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Special Features for Immigrant Foreign Carers In the German Healthcare System: The Legal Basis for Egg and Sperm Donation in The Federal Republic of Germany

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Abstract

The advancements in medical technology provide numerous German couples with the prospect of perhaps achieving parenthood through artificial methods. However, certain techniques are limited or prohibited due to legal constraints outlined in the Embryo Protection Act. Despite being the most effective form of artificial reproduction worldwide, egg donation is subject to severe legal regulations in Germany. This article explores the legal basis for egg and sperm donation in Germany. The requirements and prohibitions set out in the guidelines of the German Medical Association (german: Bundesärztekammer) and their influence on various groups of the population are explained. The focus here is on the heterologous systems of egg and sperm donation, which are to be analyzed in a differentiated manner in terms of their legal regulation and application. Considering the persistently low birth rates in Germany over the past few decades, it is advisable for the German government to adopt the policies implemented by neighboring European countries.

Keywords: artificial fertilization, sperm donation, egg donation, homologous donation, artificial reproduction

1. Introduction

The first child from a petri dish was born in England in 1978 (Bernard 2015). A few years later, on 16 April 1982, the first test-tube baby was born in Germany (Tscharnke 2012). Since then, more than 390.000 artificially conceived children have been born in Germany (Thomas 2023) and more than 12 million worldwide (Eshre 2023).

Despite medical progress, many couples in Germany are denied the desire to have children because the legal basis for some methods of artificial insemination in the Embryo Protection Act are characterized by restrictions and prohibitions and are therefore punishable by law (Familienplanung 2024). Since the judgement of the European Court of Human Rights, which attracted a great deal of media attention and confirmed the ban on egg donation in Austria in 2011, German legislation has also been strengthened in its interpretation in favour of a total ban on egg donation (German National Academy of Sciences 2024). Accordingly, anyone who enables or assists in in-vitro fertilisation using another person's unfertilised egg is liable to a fine or imprisonment (Gesetze-im-internet 2024). Sperm donation, on the other hand, can be carried out legally in most cases and is not expressly prohibited by law.

Why does the German legislator differentiate so strongly between egg and sperm donation? What are the legal aspects that underlie or justify this total ban on egg donation? This paper sets out the legal basis for egg and sperm donation in Germany. The requirements and prohibitions set out in the guidelines of the German Medical Association (Bundesärztekammer 2024) and their influence on various groups of the population are explained. The focus here is on the heterologous systems of egg and sperm donation, which are to be analysed in a differentiated manner in terms of their legal regulation and application.

In Germany, the legal issues arising from reproductive medicine, particularly sperm and egg donation, have been discussed since 1960. At that time, consideration was already being given to criminalising heterologous sperm donation (Spickhoff 2014). The birth of the first artificially conceived child in 1978 sparked another controversial debate, but did not lead to a comprehensive law on reproductive medicine. By resolution of the 88th German Medical Association in 1985, the guidelines (Deutsches Ärzteblatt 1985), of the Bundesärztekammer on the performance of in vitro fertilisation and embryo transfer were drawn up as legal regulations with Section 13 of the Model Professional Code (German Medical Association 2018) of Physicians. Finally, the Embryo Protection Act (Gesetze-im-internet 2024) came into force on 1 January 1991 and has regulated reproductive medicine uniformly ever since. It is a secondary criminal prohibition law that criminalises certain methods and abusive practices. It is therefore not a legally formative positive implementation of reproductive medicine in the sense of a Reproductive Medicine Act. As egg and sperm donation fall within the scope of the Transplantation Act and the Medicinal Products Act, they are subject to authorisation Section 8 TPG (Gesetze-im-internet 2024), Sections 20b (Gesetze-im-internet 2024) and 20c (Gesetze-im-internet 2024). The TPG and the TPG Tissue Ordinance regulate the issues relating to the necessary requirements for carrying out assisted reproduction (Wehrstedt 2011).

Artificial insemination methods are still not subject to any explicit reproductive medicine or reproduction law. The reason for this is the lack of legislative competence in the area of medical law at federal level. With the extension of Art. 74 of the Basic Law by No. 26 (Coester-Waltjen 2002), the Federal Republic now has the competence to enact laws for artificially created life. This amendment has not yet been applied. This means that the legal requirements for egg and sperm donation are still made up of a comprehensive network of legal regulations.

1.1. Sperm donation

If male fertility is severely restricted or if there is a rhesus factor incompatibility or hereditary disease, sperm donation is indicated from a medical point of view (Spickhoff 2005). The sperm for this is offered by private individuals and sperm banks for a fee at various conditions. Together with a fertility clinic, affected couples try to achieve a pregnancy using various treatment methods. There are three different fertilisation methods: Firstly, intrauterine insemination (Dorn 2013), in which selected sperm is inserted into the woman's uterus. In vitro fertilisation (IVF), in which the egg and sperm cell are united outside the human body, and the last method is intracytoplasmic sperm injection (ICSI). The sperm is injected extracorporeally directly into the woman's egg cell (Ebner & Diedrich 2013).

1.2. Sperm donation from a legal perspective

From a legal perspective, sperm donation is divided into three categories according to the personal circumstances of the couple and the origin of the sperm: homologous, quasi-homologous and heterologous sperm donation. If the husband's sperm is used, the donation is categorised as homologous. If the couple is not married but live in a non-marital partnership, it is legally categorised as quasi-homologous sperm donation (Rütz 2008). Both partners are the genetic parents (Hahn 2014). If the sperm is donated by a third person, this is referred to as a heterologous system (Rütz 2008).

Homologous insemination, homologous IVF and ICSI are legally recognised and their implementation is undisputed (Hahn 2014), as the conceived child can be easily assigned to the natural parents, as in the case of natural fertilisation.

Heterologous sperm donation must be differentiated from this, especially as its permissibility is not expressly regulated by law. However, its mention in BGB § 1600 paragraph 4 is an indication that the German legislator does not categorise it as immoral (Gesetze-im-internet 2024). Similarly, the Embryo Protection Act does not contain any explicit rules on the use of sperm cells for reproduction, regardless of their legal categorisation. The Embryo Protection Act covers heterologous sperm donation by excluding the misuse of all reproductive methods and requiring a doctor's authorisation in Section 9 Embryo Protection Act for every reproductive method (Gesetze-im-internet 2024).

Both quasi-homologous and heterologous sperm donation are permitted on the basis of the Embryo Protection Act (Gesetze-im-internet 2024). As long as the genetic make-up of the germ cell, which is removed for subsequent fertilisation and reintroduced, is not altered, the collection of sperm cells is generally permitted (Gesetze-im-internet 2024). Furthermore, § 3 Embryo Protection Act prohibits the selection of the sperm according to its sex chromosome. Unless the child can be protected from a serious sex-linked hereditary disease (Gesetze-im-internet 2024).

To date, the use of sperm cells has been regulated or restricted by law. According to Section 1 I No. 7 Embryo Protection Act, the use of a sperm donation for artificial insemination to create a surrogate mother is prohibited (Gesetze-im-internet 2024). It is also prohibited if the woman to be treated has not given her consent to insemination at the time of treatment (Gesetze-im-internet 2024). There is no restriction in the Embryo Protection Act on the number of sperm cells required for fertilisation or on the number of donors. However, it must be taken into account that the conceived child has a right to know its own parentage (Zypries & Zeeb 2014). Furthermore, the Embryo Protection Act does not contain any provisions on the origin of the sperm. It is irrelevant whether the sperm comes from the husband of the potential future mother or from a man who does not wish to assume social paternity. Only one exception is listed in Section 4 (3) of the Embryo Protection Act. The sperm may not be used for fertilisation from a dead donor (Gesetze-im-internet 2024). If the sperm comes from a deceased donor, the woman undergoing artificial insemination is not penalised (Gesetze-im-internet 2024). According to Section 9 Embryo Protection Act, only a doctor may carry out assisted reproduction or treatment using sperm donation (Gesetze-im-internet 2024). Infringement is punishable as a criminal offence in accordance with Section 11 (1) Embryo Protection Act. In this case, the woman who carries out artificial insemination, for example by means of a so-called cup donation, and the man who provides the sperm are not punished. If a doctor were to accompany and support this treatment, but possibly not carry out the fertilisation himself due to professional considerations, he would be liable to prosecution for aiding and abetting a breach of the doctor's privilege (Eberlein 2013).

As the Embryo Protection Act does not contain any explicit regulations on the use of sperm donations, the "(Model) Guideline of the German Medical Association on the Implementation of Assisted Reproduction" (Bundesärztekammer 2004), provides medical and legal guidance for doctors and affected persons (see chapter 3.3).

1.3. Sperm donation according to the guidelines of the German Medical Association

As the German legislator does not provide sufficient regulation for the implementation and use of heterologous sperm donation, the admissibility of and access for affected persons to the medical procedures is governed by the guidelines of the Bundesärztekammer. Therefore, the permissibility results from the professional law of physicians. Assisted reproduction methods are categorised as a special medical procedure in Section 13 of the " (Model) Professional Code of Conduct for Doctors Practising in Germany" (Bundesärztekammer 2018). If, for example, ICSI is performed as an artificial fertilisation procedure, Section 13 in conjunction with Section 5 of the MBO-Ä forms the legal basis. This treatment is therefore only permitted within the scope of this guideline, which was adopted by the Bundesärztekammer as part of its professional code of conduct. Failure to comply with the provisions of this guideline on assisted reproduction has professional consequences for doctors (Bundesärztekammer 2006).

The permissibility of heterologous sperm donation is not called into question by the directive. However, this procedure should not be used as a rule, but only under certain conditions. The commissions of the regional medical associations (german: Landesärztekammer) decide on this (Rütz 2008). The medical requirements are

- According to the principle of subsidiarity, assisted reproduction methods are to be used if natural conception is not possible and all alternative methods have been unsuccessful.
- The reasons why homologous semen could not be used must be medically justified.
- The attending physician must test the semen sample for certain pathogens in advance.
- The use of mixed semen and fresh semen is not permitted.

The legal requirements of the Bundesärztekammer continue to apply:

- The sperm donor must explicitly consent to the documentation of his personal data.
- The doctor must document the identity of the donor without exception.
- Both spouses must consent to the intervention for the sperm donation contract to be valid. For the sake of completeness, reference should also be made to the sperm donor contract and the treatment contract between the doctor and the intended parents. A detailed explanation of this can be found in the book Reproductive Medicine by Diedrich, Ludwig and Griesinger (2013).
- The doctor must assess whether the woman is living with an unmarried man in a stable partnership and whether he will recognise paternity.
- The parents' consent in accordance with the documentation of the sperm donation and the doctor's release from his duty of confidentiality with regard to the child's right to information from the doctor must be available.
- The doctor carrying out the fertilisation must ensure that the donor has been informed of any legal consequences before the treatment.
- The husband must have been informed about a possible challenge to the marriage and its legal consequences (Bundesärztekammer, 2006).

On the one hand, the directive specifies the requirements and, on the other, restricts the permissibility of treatment using heterologous sperm donation to a certain group of people. Homologous and quasi-homologous sperm donation is still permitted as a treatment method for assisted reproduction under the professional law of physicians (see Chapter 3.1). Single women and those living in a same-sex partnership are explicitly excluded from sperm donation and assisted reproduction methods in general. The exclusion of single and / or lesbian women is justified by an insufficiently stable relationship between the conceived child and both parents. There is no mention of homosexual men who live in a stable partnership in the Bundesärztekammer guidelines (Bundesärztekammer 2006).

1.4. The legality of the directive of the German Medical Association

A doctor is always bound by the above-mentioned prohibition if it has a direct legal effect on him. This could not be the case here if the directive issued is not a legitimate subject of medical professional law. The exclusion of women from artificial insemination who live in a same-sex partnership or are single could indicate that the Bundesärztekammer has exceeded its competences and would therefore be unlawful. As a result, this prohibition would not be legally binding for the treating physician.

1.5. The expertise of the German Medical Association

The Bundesärztekammer is the central organisation of medical self-administration. It acts as an unregistered association, in contrast to the Landesärztekammer, which acts as a public corporation (Bundesärztekammer 2006). The model guidelines drawn up by the Bundesärztekammer have no regulatory effect, as they are not legally binding. They are also not binding legal norms (Uhl 2008). Their authority to define certain professional obligations for doctors in the form of, for example, the (model) guidelines on assisted reproduction, arises from the purpose enshrined in the Bundesärztekammer statutes. The standardisation of the guidelines can be inferred from this as an adequate means of achieving "the most uniform possible regulation of doctors' professional duties and the principles of medical activity in all areas" (Statutes of the German Medical Association, 2014). The individual doctor belongs to the Bundesärztekammer only indirectly through compulsory membership of his Landesärztekammer and is bound by the respective statutes issued. Since the Bundesärztekammer is limited by the autonomy of the Landesärztekammer, only topics that are accepted by each Landesärztekammer can be the content of a model guideline (Uhl 2008). This raises the question of whether the Bundesärztekammer´s guidelines can be lawfully applied within the framework of the autonomy of the statutes under public law (Uhl, 2008). The Registered Civil Partnership Act (LPartG) could contradict this. According to Section 9 (7) LPartG, the partner in a same-sex civil partnership is permitted to adopt the other partner's child (Gesetze-im-internet 2024). However, for this reason, heterologous insemination does not have to be permitted for same-sex civil partners. The Federal Ministry of Justice states that adoption is also possible in the case of sperm donation. It cannot be concluded from this that treatment by means of sperm donation is permissible (May 2003). The Federal Constitutional Court grants the self-governing bodies, such as the Bundesärztekammer, a basis for authorisation to set standards as long as these do not conflict with fundamental rights (May 2003). The Bundesärztekammer´s guideline does not go beyond the provisions of ordinary law such as the Embryo Protection Act (May 2003), as no ordinary law defines both the implementation and application of sperm donation in person and in practice. The Bundesärztekammer guidelines are therefore lawfully applied as applicable professional law. They do not exceed their competence.

2. Egg donation

Egg donation is an established method of reproductive medicine (Depenbusch & Schultze-Mosgau 2013). A woman can have her own fertilised egg transferred. This procedure is known as autologous embryo transfer. If a woman is transferred a fertilised foreign egg, i.e. an embryo from another woman, this is referred to as heterologous embryo transfer (May 2003). There is a medical indication for this if a woman was born without ovaries or her ovaries do not develop fertilisable eggs due to a hereditary disease, for example. In the case of genetic predispositions, early menopause, patients with a low response

in the stimulation procedure and a high risk of a sex-linked disease, egg donation is indicated (Berg 2001).

Unlike sperm donation, egg retrieval can be associated with enormous health risks. Hormone stimulation can lead to the development of a dangerous ovarian hyperstimulation syndrome. It is also suspected of causing ovarian cancer (Hess et al. 2013). There is also an increased risk of injury due to the puncture of the ovaries, which can result in bleeding and infections (Berg 2001).

It is assumed that around three to four per cent of all couples who wish to have children require egg donation. With a birth rate of 50-60 per cent, egg donation treatment is the most successful artificial insemination procedure internationally (Rosenau 2012).

2.1. Egg donation from a legal perspective

In contrast to sperm donation, egg donation in Germany is clearly regulated or prohibited in the Embryo Protection Act (Depenbusch & Schultze-Mosgau 2013). Egg donation for reproductive purposes is prohibited in Germany and has been regulated expressis verbis since the Embryo Protection Act came into force on 1 January 1991. Carrying out artificial fertilisation by means of egg donation is therefore punishable by law (Möller 2013). In order to ensure the right to life of the extracorporeally created embryo and its dignity as well as to do justice to the social conditions of development, a large number of prohibitions were created in the Embryo Protection Act (Spickhoff 2014).

2.2. The ban on egg donation in the Embryo Protection Act

According to Section 1 (1) No. 1 Embryo Protection Act, anyone who transfers an unfertilised foreign egg cell to a woman is liable to a custodial sentence of up to three years or a fine. This provision only applies to egg donation for reproductive purposes. Egg donation for non-reproductive purposes is determined according to general criminal, civil and medical principles (Günther et al. 2008).

The German legislator does not explicitly prohibit the donation of egg cells, but rather treatment with them. In order to fulfil the objective facts here, an unfertilised human egg cell must be transferred. The Embryo Protection Act defines the female germ cell as an egg cell. The characteristic "human" egg cell is understood as a cell with a human cell nucleus and a human egg cell envelope. In addition, it is assumed that the egg cell does not originate from the woman to whom it is transferred, i.e. that she is not the donor and therefore the egg cell is foreign to her (Günther et al. 2008). Furthermore, the law refers to an unfertilised egg cell. As soon as the haploid chromosome sets of the egg and sperm cell have united to form a diploid chromosome set, the egg cell is to be classified as fertilised (Günther et al. 2008).

It is also prohibited under Section 1 (1) No. 2 Embryo Protection Act to "artificially fertilise an egg cell for any other purpose than to bring about a pregnancy in the woman from whom the egg cell originates" (Gesetze-im-internet 2024). This provision ties the methods of artificial insemination of egg cells to reproductive medical purposes and excludes the creation of embryos for other purposes (Spickhoff 2014). Accordingly, the creation of human embryos with the intention of using them for research purposes is uncompromisingly excluded (Günther et al. 2008). In this provision, the offence is constituted by the artificial fertilisation of a woman (Günther et al. 2008). Fertilisation in turn refers to the biological process of uniting the two haploid cell nuclei to form a diploid one. Only if fertilisation takes place artificially, i.e. with the aid of technical means and not through sexual intercourse, is a further necessary condition for the fulfilment of the offence present (Bundestag Drucksache 11/5460). It should also be noted that from a subjective perspective, in contrast to no. 1 of Section 1 (1) Embryo Protection Act, not only intentional action is required at the time the offence is committed, but also a special intention on the part of the perpetrator (Günther et al. 2008). At the time of the act, the perpetrator must have the intention to carry out fertilisation for a purpose other than to bring about a pregnancy. There must be no other intention (Günther et al. 2008).

It should also be mentioned that, as with sperm donation, the use of an egg from a deceased woman is prohibited (Gesetze-im-internet 2024).

In principle, egg donation is possible through the transfer of either individual eggs or an ovarian transplant from a deceased donor (Günther et al. 2008). In contrast to sperm donation, which is not regulated nationwide, egg donation is comparatively restrictive. As explained above, the legal provision of egg cells to fulfil a desire to have children is ruled out in Germany. For this reason, some couples who need egg donation go to other European countries. The purpose of this provision of the Embryo Protection Act is to prevent so-called "split motherhood", i.e. a genetic mother (egg donor) and a biological mother (woman carrying the child), as the consequences of the child's identity development are unclear and may not be in the best interests of the child (Bundestag Drucksache 14/9020). From a legal perspective, motherhood is borne by the woman who gave birth to the child in accordance with Section 1591 of the German Civil Code. It would therefore be possible for a child to have three mothers through egg donation. The genetic mother who donates the egg, the biological mother who gives birth to the child and the social mother who raises the child (Spickhoff 2014).

2.3. Regulation according to medical professional code of conduct

As already mentioned, the Bundesärztekammer guidelines on assisted reproduction contain clear regulations on the use of egg donation and its methods (IUI, IVF, ICSI). According to section 3.1.2, when "using the above-mentioned methods (...) only the eggs of the woman in whom the pregnancy is to be induced may be fertilised" (Bundesärztekammer 2006). This means that the attending physician is absolutely prohibited from using other people's eggs to induce pregnancy.

The provisions of the Embryo Protection Act and the Bundesärztekammer guidelines are therefore congruent. There are no doubts regarding their effectiveness and exceeding of competences, as is the case with the regulation of sperm donation.

Conclusion

The first artificially conceived child was born 40 years ago. Since then, there has been great progress in reproductive medicine. New methods have been developed and old ones refined. The Embryo Protection Act came into force over 27 years ago and has not been amended or extended since.

Similarly, no reproductive medicine law has been passed, although the Bundesärztekammer has been appealing to the respective federal government for decades. Compared to reproductive medicine, the legislation is still in its infancy.
The medical indications for sperm and egg donation are clearly defined. The legal requirements are more difficult.

Sperm donation is clearly regulated in Germany, especially for homologous and quasi-homologous donation. Access to heterologous sperm donation is somewhat more difficult, as single women and women living in a same-sex partnership are excluded. For this group, so-called cup donation without medical supervision remains the only alternative. Donors and recipients do not belong to the group of perpetrators and cannot be penalised for using this method.

Legislation regarding egg donation is more restrictive in Germany. This is prohibited, although it is the most successful method of reproductive medicine worldwide. Women who urgently need an egg donation to achieve a pregnancy must find a doctor in another European country. As health insurance does not cover the costs, this option is reserved for the better-off.

The issues surrounding the equal treatment of homosexual couples have not been conclusively clarified. Against the background of the low fertility rate in Germany, which has been low for decades, extended access to medical reproduction methods could also appear sensible. The German legislature could take inspiration from the laws of neighbouring European countries.

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