

Articles

The Legalisation of Egg Donation

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The article evaluates whether Germany could and should legalise egg donation in order to enable infertile or same-sex couples to conceive. The current criminalisation as per section 1 of the Embryo Protection Law (Embryonenschutzgesetz– ESchG) is deemed to be an inappropriate and makeshift solution, as legislative powers have been redistributed and social values have changed.

The author surveys the legal situations in Spain, Austria and the United Kingdom. It is observed that, in all these jurisdictions, there are additional safeguards in place that are supposed to prevent commercialisation and the exploitation of egg donors. Because similar regimes could be introduced in Germany, banishing patients to foreign jurisdictions where they might not enjoy the same medical security and legal protection is held to be inadequate.

Turning to the constitutional liceity of such a reform, the author determines that there is no proof that egg donation poses any danger to children's well-being. Neither are there significant health risks to the donor that would not be healed by their informed consent. It is argued that reproductive freedom under German constitutional law and the ECHR entails that any restrictions are subject to justification. Maintaining the ban would also violate equality between the sexes, as sperm donation is not subjected to the same scrutiny. The author endorses the Augsburg-Munich draft for a Reproductive Medicine Act (Fortpflanzungsmedizingesetz) based on medical indication. It is recommended that descent law is adjusted by disallowing challenges to the birth mother's legal motherhood status, and by recognizing the motherhood of the birth mother's female partner.

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I. Introduction

In about 3 to 4% of women under the age of 40, the cause of (unwanted) childlessness is the inability of the oocytes to function.¹ One possibility for affected couples to circumvent this is through egg donation. This method involves a heterologous fertilisation procedure² in which the patient is implanted with eggs from a donor, which have been fertilised in an IVF procedure either with the sperm of her own partner or with donor sperm.³ Medical indications for egg donation include insufficient ovarian function due to factors such as cancer treatment, medical conditions like endometriosis, hormone disorders, premature menopause, or multiple failed artificial insemination procedures.⁴ Additionally, reciprocal egg donation offers a possibility for homosexual female couples to realise their desire for offspring.⁵

The traditional process of egg donation commences with a comprehensive medical, and in some countries also psychological, anamnesis of the donor.⁶ The donor is then given a

¹ Heribert Kentenich and Klaus Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' in Henning Rosenau (ed) *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland* (Nomos 2013) 20; Heribert Kentenich and Georg Griesinger, 'Zum Verbot der Eizellspende in Deutschland: Medizinische, psychologische, juristische und ethische Aspekte' (2013) 10 *JReproduktionsmed Endokrinol* 273, 273-74.

² cf Hans-Ludwig Günther, Jochen Taupitz and Peter Kaiser, *Embryonenschutzgesetz – Juristischer Kommentar mit medizinisch-naturwissenschaftlichen Grundlagen* (2nd edn, Verlag W. Kohlhammer 2014) A IV fn 215 tab 1.

³ cf Wolfram Eberbach, 'Eine kurze Geschichte der Fortpflanzungsmedizin' (2020) 38 *MedR* 167, 176; Nationale Akademie der Wissenschaften Leopoldina and Union der deutschen Akademien der Wissenschaften e.V., *Fortpflanzungsmedizin in Deutschland – für eine zeitgemäße Gesetzgebung* (2019) 65.

⁴ Marion Depenbusch and Askan Schultze-Mosgau, 'Eizell- und Embryonenspende' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (2nd edn, Springer 2020) 287, 288; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 20; Leopoldina (n 3) 20, 65-66.

⁵ Christian Müller-Götzmann, *Artifizielle Reproduktion und gleichgeschlechtliche Elternschaft* (Springer 2009) 242.

⁶ Gisela Berg, 'Die Eizellspende – eine Chance für wen?' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 239, 240.

contraceptive, synchronising the cycles of the donor and the recipient, followed by hormone treatment to first suppress the menstrual cycle and subsequently stimulate ova production.⁷ The final retrieval of the eggs for donation is conducted through a (minimally) invasive procedure.⁸

In some countries, an alternative method known as "egg-sharing" is practised. Therein, a woman undergoing IVF has some of the eggs stimulated by the treatment removed for donation.⁹

However, egg-sharing brings various uncertainties and risks, including an increased risk of ovarian hyperstimulation syndrome in the donor.¹⁰

While egg donation is prohibited in Germany, it is permitted in most other European countries. However, efforts to legalise egg donation in Germany are underway, with specific legislative proposals already in place.¹¹ The current coalition in the Federal Government intends to initiate a reform in this area, and a reform commission has been established. In light of this context, this paper aims to examine the extent to which ethical or legal reasons may be opposed to the legalisation of egg donation in Germany and how a potential legal regulation could be structured.

II. Current legal situation in Germany

According to section 1 paragraph 1 number 1 of the Embryo Protection Law (*Embryonenschutzgesetz*– ESchG), it is prohibited to transfer a foreign unfertilised ovum to a woman. Classified as an offence of activity,¹¹ the wording of the provision does not penalise the occurrence of a pregnancy, but the performance of the procedure itself. Section 1 paragraph 1 number 1 ESchG criminalises the act of transfer; whereas section 1 paragraph 1 number 2 ESchG prohibits the fertilisation of an ova, unless the pregnancy is intended to occur within the donor. Section 1 paragraph 3 number 1 ESchG establishes a personal exemption from criminal liability, such that the women affected (donor and

⁷ Berg (n 6) 240; Depenbusch and Schultze-Mosgau (n 4) 288.

⁸ cf Ralf Müller-Terpitz, '§ 1 ESchG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 7; Berg (n 6) 240.

⁹ Berg (n 6) 240; Sigrid Graumann, 'Eizellspende und Eizellhandel – Risiken und Belastungen für die betroffenen Frauen' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 175, 180; Kentenich and Griesinger (n 1) 275; Leopoldina (n 3) 67.

¹⁰ Kentenich and Griesinger (n 1) 275; Leopoldina (n 3) 67.

¹¹ Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 22; Rolf Keller, Hans-Ludwig Günther and Peter Kaiser, *Embryonenschutzgesetz* (Kohlhammer 1991) section 1 paragraph 1 number 1 fn 17; Leopoldina (n 3) 67.

recipient alike) are not subject to punishment, but solely the medical personnel (physicians and other reproductive medical practitioners).¹²

The strongly condemned¹³ design of the ESchG as a criminal statute was motivated by opportunism more than principle. At the time of the ESchG's passing in 1990, the field of reproductive medicine was still in its nascent stages, thus lacking specific federal legislative authority.¹⁴ Under the German constitution (Basic Law or *Grundgesetz* – GG), every legislative power not (expressly) granted to the federation, or the federation and the states collectively, remains with the states (article 70 section 1 GG). However, in order to regulate assisted reproduction, the federal government utilised its competence for criminal law in order to enact the ESchG. Since 1994, Article 74 section 1 number 26 GG expressly grants legislative authority to the federal government in the field of reproductive medicine, yet there has still been no reform of the ESchG or the introduction of some sort of Reproductive Medicine Act which would move away from the current criminal framework.

III. International references

1. Foreign regulations

Egg donation is permitted (under varying conditions) in most European countries¹⁵ Notably, Norway legalised the practice in 2020.¹⁶ The subsequent section concisely summarises the distinct legal situations in three selected European countries.

a. Spain

Spain operates under the "Law on Techniques of Human Assisted Reproduction" (LTRHA),¹⁷ enacted in 2006, which allows both male and female gamete donation.

¹² See a 2008 judgement handed down by the Regional Court of Berlin: LG Berlin, Urteil vom 25. November 2008 – 15 O 146/08, juris. See also Peter Häberle, '§ 1 ESchG' in Georg Erbs, Max Kohlhaas and Peter Häberle (eds), *Strafrechtliche Nebengesetze* (246th edn, C.H. Beck 2022) fn 12; Keller, Günther and Kaiser (n 11) before section 1 paragraph 2 fn 87; section 1 paragraph 3 fn 1.

¹³ Hartmut Krefß, 'Grenzziehung für Ethikkommissionen' (2021) 39 MedR 1, 6; Josef Franz Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (2019) 52 ZRP 171; Ralf Müller-Terpitz, "'ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (2016) 49 ZRP 51, 53.

¹⁴ Sebastian Braun, 'Vorbemerkungen ESchG' in Dorothea Prütting (ed), *Medizinrecht Kommentar* (6th edn, Luchterhand 2022); Müller-Terpitz, "'ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (n 13) 53; Ralf Müller-Terpitz, 'Fortpflanzungsmedizinrecht – quo vadis?' (2022) 40 MedR 794, 796.

¹⁵ Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Leopoldina (n 3) 68.

¹⁶ By amending the "Act relating to the application of biotechnology in human medicine" (Act of 5 December 2003 No. 100).

¹⁷ Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida, BOE Nr 126 (27 May 2006) 19947; see also Josep Ferrer Riba, 'Künstliche Fortpflanzung im spanischen Recht' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Giesecking 2015) 229, 229-30.

According to Article 5.1, 5.3 LTRHA,¹⁸ the underlying agreement has to be non-remunerative, and any financial compensation of the donor should not act as an incentive for the donation.¹⁹ However, the level of compensation is not standardised or monitored, leading to average payments of €900. Given Spain's low minimum wage of €5.76,²⁰ such compensation can no longer be considered a mere expense allowance and inadvertently presents a financial incentive for egg donation.²¹ Differing from most countries, egg donation in Spain is conducted anonymously as per Article 6.4 LTRHA.²² Only non-identifiable genetic data about the donor may be disclosed to the intended parents or children.²³ Spain is a popular destination for foreign patients, which may be attributed to its liberal regulations in reproductive medicine and the widespread availability of oocytes.²⁴

b. Austria

In Austria, egg donation has been permitted since 2015, following a period during which affected couples had filed complaints against the previous ban for violations of the European Convention of Human Rights (ECHR). According to section 3 paragraph 3 of the Austrian Reproductive Medicine Act (*Österreichisches Fortpflanzungsmedizingesetz – Ö-FMedG*),²⁵ egg donation may be carried out if the recipient is incapable of reproducing and has not yet reached the age of 45.²⁶ Similar to Spain, Austria also mandates non-remuneration for egg donation under section 16 paragraph 1 Ö-FMedG. Section 16 paragraph 1 sentence 2 Ö-FMedG specifies that genuine compensation for the donor's expenses is not to be regarded as payment and is therefore lawful. Unlike in Spain, however, egg donation is not conducted anonymously: according to section 20 paragraph 2 Ö-FMedG, the child may request the identity of the genetic mother after reaching the age of 14.

¹⁸ LTRHA, BOE Nr 126 (27 May 2006) 19947, 19949.

¹⁹ cf Ferrer Riba (n 17) 237.

²⁰ beck-online Redaktion Fachdienst Arbeitsrecht, 'Mindestlöhne: Im EU-Mittel deutlich schwächere Zuwächse' (2021) FD-ArbR 436561.

²¹ *ibid.*

²² LTRHA, BOE Nr 126 (27 May 2006) 19947, 19950.

²³ Ferrer Riba (n 17) 238.

²⁴ Sven Bergmann, *Ausweichrouten der Reproduktion* (Springer 2014) 79.

²⁵ Bundesgesetz, mit dem Regelungen über die medizinisch unterstützte Fortpflanzung getroffen werden (Fortpflanzungsmedizingesetz – FMedG), BGBl Nr 275/1992, see www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10003046.

²⁶ For the situation in Austria, see Susanne Ferrari, 'Künstliche Fortpflanzung im österreichischen Recht' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Gieseking 2015) 181, 195-96.

c. United Kingdom

Egg donation is also permitted in the United Kingdom.²⁷ The Human Fertilisation and Embryology Act 1990 (HFEA) established the current regulations, with some amendments made

in 2008.²⁸ In the UK, egg donation is also regulated as altruistic act: pursuant to sections 12 paragraph 1 letter e, 41 paragraphs 8 and 9 HFEA, payments outside approved limits (reimbursements) are prohibited, with the maximum compensation for egg donation capped at 750 pounds.²⁹ This limit might seem relatively high at first glance, but in relation to the UK's minimum wage, which stands at about €11.31 for employees aged 23 and above,³⁰ the financial significance of the payment to donors is not as pronounced as in Spain. Similar to Austria, the UK does not provide for anonymous donations. Section 31 and the following sections of the HFEA outline provisions for the so-called "donor register," though the right to knowledge of the child's parentage was only introduced through a 2004 amendment,³¹ effective from April 1, 2005.³² Ever since, akin to the situation in Austria, children of donors may apply for basic genetic information at the age of 16 and identifiable information at the age of 18.³³

d. Interim conclusion

Evidently, the regulations in the countries permitting egg donation are tailored to the interests of the donor, the intended parents, and the child. The various bans on commercialisation are intended to counteract the exploitation of donors, necessitating oversight to monitor compensation levels. Spain deviates from the other nations in imposing anonymity requirements on egg donation. While the non-traceability of the donor could potentially be an additional incentive to donate, anonymity might prove challenging to justify in terms of the interests of the child.

²⁷ There might be deviations as far as Scotland is concerned, see Jens M Scherpe, 'Künstliche Fortpflanzung im Recht von England und Wales' in Anatol Dutter and others (eds), *Künstliche Fortpflanzung und europäisches Familienrecht* (Giesecking 2015) 295, 296 fn 3.

²⁸ Human Fertilisation and Embryology Act 2008.

²⁹ Scherpe (n 27) 298.

³⁰ cf Arbeitsrechte.de, 'Gilt der Mindestlohn in Großbritannien?' (Arbeitsrechte.de, 11 September 2023) <www.arbeitsrechte.de/mindestlohn-grossbritannien/> last accessed 26 September 2023.

³¹ Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004, SI 2004/1511.

³² cf Scherpe (n 27) 321-22.

³³ cf Scherpe (n 27) 322.

2. National impact

a. "Reproductive tourism"

Due to the prohibition of egg donation in Germany, many couples experiencing involuntary infertility seek treatment abroad. This affects several thousand treatment cycles of German women per year:³⁴ According to a study on reproductive medical procedures performed on foreign women in six examined countries, 44.6% of German women treated in 2010 travelled to the respective country solely for egg donation.³⁵ Accusations levelled against "reproductive tourism"³⁶ are mainly aimed at the circumvention of the law.³⁷ However, by maintaining the ban on egg donation, the German legislature inherently accepts the evasive migration abroad. The significance of infertility, a genuinely distressing and psychologically burdensome issue for affected couples,³⁸ is often overlooked. Seeking assistance abroad provides them with an alternative that is not available in Germany. Furthermore, German prohibition subjects patients entirely to the standards of the respective countries when undergoing donation there.³⁹ Thus, in the case of treatment abroad under the anonymity of the donor (namely in Spain), the child's moral or legal right to knowledge of genetic parentage cannot be asserted in Germany.⁴⁰ German insurance law does not entitle patients treated abroad to partial or full reimbursement even in dealings with private health insurers.⁴¹ Furthermore, it can be assumed that the domestic medical care of aspiring mothers is negatively impacted by the fact that women might not disclose their donation due to fearing stigmatisation, and that gynaecologists, constrained by prohibitive norms, lack experience in pregnancies

³⁴ Heribert Kentenich and Klaus Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' in Helmut Frister and Dirk Olzen (eds), *Reproduktionsmedizin – Rechtliche Fragestellungen* (Düsseldorf University Press 2009) 59, 68; Leopoldina (n 3) 69.

³⁵ F Shenfield and others, 'Cross border reproductive care in six European countries' (2010) 26 *Human Reproduction* 1361, 1365-66.

³⁶ Among others Eva-Maria Knoll, 'So weit gehen für ein Kind: Reproduktionstourismus als grenzüberschreitender Umweg' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 63 ff; Ulrich M Gassner, 'Legalisierung der Eizellspende?' (2015) 48 *ZRP* 126; Ulrich Pecks, Nicolai Maass and Joseph Neulen, 'Grenzüberschreitung in der reproduktiven Medizin' (2012) 45 *Der Gynäkologe* 476, 476.

³⁷ Knoll (n 36) 69 ff.

³⁸ A more detailed treatment of the psychosocial aspects of unwanted childlessness can be found in Alexandra Esser, *Ist das Verbot der Leihmutterschaft in Deutschland noch haltbar?* (Nomos 2021) 47-48; Almut Dorn and Tewes Wischmann, 'Psychosomatik und psychosoziale Betreuung in der Reproduktionsmedizin' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (2nd edn, Springer 2020) 491, 494.

³⁹ Marina Wellenhofer, '1591 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 48; Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34) 68.

⁴⁰ Wellenhofer, '1591 BGB' (n 39) fn 32; Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34) 68; Martin Löhnig, 'Auskunft über die eigene Abstammung' (2022) 75 *NJW* 1061, 1063; Leopoldina (n 3) 69.

⁴¹ cf German Federal Court of Justice, BGH *NJW* 2017, 2348, 2349 ff (fn 16ff); Kyrill Makoski, 'Recht der Reproduktionsmedizin' in Tilman Clausen and Jörn Schröder-Printzen (eds), *Münchner Anwaltshandbuch Medizinrecht* (3rd edn, C.H. Beck 2020) fn 74.

resulting from egg donation.⁴² Accordingly, patients undergoing treatments abroad find themselves inadequately protected, both medically and legally. Nonetheless, the legislator continues to maintain the ban on egg donation, despite even recognizing the issue of emigration, as demonstrated by the explanatory memorandum to the draft of the reform of the law of parentage.⁴³

b. Criminal liability of German physicians for egg donation abroad

While women seeking egg donation abroad cannot be sanctioned in Germany (see above), medical professionals can be penalised not only for the procedure itself but also for aiding or preparatory acts. For these purposes, activities merely involving advice on options for lawful egg donation abroad come into consideration.⁴⁴

Even where the act itself is not criminalised in the jurisdiction where it is performed, an act of participation performed in Germany results in punishment according to section 1 paragraph 1 number 1 ESchG in conjunction with section 9 paragraph 2 sentence 2 of the German Criminal Code (*Strafgesetzbuch* – StGB).⁴⁵ This ignores the principle of accessory liability for participation.⁴⁶ Whether an act qualifies as participation is dependent on the intensity of its influence on the patient. A neutral indication of foreign legal conditions would likely not suffice to qualify as a sufficient, whereas specific referrals to (partner) clinics might cross the line to incitement under section 27 paragraph 1 StGB.⁴⁷

IV. Discussion of the legalisation of egg donation

The question of whether egg donation should be legalised in Germany touches upon various legal spheres as well as (medical) ethical considerations, resulting in a controversial debate encompassing numerous facets. The following sections dissect the topic into ethical and legal inquiries, recognizing that there is an inevitable overlap in certain respects.

⁴² *Depenbusch and Schultze-Mosgau* (n 4) 290; Pecks, Maass and Neulen (n 36) 476, 478.

⁴³ cf legislative proposal by the German Federal Government, BT-Drs 13/4899, 82.

⁴⁴ Christina Lang, 'Das Strafbarkeitsrisiko des deutschen Arztes bei grenzüberschreitenden Sachverhalten' (2018) 36 *MedR* 568, 569; Dorothea Magnus, 'Kinderwunschbehandlungen im Ausland: Strafbarkeit beteiligter deutscher Ärzte nach internationalem Strafrecht (§ 9 StGB)' (2015) 35 *NStZ* 57, 60.

⁴⁵ Lang (n 44) 570; Magnus (n 44) 60.

⁴⁶ Kai Ambos, '§ 9 StGB' in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch. Band 1* (4th edn, C.H. Beck 2020) fn 39; Lang (n 44) 570; Magnus (n 44) 61.

⁴⁷ Rudolf Ratzel, 'Reproduktionsmedizin' in Rudolf Ratzel and Bernd Luxenburger (eds), *Handbuch Medizinrecht* (4th edn, C.F. Müller 2021) fn 5; Magnus (n 44) 60.

1. Ethical examination

The subsequent section addresses the three principal aspects predominantly invoked in the ethical discussion against the legalisation of egg donation.

a. Children's well-being

The German ban on egg donation is rooted in the goal of avoiding a so-called "split motherhood."⁴⁸ The prohibition seeks to safeguard the child's best interests by preventing a discrepancy between genetic and gestational or social motherhood.⁴⁹ Constitutionally, the child's best interests are indirectly protected both under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG and by Article 6 paragraph 2 GG.⁵⁰

The general right to one's personality anchored in Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG provides comprehensive fundamental rights protection, offering broad safeguards against encroachments upon the personal sphere of individuals. It encompasses fundamental rights such as the confidentiality of personal data, the right to one's own image, and the right to knowledge of one's personal ancestry.

Article 6 paragraph 2 GG delineates the parental right, such that parents possess the right to raise and care for their children pursuant to the paramount principle of the welfare of the child. The precise meaning of "child's well-being" and how it is measured both remain undefined.⁵¹ This lack of precision renders its exact meaning dependent on the context in which it is used. While in the case of children who have already been born, the child's well-being pertains to its welfare in the family environment,⁵² this concept cannot be conferred to the field of reproductive medicine. In the context of assisted reproductive techniques, the interests of a yet-to-be-conceived child are not directly at stake, as the child's existence has yet to be realised.⁵³ Even though some argue for a "pre-effect" of children's rights before the application of medical measures,⁵⁴ the argument of the child's welfare remains largely of an ethical nature. If one were to assume a violation of the rights of

⁴⁸ Federal Government draft for a law on embryonic protection, BT-Drs 11/5460, 6-7; cf BGH NJW 2017, 2348, 2350 (fn 22); Directive issued by the Federal Chamber of Physicians (Richtlinien zur Durchführung der assistierten Reproduktion, DÄBl 1998, 78, 82).

⁴⁹ BT-Drs 11/5460, 7; DÄBl 1998, 78, 82.

⁵⁰ Müller-Terpitz, '§ 1 ESchG' (n 8) fn 6.

⁵¹ AG Daun FamRZ 2008, 1897, 1879-80 (Local Court of Daun, Rhineland-Palatinate); Katharina Lugani, '§ 1696 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 26.

⁵² Concerning the critical intensity of endangerment, compare BGH NJW 2023, 56, 59 ff.

⁵³ cf AG Augsburg medstra 2016, 383 (fn 14) (Local Court in Augsburg, Bavaria); Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Ralf Müller-Terpitz, 'Art 6 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 13; Mathias Reinke, *Fortpflanzungsfreiheit und das Verbot der Fremdeizellspende* (Duncker & Humblot 2008) 155; Dagmar Coester-Waltjen, 'Anmerkung zu OLG München, Urt. v. 22.02.2017 - 3 U 4080/16' (2017) 63 FamRZ 904, 909.

⁵⁴ Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 8; Christian Hillgruber, 'Gibt es ein Recht auf ein Kind?' (2020) 75 JZ 12, 15.

children conceived through egg donation by that same method of conception, they would also essentially problematize their very existence.⁵⁵

The argument to protect life by preventing the inception of life is inherently contradictory and therefore cannot be invoked against the implementation of reproductive medical measures. Rather, only the subsequent psychological development can be a suitable subject for the debate.

Again, the fundamental argument for banning egg donation in 1990 was the concern over developmental psychological disorders in the child arising from the divergence between the genetic and gestational mother.⁵⁶ According to this line of thought, the deep biological and consequently psychosocial connection to two different mother figures – one through genetic relation, the other through the bond formed during pregnancy (and afterwards)⁵⁷ – could potentially lead to issues in the child's identity formation.⁵⁸ However, the legislative justification – now over 30 years old – relies on assumptions and apprehensions regarding child welfare,⁵⁹ but is lacking any concrete data or psychological studies.⁶⁰

While some voices, based on the absolute importance of child protection, assume that the necessity for substantiating these doubts is less imperative,⁶¹ the prohibition of a medically feasible and successful⁶² measure solely on the basis of doubts is not tenable. The premise that developmental disorders in the affected children "cannot be ruled out" cannot serve as a basis for presuming a threat to child welfare.⁶³ In fact, there is no scientific evidence scientifically substantiating an impairment of the child's well-being – quite the opposite: at least one examination revealed that the probability of psychological

⁵⁵ Müller-Terpitz, 'Art 6 GG' (n 53) fn 13; Reinke (n 53) 155.

⁵⁶ BT-Drs 11/5460, 6-7; cf BGH NJW 2017, 2348, 2350 (fn 22); DÄBl 1998, 78, 82.

⁵⁷ Ulrike Beitz, *Zur Reformbedürftigkeit des Embryonenschutzgesetzes* (Peter Lang 2009) 221; Ernst Benda, 'Humangenetik und Recht – eine Zwischenbilanz' (1985) 38 NJW 1730, 1733; Adolf Laufs, 'Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen: Zur zivilrechtlichen Abteilung' (1986) 41 JZ 769, 775.

⁵⁸ Keller, Günther and Kaiser (n 11) section 1 paragraph 1 number 1 fn 7; Beitz (n 57) 221; Benda (n 57) 1733.

⁵⁹ cf BT-Drs 11/5460, 7; DÄBl 1998, 78, 82.

⁶⁰ Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Janet Opper, *Das Verbot der präkonzeptionellen Geschlechtswahl* (Nomos 2020) 140-41.

⁶¹ cf Keller, Günther and Kaiser (n 11) section 1 paragraph 1 number 1 fn 8; Eberbach (n 3) 178.

⁶² Kentenich and Pietzner, 'Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin' (n 34) 67; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 20.

⁶³ Günther, Taupitz and Kaiser (n 2) section 1 paragraph 1 number 1 fn 7; Henning Rosenau, 'Strafrechtliche Risiken bei Fortpflanzungsmedizin und Gentechnologie' in Frank Saliger and Michael Tsambikakis, *Strafrecht der Medizin. Handbuch für Wissenschaft und Praxis* (C.H. Beck 2022) fn 84; Makoski (n 41) fn 135; Gassner (n 36) 126; Jens Kersten, 'Regulierungsauftrag für den Staat im Bereich der Fortpflanzungsmedizin' (2018) 37 NVwZ 1248, 1251.

or cognitive disorders in children conceived through gamete donation is no higher than in naturally conceived children.⁶⁴

The parent-child relationship and familial bond, which are in principle pivotal for child well-being,⁶⁵ can indeed be positively characterised by the parent's strong desire for a child, resulting in an abundance of love and appreciation.⁶⁶

Consequently, the avoidance of a split motherhood for the child's benefit alone is an insufficient rationale for a prohibition of egg donation.

b. Medical risks

There are also certain risks and dangers for the women involved when undergoing egg donation. As mentioned, the procedure for extracting eggs is an invasive procedure preceded by hormone therapy, and is therefore per se associated with health risks. The potential for ovarian hyperstimulation syndrome (OHSS) in the donor due to the egg retrieval procedure is particularly noteworthy.⁶⁷ There are also risks for the recipient concerning the pregnancy,⁶⁸ but these will not be delved into here. It should be noted that egg donation is not an intervention that is medically indicated for the donor. While it is not intrinsically contraindicated or impermissible,⁶⁹ the procedure, without sufficient justification, nevertheless violates the bioethical principle of non-maleficence, as formulated by Beauchamp and Childress.⁷⁰ According to this principle, the donation should not subject the donor to disproportionate risks, and "informed consent" must be obtained after a particularly conscientious risk disclosure.⁷¹ However, prohibiting donation solely based on health risks would be too narrow-minded. Modern procedures minimise the risks and intensity of the intervention.⁷² Moreover, there are generally no

⁶⁴ S Golombok and others, 'Families created by gamete donation: follow-up at age 2' (2005) 20 *Human Reproduction* 286, 292.

⁶⁵ Philip Czech, *Fortpflanzungsfreiheit* (Jan Sramek 2015) 186; Reinke (n 53) 161-62; Leopoldina (n 3) 70.

⁶⁶ Rosenau (n 63) fn 84; Leopoldina (n 3) 70.

⁶⁷ Final Report by an Investigative Commission of the German Parliament on "law and ethics in modern medicine", BT-Drs 14/9020, 36; Leopoldina (n 3) 66-67; Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 21.

⁶⁸ cf Deppenbusch and Schultze-Mosgau (n 4) 292; Berg (n 6) 246; Leopoldina (n 3) 66.

⁶⁹ cf Isabell Richter, *Indikation und nicht-indizierte Eingriffe als Gegenstand des Medizinrechts* (Duncker & Humblot 2018) 195 ff; Anja Schneider, *Body Integrity Identity Disorder* (Nomos 2016) 174.

⁷⁰ Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (OUP 2019) 106 ff; BT-Drs 14/9020; for further information on the concept of non-maleficence see Schneider (n 69) 142 ff.

⁷¹ cf OLG München BeckRS 2011, 16307 (fn 31) (Higher Regional Court of Munich, Bavaria); Kentenich and Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' (n 1) 22.

⁷² Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Leopoldina (n 3) 70.

negative long-term effects to anticipate; in particular, according to scientific findings, egg donation does not impact the donor's fertility.⁷³

Hence, medical aspects related to the donor's health protection are not sufficient grounds for justifying a ban on egg donation – instead, the focus should be on preventing harm to the donor through medical expertise and comprehensive information.

c. Protection of the donor against exploitation

The unindicated intervention in the physical integrity of the donor takes place solely for the benefit of third parties, those being the intended parents. There is an ongoing concern that compensation payments might not solely cover actual expenses but could also create a financial incentive for egg donation, as observed in Spain.⁷⁴ This situation could promote the commercialisation of egg donation and pregnancy, running counter to basic moral and ethical concepts, and potentially exploiting financially disadvantaged women by "selling" their eggs.⁷⁵ High remuneration poses a real risk that women might view the risks of egg donation as a way out of financial distress, despite their likely refusal under normal circumstances. However, a comprehensive ban on egg donation is not an appropriate solution. Instead, in the case of legalisation, clear regulations are necessary to ensure the absence of remuneration and establish oversight mechanisms to prevent commodification.⁷⁶

2. Legal aspects

In the following, the ban on egg donation will be discussed in the light of the GG and the ECHR. Explicit EU-level directives for the legalisation of egg donation do not exist, as EU Directive 2004/23/EC⁷⁷ exclusively regulates quality and safety standards for the states conducting egg donation. Article 4 (3) of the Directive explicitly states that the question of "whether" to legalise egg donation falls within the discretionary power of national legislatures due to its ethically and morally controversial context.

a. Reproductive freedom of intended parents

There is agreement that the freedom to decide whether to reproduce or not is

⁷³ Dominic Stoop and others, 'Effect of ovarian stimulation and oocyte retrieval on reproductive outcome in oocyte donors' (2012) 97 *Fertility and Sterility* 1328, 1329; Leopoldina (n 3) 70.

⁷⁴ Beitz (n 57) 224; cf Hubert Hüppe, 'Legalisierung der Eizellspende?' (2015) 48 *ZRP* 126.

⁷⁵ Beitz (n 57) 224; cf Hüppe (n 74) 126.

⁷⁶ Rosenau (n 63) 85; Gassner (n 36) 126; Barbara Klopstock, "Drei-Eltern-Babys" - Besteht Reformbedarf in Deutschland? (2017) 49 *ZRP* 165, 166; Müller-Terpitz, "ESchG 2.0" - Plädoyer für eine partielle Reform des Embryonenschutzgesetzes' (n 13) 53-54.

⁷⁷ Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [2004] OJ L 102/48.

constitutionally protected.⁷⁸ However, this protection does not grant an explicit right or entitlement to support in family formation, but a right of defence against state interference or hindrances in starting one's own family.⁷⁹ In Germany, the fundamental rights enshrined in the Constitution are generally understood as defensive rights against governmental interventions. The state is prohibited from encroaching upon the protected sphere of a citizen's fundamental right without sufficient justification. Whether this right of defence can be derived from the general right of freedom of action according to Article 2 paragraph 1 GG (being the freedom to undertake or refrain from any action and ensuring that one's personal sphere of life is not subject to governmental constraints)⁸⁰, the general right of personality according to Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG,⁸¹ from the protection of marriage and family according to Article 6 paragraph 1 GG,⁸² or a combination of any of those⁸³ is ultimately secondary⁸⁴ – the right to reproduction and the free decision on family foundation are immanently secured by one or more of these fundamental rights. Disagreement arises as regards the extent of the protection's scope, namely whether it also encompasses the utilisation of assisted reproduction measures, or "merely" the decision for or against the (natural) establishment of a family. While some argue in favour of the latter⁸⁵, the inclusion of reproductive medicine measures is warranted,⁸⁶ given the fundamentally broad interpretative scope of fundamental rights.⁸⁷ Furthermore, medical advancements in assisted reproductive medicine and the accompanying societal changes underscore the need for constitutional protection of utilising reproductive medical techniques, which illustrates the necessary adaptability of fundamental rights to social developments.⁸⁸ Concerns that the inclusion of assisted reproduction measures might blur the line to

⁷⁸ cf Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35; Nationaler Ethikrat, *Genetische Diagnostik vor und während der Schwangerschaft* (2009) 121.

⁷⁹ BVerfGE 117, 316, 329 (German Federal Constitutional Court); M Wellenhofer, '1591 BGB' (n 39) fn 48; Müller-Terpitz, 'Art 6 GG' (n 53) 3 f; Nationaler Ethikrat (n 78) 122 f; Esser (n 38) 240; Julia Schlüter, *Schutzkonzepte für menschliche Keimbahnzellen in der Fortpflanzungsmedizin* (LIT Verlag 2008) 177.

⁸⁰ Thilo Ramm, 'Die Fortpflanzung – ein Freiheitsrecht?' (1989) 44 JZ 861, 870, 874.

⁸¹ Carina Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda – Eine Analyse zum AME-FMedG* (Nomos 2018) 69; Opper (n 60) 64 ff; Gassner (n 36) 126; Kersten (n 63) 1249.

⁸² Frauke Brosius-Gersdorf, 'Art 6 GG' in Horst Dreier (ed), *Grundgesetz Kommentar. Band 1* (3rd edn, Mohr Siebeck 2013) fn 117; Joachim Gernhuber and Dagmar Coester-Waltjen, *Familienrecht* (7th edn, C.H. Beck 2020) section 6 fn 13; Müller-Terpitz, 'Art 6 GG' (n 53) fn 2; Ralf Müller-Terpitz, 'Art 2 GG' in Andreas Spickhoff (ed), *Medizinrecht* (4th edn, C.H. Beck 2022) fn 10.

⁸³ cf Schlüter (n 79) 174, 182; Werner Heun, 'Restriktionen assistierter Reproduktion aus verfassungsrechtlicher Sicht' in Gisela Bockenheimer-Lucius, Petra Thorn and Christiane Wendehorst (eds), *Umwwege zum eigenen Kind* (Universitätsverlag Göttingen 2008) 49, 51-52.

⁸⁴ Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35; Nationaler Ethikrat (n 78) 121-22.

⁸⁵ Christian von Coelln, 'Art 6 GG' in Michael Sachs (ed), *Grundgesetz Kommentar* (9th edn, C.H. Beck 2021) fn 30.

⁸⁶ Esser (n 38) 240; Opper (n 60) 76; Reinke (n 53) 136.

⁸⁷ cf BVerfGE 6, 55, 72; 32, 54, 70-71.

⁸⁸ Müller-Terpitz, 'Art 6 GG' (n 53) fn 5; Esser (n 38) 240; Reinke (n 53) 136-37.

morally questionable methods⁸⁹ can be addressed by understanding the basic right as expressing a principle-exception relationship:⁹⁰ morally indefensible measures would be explicitly prohibited, while all other assisted reproductive measures would be covered by the freedom to reproduce. Reproductive freedom does not absolutely preclude legislative restrictions on reproductive techniques.⁹¹ However, if the decision to reproduce (naturally or with medical assistance) is constitutionally protected as a negative right, any prohibition of certain reproductive techniques would need to be constitutionally justified.⁹² As discussed earlier, the child's well-being, while being one of the provision's purposes, is insufficient to justify a comprehensive prohibition. The rights of all parties involved will be described below and must be taken into account in the overall design of any potential legalisation framework in order to achieve a constitutionally valid balance of interests.

b. Right of the child to knowledge of descent

The right to know one's descent derives from the general right of personality according to Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG⁹³ and is also expressed in Article 7 paragraph 1 of the UN Convention on the Rights of the Child of 1989. In cases of anonymous egg donation abroad, the resulting child is initially denied this right. In Germany, a child conceived through permitted sperm donation possesses the right to know their genetic lineage, derives not only from Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 GG, but is also enshrined in Section 10 of the "Act to Establish a Register for Sperm Donors and to Regulate Access to Information about the Donor after Insemination with Donor Sperm" (*Samenspenderregistergesetz – SaRegG*).⁹⁴ Safeguarding this right is an important factor that would need to be considered in any egg donation regulations in order to legitimise them constitutionally.⁹⁵ After all, knowledge of one's own parentage is significant for personal and identity development⁹⁶, substantially impacting the child's psychological well-being. While the aforementioned right sets limits

⁸⁹ Hüppe (n 74) 126.

⁹⁰ Josef Franz Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' in Henning Rosenau (ed), *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland* (Nomos 2013) 127, 134; Lindner, 'Ein zeitgemäßes Fortpflanzungsmedizinrecht für Deutschland' (n 13) 173; Leopoldina (n 3) 35.

⁹¹ Reinke (n 53) 137.

⁹² Dorneck (n 81) 50-51; Esser (n 38) 240; Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' (n 90) 134; Nationaler Ethikrat (n 78) 122.

⁹³ BVerfGE 79, 256, 268-69; Wellenhofer (n 39) fn 32; Dieter Giesen, 'Genetische Abstammung und Recht - Zugleich Besprechung des Urteils des BVerfG vom 31.1.2989 - 1 BvL 17/87' (1989) 44 JZ 364, 367.

⁹⁴ cf VG Berlin BeckRS 2022, 32571 (fn 15) (Administrative Court of Berlin); Volker Lipp, 'Fortpflanzungs- und Genmedizin' in Adolf Laufs, Christian Katzenmeier and Volker Lipp (eds), *Arztrecht* (8th edn, C.H. Beck 2021) fn 35.

⁹⁵ cf Udo Di Fabio, 'Article 2 paragraph 1' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz Kommentar. Band 1* (90th edn, C.H. Beck 2022) fn 213; Leopoldina (n 3) 29, 63.

⁹⁶ BVerfGE 79, 256, 268-69; Di Fabio (n 95) fn 212.

on the potential anonymity of donation, it does not inherently preclude the procedure.⁹⁷ Adequate regulations in the realms of descent and family law could prevent the child from being disadvantaged, similar to sperm donation.

c. Equality aspects – comparison to sperm donation, Article 3 paragraphs 2, 3 GG

The question arises as to whether the different treatment of sperm donation, which is permitted in Germany, and egg donation, which is prohibited, constitutes a violation of the equality principle under Article 3 paragraphs 2 and 3 GG. From an objective-biological point of view, differentiation based on sex is undeniable: male gametes may be donated, whereas female gametes may not.⁹⁸ Such differentiation requires constitutional justification.⁹⁹ According to the prevailing case law, an encroachment on the equality principle under Article 3 paragraphs 2, 3 GG can be justified "to the extent that it is strictly necessary to resolve problems that can only arise due to the nature of the respective sex."¹⁰⁰ Accordingly, this exclusively concerns biological differences between sexes.¹⁰¹ While the more intense interference of egg donation compared to sperm donation and the resulting increased risks to women¹⁰² are based on biological distinctions, this medical difference in gamete retrieval isn't the rationale for the egg donation ban. The purpose of the prohibition is not rooted in biological differences between men and women but rather, as discussed earlier, in preventing split maternity. This normative purpose is not based on biological distinctions, but on a material disparity concerning the social role of parents: while a divided paternity due to legal sperm donation seems unobstructed, divided maternity is to be avoided.¹⁰³ Especially in the light of the necessary informed consent and voluntariness of the intervention, the differing intensity of the situations cannot in any case suffice as a justification for differentiation.¹⁰⁴ A sufficient justification for the present interference under Article 3 paragraphs 2 and 3 GG concerning the affected women is therefore not discernible, rendering the criminal prohibition of egg donation untenable.¹⁰⁵

⁹⁷ Heun (n 83) 54; see also Kersten (n 63) 1251; Leopoldina (n 3) 83.

⁹⁸ Esser (n 83) 60.

⁹⁹ Esser (n 83) 60; Leopoldina (n 3) 40.

¹⁰⁰ BVerfGE 85, 191, 207.

¹⁰¹ Uwe Kischel, 'Art 3 GG' in Volker Epping and Christian Hillgruber (eds), *Beck'scher Online-Kommentar Grundgesetz* (54th edn, C.H. Beck 2023) fn 192.

¹⁰² cf Braun (n 14) fn 9; Graumann (n 9) 177; Eberbach (n 3) 177-78.

¹⁰³ Monika Zumstein, 'Keimzellspende – Juristische Thesen' in Bundesministerium für Gesundheit (ed), *Fortpflanzungsmedizin in Deutschland* (2000) 134, 139.

¹⁰⁴ Rosenau (n 63) fn 85.

¹⁰⁵ Günther, Taupitz and Kaiser (n 2) fn 12; Ratzel (n 64) fn 8; Rosenau (n 63) fn 85; Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7; Esser (n 83) 61.

3. European aspects – the ECHR

In November 2011, the Grand Chamber of the ECHR ruled that Austria's ban on egg donation was compatible with the ECHR.¹⁰⁶ Notably, a year earlier, the ECHR's small chamber had stated that the ban exceeded the boundaries of necessity for justifying an interference under Article 14 in conjunction with Article 8 ECHR.¹⁰⁷ Couples reliant on egg donation as a reproductive measure to fulfil their wish to have a child were being discriminated against in their right to family and private life (Article 8 ECHR) compared to couples who could fulfil their wish through other, permitted measures of assisted reproduction (Article 14 ECHR).¹⁰⁸ In 2011, however, the ECHR upheld the admissibility of Austria's regulation (and by extension, that of other member states)¹⁰⁹ based on the national legislature's margin of appreciation in ethically and morally difficult areas and the fact that there was no uniform regulation for assisted reproduction across Europe, particularly for egg donation.¹¹⁰ However, the ECHR emphasised in 2011 already that, as reproductive medicine continued to evolve,¹¹¹ a "European consensus seems to be emerging,"¹¹² narrowing the margin of appreciation for national legislatures as European states become increasingly unified. This holds even more true since even more states have legalised egg donation following the ECHR's judgement, reducing the number of countries prohibiting it. This demonstrates that, although the ECHR considered the ban "still" compatible with the ECHR in 2011, its stance is subject to medical and political developments. Given these considerations, a prohibition of egg donation appears incompatible with the principles of private and family freedom and the prohibition of discrimination from a European perspective, making it highly problematic in Germany as well.

4. Conclusion

The prohibition of egg donation cannot be ethically or legally justified either on the national or the international level for the reasons mentioned. Potential risks of legalisation can and must be addressed through appropriate regulatory means within the respective legislative framework.

¹⁰⁶ *SH and others v Austria* App No 57813/00 (ECtHR, 3 November 2011).

¹⁰⁷ *SH and others v Austria* App No 57813/00 (ECtHR, 1 April 2010).

¹⁰⁸ *ibid* fn 85.

¹⁰⁹ Müller-Terpitz, '§ 1 ESchG' (n 8) fn 7.

¹¹⁰ *SH and others* (n 107) fn 94 ff, 115; see also *Evans v UK* App No 6339/05 (ECtHR, 10 April 2007) fn 77.

¹¹¹ *cf SH and others* (n 107) fn 117 f.

¹¹² *SH and others* (n 107) fn 96.

V. Design of legalisation in Germany

In the context of desirable legalisation, certain questions regarding the design of possible regulations and provisions need to be clarified and addressed to avoid the discussed problems and ensure the safety and interests of all parties involved.

1. Possibilities of legalisation

a. Amendment of the ESchG

One approach in implementing the legalisation of egg donation is to amend the relevant provisions of the ESchG. The FDP parliamentary group (Free Democratic Party – *Freie Demokratische Partei*) in the Bundestag has submitted a draft in this spirit.¹¹³ Article 1 number 1 letter a (aa) of the amendment aims at repealing the fundamental prohibition provision of section 1 paragraph 1 number 1 ESchG. Article 1 number 1 letter b also addresses the amendment of the previous number 2 of section 1 paragraph ESchG, allowing for heterologous IVF using donated eggs. According to the draft law, the amendment to the ESchG is intended to have three main practical effects: increasing the number of egg donations performed in Germany while reducing treatments conducted abroad, as well as establishing legal certainty on a national level for those affected.¹¹⁴ The challenges arising from the legalisation of egg donation, such as the risk of commercialisation or the traceability of the donor's identity are acknowledged. However, the specifics of such regulations are not explicitly defined in the proposal; instead, reference is made to the need for further provisions.¹¹⁵ Consequently, although the amendment of the ESchG represents a necessary measure, it reveals additional gaps in regulation, necessitating further action.

b. Introduction of an FMedG: the Augsburg-Munich draft

aa. Principles

Another possibility to uniformly close the mentioned regulatory gaps, encompass additional aspects of reproductive medicine, and adequately regulate them appropriately is to introduce a Reproductive Medicine Act (*Fortpflanzungsmedizingesetz*). A concrete draft law is already available for this purpose: the Augsburg- Munich draft for a Reproductive Medicine Act (AME-FMedG), developed collaboratively by various legal scholars in 2012. It comprehensively regulates all aspects of reproductive medicine under a single law, which would replace the criticised criminal law formulation of the ESchG and

¹¹³ BT-Drs 19/17633, 3 ff.

¹¹⁴ *ibid* 6.

¹¹⁵ *ibid* 5.

utilise the federal legislative competence granted by Article 74 paragraph 1 number 26 GG.¹¹⁶ The AME-FMedG covers both the specific measures of assisted reproduction and the general legal requirements and regulations. The law is structured according to the principle-exception model in order to accommodate the interests of all parties involved and sufficiently protect the fundamental freedoms of all affected individuals.¹¹⁷ The fundamental freedom to utilise reproductive medical measures initially encompasses all medically feasible reproductive procedures (including those not yet regulated and those that may emerge in the future), in order to then utilise exceptional regulations to counteract abuse and dangers of certain impermissible procedures.¹¹⁸

bb. Regulation of egg donation

Under section 6 AME-FMedG, egg donation is explicitly permitted and structured parallel to sperm donation (section 5). For egg donation to be permissible, there must be an indication (section 6 paragraph 1 AME-FMedG). The intended mother must therefore be incapable of reproduction herself, or face a high risk of severe hereditary disease if her own oocytes are used. In addition, according to section 6 paragraphs 2 and 3, egg donation may only take place in an authorised centre following prior examination of the donor. A violation of section 6 paragraph 2 is considered an administrative offence according to section 28 paragraph 2 number 3 letter b, potentially resulting in a fine according to section 28 paragraph 3. Cross-breeding of oocytes from multiple donors for a single recipient is disallowed by section 6 paragraph 4. The donation must be non-commercial, as stated in section 6 paragraph 6. The decision on whether the eggs of a single donor can be used in only one centre for a maximum of three recipients is left to legislative discretion (section 6 paragraph 5).

cc. Conclusion

The introduction of an FMedG in conjunction with the repeal of Section 1 paragraph 1 number 1 ESchG provides a suitable foundation for appropriately regulating the issues of modern reproductive medicine.

2. Regulation and subsequent questions within legislative framework

The following sections discuss the necessary regulations within the scope of egg donation and address selected family and lineage law issues that are not included in the legislative proposal and would require further adjustment. Follow-up questions in the areas of

¹¹⁶ cf Ulrich M Gassner and others, *Fortpflanzungsmedizingesetz – Augsburg-Münchener Entwurf (AME-FMedG)* (Mohr Siebeck 2013) 22 f.

¹¹⁷ *ibid* 29 f; cf Dorneck (n 81) 275.

¹¹⁸ Gassner and others (n 116) 48 f; cf Dorneck (n 81) 261.

inheritance and social law, as well as the problem of possible age limits for egg donation, are not covered.¹¹⁹

a. Problems of equality and prohibition of commercialisation

The issues of unequal treatment between egg donations and sperm donations, as well as the risk of commercialisation of egg donation and the associated exploitation of female donors, are intended to be addressed in the AME-FMedG. Thus, the only deviation from a parallel arrangement to sperm donation (section 5) in the case of egg donation is the prohibition of commercialisation pursuant to section 6 number 6 in conjunction with the administrative offence contained in section 28 paragraph 2 number 4 letter a. The rationale behind this unequal treatment lies in the increased risk of adverse health effects associated with egg donation compared to sperm donation.¹²⁰ The essence of the provision is, therefore, exclusively to prevent financially motivated self-harm by potential donors.¹²¹ Consequently, unlike the absolute prohibition of egg donation, the disparity in treatment between sexes is in this case justified under Article 3 paragraphs 2 and 3 GG. The prohibition of commercialisation does not entail social inequality of the sexes but is based solely on biological differences between males and females.¹²² Compensation for the donor is to remain possible. The Reproductive Medicine Commission (*Fortpflanzungsmedizin-Kommission*), established under section 24, would draw up guidelines on its amount according to section 25 paragraph 1 number 3. This way, to the RMC would concretise the provisions of the AME-FMedG.¹²³ These determinations must be suitable to relieve the donors with respect to their actual expenses without providing a financial incentive for engaging in a donation.

b. Right of the child to knowledge of descent

Section 22 number 6 of the AME-FMedG establishes an obligation for the documentation of the identities of germ cell donors. Correlating to this, section 23 paragraph 3 regulates the right of information for children conceived through germ cell donations. They may inquire about the identities of their donors from the age of 14. However, the interests and rights of the donors are also protected: the data is generally treated as confidential under section 23 paragraph 1. An exception to this is provided under section 23 paragraph 2 and applies to cases of medically justified exceptional circumstance for the benefit of the child. As discussed, the right of the child to knowledge of their own genetic lineage, as a

¹¹⁹ see also Dorneck (n 81) 325 ff.

¹²⁰ Gassner and others (n 116) 58; Dorneck (n 81) 323 f.

¹²¹ Gassner and others (n 116) 58; Dorneck (n 81) 324.

¹²² Dorneck (n 81) 324.

¹²³ Gassner and others (n 116) 83; Dorneck (n 81) 294, 356.

manifestation of the general right of personality, is a significant factor in the personal development of a child conceived through assisted reproduction. On the other hand, in the event of the legalisation of egg donation, the donor's interest in the protection of informational self-determination, also derived from the general right of personality, is at stake.¹²⁴ However, the donor voluntarily decides to undergo the donation and is informed not only about matters concerning themselves (section 18 numbers 1 to 3), but also about the child's right to information (section 18 number 4). Thus, the right to informational self-determination of the informed and consenting donor cannot outweigh the child's right to knowledge of their own parentage to the extent that only a completely anonymous donation without the possibility of information would be justified.¹²⁵

The AME-FMedG strives to establish the optimal balance of interests between the constitutionally protected rights of the children and the donors, ensuring the necessary right to information while at the same time safeguarding the data protection of the donors.

c. Consequences for German family law

The legalisation of egg cell donation inevitably gives rise to consequential questions, particularly in the realm of family and parentage law, which are not addressed within the framework of the AME-FMedG. These primarily result from the discrepancy between genetic and biological motherhood, thereby leading to inquiries concerning the allocation of legal parenthood.

aa. Legal maternity

According to section 1591 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), the legal mother is the one who gives birth to the child. Consequently, in the case of egg donation, the legal mother is the recipient. This allocation of legal maternity to the carrying woman is also rooted in the consideration of the child's best interests and the prevention of a fragmented motherhood, which recognizes a strong "physical and psychosocial relationship" established through pregnancy and childbirth.¹²⁶ Given this context, legal maternity of the donor and hence the genetic mother is unequivocally excluded without the possibility of contestation.¹²⁷ The principle of "mater semper certa est" (motherhood is always certain) is thus fully applicable notwithstanding the egg donation.¹²⁸

¹²⁴ Gassner and others (n 116) 83; Dorneck (n 81) 294, 356.

¹²⁵ BGH NJW 2015, 1098, 1103 (fn 54).

¹²⁶ BT-Drs 13/4899, 82.

¹²⁷ *ibid* 82; cf Klaus-Jürgen Grün, *Vaterschaftsfeststellung und -anfechtung: für die gerichtliche, anwaltliche und behördliche Praxis* (Erich Schmidt 2003) 25 f.

¹²⁸ Müller-Terpitz, 'Art 6 GG' (n 53) 15; Czech (n 65) 186; Müller-Götzmann (n 128) 322; Gassner (n 36) 126.

Furthermore, the legislator justifies the provision of section 1591 BGB as a response to the regulatory gap arising from egg donations conducted abroad.¹²⁹ The legislator recognises that egg donations are carried out abroad and therefore regulates their legal implications in terms of descent. In relation to the certainty of maternal attribution, there is therefore no need for adjustment in the case of legalisation.

bb. Adjustment of descent law

In the domains of maternity determination and maternity appeal, however, an adjustment of descent law is necessary for the sake of legal certainty. It is possible to align the regulations with those of sperm donation.

(1) Contestation of maternity

Similar to the allowance of challenging paternity and the restriction of such a right for consensual sperm donation under section 1600 paragraph 4 BGB, this aspect could be similarly regulated for egg donation concerning maternity.¹³⁰ Section 1600 paragraph 4 BGB excludes both the legal father and the sperm donor from challenging paternity: although some forms of heterologous insemination fulfil the criterion of "sexual intercourse" in the sense of section 1600 paragraph 1 number 2 BGB, and thereby the right to challenge paternity of the genetic father (meaning the sperm donor) is not entirely excluded in such cases,¹³¹ there is widespread consensus¹³² that in the field of consensual sperm donation within the meaning of section 1600 paragraph 4 BGB, no right to challenge paternity of the donor may be recognized.¹³³ The donor's consent is to be interpreted as a "clear renunciation of legal paternity and consequently of a corresponding right to challenge it."¹³⁴ This analogy would also apply in the case of legalising egg donation: its regulation would similarly fall under consensual heterologous artificial fertilisation in the sense of Section 1600 paragraph 4 BGB. The donor, through voluntary and informed consent, would also willingly relinquish her legal status as a mother; thus, so the exclusion of the right of contestation would, in general, not raise constitutional issues concerning the egg donor's parent right, which is constitutionally

¹²⁹ BT-Drs 13/4899, 82-83.

¹³⁰ Katharina Lugani, 'Warten auf die Abstammungsrechtsreform' (2021) 54 ZRP 176, 179.

¹³¹ BGH NJW 2013, 2589, 2590 ff (fn 15 ff); see also BGH NJW 2021, 2801, 2803 (fn 23); Marina Wellenhofer, '1600 BGB' in Dieter Schwab (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10 – Familienrecht II* (8th edn, C.H. Beck 2020) fn 21 f; Andreas Spickhoff, '§ 1600 BGB' in Andreas Spickhoff (ed) *Medizinrecht* (4th edn, C.H. Beck 2022) fn 2.

¹³² For a more critical perspective see Andreas Spickhoff, 'Vaterschaftsfeststellung, Vaterschaftsanfechtung und das Recht auf Kenntnis der Abstammung nach heterologer Insemination' (2017) 3 ZfPW 257, 269.

¹³³ Wellenhofer, '§ 1600 BGB' (n 131) fn 69; Magdalena Sophie Gayk, *Vaterschaft und weitere Rechtsprobleme bei heterologer Insemination* (Nomos 2020) 86; see also Arbeitskreis Abstammungsrecht, Abschlussbericht (Bundesministerium der Justiz und für Verbraucherschutz) 64.

¹³⁴ Report issued by the Law Commission (*Rechtsausschuss*), BT-Drs 15/2492, 9; BGH NJW 2013, 2589, 2590-91.

protected under Article 6 section 2 sentence 1 GG.¹³⁵ The predicament of assigning maternity through birth is essentially problematic for the construction of surrogacy, in which the intended mother and the gestating (and consequently, legal) mother diverge.¹³⁶ The exclusion of challenging the legal father's paternity is grounded in the legal-ethical consideration that, in cases of consensual artificial fertilisation, the parents bear the responsibility for this decision, and no detriment should arise for the child.¹³⁷ The well-being of a child conceived through gamete donation are to be secured by a stable legal position vis-à-vis the legal father – or in the case of egg donation: the legal mother.¹³⁸ The fundamental admissibility of a maternity challenge could also counter specific individual case issues in the context of egg donation, such as an implantation carried out without the consent of the legal mother.¹³⁹

(2) Determination of maternity

The determination of maternity could be generally permitted and restricted once again for egg donation in the sense of section 1600 paragraph 4 BGB, as envisaged by section 1600d paragraph 4 BGB for sperm donation.¹⁴⁰ The donor could therefore not be deemed the legal mother. The introduction of section 1600d paragraph 4 BGB in 2018, much like Section 1600 paragraph 4 BGB, was aimed at safeguarding the child's well-being by attributing legal fatherhood to the intended father.¹⁴¹ This regulation would also correspondingly address the interests of the egg donor who has willingly relinquished maternity through consent, thereby precluding any maintenance or inheritance claims from the child, just as in the case of sperm donors.¹⁴² This could also potentially enhance the willingness to donate eggs.¹⁴³

(3) Conclusion

Adopting provisions akin to those governing paternity offers a simple and effective means to adjust the descent law concerning maternity in the context of egg donation. This approach establishes legal certainty and safeguards the interests of the parties involved.

¹³⁵ Brosius-Gersdorf (n 82) 108; Verena Weyrauch, *Zulässigkeitsfragen und abstammungsrechtliche Folgeprobleme bei künstlicher Fortpflanzung im deutschen und US-amerikanischen Recht* (Tenea 2003) 200.

¹³⁶ cf Dorneck (n 81) 265 f; Weyrauch (n 136) 200.

¹³⁷ Draft by the Federal Council (*Bundesrat*) for a law strengthening the rights of children, BT-Drs 14/2096, 7. Taking a different approach, Arbeitskreis Abstammungsrecht (n 133) 62 ff builds on actual consent.

¹³⁸ BT-Drs 14/2096, 7.

¹³⁹ cf Dagmar Coester-Waltjen, 'Reformüberlegungen unter besonderer Berücksichtigung familienrechtlicher und personenstandsrechtlicher Fragen' (2002) 18 *Reproduktionsmedizin* 183, 194.

¹⁴⁰ Lugani, 'Warten auf die Abstammungsrechtsreform' (n 130) 179.

¹⁴¹ BT-Drs 18/11219, 35; Arbeitskreis Abstammungsrecht (n 133) 57-58.

¹⁴² BT-Drs 18/11219, 35; Jochen Taupitz and Athina Theodoridis, 'Das Gesetz zur Regelung des Rechts auf Kenntnis der eigenen Abstammung bei heterologer Verwendung von Samen' (2018) 36 *MedR* 457, 460.

¹⁴³ BT-Drs 18/11219, 35.

cc. The second parent's position

Furthermore, reference should be made to an issue not limited to sperm donation but likely to arise in the event of legalising egg donation: the legal parentage of the partner of the legal mother. While the situation for married couples can be solved unproblematically via sections 1591, 1592 paragraph 1 number 1 BGB, significant disparities arise for homosexual women. According to section 1592 paragraph 1 BGB the father of a child is either the husband of the mother at the time of birth (number 1) or the man who has acknowledged paternity by way of recognition (number 2). Female same-sex partnerships lack the possibility for acknowledgement as per section 1592 paragraph 1 BGB.¹⁴⁴ This even applies where the genetic mother of a child conceived through egg donation is the partner of the biological mother, and therefore according to Section 1591 BGB the legal mother.¹⁴⁵ In such cases, the only available recourse used to be a stepchild adoption under section 9 paragraph 7 of the Act on Registered Life Partnerships (*Lebenspartnerschaftsgesetz* – LPartG), until the legal situation changed in 2017: with the legalisation of same-sex marriages ('Marriage for All'), no new civil partnerships, as defined by the Registered Partnership Act (LPartG), will be established. Additionally, for married same-sex couples, stepchild adoption has become obsolete. However, an adjustment to the law of descent is still pending.¹⁴⁶ These contradictions in descent law warrant reform – not only as far as the legalisation of egg donation is directly concerned, but for all forms of heterologous artificial fertilisation. The Working Group on Descent Law (*Arbeitskreis Abstammungsrecht*) also acknowledges the need for action in these cases and proposes an equalisation of legal parentage for the female life partner and the mother's husband.¹⁴⁷

VI. Conclusion

In conclusion, there are no moral or legal impediments against legalising egg donation in Germany. The prohibition is highly problematic from the point of view of German constitutional law and the ECHR and consequently should be repealed. Alongside decriminalisation, a legislative solution for legalisation must encompass critical considerations regarding the rights and interests of all parties involved through appropriate regulations. Particular attention should be paid to the protection of donors through a ban on commercialisation, ensuring the children's right to knowledge of their

¹⁴⁴ OLG Köln BeckRS 2015, 14263 (fn 4 and 14 ff) (Higher Regional Court of Cologne, North Rhine-Westphalia); cf BGH NJW 2019, 153, 154 (fn 7 ff); Müller-Götzmann (n 128) 322.

¹⁴⁵ Dagmar Coester-Waltjen, 'Überlegungen zur Notwendigkeit einer Reform des Abstammungsrechts' (2021) 4 ZfPW 129, 132 f.

¹⁴⁶ cf OLG Köln BeckRS 2015, 14263 fn 16; Arbeitskreis Abstammungsrecht (n 133) 69; Müller-Götzmann (n 128) 322.

¹⁴⁷ Arbeitskreis Abstammungsrecht (n 133) 69 ff.

own genetic lineage, and the provision of medically secure and professional procedures within authorised institutions. In this regard, the already existing AME-FMedG provides an excellently suitable foundation that should be adopted. In order to prevent potential exploitation of donors due to commercialisation, there is still a need for further action in establishing regulations on the amount of compensation for expenses by the Reproductive Medicine Commission. Follow-up questions on maternity determination and contestation under the law of descent need to be adjusted to fit with current law.