

## Review Article

## What's Wrong with Gamete Donation?(Legal and Ethical Status of Gametes in Assisted Reproduction Techniques)

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Treatment with gametes donated by subjects other than those who wish to be parents is offered as part of assisted reproduction techniques in many countries. Ethical and legal concerns concerning gamete donation are discussed. Gamete donation constitutes a legal transaction, whose form is basically that of a contract, and in fact we are dealing here with a strictly regulated contractual object. The debate lies in considerations of legality and proprietorship. However, gametes cannot be compared with other parts of the human body. Their ability to originate another human being gives them a special status, which entails moral concerns. Nevertheless, and despite the fact that ethical evaluations may be a critical aspect, they cannot determine the legality of the act.

**Keywords:** Gamete; Donation; Assisted human reproduction; Law; Ethics**Introduction**

Treatment with gametes donated by subjects other than those who wish to be parents is offered as part of assisted reproduction techniques in many countries. The agreement of the person from whom the cells are collected is an essential requisite. The consent is given by means of a contract of gamete donation, which is legally regulated in a strict and detailed manner by most countries.

From a legal point of view, the terms "donation contract" is used to designate the legal act that permits cells from other people to be used for reproductive aims [1-4]. Gamete donation, therefore, constitutes a legal transaction, whose form is basically that of a contract, which raises the following questions: Are we dealing with a "res" in juridical terms, here is, a thing/object? Is this a problem of proprietorship? The disposal on parts of the human body is morally wrong? Rectius: the economic disposal on parts of the human body is morally wrong?

An ethical and moral evaluation may be the critical aspect, but this cannot determine the legality of the act.

**The contract as a donation contract**

The term "donation" is supposed to reflect the essential characteristic of being free of monetary reward. Indeed, it is supposed that the gametes cannot be sold or be the subject of any other onerous contract because of the imperative nature of the gift. For most of the lawyers and law makers the intrinsic value of a gift, a way of showing solidarity, is higher than the positive utilitarian consequences of paying and obtaining more material [5,6]. The possibility of reasonable compensation for the effort, physical discomfort and loss of earnings of the donor is covered by many laws, but only in a limited way, so that there is no economic incentive. Consequently, any compensation involved cannot be such that it becomes a money-making or commercial activity [7-9]. The European Union's 'Tissues and Cells Directive' provides that, "donors may receive compensation which is strictly limited to making good the expenses and inconveniences related to the donation", implementing as such a good example of this reasoning [10].

The fundamental idea of the action being a gift is based on respect for a certain idea of human dignity, with obvious parallels to organ transplants and blood transfusions. It is in this context that the indications of the European Parliament (10 March, 2005) on the trade

in human ovules should be understood (P6 TA 2005, 0074 published in the Official Diary of the European Union on 15 December, 2005). This resolution was adopted after an investigation carried out by the Human Fertilization and Embryology Authority of the United Kingdom in Rumania, following newspaper reports on ovule donation activities carried out in a Rumanian clinic in exchange for economic compensation. With this public statement the European Parliament reminded its citizens that the use of the human body as a source of income is related with exploitation, of which the most vulnerable become victims, particularly women living in extreme poverty. Therefore, the European Parliament condemned the exchange of ovules for money, considering the practice akin to trafficking of the human body, adding that any donations should be voluntary and unrewarded.

However, is questionable if contracts having for object parts of the human body involving a payment as a financial counterpart, necessary violate human dignity, at least, our present understanding of human dignity, which recognizes dignity mainly as self-determination and less as a paternalistic protection against oneself [11].

The traditional argument sustains that the very idea of human dignity prevents a monetary value being placed on the parts, elements or cells of the human body. However, the morality and legality of the act does not depend on the act being free. The onerous character of an act does not necessarily mean that it is reprehensible and, conversely the free nature of the same does mean that it is necessarily morally correct. There are acts or deeds that cannot be remunerated since any remuneration would take away their meaning, but disposal of body parts is not between them.

The legitimacy or illegitimacy of payment depends on what is

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being bought. It is commonly accepted that one can charge for the services provided by the human body (for the risks and inconvenience involved), but not for body parts [9]. However, it must not be forgotten that putting a value on a body, for its physical strength, intellectual capacity, aesthetic or sexual pleasure is a generally accepted idea in modern society [11-13].

### Gametes as “res”

When evaluating from a legal standpoint how gametes should be considered, the following questions may arise: are gametes objects, in other words, marketable goods? Are cells and tissues like any other part of the human body? Can they be the object of a contract such as the contract legally prescribed for goods or objects?

Gametes are not, obviously, persons, and neither are the rest of the body's components. However, and unlike other body components, gametes are transporters of a person's genetic code when a new life is formed and they may be removed from the body [14]. However, human body parts, whether they are considered things or not, should not be legally traded (*res extra commercium*). This principle is embedded in several national laws and in article 21 of the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: “The human body and its parts shall not, as such, give rise to financial gain Specifically for the genome this imposition is also foreseen in article 4 of the Universal Declaration on the Human Genome and Human Rights, which states “the human genome in its natural state shall not give rise to financial gains”.

Gametes are internal elements that can regenerate, although there are differences between the extraction of male and female gametes. The ease with which semen can be obtained and the absence of external intervention favour the free availability, while the external intervention necessary to extract oocytes by abdominal incision may limit the same. In addition, semen may be obtained during most of the male's life, whereas oocytes represent a kind of “limited resource”.

Despite the fact they are biological material gametes cannot be compared with other parts of the human body. Their ability to originate another human being gives them a special status. Therefore, it is not suitable to confuse the power and control over gamete with typical property rights. Rather, the kind of power and legal rights that people have on their own gametes assume the nature of personal rights when gametes are still inside of the human body, connected with the respect for human dignity which that entails. Differently, when gametes are outside the human body the nature of the power legally recognised over gametes is a mixture between a personal and a patrimonial right, though, never a property right in its traditional sense.

The relevance of gametes disposal has been treated by the California Supreme Court, in the case of *Johnson vs. Calvert* (1993, 15 Cal. 4<sup>th</sup> 84), which held that the gestational surrogate had no parental rights to the child that she gave birth, therefore sustaining that the surrogacy contract was legal and enforceable, thus, the surrogate should deliver the child to the genetic parents. The cornerstone of the Johnson decision is that power over gametes provides a correlative power over the “product” of those gametes, i.e., the child [12].

Another legal case related with the recognition of a property right over the reproductive material of oneself is the case *Hecht vs. Superior Court* (1993, 20 Cal. Rptr. 2d 275). This case deals with sperm that had been deposited by a man, William Kane, in a sperm bank, and afterwards left by will to his girlfriend, Deborah Hecht. Kane had authorized the girlfriend to use the sperm at any time in the future for

reproductive aims, in other words, to have a child. Upon the suicide of Mr. Kane, Hecht was named as executor of the estate and was also personally named as the recipient of the sperm. A petition requesting destruction of the sperm was filed by Mr. Kane's adult children and indeed was granted by the court. They argued that the sperm was property of the estate; as such, under terms of a property settlement between the heirs, Hecht was entitled to 20% of the property, in other words only three vials of sperm. Hecht appealed and was awarded, by the appellate court, a writ of mandate vacating the lower court's order to destroy the sperm. The Court of Appeal declared that sperm was a kind property over which Mr. Kane could dispose. Further, the court found that public policy does not bar posthumous artificial insemination or artificial insemination of an unmarried woman [12].

### Limits on gamete's disposal

The marital state of a person is thought by some authors to impose a limit on the freedom to decide what one wants to do with one's body, since married people can only donate gametes with the spouse's permission. This is a limit expressly recognised by French law on gamete donation.

However, this thesis has no legal basis in other jurisdictions, like the Portuguese one, which admits that a married person may assume the paternity of a child whose other progenitor is not the spouse and even without the consent of the spouse.

Therefore, expressly (English law) or implicitly (Portuguese and Spanish laws), the majority of legislations do not require the consent of the donor's spouse.

### Destruction of cryopreserved gametes

Semen and ovarian tissue can be cryopreserved in authorised sperm banks.

Many laws, like the Portuguese one, are silent about the possible damages suffered by cryopreserved gametes and embryos, hence, any loss (moral or patrimonial damage) suffered by the depositary of the gamete or the embryos will be regulated by general laws on civil liability.

Differently, article 11.7 of the Spanish law 14/2007, of 3<sup>rd</sup> July (2007), on biomedical research refers to the responsibility in the case of accident, stating that fertility clinics authorised to practice the cryopreservation of gametes or pre-embryos should have a suitable insurance or provide an equivalent financial guarantee to “compensate couples in the case of an accident that affects their cryopreservation”. This is tantamount to recognising the existence of a quantifiable damage, which, nevertheless, is difficult to value both in its material and moral aspect.

In 1993, the German Federal Supreme Court (BGHZ 124, 52 VI, Civil Senate, and VI ZR 62/93) treated the case of a man whose sperm had been negligently destroyed by the sperm bank where he had deposited it for reasons of illness. The sperm depositor sued the bank for 50,000 German marks for the loss of the reproductive capacity and psychosomatic damage. The defendants, while recognising the violation of their duty to take care of the sperm, only offered to compensate the amount the plaintiff had paid to store the sperm. The demands of the plaintiff were repeatedly rejected on the grounds that part of the body become things when separated from the originating body (as is happens when deposited in a sperm bank, which, unlike cryopreserved oocytes, is not supposed to come back to the male body), simply recognising the violation of property rights and the devolution of the sum paid. However, the German Supreme Court recognised the question as a violation of the right to reproduce. They considered the body as integral part of the person's legal personality. That is, we are not

dealing exclusively with the violation of property rights but with the violation of personal rights, since the sperm was kept with the aim of being used for reproduction, an essential part of human personhood. Consequently, the situation should be compared with oocytes that are destined to be returned to the woman's body, because in both cases we are dealing with self-determination and self-realisation of the person. Bearing this in mind the court awarded the plaintiff 25,000 marks for violation of his legal personality. This quantity was awarded without regard to the probability of the plaintiff's wife becoming pregnant since it was the man's reproductive right that was being considered, not that of his wife.

We consider the most interesting aspect of this is the consideration that body parts, elements and fluids, continue to be regarded as part of the person, even when separated, as long as they are still intended to the fulfilment of a human biological purpose. In fact, modern medical science permit part of the body to be removed and then replaced (e.g. skin surgery, haematology, oocytes and sperm for subsequent *in vitro* fertilisation). In such cases the parts or elements of the body maintain the same protection as the body, which may become a corner principle on the regulation of gamete donation.

#### Capsule

The donation of gametes constitutes a legal transaction. The ability of the gametes to originate another human being gives them a special legal and ethical status.

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