ASSISTED REPRODUCTION TECHNOLOGIES: LEGAL CHALLENGES

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ABSTRACT

In this article the author analyses particular techniques of assisted reproduction technologies which are received differently in various legislation. The primary issues addressed in this article include regulation of posthumous fertilisation, egg donation, legal status of the so-called spare (surplus) embryos and genetic material in Serbian law and comparatively in European countries. These issues are examined in light of relevant court practices, both international and domestic, including recent cases of posthumous fertilisation in Serbia.

KEYWORDS

assisted reproduction technologies
posthumous fertilisation
egg donation
spare embryos
genetic material

1. Introduction

Assisted reproductive technologies (ART) include *in vivo* fertilisation and *in vitro* fertilisation with embryo transfer. These technologies also involve insemination by donor sperm (AID), egg donation, embryo donation, posthumous fertilisation and surrogate motherhood. For some time now, the realm of ART has raised numerous controversial issues, prompting certain state legislations to make serious efforts to provide appropriate legal responses. Conception through biomedicine is no longer considered an innovation, as various ART methods have been in use for over half a century. Nevertheless, both international and national law continue to face new issues, while some long-standing matters remain inadequately addressed.

Considering some states prohibit particular ART procedures, infertile couples sometimes travel to the state where the desired procedures (e.g. egg donation, embryo donation, posthumous fertilisation, surrogate motherhood) are permitted or more accessible.

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Therefore, cross-border reproductive medicine has become a pathway for some people to get necessary ART procedures.

2. Posthumous Fertilisation

The possibility of freezing genetic material, such as creating embryos *in vitro*, has led to new forms of assisted reproduction. Today, genetic material can be used even after the death of the person from whom it originated. The significance of sperm cells freezing increased in 1953 when scientists Bunge and Sherman discovered that human sperm cells could be frozen and then thawed for fertilisation, resulting in the birth of healthy children.[2] Similarly, once conditions allowed for the creation of embryos *in vitro*, it also became possible to freeze them for future use, and this procedure is now performed almost nearly as routinely as sperm freezing.

There are several potential cases of posthumous fertilisation. The first involves a scenario where the couple was already involved in an *in vitro* fertilisation process, frozen embryos are available, and there is explicit consent from the deceased partner for the use of this genetic material in the event of death. This situation represents a straightforward case that generally does not raise concerns, assuming posthumous fertilisation is permitted in the relevant jurisdiction. Another case arises when the partners, when undergoing assisted reproduction techniques, do not explicitly state their position on posthumous fertilisation, but their genetic material was frozen as part of the procedure. In this situation, the surviving partner may request permission the frozen material for posthumous fertilisation. The third, and most controversial, case involves posthumous fertilisation where there is no pre-frozen genetic material. Here, the surviving partner requests the collection of fertilised cells from the deceased partner after death. This scenario raises the most ethical dilemmas due to its complexity and the sensitive nature of the issue involved, making it difficult to arrive at a definitive answer. In this scenario, two possibilities arise: the first, where there is clear evidence that the deceased partner explicitly expressed a desire to have children even after his death, and the second, where only the surviving partner attests to the couple's mutual desire to have children. If posthumous fertilisation is permitted, it would be advisable to establish a specific waiting period before the procedure can begin, accompanied by a simultaneous requirement for psychosocial counselling.

The decision to use frozen genetic material must rest solely with the surviving partner, and never with third parties, such as the parents of the deceased. However, if there is no written consent regarding the posthumous use of frozen genetic material, a distinction should be made between frozen embryos and frozen reproductive cells. Specifically, in the case of sperm cells, the absence of consent should prevent their use. The so-called opt-out model, or the presumed consent model, which assumes that all persons consent to the posthumous fertilisation unless they expressly opposed it during their lifetime, would not be acceptable. However, when it comes to embryos, if the legislation does not contain an explicit prohibition on posthumous fertilisation, some authors are

2 | Benshushan and Schenker, 1998, p.1407.

of the opinion the decision of the surviving partner should be respected.[3] Posthumous reproduction is an exception and should be treated as such, so there no justification for posthumous extraction of fertile egg cells. A more permissive stance would seriously undermine the values in the field of reproduction, which cannot be reduced solely to the benefit of the person who wants to become a parent.

There are arguments both in favour and against posthumous fertilisation. Some countries accepted practice of posthumous fertilisation, while others explicitly forbid it. Furthermore, some countries lack clear regulations, making it difficult to determine at first glance whether this practice is permitted. For instance, this procedure is allowed in United Kingdom, Spain, Belgium, Greece, North Macedonia. However, it is forbidden in France, Italy, and other states of the region of former Yugoslavia (except North Macedonia). In Serbia, posthumous fertilisation is neither explicitly forbidden nor allowed.

One of the arguments against posthumous fertilisation is that a child born under these circumstances would lack a father in a *de facto* sense. *De iure*, the father is mother's husband or partner. This raises concern about the child's need for two parents who can provide care, which is the reason why some countries do not allow posthumous fertilisation. Meanwhile, one of the arguments in favour of posthumous fertilisation is the respect of the woman's reproductive right to have a child, regardless of her husband's or partner's death.

Countries that allow posthumous fertilisation stipulate conditions that should be met for its implementation. For instance, in Greece, assisted reproduction after the death of the husband or partner is permitted with court approval only if certain conditions are met. These conditions include: husband or partner being ill in a way that could impact conception or could endanger his life; the husband or partner having provided consent to *post mortem* conception, with the document certified by public notary and assisted reproduction not being allowed before six months after his death and more than two years after his death.[4]

The Serbian Law on Biomedical Assisted Fertilisation 2017 (hereinafter referred to as 'LBMAF') defines bio-medical assisted fertilisation (hereinafter referred to as 'BMAF') as a controlled procedure of female fertilisation conducted in compliance with current standards of medical science, different from sexual intercourse.[5]

This Law does not explicitly state whether posthumous fertilisation is permitted or forbidden. Thus, it is essential to consider relevant articles within this Act. Mutual life together at the time of performing assisted reproductive technologies is one of the conditions for these procedures.[6] Another condition is obtaining written consent from all persons are involved in the procedure, especially before starting each step.[7] Consent may be withdrawn in writing until the sperm, unfertilised eggs or early embryos are transferred into the woman's body. Before inserting sperm, unfertilised eggs or early

3 | Robertson, 1993, p.1047.
4 | Art. 1457 of the Act 3089 on Medically assisted human reproduction. Law 3089/2002, Translation of the Law to Serbian in: Kovaček Stanić, 2008, p. 211. Kovaček Stanić, 2014, pp. 151–169.
5 | Art. 3/1 of the LBMAF. Law on Biomedical Assisted Fertilisation, Official Gazette of Republic of Serbia 40/2017 (Zakon o biomedicinski potpomognutoj oplodnji).
6 | Art. 25/1 of the LBMAF.
7 | Art. 27 of the LBMAF.

embryos, the responsible physician should verify whether the consent exists or has been withdrawn.[8]

Additionally, there is another provision which should be mentioned in the context of posthumous fertilisation. This provision states that in the BMAF process, the use of reproductive cells and embryos from living donors is allowed.[9] Although, the Act refers to donors in this provision, it is unclear why donors must be alive. It can be very challenging, or even impossible to determine whether the donor is alive, especially if the donor donated cells or embryo prior to the procedure and the bank lacks record on the donor's status. It is conceivable that the lawmakers were considering posthumous fertilisation in the case of husband's or partner's cells or embryos.

In Serbian law, apart from married or heterosexual partners who are considered as eligible participants for medically assisted fertilisation procedures, exceptionally, an adult and legally capable woman living alone is exceptionally entitled to the bio-medical assisted fertilisation procedure, provided able to perform parental duties in the best interest of the child.[10] Donor insemination (AID) of the woman without a partner results in a family law consequence whereby the born child would not have a father, as it is not allowed to establish paternity of a donor. The child would have just one parent, the mother. From a family law perspective, the interests or rights of the child to have both parents should be considered. If a single woman has access to AID, the interest or right of the child may be compromised. Meanwhile, one can argue that a single woman has reproductive rights, including the right to AID. This situation bears some similarities with posthumous fertilisation. In both cases, the child will not have father *de facto*; she/he will have only one parent: the mother. However, in *de iure*, in the case of posthumous fertilisation the child will have a father, as the father is the mother's husband or partner. Therefore, the argument that the child will not have a father to take care of him/her in the situation of posthumous fertilisation is not justified, as this is the same for a single woman undergoing the process. Given that Serbian law allows single woman to access assisted reproduction procedures, this could be argument for allowing posthumous fertilisation in Serbian law *de lege ferenda*.

In case of posthumous conception involving a female partner using the fertilised cells of the deceased spouse/partner, the father of the child is regarded as the man whose sperm cells were used for fertilisation and who is also the biological father, provided that he consented to this type of fertilisation.[11] However, Serbian succession law does not recognise posthumously conceived children as descendants of their deceased biological parents.[12] We argue that the child should have the right to inherit from their biological parents. Therefore, we believe it is necessary for the legislator to take appropriate action to amend the existing law to guarantee the right of the born child to inherit from their deceased parent and relatives if posthumous fertilisation is permitted Serbian law *de lege ferenda*.[13]

8 | Art. 28 of the LBMAF.
9 | Art. 41 of the LBMAF.
10 | Art. 25 of the LBMAF.
11 | Kovaček Stanić, 2010, pp. 147–161. Kovaček Stanić, 2021.
12 | Art. 3. par. 2 of the Law on Inheritance of Serbia stipulates that a child can inherit the testator only if the child was already conceived at the time of his death and if born alive. Law on Inheritance, Official Journal of the Republic of Serbia No. 46/1995.
13 | Kovaček Stanić, Vidić-Trninić and Samardžić, 2017, pp. 63–79.

As a comparative example, the United Kingdom's approach to the posthumous fertilisation is examined. Since 2008, UK family law stipulates that the man whose sperm is used for the child's conception is legally recognised as the father. Consent is required for posthumous fertilisation by his sperm; as well as transferring of the embryo using his sperm before his death. Additionally, he must consent to placing the embryo in the woman after his death and to being recognised as the father of any resulting child. This consent cannot be withdrawn. Furthermore, the woman must provide written notice, no later than the end of the period of 42 days after the child's birth, for the man to be recognised as the father of the child. In addition, it is necessary that no-one else is recognised as the father of the child. In addition, it is necessary that no-one else is recognised as the parent of the child or as a parent if the child is adopted.[14]

However, according to earlier UK legislation (Human Fertilisation and Embryology Act 1990) it was stipulated that, 'where the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as a father of the child'.[15]

Additionally, this provision is inserted, as the Warnock report recommended,

> to ensure that estates can be administered with some degree of finality and to give effect to Warnock's expressed desire that fertilisation of a woman following the death of her partner (or husband as Warnock would have limited it) should be actively discouraged. This they recommended because it may give rise to profound psychological problems for the child and the mother.[16]

Eventually, after 18 years, this stipulation is abandoned and replaced with the rule that the man could be considered as the legal father of the child conceived after his death.

2.1. Posthumous Fertilisation: Court Practice

The first case involving posthumous fertilisation in Europe was the famous case *Parpalaix c. Centre d'etude et de Conservation du Sperme* in 1984. Following her husband's death, Mrs. Parpalaix requested his sperm from CECOS (*Centre d'etude et de Conservation du Sperme)* for the purpose of insemination. CECOS refused, claiming that no law mandated the return of the sperm. Mrs. Parpalaix went to court, suing for possession of the sperm. The Court ordered CECOS to turn the sperm over to Mrs. Parpalaix and her doctor for insemination or destruction. Mrs. Parpalaix went abroad for fertilisation, as French law does not permit posthumous fertilisation; however, the fertilisation was not successful.[17]

In Serbia, two cases involving posthumous fertilisation have occurred in 2022. First case is a case of a married couple Prizrenac. They entered the BMAF procedure after the husband was diagnosed with testicular cancer. Ten healthy embryos were created, but the husband died in the meantime. The husband made a last will in which he bequeathed the use of the embryos to the wife.[18]

14 | Sec. 39 of the Human Fertilisation and Embryology Act of 2008.
15 | Sec. 28 (6) (b) of the Human Fertilisation and Embryology Act of 2008.
16 | Morgan and Lee, 1991 pp. 156–160. Kovaček Stanić, 2014.
17 | More in: Jones, 1988, pp. 525–545. Kovaček Stanić, 2014.
18 | Case Prizrenac.

The second case is a case of a couple from Belgrade who wanted a second child.[19] Since both had already entered the period of reduced reproductive capacity, they decided to undergo *in vitro* fertilisation. Five embryos were created, two of which were returned to the uterus, where they did not survive, while three were frozen. However, the husband died as a consequence of the COVID-19 in January 2020. The clinic refused the wife's request to continue the *in vitro* procedure and denied her request to transfer the embryos to another institution as well. The Primary Court (Osnovni sud) in Belgrade (P. 462/22) denied the wife's petition to obtain the frozen embryos from the clinic. The wife claimed she has a right to access the embryos based on inheritance decision. The Higher Court in Belgrade overturned the Primary Court's judgment and returned the case for retrial to the Primary Court.

The first-instance court found that the plaintiff's claim was completely unfounded on the ground of the Law on the Basis of Ownership and Property Relations. The court stated that in this case, the first condition stipulated in Art. 37/2 the Law on the Basis of Ownership and Property Relations, which stated that the owner must prove that he/she has the right of ownership to the items whose return he/she is seeking, was not met. Additionally, the court stated that the decision on inheritance has a declaratory and not a constitutive character, implying that the court does not determine the right of ownership of the decedent's property, but rather the property that constitutes his/her inheritance. In this particular case, the legally binding decision is notary's public decision UPP: 615-2021 dated 9 November 2021. According to this decision, the heir is the wife of the deceased. She inherits the rights and obligations of the deceased from IVF/ISCI-ET Consent for the procedure LP OBR-1087 dated 17.11.2020, Consent for embryo transfer LP OBR--1088 dated 20.11.2020, Certificates for the embryo freezing procedure LP OBR-1158 dated 22.11.2020. The notary public references to the last will of the deceased. However, it is important to emphasise that an analysis is needed to determine whether the statements in the last will possess a legal nature that qualifies for inheritance under the inheritance law.

The court stated that based on this decision, the wife did not inherit the right of ownership of the embryos in question. Instead, she inherits only the rights and obligations arising from the inheritance documents. According to the opinion of the first-instance court, the inheritance decision cannot grant the plaintiff more rights than those explicitly outlined in the agreements themselves. Since the contents of the agreements do not confer any rights that the plaintiff can exercise independently, all the agreements were signed jointly by plaintiff and her late husband. Furthermore, the agreements did not indicate that the plaintiff's late husband ever consented to her using and disposing of the embryos independently, including transferring them between institutions. Thus, any disposition, use, or transfer of embryos would contravene her husband's wishes and violate Art. 49 par. 1 item 1 Law on Biomedical Assisted Fertilisation which prohibits the donation and use of embryos without the written consent of the donor. This aligns with the principle of freedom of decision, which guarantees an individual's right to free choice, including the necessity of obtaining free consent in the BMAF procedure.[20] Thus, the inheritance decision cannot replace her husband's consent. In addition, the previously mentioned agreement regarding the embryo freezing indicates that the plaintiff and her husband

19 | Case Marković, Gž. 4356/23 Higher Court Belgrade. The decision in this case is not final in this moment.

20 | Arts. 9 and 27 of the LBMAF.

agreed that, in the event of divorce, an accident or other unforeseen circumstances, the embryos will be destroyed through standard procedure.

The Higher Court believes that the first instance court's conclusion – that the wife has no right to request the transfer of embryos from one institution to another for BMAF – is unclear. According to the provisions of Art. 52 Law on Biomedical Assisted Fertilisation the persons from whom the stored reproductive cells, tissues or embryos originate may, for justified reasons, request their transfer to another institution within the Republic of Serbia that is registered to perform BMAF procedures for their own assisted insemination. The Higher Court asserts that, since the plaintiff has inherited her husband's rights and obligations from the aforementioned agreement and confirmation, she has acquired the right to make all decisions regarding the disputed embryos. Accordingly, the plaintiff has the right to request their transfer to another institution licensed for BMAF for justified reasons.

In addition, the Higher Court believes that the agreement between the wife and her husband regarding the destruction of embryos during divorce process, accident or other unforeseen circumstances, is irrelevant. Specifically, the contract for biomedical assistance is established between the potential parents as one party and obstetrician-gynaecologist as the other. The contract is contract of adhesion, that is, it has pre-prepared content where the clinic offers the potential parents possibilities, and it is up to them to fit into such an offer. Considering this, such contracts should be interpreted subjectively, reflecting the true intent of the parties. Furthermore, determining the legal status of the embryo in the event of one of the potential parents' deaths should be a crucial aspect of the contract for biomedical assistance, including as a specific provision for consent. This is especially important since this issue is not regulated by the law of Serbia, including the Law on Biomedical Assisted Fertilisation nor any other laws or bylaws. Consequently, the Higher Court, as the court of second instance, believes that the death of one of the potential parents cannot be considered as unfortunate event or other unforeseen circumstance. Thus, the destruction of the embryo due to the death of a potential parent must have been explicitly outlined in the contract.

In its decision, the Higher Court believed that an embryo results from the voluntary genetic contribution of two individuals. Legally, it can be viewed as a type of property under the civil law, over which a man and a woman have a form of a co-ownership. However, since the embryo represents a *sui generis* entity – meaning it is a special kind of a thing –it cannot be completely subsumed under the rules that govern property in civil law. In this regard, the conclusion of the court of first instance, which stated that the conditions prescribed by Art. 37 of the Law on the Basis of Ownership and Property Relations should apply, is not acceptable. This article asserts that the owner can sue the holder for the return of an individually determined thing, whereby the latter must prove that he has the right of ownership and that this thing is in the actual possession of the defendant. The conclusion of the court of first instance cannot be accepted as correct because the embryos cannot be in the actual possession of the potential parents or third parties, but only in the Laboratory for cryo procedure.

According to Art. 41 and Art. 49 par.1item 1 of the Law on Biomedical Assisted Fertilisation, which the first-instance court references, the BMAF procedure permits the use of reproductive cells that is embryos of living donors.[21] It is forbidden to give and use

21 | Art. 41 of the LBMAF.

reproductive cells – embryos – without the consent of the donors.[22] As follows from the quoted provisions of the Act, they apply to women and men who donate their reproductive cells, embryos to assist in the medical fertilisation of third parties. Therefore, the first-instance court's reference to these provisions is unclear. The plaintiff's appeal raises doubts regarding the conclusion of the first-instance court that any disposal or transfer of embryos from one institution to another would violate the will of the plaintiff's late husband and contradict Art. 49 par. 1 item 1, which prohibits giving up or using embryos without the donor's consent, considering that the husband is not actually a donor. The Higher Court believed that the plaintiff's argument is valid. In our view, the High Court correctly concluded that this case does not involve embryo donation, so the provision of Art. 9 par. 1 item 1 of the Law on Biomedical Assisted Fertilisation does not apply here.

In inheritance law, the rule is that things and rights can be inherited; however, we believe that an embryo does not fit into these categories, due to its potential to develop into a human being. The inheritance comprises all inheritable rights that belonged to the testator at the time of death.[23] In our opinion, the will expressed in the agreements which constitutes certain entitlements, are not heritable, as these rights are of personal nature. Only rights and obligations with a property nature are inheritable. In fact, consent represents an expressed will rather than a true right.

3. Egg Donation

ART procedure which involves egg donation has not been universally accepted. Some countries expressed doubts about egg donation.

However, Serbian law allows egg donation. Law on Biomedical Assisted Fertilisation of 2017 stipulates that donated female egg cells may be used in BMAF procedures when current standards of medical science and practice do not indicate that conception could occur with the use of female spouse's or partner's sex cells, in cases where previous BMAF procedures have been unsuccessful, or when this is necessary to prevent the transmission of serious genetic disorders to the child.[24] The reproductive cells of a single donor can be used in BMAF procedure until the birth of a child or children. A particular donor's reproductive cells or embryos can be used for the birth of a child or children for only one couple or one single woman.[25]

The BMAF procedure using donated reproductive cells is performed upon the recommendation of a medical doctor specialising in gynaecology and obstetrics. An expert advisory commission, appointed at the BMAF's centre, evaluates the specialist's proposal. The commission comprises a doctor of medicine, a specialist in gynaecology and obstetrics with a sub-specialisation in fertility and sterility, an embryologist, a graduate psychologist and a graduate lawyer appointed by the director of the authorised health

22 | Art. 49 par. 1 item 1 of the LBMAF.
23 | Art. 1/2 Law on Inheritance.
24 | Art. 29 of the LBMAF.
25 | Art. 30 of the LBMAF.

service. A doctor of medicine cannot serve as a member of the expert committee when an opinion must be provided on his/her proposal.[26]

The Serbian Family Act defines legal motherhood in the context of egg donation. The mother of a child conceived through biomedical assistance is the woman who gave birth to the child. If a child is conceived through biomedical assistance by a donated egg, the maternity of the woman who donated the egg may not be established.[27]

In comparative law, in French bio-ethical laws[28] regulating egg donations stipulate that a woman aged 18 to 37, with or without children, can donate her egg (or eggs) to married or single women who cannot conceive. The donation is made in a hospital and is free and anonymous.[29]

Italian Act of 2004 forbids sperm and egg donation. However, on 9 April 2014, the Constitutional Court declared these articles as unconstitutional, implying that sperm and egg donation should become permitted procedures in Italy in the future. This change suggested that Italian couples will no longer need to seek cross-border medical solutions for gamete donation.[30]

Some legislations, for instance, Austrian do not permit IVF in combination with gamete donation. IVF is permitted only using gamete from the couple involved in the procedure. The case of S. H. and Others v. Austria concerns the prohibition of gamete donation.[31]

> 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 fertilisation (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 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 fertilisation. 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.[32]

European Court for Human Rights has concluded that:

26 | Art. 31 of the LBMAF.
27 | Art. 57 of the LBMAF. Family Act, Official Gazette of Serbia no. 18/2005, 72/2011, 6/2015.
28 | Bioethics Act No. 2004-800 of 6 August 2004 as amended in 2011 and 2021.
29 | Ce que dit la loi de bioéthique qui encadre le don d'ovocytes, 2021. Donation of eggs (oocytes), 2022.
30 | B92 news 9 April 2014. Italian Act – No 40/2004, (Norms on medically assisted procreation), Italian Official Journal No 45/2004, translation to Serbian in Kovaček Stanić, 2008, p. 223. More in: Miranda, 2007, p. 270.
31 | Artificial Procreation Act 1992, Information Note on the Court's case-law No. 146. Amendments Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023. (S.H. and Others v. Austria Application no. 57813/00) Judgment 03/11/2011, Hudoc.
32 | Ibid.

> 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* fertilisation under section 3 of the Artificial Procreation Act had the Austrian legislature exceeded the margin of appreciation afforded to it at the relevant time. 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 must be a wide one.[33]
>
> The Austrian Parliament had not thus far undertaken a thorough review of the rules governing artificial procreation, taking into account the relevant dynamic developments in science and society. The Austrian Constitutional Court had observed that medical science at the time and the consensus existing in society were subject to developments that the legislature would have to take into account in future. Although the Court had concluded that there had been no violation of Art. 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.[34]

In a meantime Austrian law has changed, allowing the use of egg cells for a third party if this woman is unable to conceive and if she has not reached 45 years of age.[35]

One particular ART procedure results in the situation where a child could have two genetical mothers. This procedure involves removing the nucleus from mother's fertilised egg and inserting it into an empty egg cell donated by another woman – a technique known as mitochondrial transfer, also referred to as *in vitro* fertilisation with three parents. The procedure aims to avoid genetic abnormalities in the mother's mitochondrial DNA.[36]

4. Spare (Surplus) Embryos

Spare embryos are embryos that have been preserved by cryopreservation because they will not be used for immediate treatment. The use and storage of the spare embryos are important issues in comparative law and court practice.

4.1. Spare Embryos: Use

Spare embryos can be used in several ways, including: subsequent fertilisation of the couple from the initial procedure if pregnancy and childbirth did not occur in the previous attempt or for the birth of a second child; posthumous fertilisation, i.e. the fertilisation of a woman after the death of her spouse or non-marital partner from whose sperm cells the

33 | Ibid.
34 | Ibid.
35 | Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023, §3 (3).
36 | Deech and Smajdor, 2007, p. 159.

embryo was created; fertilisation of the second couple (donation) and use for embryonic research.

All consulted laws permit subsequent fertilisation of the couple from the initial procedure. Some allow post-mortem fertilisation (e.g. United Kingdom, Spain, Belgium, Greece, North Macedonia), while others allow fertilisation of another couple (e.g. United Kingdom, France, Greece), and some allow use for embryonic research (e.g. United Kingdom, Greece, Switzerland, France).

Authors Ruth Deech and Anna Smajdor have explained the situation regarding changed circumstances in relationship of the couple and the eventual consequences for the frozen embryos and gametes in United Kingdom.

> ... becoming a parent is one of the most life-changing events one can experience. Because of this, people often find that their assumptions or values change. In these circumstances, consent given prior to treatment for the disposition of embryos or gametes may no longer seem valid... If a couple splits up, either party can withdraw consent to the storage or use of embryos that have been created during the course of relationship. This can cause terrible distress for those whose only chance of having a child bay be thwarted by an ex-partner...The consent provisions of the HFE Act are designed to circumvent this kind of problem by specifying, as far as possible, every eventuality. This is one reason why ongoing consent is required, rather than consent given at the tie of treatment or storage simply being regarded as binding over time. Patients consenting to the storage of gametes or embryos must also specify the length of the storage period (within the legal ten-year maximum period). Patients must also state what is to be done with the gametes or embryos if either partner dies or becomes incapacitated... For adults in this situation, leaving their embryos unclaimed in clinics may be preferable to the idea 'their' chid would go into the world in circumstances beyond their control on being donated to another couple. Donating embryos for research is also a difficult choice. It is perhaps not surprising that potential donors, feeling caught between two unappealing options, sometimes disappear from clinics's records, leaving spare embryos unclaimed. In 1996, this problem came to the fore when a large number of embryos created in 1991 reached the end of the five-year storage period consented to by their progenitors. Many of the former IVF patients simply could not be traced, leaving the embryos in a legal limbo. Further storage was illegal without specific consent, as was donation to research or to other couples. Embryos abandoned in this way were allowed to perish. There is something very sad about this when many people desperately long for children. In these cases, as in most aspects of fertility treatment, parental consent has prevalence over any moral interest which the embryos might thought to have (eg to be 'adopted' by another parent) or any interests their scientists or society at large might have. This is something which may in itself be questionable.[37]

According to French law, an embryo can be conceived *in vitro* only for the purpose of medically assisted procreation. It can be conceived only if it originates from the gametes of at least one of the spouses. Considering the level of medical techniques, both spouses can make a written decision regarding the fertilisation of a number of egg cells. The spouses can agree in writing to transfer the stored embryos to another couple. In the event of the death of one spouse, the surviving spouse is consulted in writing as to whether he/

37 | Ibid.

she agrees to transfer the stored embryos to another couple.[38] The transferred embryo, in exceptional cases, can be given to a married couple who meet the legal requirements, provided that medically assisted procreation has not been successfully completed in their case (except for instances involving a third donor). The court makes a decision on embryo transfer. The judge determines whether the married couple requesting the embryo has met the stipulated conditions and accesses if this couple is able to offer to the child born the necessary familial, educational, and psychological conditions. The couple accepting the embryo and the couple donating the embryo cannot know each other. In the case of the need for treatment, the doctor will be able to access the medical data concerning the couple who donated the embryo, but not the data that could be used to identify them. No payments can be made to the couple who donated the embryo. Embryo acceptance is subject to sanitary safety rules. These rules include, first and foremost, tests for the detection of infectious diseases.[39] The *in vitro* conception of human embryos for the purposes of studies, research or experiments is prohibited, as well as the carrying out of experiments on embryos. However, in exceptional cases, a couple can allow studies performed on their embryos, which must have a medical character and must not endanger the embryo itself. Approval must be provided in writing. Studies can be undertaken only after the commission gives a positive opinion according to the conditions defined by the decision of the State Council. The commission is obliged to publish a list every year of institutions where these studies can be conducted, as well as their subject.[40]

In Greece, embryo donation to another couple is permitted, as is donation for scientific research, depending on the wishes of the couple from whom the reproductive material originates. The law requires that individuals undergoing assisted reproduction should jointly decide and express their will in writing, instructing the doctor of the fertility clinic before starting the relevant treatment. They must specify whether the reproductive material that has been preserved through cryopreservation, which will not be used for their treatment (spare embryos) should be: donated for the fertilisation of other individuals according to the decision of the doctor or clinic, used for research for therapeutic purposes or should be destroyed. After a storage period of 5 years, the material can either be used for research or therapeutic purposes or it can be destroyed.[41]

In Switzerland, research on spare embryos is permitted. The couple from whom the embryo originates must give consent before the embryo can be used for research purposes.

In contrast, for example in Austria, embryos could only be used for assisted reproduction. Scientific research on embryos is not allowed, nor is the use of embryos for fertilisation of another couple.

Under Serbian law, the donation of the spare embryos is permitted, as is scientific research on embryos.[42]

38 | Art. L. 152-4. Bio-ethical laws.
39 | Art. L. 152-5. Bio- ethical laws.
40 | Art. L. 152-8. Bio-ethical laws.
41 | Art. 1459 Act 3089 on Medically assisted human reproduction.
42 | Arts. 35/2, 51/6 of the LBMAF.

4.2. Spare Embryos: Storage

According to Serbian Law, early embryos are stored for the period specified in the written consent given by spouses or non-marital partners involved in the BMAF procedure, but for no longer than five years from the date of their storage. The storage time of early embryos can be extended by a maximum of five years for medical reasons, upon a written request by the person from whom the unused early embryos originate. At the end of the term, the early embryos spontaneously decompose and are destroyed.[43]

In comparative law, for instance in United Kingdom the spare embryos may be frozen for use in later cycles if more embryos are created than can safely or legally be transferred into the mother. By law, no more than two embryos can be transferred per cycle, although, in patients over 40, this limit may occasionally be extended to three. In certain cases, longer period may be appropriate, such as when a young person, usually a man, requires treatments which may render him sterile, and where he (and his partner) may wish to store sperm for future use. This situation could arise in treatments for Hodgkin's disease or testicular cancer. If patients consent to the storage of embryos, they must specify how long they want embryo to be stored within the legal time limit, which is 10 years for gametes and five years for embryos. An embryo created from stored gametes may itself be stored for the full length of the applicable storage period. Thus, an embryo created from gametes stored for, for instance, eight or nine years, or right up to the ten-year limit, may then be frozen and stored for the maximum period up to 15 years after the egg or sperm from which it derives was donated.[44]

According to French law, the embryos can be preserved for up to five years to fulfil the parental request of the couple. Both spouses are consulted annually during this five-year period to confirm whether they still wish to pursue parentage.[45]

In Italy, the cryopreservation of the embryo is permitted only when transferring the embryo into the uterus is not feasible due to a serious and documented case of *vis major* related to woman's health, which could not have been predicted at the time of fertilisation. The cryopreservation of the embryo is permitted until the date of the transfer, which should occur as soon as possible.[46]

In Greece, the law specifies that cryopreservation can last for a maximum of five years (in case there is no joint declaration of the persons concerned).[47]

4.3. Spare Embryos: Court Practice

The European Court for Human Rights addressed the issue of consent withdrawal in the case of Evans v. United Kingdom. These are facts of this case:

Ms Evans decided to have some of her eggs removed prior to the cancer treatment and fertilised with her partner's sperm. The embryos were kept in storage while she underwent her treatment. However, the relationship broke down, and Ms Evans' partner

43 | Art. 51/1,3,4 of the LBMAF.
44 | Morgan and Lee, 1991, p. 115.
45 | Austria: Federal law on medical conception (FMedG), Civil code, Law on marriage, norms on the jurisdiction (No.: GP XVIII RV 216 AB 490 p. 69. BR: AB 4255 p. 553.) StF: BGBl. no. 275/1992. Ammandements BGBl. I no. 98/2001 (No. GP XXI RV 621 AB 704 p. 75.BR: 6389 AB 6424 p. 679.) BGBl. I no. 163/2004 (No. GP XXII RV 678 AB 741 p. 90BR: AB 7167 p. 717.), par. 17.
46 | Italy: Law from 19 February 2004, no. 40, Norms on medically assisted procreation, Official Journal no. 45, from 24 February 2004, Art. 3.
47 | Greece: Law 3089 Medically assisted human reproduction, Official Journal 327/2002, Art. 1459.

decided that he no longer wanted to have a family with her. He requested that the couple's embryos be destroyed. Ms Evans embarked on a lengthy court battle to save her embryos, and her right to implant them. At each successive turn, she was turned down, despite the sympathy that judges had with her case. In April 2007, her final appeal was rejected. For many, the judgment was welcomed as an indication that fatherhood is taken as seriously as motherhood and that reproductive technology is not allowed to reduce the role of men to mere fertilisation.[48]

In short, Court was of the opinion:

> Private life (Art. 8 of the Convention on human's rights) incorporated the right to respect for both the decisions to become and not to become a parent.... The dilemma central to the case was that it involved a conflict between the Art. 8 rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant was permitted to use the embryos, J. would be forced to become a father, whereas if J.'s refusal or withdrawal of consent was upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. The legislation also served a number of wider, public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as 'entirely incommensurable' interests....including the lack of any European consensus on the point, the Court did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her.

In a comparative context, there are two categories of legislations regarding withdrawal of the consent. The first group consists of laws that allow consent to be withdrawn at any point before the embryo is planted in the woman's body (e.g. Denmark, France, Greece, Switzerland etc.). The second group comprises laws that permit withdrawal of the consent only up until fertilisation, after that, the woman alone may decide whether to continue the process (e.g. Estonia, Italy). Previously, in Austria, men could withdraw consent only until fertilisation, but following amendments, it is now possible to withdraw consent up until the implantation of the cells in the woman's body.[49] As mentioned earlier, in Serbia, consent may be withdrawn until implantation.

48 | Case of Evans v. The United Kingdom, No. 6339/05 od 10/04/2007. Court decided that there is no violation of Art. 8 (thirteen votes to four).

49 | Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023.

5. Concluding Remarks

The advancement in biomedicine and new technologies trigger parallel advancement in the social sciences, especially in law, because legal frameworks inevitably adapt to scientific breakthroughs. In the process of establishing whether some new technology should be permitted and how, lawmakers must consider the development of social circumstances within a certain society. In its practice involving the IVF procedure, the European Court for Human Rights determined that the margin of appreciation afforded to the respondent State must be a wide one, having in mind '...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'.[50]

The existing differences in the comparative law regarding posthumous fertilisation, egg donation, legal status of the so-called spare (surplus) embryos, and genetic material are acceptable as long as they are consequence of different social circumstances in particular country. The role of the comparative family law is to find legal answers to family situations that arise from ART, keeping the best interests of the child as the top priority.

50 | In its decision involving child born as a result of the surrogate motherhood the Court has respected the wide margin of appreciation of each country, as well. Paradiso and Campanelli v. Italy [GC] – 25358/12 Judgment 24, 1, 2017.

Bibliography

Benshushan, A., Schenker, J. G. (1998) 'The right to an heir in the era of assisted reproduction', *Human Reproduction*, 13(5), pp. 1407–1410; https://doi.org/10.1093/humrep/13.5.1407.

Ce que dit la loi de bioéthique qui encadre le don d'ovocytes (2021) *Agence de la biomédecine*, 2021 [Online]. Available at: https://www.dondovocytes.fr/ce-que-dit-la-loi/ (Accessed: 10 November 2024).

Deech, R., Smajdor, A. (2007) *From IVF to Immortality.* Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199219780.001.0001.

Donation of eggs (oocytes) (2022) *République Française*, 1 September [Online]. Available at: https://www.service-public.fr/particuliers/vosdroits/F24586?lang=en (Accessed: 10 November 2024).

Jones, D. J. (1988) 'Artificial Procreation, Societal Reconception: Legal Insight from France', *The American Journal of Comparative Law,* 36(3), pp. 525–545; https://doi.org/10.2307/840345.

Kovaček Stanić, G. (2008) *Legislativa o ljudskoj reprodukciji uz biomedicinsku pomoć*. Novi Sad: Centar za izdavačku delatnost–Pravni fakultet.

Kovaček Stanić, G. (2014) 'Comparative Analysis of Art in the EU: Cross-Border Reproductive Medicine', *Medicine, Law & Society*, 8(1), pp. 151–169.

Kovaček Stanić, G. (2010) 'Family autonomy in contemporary parent-child relationships', *The International Journal of Jurisprudence of the Family – IJJF*, 2010/1, pp. 147–161.

Kovaček Stanić, G. (2021) 'The child's right to know their biological origin in comparative European law: consequences for parentage law' in Marrus, E., Laufer-Ukeles, P. (ed.) *Global Reflections on Children's Rights and the Law. 30 Years After the Convention on the Rights of the Child*. London: Routledge, pp. 199–210; https://doi.org/10.4324/9781003131144-24.

Kovaček Stanić, G., Vidić-Trninić, J., Samardžić, S. (2017) 'Sporna pitanja u oblasti biomedicine sa aspekta porodičnog i naslednog prava', *Pravni aspekti biomedicine i zaštite životne sredine: zbornik radova,* 2017, pp. 63–79.

Miranda, A. (2007) 'In vitro veritas? The New Italian Human Fertilization and Embryology Act 2004: Legal Issues between Balancing of Individual Interests and Social Priorities', *Family Law: Balancing Interests and Pursuing Priorities*, 2007, pp. 270–274.

Morgan, D., Lee, R. G. (1991) *Blacktone's Guide to the Human Fertilisation and Embryology Act 1990: abortion and embryo research, the new law/Derek Morgan and Robert G. Lee.* London: Blackstone Press Limited.

Robertson, J. A. (1993) 'Posthumous Reproduction', *Indiana Law Journal*, 69(4), pp. 1027–1066.