derek

the Netherlands,[12] may be called 'liberally' regulated countries. England, for example, allows parents-to-be access to third party donor eggs and sperm. Not even surrogacy is prohibited categorically: the *Surrogacy Arrangements Act 1985* (UK)[13] distinguishes the practice of commercial surrogacy agencies from the practice of non-profit surrogacy agencies. Only those agencies whose purposes include, inter alia, the commercial recruitment of women for surrogate pregnancy, have been proscribed.[14] In 1990 the English legislature established the Human Fertilisation and Embryology Authority ('HFEA').[15] The principal function of this body corporate is to license treatment services, the storage of gametes, and research on embryos. This 'licensing model' has also been incorporated in South Australia and Western Australia.[16] Regarding the question of access to the various methods of non-coital reproduction, the Australian States have adopted laws that also reflect the English legislature's more liberal approach.[17]

In some European countries the attitude towards non-coital reproduction can be characterised as restrictive, if not hostile. This is especially true for Germany, Switzerland and Austria.[18] In Germany, the

Morgan and Linda Nielsen, 'Prisoners of Progress or Hostages to Fortune?' (1993) 21 *Journal of Law, Medicine and Ethics* 30-42.

10 See Michael Freeman, 'Medically Assisted Reproduction' in Ian Kennedy and Andrew Grubb (eds), *Principles of Medical Law* (1998) 546-608.

11 Amos Shapira, 'Normative Regulation of Reproductive Technologies in Israel' (1989) 13 *Nova Law Review* 610-24; Dalia Dorner, 'Human Reproduction: Reflections on the Nachmani Case' (2000) 35 *Texas International Law Journal* 1-11.

12 See Trees A M te Braake, 'Regulation of Assisted Reproductive Technology in the Netherlands' (2000) 35 *Texas International Law Journal* 93-122.

13 *Surrogacy Arrangements Act 1985* (UK) c 49.

14 *Surrogacy Arrangements Act 1985* (UK) s 2(1).

15 *Human Fertilisation and Embryology Act 1990* (UK) c 37, s 5.

16 See Loane Skene, 'An Overview of Assisted Reproductive Technology Regulation in Australia and New Zealand' (2000) 35 *Texas International Law Journal* 31-49.

17 See Karen Dawson and Peter Singer, 'Some Consequences of Regulating Reproductive Medicine in Australia' in Christian Byk (ed), *Artificial Procreation – The Present State of Ethics and Law* (1989) 185-92; Donald Chalmers, 'Regulating Reproductive Technology in Australia' in *Reports I, 7th World Congress on Medical Law* (1985) 145-51; M D Kirby, 'Medical Technology and New Frontiers of Family Law' (1986) 14 *Law, Medicine and Health Care* 113-9, 128; Russell Scott, 'Experimenting and the New Biology: A Consummation Devoutly to be Wished' (1986) 14 *Law, Medicine and Health Care* 123-8; Louis Waller, 'New Law for Laboratory Life' (1986) 14 *Law, Medicine and Health Care* 120-2.

18 Cf Erwin Bernat, 'Towards a New Legal Regulation of Medically Assisted Reproduction: The Austrian Approach' (1992) 11 *Medicine and Law* 547-55; 'Between Rationality and Metaphysics: The Legal Regulation of Assisted Reproduction in Germany, Austria and Switzerland – A Comparative Analysis' (1993) 12 *Medicine and Law* 493-505.

so-called *Embryo Protection Act 1991* makes egg and embryo donation, inter alia, a criminal offence.[19] In Austria, these techniques are also proscribed by law. However, the principal feature of the Austrian law on assisted reproductive techniques is not the criminal but the licensing model. To contravene the conditions of a license is penalised with a fine, as is the violation of the substantive prohibitions of the Austrian *Act on Reproductive Medicine*.[20]

The Austrian *Act on Reproductive Medicine*

Legislative History

The Austrian *Act on Reproductive Medicine* (*Fortpflanzungsmedizingesetz* – 'FMedG')[21] was adopted by the General Assembly[22] in May 1992 and came into force on the first day of July of the same year. Its legislative history can be traced back to a set of guidelines drafted in 1986 by a committee of experts established by the Austrian Conference of University Rectors.[23] It took the Federal Ministry of Justice an additional four years to complete an initial draft of an Act on assisted reproduction (in 1990).[24] One year later (in 1991), the government Bill,[25] entitled 'FMedG', was completed.[26] Parts of the Bill were

19 See below n 64.

20 FMedG §§ 22-25, below n 21.

21 The *Fortpflanzungsmedizingesetz* ('FMedG') is a federal statute. See Federal Law Gazette No 275/1992. An (unofficial) English translation of the FMedG is reprinted in (1993) 44 *International Digest of Health Legislation* 248. For an overview of the Act, see Derek Morgan and Erwin Bernat, 'The Reproductive Waltz: The Austrian Act on Procreative Medicine' (1992) *The Journal of Social Welfare and Family Law* 420-6; Erwin Bernat and Erich Vranes, 'The Austrian Act on Procreative Medicine: Scope, Impacts, and Inconsistencies' (1993) 10 *Journal of Assisted Reproduction and Genetics* 449-52.

22 Unlike the United States, in civil law countries such as Austria, statutory regulation is comprehensive, and judges have no overt law making function. They are to apply faithfully the statute, not challenge it and thereby superimpose themselves on the legislature: Hausmaninger, above n 7, 138. But see ABGB § 7, according to which, cases should be decided – at least as a last resort – 'upon the carefully collected and well-considered circumstances in accordance with the natural principles of justice'.

23 These guidelines are reprinted in *Bericht des Bundesministers für Wissenschaft und Forschung an den Nationalrat. Zu grundsätzlichen Aspekten der Gentechnologie und der humanen Reproduktionsbiologie* (1986) 13-33.

24 JMZ 3.509/363/-I 1/90, reprinted in Erwin Bernat, *Fortpflanzungsmedizin. Wertung und Gesetzgebung. Beiträge zum Entwurf eines Fortpflanzungshilfegesetzes* (1991) 123-4.

25 A Bill may be introduced in the National Council (see below n 80), inter alia, as a proposal by the federal government (government draft) usually prepared by the

substantially altered by the Judiciary Committee from the model developed by the Ministry of Justice.[27]

The Austrian *Act on Reproductive Medicine* as a Comprehensive Statutory Framework

The FMedG encompasses all forms of medically assisted reproduction. The text speaks of the employment of medical methods in order to induce a pregnancy by means other than sexual intercourse.[28] These methods are enumerated[29] in section 1(2). Among them is artificial insemination, defined in section 1(2), paragraph 1 as the introduction of semen into the reproductive organs of a woman. In vitro fertilisation ('IVF') is defined as the combination of egg and sperm cells outside of a woman's body.[30] Finally, embryo transfer is defined as the introduction of a viable zygote into a woman's uterus.[31]

With this Act, the Austrian legislature promulgated a comprehensive statutory framework for state regulation to encompass all of these methods of medically assisted reproduction. In one sentence, the FMedG attempted to answer practically all legal questions concerning reproductive medicine arising in the most diverse legal contexts. Essentially, these are:

(a) Should the law permit all practices of reproductive medicine, or should specific, obviously abusive practices be completely banned?[32]

(b) What administrative regulations should doctors, prospective parents and sperm donors be subject to before, during, and after conception?[33]

ministerial bureaucracies. Prior to approval in the Council of Ministers, the government draft is subjected to a process of examination and comment by ministries and interest groups. See Hausmaninger, above n 7, 50.

26 The Bill is reprinted in No 216 of the appendices to the shorthand records of the National Council (see below note 80), XVIII legislative period ('Blg St Prot NR').

27 The Report of the Judiciary Committee is reprinted in No 490 Blg St Prot NR, XVIII legislative period. See Erwin Bernat, 'Legislating for Assisted Reproduction and Interpreting the Ban on Corporal Punishment' (1993/1994) 32 *University of Louisville Journal of Family Law* 247.

28 FMedG § 1(1).

29 The Judiciary Committee inserted the words 'in particular' ahead of the catalogue of methods. Thus, the enumeration is now exemplary. See Report of the Judiciary Committee, above n 27, 3.

30 FMedG § 1(2) [2].

31 FMedG § 1(2) [3].

32 See, eg, FMedG §§ 2, 3, 9, 16, 17, 21.

33 See, eg, FMedG §§ 6, 7, 8, 10, 11-15.

(c) Should the family law governing the status of a child born as a result of sperm or egg donation be amended?[34]

In contrast to German law,[35] there are no prescriptions in the FMedG acknowledging certain practices of reproductive medicine as medical practices that are covered by the state-sponsored social insurance system. Only in 1999 – with the enactment of the IVF-FondsG[36] – were monies set aside to assist prospective parents with the cost of IVF. The IVF Fund, created by the IVF-FondsG, subsidises 70 per cent of the costs associated with IVF when certain prerequisites, as delineated in sections 4 and 5 of the IVF-FondsG, are met.[37] The remaining 30 per cent of the costs of treatment and medication must be borne by the prospective parents. One half of the monies comprising the IVF Fund are drawn from the general family support fund and the remaining half is supplied by the statutory health insurance agency.[38]

Restrictions Placed on the Right to Reproduce

Sections 2 and 3 of the FMedG comprise the heart of the Austrian law governing reproductive medicine. These sections limit, in some areas considerably, the freedom of prospective parents to take advantage of advances in reproductive medicine because they prohibit the following:

(a) the employment of medical means to assist conception (procreation) in a single woman;[39]

(b) the use of sperm donated by a third party in the context of in vitro fertilisation;[40]

(c) embryo transfer following egg or embryo donation;[41]

34 FMedG, article 2 amends §§ 137b, 155, 156a and 163 of the Austrian law of filiation of the ABGB. See Brigitta Lurger, 'Das Abstammungsrecht bei medizinisch assistierter Zeugung nach der deutschen Kindschaftsrechtsreform im Vergleich mit dem österreichischen Recht' (1999) 1 *Deutsches und Europäisches Familienrecht* 210-23.

35 Cf German *Social Security Act* (*Sozialgesetzbuch*) Book V § 27a.

36 The *IVF-Fonds-Gesetz* ('IVF-FondsG') is the federal Act establishing a fund to finance IVF. See Federal Law Gazette I, No 180/1999.

37 IVF-FondsG § 2(2).

38 IVF-FondsG § 3. See also Wolfgang Mazal, 'Rechtsfragen der Gewährung von IVF als Sozialleistung' in Erwin Bernat (ed), *Die Reproduktionsmedizin am Prüfstand von Recht und Ethik* (2000) 182-9.

39 FMedG § 2(1).

40 FMedG § 3(1), § 3(2).

41 FMedG § 3(1), § 3(3).

(d) the artificial insemination of a surrogate mother as well as gestational surrogacy.[42]

The use of sperm donated by a third party[43] is permitted in the context of artificial insemination only if the prospective father (husband or cohabitant) is infertile.[44] The practical effect of this provision, read in light of the clear legislative intent, is that prospective parents are not permitted to make use of third party donor sperm if the father-to-be is fertile, even if he suffers from a hereditary disease.[45]

The question of whether or not these restrictions on procreative autonomy are legitimate in light of various rights and freedoms guaranteed by the *Austrian Constitution* was hotly debated, even before the enactment of the FMedG. The prevailing view of commentators recognised that, at the least, the prohibition of IVF using sperm donated by a third party – like the prohibition of embryo transfer following egg or embryo donation – infringes the basic rights to privacy and to found a family guaranteed by article 8(1) and article 12 of the ECHR.[46] These prohibitions are also brought into question in the context of the equal protection clause (article 7) of the *Austrian Constitution*.[47]

The Austrian Constitutional Court's Judgment of 14 October 1999

The Ratio Decidendi

In its judgment of 14 October 1999,[48] the Austrian Constitutional Court (Verfassungsgerichtshof – 'VfGH')[49] was required, in reaction

[42] FMedG § 2(2).

[43] FMedG § 1(2) [1].

[44] FMedG § 3(2).

[45] FMedG § 2(1).

[46] Cf Erwin Bernat, 'Das Recht der medizinisch assistierten Zeugung 1990 – eine vergleichende Bestandsaufnahme' in Bernat, *Fortpflanzungsmedizin*, above n 24, 81-2; Peter J Schick, 'Der Entwurf eines Fortpflanzungshilfegesetzes (FHG) – eine kritische Wertungsanalyse' in Bernat, *Fortpflanzungsmedizin*, above n 24, 34-5.

[47] See Ulrike Elisabeth Binder, *Die Auswirkungen der Europäischen Menschenrechtskonvention und des UN-Übereinkommens über die Rechte des Kindes vom 20. November 1989 auf Rechtsfragen im Bereich der medizinisch assistierten Fortpflanzung* (1998) 66-83.

[48] VfSlg 15.632. The judgment, as well as the argument of the petitioners, is reprinted in its entirety in Bernat, *Die Reproduktionsmedizin*, above n 38, 199-222.

[49] Judicial review of the legality of administrative regulations and the constitutionality of statutes is reserved solely to the VfGH. Article 92 of the

to two individual claims,[50] to address the question of whether there is a liberty interest protected by the *Austrian Constitution* to reproduce non-coitally. The first claim concerned the prohibition of IVF using sperm donated by a third party. The second related to the prohibition of embryo transfer following egg donation.[51] In both cases, the petitioners would only be able to procreate using these legally prohibited techniques. These two cases were of first impression for the Court on the question of whether the prohibitions of sections 3(1) and 3(3) of the FMedG violate fundamental rights set forth in the ECHR and/or the equal protection clause (article 7) of the *Austrian Constitution*.

The VfGH did find the right to procreative autonomy worthy of protection under article 8(1) of the ECHR.[52] According to the Court, there is no question that the decision of a married couple or of domestic partners (cohabitants) to have a child falls under the protection of article 8(1) of the ECHR, even if this decision can only be realised by means of medical assistance. The Court therefore found that the contested provisions infringe the fundamental right to respect for privacy set forth in article 8(1) of the ECHR. In other words, not only techniques using the gametes of the parents-to-be (ie homologous techniques), but also techniques using donated gametes (ie heterologous techniques) enjoy the protections derived from article 8(1) of the ECHR.[53]

In its conclusion, however, the Court held that the prohibitions of sections 3(1) and 3(3) of the FMedG do not infringe constitutionally protected freedoms. This is a clear step back from the more liberal attitude evinced by the Court in its construction of article 8(1) of the ECHR. Although the Court was of the clear opinion that the right to reproduce non-coitally is protected under article 8(1) of the ECHR, it emphasised that there is good reason to assume that an infringement of this liberty interest can be justified by article 8(2) of the ECHR.

An infringement of article 8(1) of the ECHR is permissible if the infringing law serves to promote, inter alia, the 'protection of health or

Austrian Constitution establishes a separate Supreme Judicial Court (Oberster Gerichtshof – 'OGH') as the highest court in civil and criminal matters. See Hausmaninger, above n 7, 121-2.

50 *Austrian Constitution* art 140. The *Austrian Constitution* allows the VfGH to review the constitutionality of statutes *principaliter* (ie without a specific case at issue) in addition to *incidenter* (case in controversy), as in the United States. See Hausmaninger, above n 7, 137.

51 FMedG § 3(1) and § 3(3).

52 VfGH, judgment of 14 October 1999, II.B.1.2.4.

53 Compare ibid at II.B.1.2.4 with ibid at II.B.2.

morals, or ... the protection of the rights and freedoms of others': Article 8(2) of the ECHR.

Why is the VfGH now of the opinion that an infringement of the right to reproduce non-coitally is justified in light of article 8(2) of the ECHR? First and foremost, the Court emphasised that its general approach does not give the General Assembly license to categorically prohibit all methods of medically assisted reproduction. However, the Court took the view that the discretion of the legislature to proscribe certain practices of reproductive medicine and to allow others was broad because there are new medical techniques at issue, the moral and ethical implications of which are not agreed upon by all signatories to the ECHR.[54] Only if the legislature chooses a means completely unsuited to realising its objective, or if the chosen means – per se appropriate – would lead to the existence of unequal classifications in violation of article 7 of the *Austrian Constitution*, would the infringement on the right to privacy guaranteed by article 8(1) of the ECHR no longer be justified.[55]

What then are the substantive arguments underlying the Court's holding that article 8(2) of the ECHR does indeed provide a justification for sections 3(1) and 3(3) of the FMedG? The VfGH found the following arguments persuasive: heterologous forms of medically assisted reproduction are 'unnatural'. Under certain circumstances, they could lead to the exploitation of women and could be abused, particularly in the case of surrogacy.[56] The Court also warned against the possibility of eugenic sex selection and commercialisation of reproductive medicine.[57] The Justices were also concerned that the abuse of 'surplus' embryos by physicians and the possibility of a 'generation gap' facilitated by cryopreserved embryos could undermine the professional ethics of those who practice reproductive medicine.[58] Regarding embryo transfer following egg donation, the VfGH observed that children having two biological mothers (a genetic and a birth mother) perhaps face an increased psychological burden.[59] On the question of whether the prohibition of IVF using third party donor sperm violates article 7 of the *Austrian Constitution*, the Court held that the dangers individually inherent in sperm donation and

54 Ibid II.B.2.4.2.2.
55 Ibid II.B.2.4.2.1.
56 Ibid II.B.2.3.1.
57 Ibid II.B.2.3.2.
58 Ibid II.B.2.3.3.
59 Ibid II.B.2.6.1.1.

IVF 'aggregate' when both methods are combined.[60] Equal treatment of artificial insemination using donated sperm[61] and IVF using donated sperm[62] is therefore, according to the Court, not required by the equal protection clause.[63]

Critical Review

Introductory Remarks

The decision of the VfGH contains very specific normative propositions, the ramifications of which, particularly in the context of the legal systems of ECHR signatory nations, cannot yet be determined.

On the one hand, legal rules governing reproductive medicine are, in many nations, as restrictive as those in Austria. For example, Germany,[64] Sweden[65] and Norway[66] have also prohibited embryo transfer following egg donation. In Sweden and Norway, IVF may only be carried out using the gametes of the prospective parents.[67] This Scandinavian regulatory regime may have in fact been the model for section 3 of the FMedG.

On the other hand, the VfGH had to answer a question important in any jurisdiction committed to individual freedoms and equal protection before the law: 'is procreative autonomy constitutionally protected?'

The Prohibition of In Vitro Fertilisation Using Third Party Donor Sperm

While the FMedG permits[68] the use of donated sperm in the context of artificial insemination,[69] it categorically prohibits the use of such sperm in the context of IVF.[70] In light of the legislative purpose of

60 Ibid II.B.2.6.1.2.

61 FMedG § 1(2) [1].

62 FMedG § 1(2) [2].

63 VfGH, judgment of 14 October 1999, II.B.2.6.1.2.

64 *German Embryo Protection Act* § 1(1) [1], (German) Federal Law Gazette 1990 I, 2746.

65 (Swedish) Federal Law Nr 711 (concerning in vitro fertilisation) § 2(3) quoted in Albin Eser, Hans-Georg Koch and Thomas Wiesenbart, *Regelungen der Fortpflanzungsmedizin und Humangenetik* (1990) vol 2, 185.

66 (Norwegian) Federal Law Nr 68, Ch III, § 12, cl 2 (concerning in vitro fertilisation) quoted in Eser et al, above n 65, 138.

67 (Swedish) Federal Law Nr 711; (Norwegian) Federal Law Nr 68.

68 FMedG § 3(2).

69 FMedG § 1(2) [1].

70 FMedG § 1(2) [2].

the FMedG (as set forth in the Act), this prohibition is not particularly convincing.[71] IVF using donated sperm is nothing more than the combination of two procedures individually permitted by the FMedG: homologous IVF and heterologous (in vivo) insemination. The VfGH does not succeed in persuasively clarifying the difference, under constitutional law, between in vivo and in vitro fertilisation using donated sperm when the latter is medically indicated. If the heterologous variants of medically assisted reproduction are also protected under article 8(1) of the ECHR, as is the opinion of the VfGH, [72] then there is no sound reason to proscribe the use of third party donor sperm simply because it is applied in vitro rather than in vivo. Contrary to the general hypothesis favored by the VfGH, combination of heterologous insemination with homologous IVF does not lead to an 'aggregation' of the dangers individually inherent in each method. In any case, the problems associated with both of these methods do not become qualitatively more acute when IVF is practised using sperm donated by a third party. Nor is the Court's reference to the 'high degree of technical effort' persuasive. The level of *technical* effort is identical in heterologous and homologous IVF. It is not the technical effort that creates additional difficulties; it is simply the recruitment of a sperm donor who shares physical characteristics with the prospective father.[73] The difficulty of donor recruitment, however, did not prevent the legislature from permitting the use of donated sperm when it is employed in vivo.[74] Even if the empirical hypotheses that underlie the Constitutional Court's normative assumptions are valid, the question remains whether a 'high degree of technical effort' is a sufficient ground to infringe rights protected by article 8(1) of the ECHR. This question could only be answered in the affirmative if the techniques involved in these cases appeared to

[71] This proposition is unequivocally stated in Dagmar Coester-Waltjen, 'Fortpflanzungsmedizin, EMRK und österreichische Verfassung' (2000) 47 *Zeitschrift für das gesamte Familienrecht* 599; Brigitta Lurger, 'Das Fortpflanzungsmedizingesetz vor dem österreichischen Verfassungsgerichtshof' (2000) 2 *Deutsches und Europäisches Familienrecht* 134.

[72] Compare the clear position taken by the VfGH in its judgment of 14 October 1999, II.B.1.2.4 with II.B.2.

[73] For an analysis of this difficulty, see Erwin Bernat, 'Der anonyme Vater im System der Fort-pflanzungsmedizin' in Heinz Walter (ed), *Männer als Väter. Sozialwissenschaftliche Theorie und Empirie* (2002) 257-86; Susan Golombok and Rachel Cook, 'A Survey of Semen Donation: Phase I – The View of UK Licensed Centres' (1994) 9 *Human Reproduction* 882-8.

[74] FMedG § 3(2).

endanger the health or morals, or the rights and freedoms, of others.[75]

The health, morals, or rights and freedoms of others would, contrary to the opinion of the VfGH, not be in any greater danger even if IVF using donated sperm did require a higher degree of technical effort. This is true for the following reasons: firstly, the legal status of a child conceived by heterologous IVF is the same as one conceived by heterologous (in vivo) insemination. In both cases, the prospective father, provided he consented to the use of third party donor sperm by way of notarial act or court protocol, is treated by the law as if he were the natural father of the child thereby conceived.[76] Secondly, the health of a woman who participates in an IVF program is not more seriously endangered simply because third party donor sperm is used. Thirdly, there is still the question of the definitive meaning of the word 'morals' as it is used in article 8(2) of the ECHR. Certainly, article 8(2) of the ECHR does not permit the legislature to infringe individual rights set forth in article 8(1) of the ECHR simply to enforce a philosophical notion of morality. Morality, as discussed in article 8(2) of the ECHR, is based on the concept of conventional social mores that consist of nothing other than the prevailing moral standards of a particular society.[77] There can be no doubt that it is difficult to prove that there is a common morality on the subject of reproductive medicine. Therefore, it is even less plausible that the prevailing morality of society would find that the use of sperm donated by a third party is immoral simply because it is employed in vitro rather than in vivo.

Article 8(2) of the ECHR then does not seem to justify the prohibition of IVF using sperm donated by a third party. On the contrary, treatment is clearly unequal of that class of women who, as in the case of the first petitioner, are unable to conceive a child by 'natural means' – not only because their partners are sterile, but also because

75 ECHR, art 8(2).

76 Cf ABGB §§ 156a, 163(3) and 163(4) as amended by the FMedG. See judgment of the OGH of 13 March 1996, reprinted in (1996) 118 *Juristische Blätter* 717, with comments by Erwin Bernat. § 156a of the ABGB corresponds to s 10C(2)(a) of Victoria's *Status of Children (Amendment) Act 1984*: 'Where a married woman, in accordance with the consent of her husband, has undergone a procedure [ie artificial insemination with semen produced by a man other than her husband] as a result of which she has become pregnant the husband shall be presumed, for all purposes, to have caused the pregnancy and to be the father of any child born as a result of the pregnancy.'

77 Peter Koller and Peter Strasser, *Rechtsethik und Rechtspolitik* (2nd ed, 1999) 44. See also Lurger, above n 71, 139.

they themselves are infertile. Formulated differently, those couples who appear to be most in need of assistance to fulfill their desire to have a child (because of a double natural disadvantage), are presented by the FMedG with a particularly intransigent barrier that cannot be brought into harmony with either article 8(2) of the ECHR or the equal protection clause of article 7 of the *Austrian Constitution*.[78]

The Prohibition of Embryo Transfer Following Egg/Embryo Donation

The legal prohibition of embryo transfer following egg donation appears to the VfGH to be permissible under article 8(2) of the ECHR because, as the Court reasons, the prohibition may serve the best interests of the resulting child. In this respect, the VfGH finds itself in agreement not only with Austrian and German legal literature,[79] but can also buttress its opinion with the legislative intent of section 3(3) of the FMedG as documented in the appendices to the shorthand records of the National Council,[80] as well as that of the corresponding prohibition of the German *Embryo Protection Act 1991*.[81] According to the German federal government, a legal prohibition of egg donation is justified because of the empirical hypothesis that 'a young person who owes his or her existence to three parents (ie biological father, birth mother, and genetic mother) will have difficulty in developing his or her personal identity.'[82] Similarly, the official comments to the FMedG state that, concerning the artificially facilitated conception of a human being, '... it seems permissible and justified to set standards

78 See Bernat, 'Das Recht der medizinisch assistierten Zeugung 1990', above n 46. See also Schick, above n 46; Michael Memmer, [book review] (1993) 34 *Zeitschrift für Rechtsvergleichung* 172; Ferdinand Kerschner, [book review] (1993) 115 *Juristische Blätter* 745; Theo Öhlinger and Manfred Nowak, 'Grundrechtsfragen künstlicher Fortpflanzung' in Bundesministerium für Familie, Jugend und Konsumentenschutz, *Familienpolitik und künstliche Fortpflanzung* (1986) 37.

79 For an analysis of the German law, see, for example, Rolf Keller, 'Das Kindeswohl: Strafschutzwürdiges Rechtsgut bei künstlicher Befruchtung im heterologen System?' in *Tröndle-Festschrift* (1989) 705. For an analysis of the Austrian law, see Oskar Edlbacher, 'Künstliche Zeugungshilfe – eine Herausforderung für den Gesetzgeber?' (1986) 41 *Österreichische Juristenzeitung* 325.

80 The Austrian Parliament is bicameral. The more important is the National Council (ie the first chamber): Hausmaninger, above n 7, 49. For an explanation of the limited function of the second chamber (Bundesrat), see articles 34-39 of the *Austrian Constitution*.

81 *Embryo Protection Act* § 1(1) [1].

82 Official comments to the government Bill introducing the *Embryo Protection Act* (1990) BT-Drucks 11/5460 at 7.

that guarantee the positive development of the child.'[83] This position is upheld notwithstanding the assumption that in the context of natural procreation, no such restrictions could be imposed. And finally, according to the official comments, it is permissible and not contradictory to ask whether or not the child-to-be would have a life worth living.[84]

The argument that a human entity not yet conceived has an interest in being born makes no sense, as is properly argued by the VfGH, because prior to conception, there is no human being with an interest to protect. Prior to his or her conception, the future person is not 'some shadowy creature waiting in its metaphysical limbo to be born.'[85] In other words, the prohibition of conception does not harm those persons who without the prohibition would otherwise exist. It harms only those who are directly affected by the prohibition – the prospective parents.[86] The best-interests-of-the-child argument is not, however, *a priori* absurd if it is construed differently. It is not absurd on logical grounds to hold the view that children who could be conceived are better not conceived because it is in their own best interest not to live at all.[87] The value judgement that non-existence is preferable to existence in certain extremely rare circumstances has been accepted by the courts not only in the United States,[88] but also in Germany,[89] in connection with decision making at the end of hu-

83 Official comments to the government Bill introducing the FMedG, above n 26, 11.

84 Ibid.

85 Joel Feinberg, *The Moral Limits of Criminal Law, Vol 1: Harm to Others* (1984) 100.

86 See also Michael Bayles, 'Harm to the Unconceived' (1975/1976) 5 *Philosophy and Public Affairs* 292.

87 Contrary to the view of the Court, the best-interests-of-the-child argument is not employed *ad absurdum* in the relevant literature. Compare judgment of 14 October 1999, II.B.2.6.3, with Erwin Bernat, *Rechtsfragen medizinisch assistierter Zeugung* (1989) 91. See also the judgment of the Austrian OGH of 25 May 1999 (1999) 121 *Juristische Blätter* 599, refusing to recognise a 'wrongful life' as a ground for awarding damages. In the words of the Court, '[n]either the facilitation of, nor the absence of action to prevent a life infringes on any legally protected interest.' For an analysis of this opinion, see Erwin Bernat, 'Unerwünschtes Leben, unerwünschte Geburt und Arzthaftung: der österreichische case of first impression vor dem Hintergrund der anglo-amerikanischen Rechtsentwicklung', in *Krejci-Festschrift* (2001) 1041-77.

88 Cf, inter alia, *In the Matter of Claire C Conroy*, 98 NJ 321, 486 A 2d 1209 (NJ 1985).

89 Cf, inter alia, the decision of the German Supreme Court (Criminal Division) of 13 September 1994 (1995) 13 *Medizinrecht* 72. See also Reinhard Merkel, 'Tödlicher Behandlungsabbruch und mutmaßliche Einwilligung bei Patienten im

man life.[90] That is to say, in such circumstances, a physician is permitted to, or may even be required to, withhold or withdraw life support, namely when life – from the perspective of the afflicted individual – is no longer worth living.[91] According to the so-called 'pure objective test' employed by the New Jersey Supreme Court, this is the case:

> if the net burdens of the patient's life with the treatment clearly and markedly outweigh the benefits that the patient derives from life so that the recurring, unavoidable, and severe pain of the patient's life with the treatment would render the life-sustaining treatment inhumane.[92]

If, in the context of reproductive medicine, the best-interests-of-the-child argument is construed in this way, this argument, contrary to the VfGH, does by no means support a legal prohibition of non-coital reproduction. This is clearly and convincingly demonstrated by empirical studies and theories relating to the well being of children. The fact that a child learns that it has not one, but two biological mothers, will generally not lead it to conclude that it would have been better if its parents had decided not to conceive it. Empirical studies conducted with children born as a result of artificial insemination with sperm derived from a donor paint a clear picture. The lives of those children do not dramatically change following the revelation of their origins.[93] *Mutatis mutandis*, the same should hold true for children who owe their existence to donated eggs. Surely whether the father or mother is only legally – and not genetically – related to the child plays no role in the level of love and affection given on both sides. This hypothesis is further supported by studies conducted on the well being of adopted children after they learn the truth of their

apallischen Syndrom' (1995) 107 *Zeitschrift für die gesamte Strafrechtswissenschaft* 545-75.

90 See Norman L Cantor, 'Conroy, Best Interests, and the Handling of Dying Patients' (1985) 37 *Rutgers Law Review* 543-77; Hans-Georg Koch, Erwin Bernat and Alan Meisel, 'Self-Determination, Privacy, and the Right to Die: A Comparative Law Analysis (Germany, United States of America, Japan)' (1997) 4 *European Journal of Health Law* 127-43; Andrew Grubb, 'The Persistent Vegetative State: A Duty (Not) to Treat and Conscientious Objection' (1997) 4 *European Journal of Health Law* 157-78.

91 Cf Erwin Bernat, 'Behandeln oder sterben lassen? Rechtsdogmatische und rechtsvergleichende Überlegungen zum Abbruch lebenserhaltender medizinischer Behandlung', in *Deutsch-Festschrift* (1999) 457.

92 *In the Matter of Claire C Conroy*, 98 NJ 321, 486 A 2d 1209, 31.

93 See Robert Snowden, G D Mitchell and E M Snowden, *Artefizielle Reproduktion* (Walter Krause trans, 1985) 41; Annette Baran and Reuben Pannor, *Lethal Secrets* (1989) 54.

parentage.[94] Even if the lives of some children who owe their existence to embryo transfer following egg donation may be somewhat burdened by the fact that they will never come to know their genetic mothers,[95] their lives would still be worth living.

If there are any viable arguments remaining against the legitimacy of egg donation, they are difficult to discern. The argument of 'unnaturalness' is as unconvincing as the slippery slope argument. Firstly, it has never been convincingly demonstrated that nature untouched by man presents a perfect basis for moral and legal reasoning.[96] Secondly, the argument that allowing practice A, which is in and of itself legitimate, necessarily leads to the acceptance of illegitimate practice B, is not really tenable.[97] It can well be argued that if B differs considerably from A, B may be prohibited and A allowed.[98] In other words, allowing egg donation does not necessarily require the legal recognition of surrogate motherhood.[99]

Closing Remarks

The right not to reproduce has been broadly recognised in Austrian law. The 'decision to have a child by means of medical assistance'[100] has found much less recognition. While the Austrian abortion law

94 Christa Hoffmann-Riem, *Das adoptierte Kind. Familienleben mit doppelter Elternschaft* (1985) 245.

95 See H J Sants, 'Genealogical Bewilderment in Children with Substitute Parents' (1964) 37 *British Journal of Medical Psychology* 133-41. Under § 20(2) of the FMedG, a child conceived by third party donor sperm has the right to receive information concerning the identity of its biological father. If embryo transfer following egg/embryo donation were permitted, the legislature would most likely extend the child's right to know to information concerning the genetic mother's identity. However, the right granted by § 20(2) of the FMedG does not allow the child to legally establish parentage for purposes of child support or inheritance. See ABGB § 163(4) as amended by the FMedG, which is similar to § 5 of the US *Uniform Parentage Act 2000*.

96 Peter Singer and Deane Wells, 'In Vitro Fertilisation: The Major Issues' (1983) 9 *Journal of Medical Ethics* 193.

97 See Bernard Williams, 'Which Slopes are Slippery?' in Michael Lockwood (ed), *Moral Dilemmas in Modern Medicine* (1985) 126-37.

98 Karl Engisch, 'Der nächste Schritt', in *Schaffstein-Festschrift* (1975) 9.

99 If we assume – for the sake of argument – that there is good reason for a general prohibition of surrogacy. Cf, for example, Alan Wertheimer, 'Two Questions About Surrogacy and Exploitation' (1992) 21 *Philosophy and Public Affairs* 211; Ruth Macklin, *Surrogates and Other Mothers* (1994) 49-71; Donald Chalmers, 'No Primrose Path: Surrogacy and the Role of Criminal Law' (1989) 7 *Medicine and Law* 595-606; Amos Shapira, 'A "Yellow Light" Approach to Surrogacy', in *Deutsch-Festschrift* (1999) 787-98.

100 VfGH judgment of 14 October 1999, II.B.1.2.3.

primarily stresses a woman's right to self-determination,[101] the self-determination of couples who wish to reproduce non-coitally has been distinctly circumscribed.[102] The VfGH found the legal rule that allows abortion on demand within the first trimester of pregnancy constitutional,[103] but it also ruled that particular infringements of the right to non-coital reproduction (section 3 of the FMedG) do not violate the *Austrian Constitution*. In its decision of 14 October 1999, the VfGH made distinct concessions to moral conservatives,[104] the majority of whom never have accepted the recognition of abortion rights.[105] This population will certainly remain likewise unsatisfied by this decision, because the compromises secured are obviously contradictory.

Be that as it may, in the judgment, the VfGH stressed that there is a human right to reproduce non-coitally and held that this right is secured by article 8(1) of the ECHR. The Court did not say that the legislature must hold to the restrictions imposed by section 3 of the FMedG which are, at least in my opinion, morally and *de lege ferenda* untenable. On the contrary, the VfGH explicitly held that if 'the factual circumstances change, the discretion of the legislature may narrow and it may – on constitutional grounds – then be required' to liberalise the current state of the FMedG.[106] The legislature would be

[101] Austrian *Penal Code* § 97(1).

[102] FMedG § 3.

[103] VfGH judgment of 11 October 1974, VfSlg 7.400, in support of which, see Wilhelm Rosenzweig, 'Drei Verfassungsgerichte zur Fristenlösung', in *Broda-Festschrift* (1976) 231-66. For comments on the analogous American opinion, *Roe v Wade*, 410 US 113 (1973), see Donald Regan, 'Rewriting Roe v Wade' (1979) 77 *Michigan Law Review* 1569-646, and John Hart Ely, 'The Wages of Crying Wolf: A Comment on Roe v Wade' (1973) 82 *Yale Law Journal* 920-49. See Giselher Rüpke, *Schwangerschaftsabbruch und Grundgesetz* (1975) 109-34, for a comparison of the first German Constitutional Court opinion regarding abortion (BVerfGE 39, 1) with *Roe v Wade*.

[104] See Peter Strasser, 'Ethik der Fortpflanzung' in Bernat, *Die Reproduktionsmedizin*, above n 38, 23.

[105] Cf – *pars pro toto* – Andreas Laun, 'Der falsche Alarm um Österreich', *Die Presse*, 18 February 2000, 2.

[106] VfGH judgment of 14 October 1999, II.B.2.4.2.4.

well advised to take this counsel to heart.[107]

[107] See also Richard Novak, 'Fortpflanzungsmedizingesetz und Grundrechte' in Bernat, *Die Reproduktionsmedizin*, above n 38, 73. For a proposed amendment to the FMedG, see *Konsensuspapier der Österreichischen Gesellschaft für Reproduktionsmedizin und Endokrinologie* (Stand: 16.11.2000), reprinted in (2001) 8 *Recht der Medizin* 29-30; see also Bundesministerium für Justiz/Bundesministerium für soziale Sicherheit und Generationen, *Fortpflanzungsmedizin – Ethik und Rechtspolitik* (2001). For an international perspective, see George P Smith, 'Assisted Noncoital Reproduction: A Comparative Analysis' (1990) 8 *Boston University International Law Journal* 21-52; Robert Stenger, 'The Law and Assisted Reproduction in the United Kingdom and United States' (1994/1995) 9 *Journal of Law and Health* 135-61; Henry D Gabriel and Eunice B Davis, 'Legal Ethics in Reproductive Technology' (1999) 45 *Loyola Law Review* 222-37; Kathryn Venturatos Lorio, 'The Process of Regulating Assisted Reproductive Technologies: What We Can Learn From Our Neighbors – What Translates and What Does Not' (1999) 45 *Loyola Law Review* 247-68.