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Contested change: how Germany came to allow PGD[☆]

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Abstract Until recently, German laws protecting the human embryo from the moment of conception were some of the strictest internationally. These laws had previously prevented any manipulation of the embryo, such as in preimplantation genetic diagnosis (PGD), and continue to affect stem cell research. In 2011, however, the German parliament voted in favour of allowing PGD in specific cases. While the modification in the law in earlier analysis was interpreted as being in keeping with the usual norms in Germany, this article argues instead that the reasoning behind the partial acceptance of PGD, rather than the legal decision itself, is indicative of a sociocultural change that needs to be accredited. Demonstrating that a significant change occurred, this article analyses the arguments that led to the amendment in law: not only has the identity of the embryo been redefined towards a pragmatic concept but the notions of parenting and pregnancy have also changed. The focus on the mother and the moment of birth has given way to a focus on conception and 'genetic couplehood'. The professional discourse preceding the decision allowing PGD suggested that the rights of the not-yet-implanted embryo should be negotiated with those of the two parents-to-be, a concept that may be called 'in-vitro pregnancy'.

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KEYWORDS: assisted conception, German Embryo Protection Act, in-vitro fertilization, in-vitro parenting, parenting, preimplantation genetic diagnosis

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Introduction

Until recently, German laws protecting the human embryo from the moment of conception were some of the strictest internationally. The German situation has been called 'unique and contradictory' (Krones and Richter, 2004: 625), as the relatively liberal German position on the termination of pregnancy seems to contrast with the strict protection of the embryo *in vitro*. As reported in the international media, the German parliament, where majorities had previously been against preimplantation genetic diagnosis (PGD), voted on 7 July 2011 to allow PGD in Germany (Deutscher Bundestag, 2011a). With this ruling, Germany became one of the last remaining European countries, but the first German-speaking country, to allow PGD in principle. However, the ruling permits PGD only in specific cases of severe illnesses that are genetically detectable in the embryo (Bundesgesetzblatt, 2011).

On a superficial level, this change came about alongside a legal decision: on 6 July 2010, the German Federal Court received a request from a gynaecologist for a decision on various PGD treatments that he had administered in 2005 and 2006 to couples known to carry predispositions that would severely affect the fetus or child (Bundesgerichtshof, 2010). The gynaecologist had diagnosed the existence or non-existence of these predispositions in IVF embryos after growing them to the eight-cell stage and removing one cell in order to perform the diagnosis. He then transferred only those embryos that did not show the incriminated monogenetic effect.

According to the common-sense view at the time, including the interpretation of the German Medical Association that defines the binding rules for medical practice (Gerst, 2004), these treatments breached several laws and regulations. In 2010, the German Federal Court, however, ruled in favour of the physician, interpreting the procedures that had been carried out not as breaches of the law but rather as being in accordance with it.

Previous analysis of the legal shift followed the argument of the German parliament (Deutscher Bundestag, 2011a) and claimed that this partial acceptance of PGD signified no real change in the German situation. Such interpretations argue that the legal shift merely confirms the concept of the 'embryo-as-person' in Germany, as Valkenburg and Aarden (2011: 462) believe, instead of abandoning or fundamentally challenging it. It could also be asserted that this partial acceptance of PGD does not demonstrate any real change in (medical) culture or in the social understanding of human life, as this was an inevitable small step in the slow evolution of a European country emulating its neighbours.

This article argues that a thorough analysis of relevant expert documents leads us to a different conclusion, namely that the German concept of the embryo and the idea of parenting underwent a fundamental transformation between 2003 and 2011. The main argument of this article is therefore that in contrast to earlier claims we do indeed observe a change in Germany regarding PGD.

This article shows that the reasoning behind the partial acceptance of PGD, rather than the legal decision itself, is indicative of such a change. Not only has the identity of the embryo been reconstructed: it moved away from concepts according to which the embryo intrinsically comes into being

endowed with pre-given full human dignity, to theories relativizing the embryo's rights according to specific factors. The notions of parenting and pregnancy have also changed. The focus on the mother and the moment of birth has given way to a focus on conception and 'genetic couplehood' (Prainsack and Siegal, 2006). With an accompanying change in the understanding of pregnancy termination, a new concept of 'in-vitro pregnancy' emerged in Germany.

In the methods section below, key terms by the jurist and legal philosopher Horst Dreier are introduced as the analytical framework employed in the document analysis. The results section that subsequently follows is divided into three parts. Change, by definition, means a difference in the state of a phenomenon at different points in time. When change in the underlying values is involved we refer to a change not as an accidental one but rather as a cultural change. In order to explicate the change in Germany, and present the core argument, the situation reflected in articles and documents from around the year 2000 and from around 2010 are compared and analysed. The first part of the results chapter discusses the results regarding the prevailing situation before the change, i.e. the history of what I call the 'categorical' embryo and the Embryo Protection Act, culminating in the decision of the German parliament against an amendment of the Embryo Protection Act in 2003. Categorical in this case means (with an intended allusion to Kant) 'ruling in any case without exception', so that the embryo is gifted with human dignity at any stage and circumstance. This corresponds to the dowry theory unwrapped in the following. It contrasts a pragmatic approach that relates the rights of the embryo to needs and rights of others and/or that distinguishes between different stages of embryonic life. The second part presents the examination of the material produced by medical and legal institutions in the decisive years before 2011 in the process leading up to the German parliament's decision in favour of PGD. This second part also explains differences between the two episodes in the ways of decision taking. While this second part focuses on the change of identity of the embryo, the third part links the latter to findings regarding a change in parenting. It argues that the in-vitro situation attained a status comparable to the in-vivo situation. In the discussion section it is suggested that these reconceptualizations can be understood as part of the introduction of the idea of 'genetic couplehood' (Prainsack and Siegal, 2006), contributing to the situation in which the rights of the conceiving couple are negotiated with those of the embryo.

Materials and methods

This study is a document analysis based on professional, parliamentary and academic writing published by national physicians' organizations, in parliamentary protocols, expert philosophical statements on PGD and local legal records.

In order to more specifically differentiate between the various concepts of the embryo appearing in the analysed material, the terminology 'dowry', 'capacity' and 'communication theory' have been applied in the analysis. These terms were first presented by the jurist and legal philosopher Horst Dreier (Dreier, 2004) and help to analyse different ways of conceptualizing the embryo in this article. Dreier assesses the rights of the embryo by distinguishing

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