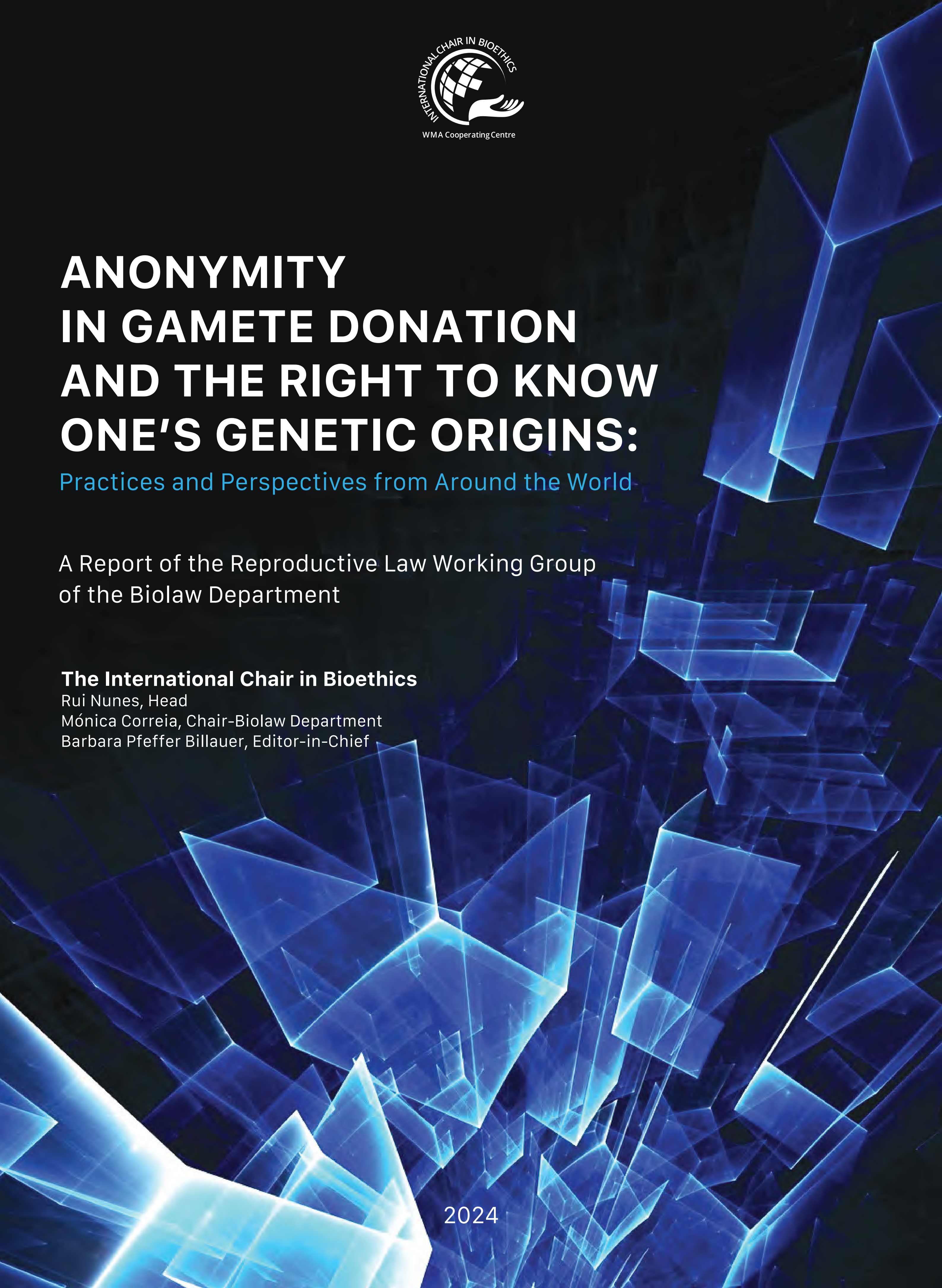

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ANONYMITY IN GAMETE DONATION AND THE RIGHT TO KNOW ONE'S GENETIC ORIGINS:

Practices and Perspectives from Around the World

A Report of the Reproductive Law Working Group
of the Biolaw Department

The International Chair in Bioethics
Rui Nunes, Head
Mónica Correia, Chair-Biolaw Department
Barbara Pfeffer Billauer, Editor-in-Chief

2024

ANONYMITY IN GAMETE DONATION AND THE RIGHT TO KNOW ONE'S GENETIC ORIGINS:

Practices and Perspectives from Around the World

Reproductive Law Working Group

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This work is produced under the auspices of the International Chair of Bioethics.

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Preface

Rui Nunes

Head of the International Chair in Bioethics

It was a pleasure writing the preface of the book "Anonymity in Gamete Donation and the Right to Know One's Genetic Origins: Practices and Perspectives from Around the World" - A Report of the Reproductive Law Working Group of the BioLaw Department of the International Chair in Bioethics, a book promoted by Professor Barbara Pfeffer Billauer, Editor-in-Chief, and Professor Mónica Correia, Head of the BioLaw Department of the Chair.

This book addresses a very important issue in the fields of bioethics, BioLaw, and reproductive medicine. It is a paradigmatic example of the dilemmas of modern bioethics and the responsibility of the law to regulate medical-assisted procreation following the fundamental values of democratic and plural societies. Also, it is essential to carry out a comparative analysis of the legislation between different countries to create critical humanitarian awareness on this and other topics of huge international relevance.

This book approaches different, even opposite, sets of rights. Indeed, the right to personal privacy is a milestone of modern societies. The irreducible right to protect private life and personal intimacy, including, but not limited to, the protection of personal data is paramount. Including nominative data that identifies a specific person. Therefore, the exercise of this right limits, in principle, unauthorized access to this data, without the explicit consent of the person, namely the gamete donor. The evolution of this right may even imply the enjoyment of another right, that is, the right to be forgotten, that for its full realization leads to the erasure of all personal data from the system, including from digital applications.

On the other hand, the human person exists within the scope of an existential project, with a unique and unrepeatable biography. Therefore, it is also considered a fundamental right to satisfy the need-to-know personal identity in detail, whether from a biological, genetic, or familiar perspective. This right to personal identity includes the right to individual historicity, so it is ethically justifiable and humanly understandable that anyone born using donor gametes has a deep desire to know their biological roots.

The role of modern and inclusive bioethics, based on human rights and respect for the intrinsic dignity of the person, is to reconcile opposing rights and suggest a legislative path to harmonize these rights. It was therefore unsurprising that many countries evolved legislatively to expressly provide in law the right to know the genetic origins and therefore, the identity of the sperm or oocyte donor.

This evolution was accompanied by complete information to the donors of this plausibility, as it is not acceptable to violate the donors' privacy without their expressed written consent. Regarding public policy, this raises natural concerns that must be addressed with great caution. For example, the impact that this measure has on the availability of gamete donors makes it necessary to find ethically acceptable solutions so that the viability of the programs is assured. Donors should continue to be recruited guaranteeing the necessary quality of the biological products so that the success of medical-assisted procreation programs is not reduced.

This book intends to address the practices and perspectives from around the world of anonymity in gamete donation and the right to know one's genetic origins giving therefore an excellent contribution to anyone interested in this topic, even with very different professional backgrounds.

The International Chair in Bioethics welcomes this work for the excellence of the contributions of the different authors and for the humane and compassionate way in which it approaches a topic that represents a life drama for all those involved in the process.

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Executive Summary

Barbara Pfeffer Billauer, JD MA, PhD

1. Introduction

This monograph is presented to address the vexing question of donor versus donee rights in the context of gamete donation. The work illustrates the differences across orders and oceans in both laws and actual practices and discusses the varying idiosyncratic cultural motivations governing each. The individual chapters were composed of an international cadre of experts, all members of Reproductive Law Working Group (of the BioLaw Department) of the International Chair of Bioethics. Each chapter reports on the laws and practices of the author's country of origin, or another country with which they are intimately familiar.

Attitudes favoring gamete donor rights, whether donating eggs, sperm, or embryo, are primarily manifested in laws requiring and guaranteeing anonymity, both of the donee and the donor. Further accommodations to the needs of the donor surface in the form of compensation, either for the part or fluid donated or for the time/expense/inconvenience and even risk of donating. The stated reasons vary by country and range from the belief that anonymity fosters supply by encouraging donation,[1] to protecting the donor's right to privacy.

As to the rights of the donee, exemplified by Germany, legislators and experts cite the right to know one's biological identity and medical destiny (as a function of knowledge of genetic heritage) as a fundamental right of human dignity guaranteed by the UNESCO Declaration on Bioethics and Human Rights, as well as various international conferences.

In this edition, eight countries are surveyed: three in Europe, two in Asia, and three in Americas. The laws and practices run the gamut, with those in Europe mostly favoring the donee, requiring disclosure, and those in Asia and the Americas favoring the donor

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[1] Barbara Pfeffer Billauer, *Does Technology Affect The Law And Morality Of Parental Planning?* American Council of Science and Health, https://www.acsh.org/news/2023/09/21/does-technology-affect-law-and-morality-parental-planning-17351.

requiring anonymity. Other issues also surface, such as the amount of time records must be maintained, the eligibility of the donor and the done, and disposal issues. These vary enormously, even within continents, a practice that fosters reproductive tourism. While uniformity of rules would discourage this practice, which mostly favors the rich, as is evident from the submissions, the cultural heritage of each country appears to strong to reach any degree of consensus.

Different Laws

Of the eight countries surveyed here, only two, Germany and Portugal, require disclosure. In the US, where anonymity is the rule, disclosure is mandated in one state, Colorado. Other countries requiring disclosure which are not surveyed here include Australia, Sweden, the UK, and various other European countries. Nevertheless, laws governing record-retention (both scope and duration), mandated medical assessment of donors, preservation duration, and eligibility vary enormously, regardless whether disclosure is required or anonymity is the rule.

Different Cultural Motivations

Prioritization of Rights

While laws requiring anonymity favor the donor, the reasoning behind these laws varies by country. It is not always to protect the donor. In some countries, like India and Brazil[2], attention to the rights/needs of the family are included in the deliberation and prioritized. Countries fearing that disclosure might interfere with the family unit by weakening family bonds and encouraging relationships with an extrafamilial (albeit biologically-related) donor, weakening parental bonds or introducing intra-sibling jealousies, end up requiring anonymity – not necessarily to protect the donor but to protect the family unit. (It bears mention that where a sperm bank facility mistakenly

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[2] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10471945/#:~:text=Despite%20the%20global%20tendency%20towards,origin%20of%20his%2Fher%20conception

used the sperm of an outsider rather than the husband, the husband was entitled to sue for loss of genetic affinity).[3]

We saw in these submissions that countries often use their laws of adoption as a launch-point in discussing gamete donor anonymity versus the rights of the child, but not always interpreting them in consistent fashion, but in a manner consistent with the basic policy orientation of the country, i.e., in an outcome-determinative fashion.

Outcome Determinative Arguments in Support of Anonymity

Even when relying on adoption laws requiring disclosure, countries interpret those laws differently, depending on other intrinsic values, i.e., the priority of the family unit vs. that of the individual child: same laws – different outcome on disclosure. Thus, countries will turn to adoption rules if it supports their position. When adoption rules favor disclosure, but the country has determined anonymity is the preferred route in the case of gamete donation, it will distinguish the gamete donation situation from adoption, with varying arguments, such as in gamete donation, at least one parent is related (the relevance of which is questionable to the issue of the children's right to know their full genetic identity), or that the family unit is more stable, and can withstand disclosure.

Another example how cultural views shape the outcome is reflected by the following example: One member of our working group who was from a country favoring disclosure claimed that only more moral donors will apply, with such morality perhaps being an inherited trait.

The rationale for anonymous donation fostering supply is another example of attempting to shape the outcome.[4] This argument, however, fails when considering that when Australia removed its anonymity requirement[5], the supply actually increased. Similar results were reported in a small United States survey.

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[3] This right is recognized in Singapore via the cases of ACB v Thomson Medical Pte Ltd [2017] SGCA 20.

[4] https://www.fertstert.org/article/S0015-0282(22)01522-9/fulltext.

[5] Barbara Pfeffer Billauer, *Body Fluids for Sale. Are Body Parts Next*?, ACSH.org. Sept. 28, 2023 commenting on Alex Tabarrok *EU May Ban Payments for Milk, Sperm and Blood* September 18, 2023

The impact of DNA (and other modern) technologies

The indelibility of cultural influence is manifested in the views of our authors regarding the impact of new DNA-sequencing and social media technology. These products, such as 23 and Me, have the capacity to furnish genetic identity information – and facilitate contact among genetically-related siblings. Individual members advocating against anonymity (regardless of the position of their home country) claim the new technology makes anonymity laws obsolete. Those opposed to vitiating anonymity requirements are either unaware of the powers of the new technology, or focus on its unavailability to establish paternity, an irrelevant consideration.

Once the powers and possibilities presented by these now commercially available technologies become more widespread, perhaps these views will change, and anonymity will no longer be required. Alternatively, it is possible countries which strongly favor anonymity, such as India and Israel, may ban use of the technology, as one private sperm bank tried to do in the US.

Conclusion

In sum, it seems that the desired outcome determines the interpretation of laws and mores in a fashion that leads to that outcome. This finding suggests that indigenous cultural influences strongly drive reproductive laws and defy standardization. This expected variation in country-by-country position will both facilitate and frustrate reproductive tourism. It is also an entrenched driver of laws that must be considered by all involved in this field.

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https://marginalrevolution.com/marginalrevolution/2023/09/eu-may-ban-payments-for-milk-sperm-and-blood.html.

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Chapter 1: Introduction

The Clash of National Values as a Determinant of Anonymity Requirements

Barbara Pfeffer Billauer, JD MA, PhD

** Dr. Billauer holds academic appointments at the University of Porto, Portugal, where she is a Professor in the International Program on Bioethics, and the Institute of World Politics in Washington, D.C., where she is Research Professor of Scientific Statecraft. She has advanced degrees and certificates in law and in public health and has lectured and published extensively, both for the lay and academic audience, including writing for the *Harvard Bill of Health*, the *American Council on Science and Health*, and the *Greensboro News and Record* as well as in scholarly journals and law reviews. Most recently she has published *Health Inequity and the Elderly: The Impact of Pandemic-Policy, Bioethics, and the Law.*

1. Introduction

This monograph is presented to address the vexing question of donor versus donee rights in the context of gamete donation. In a sense, the term "gamete donation" – which refers to the contribution of genetic material from males in the form of sperm – and from females – as eggs or ova, is misleading. In some countries, gametes must be "donated" as an eleemosynary or a purely charitable endeavor i.e., donors cannot get paid, and the word "donation" is appropriate; in others, payment – either direct or indirect in the form of travel and or compensation for time – is countenanced, and we are talking about what is essentially a commercial activity. Here, we should more accurately refer to the transferor of sperm or egg as "suppliers", although for the purpose of this work, we will use the term "donation" and "donors" throughout.

2. Background

Gamete "donation", as a subject for regulation, first came to the fore in the 1980s, burgeoning in the 1990s when cryopreservation (or freezing) of gametes (and later embryos) for third- party use became commercially viable. In conjunction with In Vitro

Fertilization (IVF), or “test-tube fertilization,” first successfully introduced in humans in 1978, the practice became a godsend to the childless. As social morés changed, the audience of would-be consumers expanded to include not only infertile heterozygous couples, but single parents and same-sex couples, and the practice burgeoned, although it took time for the laws to catch up. Watershed moments in laws, treaties, and cases, both international and domestic, coalesce around the years 2005-2009 and 2017-2020.[6]

As a commercial endeavor (the fertility industry is now worth billions), as well as a mechanism to enable child-bearing, increasing the supply of genetic material is a crucial element to the project or industry’s success. (In the US, for example, heavy-handed marketing techniques were employed to excite contributions,[7] a practice strictly forbidden – and punishable by fine in Bosnia/Herzegovina). First-time parents previously unable to conceive were thrilled with successful results – and their new gurgling, bouncing baby. At the outset, the thought that the would-be child might have rights of her or his own was not contemplated, nor “conceived” of.

Flash forward some years – and the bouncing baby has grown up. That newly mature individual has needs of its own – needs he or she is now able to loudly articulate, needs which were first recognized only in the 1980s, first in Sweden. For the most part and in most places, initially the needs of the child were ignored, in favor of Mom, Pop, and ‘Capital Enterprise’.[8]

Flash forward a few more years. Technology has now eclipsed legality in many places. Genetic editing, copying, and identification has now become mainstream – easily available to all, including the previously shut-out progeny of this Brave New Endeavor. Now, even if the law doesn’t provide the solution, genetic identification techniques produced by companies like 23 and Me coupled with ubiquitous social media has made identification of genetic parents available by fact, if not by law. As was crystalized by

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[6] See e.g., infra. Prof. Milinkovic on Bosnia and Herzegovina.

[7] Barbara Pfeffer Billauer, *The Sperminator as a Public Nuisance: Redressing Wrongful Life Claims in New Ways (Aka New Tricks for Old Torts)*, 42 U. ARK. LITTLE ROCK. L. REV. 1 (2019)*;* see also Barbara Pfeffer Billauer, *Wrongful Life’ in the Age of CRISPR-CAS: Using the Legal Fiction of “The Conceptual Being” to Redress Wrongful Gamete Manipulation,* 142 PENN ST. L. REV. 435 (2020).

[8] In Israel at a conference in 2018 addressing the matter convened by Prof. Roy Gilbar at the Netanya Academic College of Law in conjunction with the Israeli Fertility Association (AYALA), and at which I presented, doctors and sperm bank operators were uniformly adamant that anonymity hold sway. An organized group of young adult children strongly and vociferously protested, raising poignant tales of their need to know the biologic origins.

researchers examining the situation in the UK: [These] technological development[s] … have torn the veil separating social family and genetic heritage, with implications for all parties. [Here] we examine how it has brought the rights of donor conceived people to information into conflict with donors' right to privacy and consider how the divide might be bridged."[9]

These advances beg us to revisit early 'conceptions' of the will of prospective parents and the rights and expectation of prospective donors – largely couched as the right of privacy (or alternatively the requirement of a professional secret forbidding a physician to disclose the information) – versus the rights of the child, often described as vesting under the right of dignity – which conveys a right to know one's genetic identity. It is at this impasse that our inquiry begins.

Newer technology, such as synthetic human embryos induced regressively by pluripotent stem cells,[10] along with technologies described by Professors Suter and Cahn, theoretically enabling a type of asexual reproduction (IVG), and other advanced fertilization techniques, such as ICSI – providing for direct injection of the spermatic material into the ova, may eventually solve the problem by obviating entirely the need for donation of genetic material. For now, we stand on the precipice of weighting the rights of one segment of society against another, evaluating the hierarchy of basic human rights and trying to predict the consequences of new legislation on an adequate supply of genetic material.

Because a variety of fertilization techniques may be called upon in these scenarios, we will use the term Assisted Reproductive Technology or ART to encompass all reproductive technologies that might be invoked in gamete donation or supply.

In retrospect, it might seem that the nobility of "the right of privacy" upon which the rule of anonymity is often predicated was invoked as a sinecure to cement the original, prevailing view favoring the donor, the commercial enterprise providing the service, and probably the parents, as well, and is a red-herring to the actual issues: whose needs

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[9] Hodson, Howell, Parker 2022.

[10] Although this technology brings risks of its own. See Barbara Pfeffer Billauer, *What The Law And Bioethics Tell Us About Synthetic Human Embryos,* ACSH, August, 10, 2023. https://www.acsh.org/news/2023/08/10/what-law-and-bioethics-tell-us-about-synthetic-human-embryos-17255.

govern, how do we reconcile the current anonymity laws with the "best interests of the child" and how do we – objectively – make these determinations?

3. Intransigent Disparity in Law and Practice

At the inception of the working group's work on this project, it was assumed we would present a "White Paper" with the general consensus of opinion in agreement on what the law should be – although we had not canvassed among ourselves what that position would actually entail. We all merely presumed that everyone else agreed with our respective stances. We allowed that there might be one or two outliers, and provided for a dissent section, but uniform agreement was certainly expected.

Although the members of the committee were self-selected, the countries represented in this work are randomly composed – three are European countries (Germany, Portugal, and Spain), two are from the Asian continent (Israel and India), and three come from the Western Hemisphere (the US, Argentina, and Brazil).

At the project's conclusion, we were shocked to see quite the opposite result to our initial assumption! The views were diametrically different across the countries, although fairly similar if evaluated on a continental basis. Roughly half the participants were aligned with favoring the rights of the donor; half favored the donee. Each participant raised strong and cogent arguments supporting their country's position. With three exceptions voiced by five members (Israel, the US and Bosnia/Hertzegovina), the position of the author matched that of her or his home country.

While some commentators have reported an international trend prioritizing the rights of the children born using third party gametes, requiring disclosure of donor identity,[11] this work illustrates that this broad conclusion may only apply to European countries. Even within Europe, the views are not uniform. Many European countries, including Sweden, Iceland, Finland, Austria, Switzerland, the Netherlands, Portugal,[12] and

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[11] CORREIA/REGO/NUNES, 2021: 70). Austria, Switzerland, the Netherlands, Finland, Iceland. Portugal seems to be in flux.

[12] *IVF and Egg Donation in Portugal* https://www.eggdonationfriends.com/ivf-egg-donation-country-portugal/#:~:text=In%20Portugal%2C%20egg%20donation%20is,single%20women%20and%20female%20couples.

Germany (discussed by Prof. Alice Margaria) have indeed embraced a donee's "right to know". Some countries, including Spain and France, are strongly opposed to breaching the anonymity expected by the donor. Bosnia and Herzegovina are accord with the Spanish and French views, as addressed by Professor Igor Milinkovic. (Although it must be noted that even in countries insisting on strict anonymity, recourse exists to seek a (usually limited) judicially-granted exception in the event of medical need or other "weighty reasons".) Other countries are in flux. The United Kingdom, for example, requires disclosure,[13] but only for procedures performed after 2005, leaving those involved beforehand in a state of uncertainty (Hodson, Howell, Parker, 2022).[14]

At the other end of the spectrum are the Asian countries of Israel and India; both employing a strict requirement of anonymity, (albeit with provisions for judicially countenanced exceptions), as described by Dr. Vivek Mady (India) and Professors Zafran and Blechar-Prisgat (Israel). Both countries require anonymity, and both appear to be strongly influenced by social and cultural morés indigenous in the country and intransigent in its proponents. Nevertheless, this same overall legal position of anonymity is implemented somewhat differently in the two countries, ostensibly due to the difference in the driving cultures. These difference cultural beliefs are also manifested by different rationales given for anonymity.[15]

Finally, we have the Western Hemisphere, which leans to favoring anonymity, although cracks in the structure are beginning to appear. In the US, as described by Professors Suter and Cahn, the practice is, by and large, not legally regulated, and is employed primarily on a private basis where the transfer of gametes is contractually governed. Private sperm banks are free to insist on acquiescence of anonymity by prospective parents (and most do), promising the same to the donor. Some enlightened facilities do provide un-anonymized gametes – although at a premium in terms of cost. By comparison, at least one American facility threatened legal action to recipients trying to "end-run" the contractual agreement by using Direct-to-Consumer Genetic Testing

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[13] See PET BioNews, Oct. 2, 2023 for a review of the changes incident to the new UK rules.

[14] The rupture of anonymity for sperm donors—a tangled web of conflicting rights https://www.bmj.com/content/376/bmj.o658#:~:text=Between%20the%201970s%20and%20early,consumer%20(DTC)%20DNA%20testing

[15] E.g., semen-mixing to blur genetic lineage was once implemented in Israel, but has always been forbidden in India.

and social media to identify the donor. One state, Colorado, has now made disclosure mandatory.

In Brazil, according to Judge Ana Claudia Brandão de Barros Correia, the law requires anonymity, but provisions exist allowing judicial bypass where good, medical reason exists. And in Brazil, as in India, concerns of family stability seem to drive the national platform.[16] A similar situation exists in Argentina, per the report of Prof. Stela Barbas and Dr. Giselle Crosara Gracindo.

The remaining continents take opposing views. Australia requires disclosure across the continent; South Africa requires anonymity.[17]

While the laws, where they do exist, specify either the requirement of anonymity or the requirement that the child be given identifying data, they are not uniform in terms of other requirements included in the enabling legislation.

4. Different Countries – Different Practices

For example, the different requirements for *record-keeping* are staggering. The *length of time* for retention of documents and information varies by country (e.g., from ten years India, and the U.S., to upwards of 50 years in Bosnia/Herzegovina to one hundred and ten years in Germany), as do provisions for record destruction and the locus of the repository retention. Similarly variable is allowance of *compensation,*[18] (The Council of Europe's Convention on Human Rights and Biomedicine – the Oviedo Convention of 2007 – prohibits payment of material compensation for body parts, which sperm and egg are considered in some countries).[19] Some countries specify the availability of *posthumous use;* most are silent, and some actively forbid it.[20] Even the *availability of the procedure* varies by country; some allowing it to all on request, some confining it

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[16] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10471945/#:~:text=Despite%20the%20global%20tendency%20towards,origin%20of%20his%2Fher%20conception

[17] D. Thaldar, B. Shozi, *Is open-identity gamete donation lawful in South Africa?* S Afr Med J. 2022 May 31;112(6):409-412.

[18] E.g, India strictly forbids compensation, while Israel allows it, both for sperm and egg donation.

[19] The United States for example, does not consider sperm and egg to be body parts; once donated one cannot claim ownership.

[20] Compare, for example, Israel, which allows posthumous use of sperm to a spouse if the donor specified this was his wish while alive, with Bosnia/ Herzegovina which entirely forbids the practice.

to married heterosexual couples. *Criteria for selection* of gamete donor and the *number* of times one can donate also varies by country. The *age* of allowed use and *insurance* coverage also differs, as does *cost*, often determined by *the natalistic policies* of the country. The *destruction of unused gametes* is another an issue that cries for uniform regulation. Some countries have two different sets of regulations, one governing gametes donated by citizens/residents and one for imported material. These variations not only impact international commerce by encouraging reproductive tourism.

5. Nationalistic Defenses and Rationales

Perhaps more interesting than the disparity in laws among the countries featured in this work, are the respective differences in the ways the countries justify these laws. In some cases, the very same outcome is defended or supported using entirely different rationales or schema. Conversely, sometimes the same rationale is used to justify opposing policies. Of particular interest are the philosophies used to support or sustain a country's position. Some countries, for example, turn to the laws of foster car or adoption for guidance,[21] while others eschew such laws claiming that the family unit in adoption is different and requires a different legal approach than that involved in gamete donation.

Breaching anonymity is not simply a yes or no decision; rather a bifurcated assessment is often involved. Knowledge of genetic identity could be limited to genetic and medical information without disclosure of social identity.

Further, some countries do not require complete disclosure of medical history at the time of registration for donation; others do not require continual updates. Thus, furnishing the registered data regarding genetic history may not be sufficient for a child to access information that may be critical to her or his medical treatment (or perhaps to request tissue or organ donation should the child need such attention from a biologic family member). At most such information be limited to knowledge needed for matrimonial decisions and avoidance of incest.

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[21] In some cases, ignoring it. Thus, as Prof. Milinkovic tells us, while anonymity is the rule in Bosnia/Herzegovina in gamete donation, adoptive parents are required to inform the adopted child about the adoption no later than the child's seventh birthday.

In any event, genetic information, such that it is, can be obtained even in the most draconian countries by application to the court for an exception and a showing of good cause or need.

Another layer of genetic identity pertains to the actual social identity of the donor. Arguments made supporting protection of this layer includes fear of paternity responsibility (which is a red herring int that paternity is almost uniformly barred by law or contract), or fear of upsetting the donor's expectation of the right of privacy (especially when the donation may have occurred long before, at a time when the donor's private life was different from the state at the time of projected disclosure).

6. Another Justification for Anonymity: Concern for Family Stability

Another salient concern raised by two authors is that the child may attempt to contact the donor. Should the donor consent to a relationship with the child, this may inure to the detriment of the family commissioning the gamete donation. Disruption to the family unit has been raised in countries where the family unit is prized. This respect and deferral to the family unit and its potential disruption, once upon a time, was the predicate, world-over, to keep gamete donation a secret from the child. This concern also served as the basis for practices in some countries (forbidden by others) of "blurring" the parental identity by sperm mixing – mixing an infertile husband's spermatic material with that of the sperm donor such that it would be impossible to say for sure that the biological father was not the child-rearing father. That concern no longer exists, and most experts urge that the child be told as soon as practicable of his genetic lineage – or at least of the circumstances of his or her birth (and similarly of adoption).[22] This new approach to child rearing should attenuate concern that disclosure of donor identity might affect the family unit. Nevertheless, the concern persists.

One example of the impact on the sanctity of the family unit raised both by Dr. Mady of India, and Professors Zafran and Blechar-Prigat of Israel, was the fear that the biological donor might wish a relationship with his or her progeny. In other words, the outreach comes from the donor, top-down, who ultimately may seek to bequeath the

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[22] https://www.londonspermbank.com/blog/ancestry-dna-tests-and-the-implications-on-sperm-donation-and-anonymity/

biological son or daughter with an inheritance. This possibility, fear some, might inexorably influence intrafamily relationships, disrupting the family unit, introducing jealousy and strife between half-siblings and between the biological parent and the parents who reared the child.

This deep-seated fear, favoring not the donor's expectation of privacy, but the stability of the family unit has infiltrated the anonymity argument, fostering the law of non-disclosure save under extraordinary circumstances as determined by an impartial legal tribunal – for good "or weighty- cause", same as would be expected to protect the privacy of a gamete donor.

7. The Impact of International Laws, Conventions, and Treaties

It also appears that the underlying cultural views of the country may end-run any concern for the rights of the child, even if the country has nominally signed on to, or is in accord with, broad bioethical declarations favoring the rights of the child. These agreements which hagiographize the right of human dignity which is also interpreted as favoring the child. Nevertheless, even signatories to such agreements require anonymity.

Several international and domestic conferences and treaties have memorialized such rights, including *The Oveido Conference* 2007, *The UN Convention on the Rights of Child of 1989*, which in 1991 made the right of the child to know his/her origin as far as possible mandatory in Article 7;[23] *The UNESCO Universal Declaration on Bioethics and Human Rights*: (2005, 2009) and *The Uniform Parentage Act* in the US (2017-2018 -2020).

That many countries signed on to these manifestos without officially adopting them or integrating them into their legal structure is evident by the schizophrenic nature of the laws, for example in Brazil and Israel.

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[23] Which, a brought down by Prof. Milanovic, is "celebrated as one of the most significant steps taken toward improving the lives of children throughout the world."

As Professor Zafran explains: “Israel is a dualist system and as such a treaty signed by Israel is not legally binding unless the treaty is adopted by the Knesset as a law. The CRC wasn’t adopted as a binding law...– it is only a source of interpretive inspiration.”

And as Judge Ana Claudia Brandão de Barros Correia echoes regarding the law in Brazil, while the law establishes an anonymous donation, a window exists to open this provision in court – special circumstances warranting – because of the provision guaranteeing a right to know one’s genetic identity. Even so, this identification is limited to genetic information, in Brazil; personal data is never revealed.

Added to the UN provisions of The Rights of the Child, are the articles of the UNESCO Declaration. While the UNESCO Declaration is not as clear-cut, it is quite definitive. Most countries reported on here were signatories, although the language reflected in Article 3 of the Declaration is nowhere to be seen their laws on anonymity.

Article 3 provides:
“1. Human dignity, human rights and fundamental freedoms are to be fully respected.
2. The interests and welfare of the individual should have priority over the sole interest of science or society.’

Some countries, like Germany, are adherent and respect a greater right of the children to know their parentage than that of the donor to anonymity. Here, the change came through a decision by Germany’s Constitutional Court in 1989, ratified and expanded via a courtroom battle in 2013 in the case of *Sarah P v. Prof. Thomas Katzorke*. In that case, the court “decided that the right of a child to know her genetic origins is a fundamental right and the basis of principles of human dignity and individual rights.”[24] In weighing the right of privacy of the donor versus the right of a child to access one’s parentage, the court noted “’the interest of the plaintiff in ascertaining her parentage is assessed to be higher than the interests of the defense and the right to non-disclosure of donor information’ a right that supersedes the duty of the physician to assure the anonymity of the sperm donor.”[25] While the physician involved claimed the records had been destroyed after ten years, as permitted by law, the court rejected that rationale, and imposed an even higher duty on the physician than the UNESCO Declaration or

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[24] Amnon Carmi and Barbara Pfeffer Billauer, eds., Casebook on Bioethics for Judges, UNESCO (2016) p. 86.
[25] Id.

Germany law imposed at the time, charging the physician with making an effort to finding identifying records. The German view is admirably fleshed out by Professor Alice Margaria in Chapter Two.

The opposite resolution is found in Israel, which though a signatory to provisions requiring parental disclosure, forbids it.

8. Cultural Determinants of the Best Interests of the Child

The dichotomy between the yea and nay side clearly derives from nationalist policy and social mores – signifying that no "one size fits all" solution will ever be adopted. Thus, perhaps it can be said that given its history, Germany is overly sensitive to the rights of individuals. That same history (WWII and the holocaust) resulted in a 180-degree different approach in Israel according to Professor Barbara Prainsack in assessing Israel's view towards human reproductive cloning.[26] She believes that in Israel the holocaust experience translated into a pro-natalist policy. Whether there is a causal connection might be argued, but Israel's pro-natalistic policy is surely a reality,[27] as discussed by Professors Zafran and Blechar-Prigat This pronatalism manifests in one of the loosest reproductive policies of the countries surveyed here: ART and gamete donation is available to single women as well as married couples, and women may receive donations until the age of 54 (the oldest age of the countries surveyed, (and the oldest known to this author, world-wide), the sperm donor is compensated, and anonymity is guaranteed – at least for domestically produced products. By contrast, in Bosnia and Herzegovina, as Professor Igor Milinkovic relates, where anonymity is also the strict rule, ART procedures are limited in availability.

This idiosyncratic view of whose rights are superior, that of the child or the donor, is even reflected in interpretation of surveys and assessment of the availability of sperm once the requirement of anonymity is abandoned or relaxed. Those countries favoring anonymity report that any attempts to remove that protection results in less product

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[26] Barbara Prainsack, *Negotiating Life': The Regulation of Human Cloning and Embryonic Stem Cell Research in Israel, 36* SOCIAL STUDIES OF SCIENCE 2 (Apr., 2006), pp. 173-205.

[27] Shulamit Almog and Sharon Bassan, *The Politics of Pro and Non Reproduction Policies in Israel,* J. HEALTH & BIOMEDICAL L.*, symposium issue 27 (2018).*

(e.g., Canada); while results are interpreted differently by those who favor the superior rights of the children, such as Australia.[28]

The issue can be summed up as understanding that determining what is in the best interest of the child varies by country. In America, most academics would say it is disclosure of genetic identity, in India, by contrast, experts say it is non-disclosure, as disclosure would disrupt the family unit. Comparison to adoption also has national and idiosyncratic interpretations. Some say adoption laws should be a template for use in determining gamete-disclosure; others say the adoptive family is, *per se,* different from the gamete-donee's family, where at least one parent bears a biological nexus, and the likelihood of love and devotion intra-family is identical to a typical biological family.

The *ramifications* of breaching anonymity also differ according to a cultural lens. As one member put it, breaching anonymity assures a morally superior donor, in that the donor is willing to provide material without regard to personal circumstance.

9. View of the Impact of Technology

Another mirror of how a country's views manifests in the assessment of the impact of technology. The widespread availability of direct-to-consumer genetic testing coupled with Facebook groups devoted to siblings-search renders the anonymity requirement pyrrhic in actuality. Yet, in many countries where anonymity is considered sacred, a request to address this issue resulted in a focus on its use in court to prove paternity (which all countries reject), rather than addressing the actuality that technology has indeed done an end-run around the law. Indeed, this availability was unknown to some of our members.

10. Conclusion

After months of work and discussion, and after reviewing the drafts sent to me, I feel safe in saying that we will never objectively resolve the question. As will be apparent

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[28] Thus, in the US where anonymity is the rule, per Prof. Cahn and Suter bringing down a survey by Prof. Glenn Cohen, 29% of donors surveyed would refuse to donate if anonymity is revoked, while in Australia, where the rule requires disclosure, the supply of sperm donors increased after anonymity was removed. The question I asked is which came first, the societal trend, or the law?

in the papers below, the matter is culturally driven. A country's culture, it appears, not only governs the state of the law, but the framing of the question, the interpretation of surveys, and the divination of rationale – on one side or the other – that supports the conclusion.

In short, I feel secure in saying that answers to the questions raised at the outset of this project to determine the correct course are unanswerable. Is this a country favoring anonymity because of its Jungian views on the family or its support of industry? If so, the reasons in support of this position will be more eloquent and carefully developed. Is it a country that supports the child's "right to know"? If so, the evidence in favor will have been more thoroughly developed, both actually and theoretically.

11. Recommendation

The spectrum of authors' recommendations are wide, in some cases refining their countries positions, in others at odds with it. One conciliatory approach was voiced by Prof. Milinkovic, advocating a two-tiered system, whereby anonymity might be available in one tier and non-anonymous donations on another. This approach, while perhaps favoring the wealthy, addresses societal needs by guaranteeing the maximum availability of supply. It is also a commercially viable process, as exemplified in the US that provides such programs.

If I can add one additional, personal recommendation, it would be that the donor is required to update the registry to include all medical conditions that develop after donation that could be heritable. In that the best interest of the child should be held to govern, and argument could be made as to what that best interest would be, assuring that the full data-set and complete information is available should a country's regime so allow now- or in the future - would be most prudent and prescient.

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Chapter 2

The Law in Germany

Donor's Anonymity and the Right to Know One's Genetic Origins in Germany[29]

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1. Introduction

In recent decades, Germany – much like many countries in Europe – has seen a rapid increase in levels of childlessness (KREYENFELD/KONIETZKA, 2016: v). Involuntary childlessness, more specifically, affects millions of people in Germany: among those aged 20 to 50, the percentage of involuntary childless people grew from 25% to 32% between 2013 and 2020 (WIPPERMANN, 2021: 37). Thus, for many people, resorting to assisted reproductive technologies (ART) gives them an opportunity to fulfill their desire to have children.

The first successful resort to ART in Germany resulted in the birth of a baby, conceived through *in vitro* fertilization (IVF), in the spring of 1982 at the University Hospital in

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[29] This work was carried out with the generous support of the University Priority Research Program "Human Reproduction Reloaded" at the University of Zurich.

Erlangen (Hoßmann/Sütterlin, 2007: 23). Since then, considerable advances have been made in the field of reproductive medicine and, along with ART's growing social acceptance, many ART procedures have become part of everyday medical practice (Trappe, 2016: 269 f.). In the period 1997-2020, 363'940 children were born following the use of IVF, intracytoplasmic sperm injection (ICSI), and cryo-embryo transfer (Bartnitzky et al., 2022: 278).

Despite their growing prevalence, the use of ART gives rise to a range of ethical and legal dilemmas. Third-party reproduction, which involves a person – other than the two intended parents – providing genetic material or undertaking gestation, is no exception. Some of the central controversies that arise in the context of third-party reproduction are whether people born from donor gametes have a right to know their genetic parents' identity, whether donors have a right to preserve anonymity, and how to balance these two – often seen as competing – rights. In various European countries, including Germany, legal frameworks have turned away from the rule of anonymity (*see also* for instance Sweden, the United Kingdom and Switzerland) (Correia/Rego/Nunes, 2021: 70). While not all jurisdictions have followed suit (e.g., Spain, France), there appears to be a recent tendency – at least in Europe - favoring the right to know one's origins (*Ibid*: 70 f.).

Several arguments have been put forward to support the disclosure of information relating to a child's genetic progenitors. Firstly, Article 7(1) of the UN Convention on the Rights of the Child can be read as containing a basic human right to know one's genetic origins (Frith, 2001: 821). Secondly, it has been argued that ensuring access to this knowledge enables the preservation of one's personal identity and autonomy (Correia/Rego/Nunes, 2021: 71). Thirdly, since donor anonymity leads to a situation where some people can access information on their genetic background and others cannot, it has been argued that safeguarding anonymity violates equality (Cameron/Gruben/Kelly, 2010: 114). Finally, there is empirical evidence suggesting that people conceived via third-party reproduction are interested in finding siblings (Blyth, 2012; Thorn, 2015: 135).

2. The Legal Framework of ART in Germany

A central pillar in the German legal framework pertaining to reproductive medicine is the Embryo Protection Act (Embryonenschutzgesetz, ESchG), which entered into force in 1991 (DIEDRICH, 2008: 8). This piece of legislation aims to enable (some) fertility treatments in Germany while also protecting human embryos (Nationale Akademie der Wissenschaften Leopoldina, 2021: 8). In line with this, the ESchG restricts the permitted use of ART to one purpose: optimizing the success of pregnancy (TRAPPE, 2016: 270). For instance, the number of fertilised egg cells must be limited to three (§ 1(1) no. 4 ESchG) as this is the number of embryos that can be transferred in one treatment cycle according to § 1(1) no. 3 and 5 ESchG (cf. RIEDEL, Gesetzgebung, 2008: 11).

Moreover, the ESchG prohibits various types of ART procedures. Reproductive technologies that are necessary for surrogacy are criminally sanctioned. These include the removal of an embryo/egg for transfer to another woman (§ 1(1) no. 1 and 6 ESchG), the transfer of embryos to a surrogate (no. 7) as well as artificial insemination of a surrogate's eggs (no. 7) or of donor eggs (no. 2). Only the donation of "surplus" embryos, that were not created with the purpose to donate, is permitted (MÖLLER/MAKOSKI, 2020: 590). Additionally, pursuant to §§ 13a ff. of the Act on Adoption Placement and Support and on the Prohibition of Surrogacy Placement (Adoptionsvermitlungsgesetz, AdVermiG), all activities – commercial and non-commercial alike – relating to surrogacy carry criminal sanctions. Consequently, all contracts entered in this context are not enforceable (DUTTA, 2019: 37 f.).

Also egg donation is criminally sanctioned (§ 1(1) no. 1 ESchG). Although these sanctions are applied solely to medical practitioners (whereas neither the intended parents nor the egg donor face prosecution) (§ 1(3), 11(2) ESchG), they *de facto* render access to these procedures impossible in Germany. Meanwhile, sperm donation (and subsequent donor insemination) is not mentioned in the ESchG and is allowed (TRAPPE, 2016: 271). This not only includes homologous sperm donation (the donation of sperm cells from the female patient's male partner), but also heterologous sperm donation (the donation of sperm cells that come from a party other than the female patient's male partner). In the latter case, consent of the intended parents as well as of the sperm donor is needed by means of a written declaration (TRAPPE, 2016: 271).

The more restrictive regulation of egg donation, compared to sperm donation, has been justified as necessary to prevent ambiguity about the identity of the mother by ensuring that the genetic and the gestational mother are one and the same (TRAPPE, 2016: 272). In this context, the case of *S.H. and Others v. Austria* (Appl. no. 57813/00, GC, ECHR 2011), decided by the European Court of Human Rights in 2011, is enlightening. At the time, Austria prohibited egg donation but allowed sperm donation for *in vivo* fertilisation. As a justification, the Austrian Government submitted that the *mater semper certa est* principle prevents the possibility of two people (the woman providing genetic material and the gestational mother) from claiming the status of legal mother (*Ibid*, para. 104). Additionally, the Austrian Constitutional Court explained that allowing *in vitro* fertilisation with donated sperm but not with donated eggs could not be considered as discriminatory, because sperm donation "was not considered to give rise to a risk of creating unusual family relationships which might adversely affect the well-being of a future child" (*Ibid*, para 25). Intervening as a third party, the German Government expressed a similar notion, stating that the prohibition of egg donation was necessary "to protect the child's welfare from the unambiguous identity of the mother" and that "splitting motherhood might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity" (*Ibid*, para 70). No similar concerns were raised regarding split fatherhood in the context of sperm donation. As I have argued elsewhere (MARGARIA, 2023), this reflects the persisting gendered character of (legal) notions of parenthood, in particular the understanding of gestation, (legal) motherhood, and care as a *continuum*.

Various experts have called for the introduction of a new comprehensive legal framework of ART in Germany, which would also encompass lifting the prohibition on egg donation (DETHLOFF/GERHARDT, 2013: 93; MÜLLER-TERPITZ, 2016; RIEDEL, FMG, 2008; SCHEWE, 2014). Up to this point, these calls have not resulted in tangible political actions regarding egg donation.

Beyond the ban on egg donation, the overall regulation of ART remains incomplete and fragmented. Some central aspects, such as the (very limited) use of diagnostic options related to ART, including as polar body diagnosis (PBD), elective single embryo transfer (eSET), and preimplantation diagnostics (PID), are regulated within the ESchG (cf. REVERMANN/HÜSING, 2011). In 2014, after the integration of the Preimplantation Diagnostics Act (Präimplantationsdiagnostikgesetz, PräimpG) into the ESchG in 2011, an Ordinance regulating the application of preimplantation diagnostics came into effect (Präimplantationsdiagnostikverordnung, PIDV).

Other key aspects of ART, such as accessibility, remain unregulated (TAUPITZ, Assistierte Befruchtung, 2021: 1430). Prior to 2018, the guidelines established in 2006 by the German Medical Association (Bundesärztekammer, BÄK) provided access to ART services to all married (heterosexual) couples and – under exceptional circumstances – to heterosexual couples in a stable relationship (No. 3.1.1. of 2006 BÄK Guideline). In 2018, the BÄK introduced guidelines regulating the collection and transfer of human gametes in the context of assisted reproduction (Richtlinie zur Entnahme und Übertragung von menschlichen Keimzellen im Rahmen der assistierten Reproduktion). However, these guidelines fail to specify who qualifies for access to assisted reproduction. This ambiguity has been interpreted by some as indicating the lack of convincing reasons to deny a woman medically assisted fertilization if she is in a same-sex relationship or single (TAUPITZ, Assistierte Befruchtung, 2021: 1430). (TAUPITZ, Assistierte Befruchtung, 2021: 1430). However, it is important to note that according to § 10 ESchG, medical practitioners have the authority to decline treating a patient with ART. As some individuals argue that access to assisted reproduction should be contingent upon the presence of a medical condition hindering conception (WEHRSTEDT, 2019: 126), and/or that lacking a second parent is not conducive to a child's well-being, lesbian couples and single women might face extended challenges in finding a medical doctor willing to treat them (TAUPITZ, Assistierte Befruchtung, 2021: 1432-1433).

Finally, an aspect that is intrinsically connected to the accessibility of fertility treatments is the assumption of costs associated with ART. In general, the coverage provided (by the state) for examination and treatment of conditions causing infertility is more extensive than the coverage provided for ART procedures. For the latter, certain criteria need to be met. According to § 27a of Volume V of the Social Insurance Code (Sozialgesetzbuch Band 5, SGB V), married heterosexual couples within a certain age group that have statutory health insurance are entitled to coverage of 50 % of fertility treatment costs if they use their own gametes, irrespective of the medical reason. In contrast, unmarried couples are only entitled to coverage for the treatment of a specific medical condition (cf. TAUPITZ, Künstliche Befruchtung, 2021: 323). The Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) ruled that this differential treatment does not amount to discrimination (BverfGE, 28.02.2007, 117, 316, 325 ff.). Meanwhile, same-sex couples and single people do not qualify for any coverage of fertility treatments and must therefore bear the full costs themselves (critically TAUPITZ, Künstliche Befruchtung, 2021: 323 f.).

3. The right to know one's origins in Germany

In the context of heterologous sperm donation, the issue arises as to whether the interest of offspring born from donor gametes to know their origin outweighs gamete donors' interest to remain anonymous. The idea that a child has the right to access information concerning their genetic heritage has existed for some time and is rooted in constitutional guarantees: the BVerfG traditionally attaches great importance to the right to know one's origins (BVerfG 96, 56 = FamRZ 1997, 869; BVerfGE 117, 202 = FamRZ 2007, 441), first recognizing the right of children conceived by means of sperm donation to know their genetic parentage in 1989 (BVerfG 79, 256 = FamRZ 1989, 255). The prevailing view is that this right is an integral part of the right to personality ("Persönlichkeitsrecht" in German) under article 2(2) in conjunction with article 1(1) of the German Constitution (Grundgesetz für die Bundesrepublik Deutschland, GG) (cf. MÖLLER/MAKOSKI, 2020: 596). These articles do not confer a right to obtain knowledge of one's origin; they merely protect against obtainable information being withheld (*Ibid*). Additionally, it has long been the prevailing view in Germany that in the case of heterologous sperm donation, the sperm donor's identity must be documented, and that the child concerned must be informed accordingly (HELMS, 1999: 187 f.; HELMS, 2017: 1537). Yet, prior to 2018 Germany lacked a specific statutory regulation concerning this matter (HELMS, 2017: 1537). As a result, the child had to request information from the medical professional under general principles of contract law, namely a contract with protective effect towards third parties (i.e. the child) under the general good faith provision of the Civil Code (§ 242 Bürgerliches Gesetzbuch, 'BGB') (*Ibid*; cf. BGH, 28.1.2015, BGHZ 204, 54 = *FamRZ* 2015, 642).

Following the example of many neighboring European countries (HELMS, 2017: 1537), the German legislature introduced a new act regulating the right to know one's progenitors in the case of heterologous sperm insemination ("Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen", 2018).

In the context this Act, two important steps were taken: first, the introduction of the Sperm Donor Registry Act ("Samenspenderregistergesetz", 'SaRegG'); second, the amendment of the Civil Code (§ 1600d (4) BGB) to ensure that sperm donors no longer face the risk of becoming the legal father and bearing financial responsibility for their genetic offspring. Both regulatory changes came into effect on July 1st, 2018.

The SaRegG establishes a central sperm donor registry at the German Institute for Medical Documentation and Information ("Deutschen Institut für Medizinische Dokumentation und Information", 'DIMDI') and regulates how data should be kept (§§ 1(1, 6–8) SaRegG). The storage of important data about the sperm donor in this registry and the right of a child conceived via heterologous sperm donation to access this information under the SaRegG both facilitate the child's access to the donor's data, all whilst ensuring the donor's data is protected (KEMPER, 2017: 438).

The SaRegG's detailed procedural requirements for a heterologous sperm donation can be summarised as follows. First, the center responsible for collecting the donor sperm must inform the donor about three issues (§ 2(1) SaRegG): (i) the right to information of a child conceived with the donor's sperm, (ii) the storage and transmission of the donor's data to the DIMDI, (iii) the donor's exclusion from legal paternity (see § 1600d (4) BGB below). The donor must then confirm that he has been informed and that he has understood the instructions (§ 2(1) SaRegG). Only then, the sperm collection center may give the donated sperm to a medical facility to carry out the heterologous insemination (§ 3 SaRegG). The medical facility can only use sperm donations from abroad if the necessary information about the donor can be obtained (§ 5(1), (2) SaReG). The medical facility is responsible for informing the sperm recipient about the child's right to information, the importance of knowing one's origins, available counseling options, data storage and transmission to the DIMDI, and the DIMDI's obligation to disclose information (cf. § 4 sentence 1 SaReG). The sperm recipient must also confirm in writing that they have fully understood the information they were provided with (cf. § 4 sentence 2 SaRegG). No later than 3 months after the birth of a child, the sperm recipient (the mother) must inform the healthcare facility of the birth and state the date of birth (§ 4 sentence 3 SaReG). The sperm recipient must be informed of this obligation beforehand (in writing) and give written assurance that she will comply (§ 4 sentence 3 SaReG). The medical facility may only perform the insemination once the conditions in § 4 sentence 2 SaRegG have been met and once it has the donation identifier sequence or the unique donation number of the sperm intended for use ("Spendenkennungssequenz oder die eindeutige Spendennummer des zur Verwendung vorgesehenen Samens" in German, § 5(1) SaRegG).

Additionally, § 5(3) SaRegG requires that the medical facility record and store the date of use of the sperm, and the expected date of birth. The medical facility must transmit this data to the DIMDI as soon as it becomes aware of the birth of a child; if the sperm recipient fails to update the medical facility, the latter must transmit the data to the DIMDI no later than 4 months after the expected date of birth (§ 6 SaRegG). The DIMDI then stores the data for 110 years (cf. §§ 7–9 SaRegG). It should be noted that the DIMDI's registry only contains information for offspring conceived after July 1st, 2018 (when the SaReG came into effect). However, all sperm collection centers that delivered sperm for heterologous use prior to July 1st, 2018 are required to store all donor data (within the meaning of § 2(2) sentence 1 SaReG) as well as the code assigned to the sperm donation for 110 years (§ 13(3) SaReG). Thus, data relevant for offspring conceived prior to the SaRegG's entry into force cannot be destroyed.

If a person suspects that they have been conceived through heterologous, medically assisted insemination, they are entitled to obtain information from the DIMDI's sperm donor registry (§ 10(1) sentence 1 SaRegG). Once this person reaches the age of 16, they can only assert this claim themselves (§ 10(1) sentence 2 SaRegG). This means that there is no minimum age to access the data and that a legal guardian must assert the claim for a child under 16 (KEMPER, 2017: p. 439). Already in 2015, the German Federal Supreme Court ruled that parents could assert such a claim for the purpose of informing their child (BGH, 28.1.2015, XII ZR 201/13). The right to information exists for the entire storage period of 110 years (§ 8 SaRegG), regardless of whether the information is granted or not (§ 10(1) sentence 3 SaRegG). Therefore, the information can be requested several times (KEMPER, 2017: 439). The DIMDI can charge a disclosure fee (§ 10(6) SaRegG). § 10(5) SaRegG further stipulates that the DIMDI must inform the sperm donor of the information request 4 weeks before it intends to provide the information (§ 10(5) SaRegG). The right to information relates to the mandatory data stored about the sperm donor (surname, surname at birth if different, first name, birth date, place of birth, nationality, address) and supplementary information that the sperm donor has voluntarily provided and consented to have stored (§ 10(2) SaRegG in connection with § 2(2) SaRegG). The DIMDI suggests to the person requesting the information to seek specific counselling and recommends suitable counselling services when providing the requested information (§ 10(4) SaRegG).

The second important change introduced in 2018 relates to the amendment of the German Civil Code by introducing § 1600d (4) BGB. According to § 1600d (4) BGB, a court cannot establish the sperm donor's legal paternity if he consented to heterologous insemination using his sperm, regardless of whether the child, the sperm donor or the child's mother requests it. The sperm donor can only become the child's legal father by acknowledging his paternity (§ 1592 nr. 2 BGB) (Kemper, p. 439). If another man is the legal father, his paternity must first be challenged by the child (the legal father's and the mother's options for contesting paternity are excluded under § 1600(5) BGB) and be excluded (KEMPER, 2017: 439).

However, there are two situations in which § 1600d (4) BGB does not apply. The first is when the fertilisation took place before § 1600d (4) BGB entered into force (cf. HELMS, 2017: 1539 f.). The second situation is when the child was not conceived with sperm obtained in accordance with the provisions in the SaRegG, ie via medically assisted heterologous insemination carried out by medical professionals (KEMPER, 2017: 439). Several cases of 'at home' insemination have been brought before courts in the last decade (e.g., BGH, 18.02.2015, *FamRZ* 2015, 828; BGH, 15.05.2013, *FamRZ* 2013, 1209; OLG Oldenburg, 30.06.2014, *FamRZ* 2015, 67; OLG Düsseldorf, 14.03.2017, *FamRZ* 2017, 809). It remains unclear whether §§ 9 no. 1, 11(1) ESchG require a medical doctor to be involved. Even though these provisions impose criminal sanctions, they do not lead to repercussions for the woman or the donor (§ 11(2) ESchG).

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Chapter 3

The Law in Bosnia and Herzegovina

Donor's Anonymity and the Right to Know One's Genetic Identity in Bosnia and Herzegovina

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1. Introduction

Infertility is a global reproductive health problem. The inability to have children affects couples worldwide and causes significant psychological distress in both women and men. Medically assisted reproductive techniques have radically changed the outcome for patients who otherwise would not have an opportunity to reproduce. A significant proportion of medically assisted fertility treatments are third-party reproduction, which is defined as "a form of reproduction in which DNA or gestation is provided by a third party or donor other than the two intended parents who will raise the resulting child" (Biko, Nene, 2017: 12).

However, third-party reproduction also raises difficult ethical dilemmas. One of the most controversial issues raised by this form of assisted reproduction is the problem of disclosing information about gamete or embryo donation to children conceived by third-party reproduction. Many authors agree that: “Disclosure and secrecy (information-sharing) in gamete and embryo donation has been, and to certain extent remains, one of the most controversial and debated issues in assisted human reproduction” (Daniels, Grace & Gillett, 2011: 2783). A comparative analysis of national regulatory frameworks shows that the aforementioned issue is regulated differently in different countries (various models of donor’s anonymity/identity disclosure regulation are sometimes adopted even within the same country, where, due to its complex state organization, passing of legislation governing assisted reproduction is under the jurisdiction of different territorial units).

Sweden was the first country to make donors non-anonymous in 1984 (Harper, Kennet & Reisel, 2016: 1136). Since then, several countries followed Sweden’s example and adopted provisions requiring disclosure of the donor’s identity (e.g., Austria, Switzerland, the Netherlands, the United Kingdom, Germany, Finland, Iceland, and Portugal) (Correia, Rego & Nunes, 2021: 70). However, despite the increasing tendency to respect the donor-conceived children’s right to learn their origins, a number of states kept the model of the strict protection of donor’s anonymity (including Bosnia and Herzegovina).

2. Legal Framework of Gamete and Embryo Donation and Donor’s Anonymity in Bosnia and Herzegovina

Bosnia and Herzegovina (BiH) is a complex state community, which consists of two entities: the Federation of Bosnia and Herzegovina (FBiH) and the Republic of Srpska (RS). (The Brcko District (BD) is a third territorial unit. It is a small subnational unit that enjoys wide legislative autonomy). The regulation of health protection in Bosnia and Herzegovina is the responsibility of the BiH entities. The Constitution of BiH expressly enumerates the responsibilities of the BiH institutions, while establishing the presumption of responsibility in favour of the entities. Since health protection regulation is not mentioned among the competences of the BiH institutions, this field has been regulated by the entity legislations. After many years of efforts, both BiH entities adopted laws on assisted reproduction. The BD has not yet passed assisted reproduction law (although the District finances assisted reproduction procedures for its residents through the BD Health Insurance Fund).

In the FBiH, medically assisted reproduction is regulated by the Act on Infertility Treatment by Biomedically Assisted Fertilization Procedures adopted in 2018 (FBiH ITBAFP Act). The passing of the ITBAFP Act was preceded by several unsuccessful attempts to adopt the draft law. The Act prescribes restrictive solutions regarding the circle of persons who can be subjected to the procedure of medically assisted fertilization, as well as the possibility of donating reproductive cells or embryos. The FBiH ITBAFP Act stipulates that married and unmarried couples have the right to medically assisted fertilization (the existence of an extramarital union (cohabitation) is proven by means of a notarized document). The Act, however, did not provide for such a right for women who are not in a marital or extramarital union. This is an exception in relation to most countries of this region, except Slovenia, where such a ban also exists (Vrtačnik, 2019). According to the FBiH ITBAFP Act, only homologous fertilization is allowed. Article 24 of the Act stipulates that only the reproductive cells of married or extramarital partners can be used for fertilization. The law expressly prohibits the donation of reproductive cells and tissues that was not carried out between spouses, or extramarital partners, as well as donating embryos for the application of medically assisted fertilization procedures (Article 37). According to Article 67(j) of the ITBAFP Act, enabling the donation of reproductive cells, tissues, and embryos constitutes a misdemeanor, punishable by a fine. The prohibition of heterologous fertilization (which implies the use of donated reproductive cells and embryos), resulted in the ban on the import and export of reproductive cells, tissues, and embryos, prescribed in Article 58 para. 1 of the FBiH ITBAFP Act.

According to Article 6 para. 1 of the FBiH Act, all data related to the procedure of medically assisted fertilization, and especially personal data about the woman, her married or extramarital partner, as well as the child conceived in the procedure of medically assisted fertilization, are considered a professional secret. The Act also prescribes that all legal and natural persons participating in the procedures of biomedical fertilization are obliged to ensure the protection and security of personal data in the aforementioned procedures, in accordance with the personal data protection regulations (Article 6 para. 2 of the FBiH ITBAFP Act). In particularly justified cases a court may release the person which participates in the assisted reproduction procedure from professional secrecy, in accordance with the rules of criminal and civil procedure.

The RS Act on Infertility Treatment by Biomedically Assisted Fertilization Procedures (RS ITBAFP Act) was adopted in 2020. The RS Act is significantly more liberal than the FBiH ITBAFP Act. The RS ITBAFP Act prescribes that beneficiaries of biomedical assisted fertilization may be adult and capable men and women who are able to exercise parental rights and duties and who are married or live in an extramarital community (cohabitation), as well as a single woman, but only if previous fertility treatment was not successful (Article 39). Unlike the FBiH ITBAFP Act, the RS Act allows the application of heterologous insemination. According to Art. 35 para. 1 of the RS ITBAFP Act, preference should be given to homologous fertilization. However, the Act foresees the possibility of using donated reproductive cells and tissues. According to Article 36 para. 1 of the Act, heterologous *in vitro* fertilization can be applied only when it is not possible to use reproductive tissues and/or cells of one of the married or extramarital spouses in a medically assisted reproduction procedure, or this procedure is required to prevent the transmission of a hereditary disease to the child.

The RS ITBAFP Act stipulates that the donation of reproductive tissues and/or cells and embryos is voluntary and anonymous (Article 44). The Act also regulates who can be a donor of reproductive cells or embryos. According to Article 47 of the Act, the donor of reproductive cells must be an adult, healthy, and legally competent person, while embryos can be donated by married or extramarital couples who have given up the use of their embryos in homologous *in vitro* fertilization. The Act provides for the prohibition of the so-called posthumous fertilization, by using the reproductive tissues and cells of people who are no longer alive (Article 46). The RS ITBAFP Act forbids payment of compensation for reproductive cells or embryos (Article 54 para. 1). This ban is in accordance with the Council of Europe's Convention on Human Rights and Biomedicine (Oviedo Convention), which prohibits payment of material compensation for human body parts (Article 21) (Bosnia and Herzegovina ratified the Oviedo Convention in 2007). However, the RS ITBAFP Act allows compensation and payment of medical and technical services related to assisted reproduction procedures, as well as compensation for travel expenses related to the donation of reproductive tissues and/or cells and embryos (Article 54 para. 2). Publishing advertisements seeking or offering reproductive tissues and/or cells and embryos constitutes misdemanor and is punishable by fines between 10.000 and 100.000 BAM (approximately between 5.000 and 50.000 Euros) (Article 73 para. 1(23) of the Act). The Act stipulates that the donated reproductive tissues and/or cells and embryos can be used for assisted reproduction procedure of one married or extramarital couple, or a single woman in accordance with the Act's provisions (Article 48 para. 1). If a child or children are born with donated reproductive tissues and/or cells and embryos, the remaining donated reproductive material can be used exclusively for repeated assisted reproduction procedure of the same couple or a single woman (Article 48 para. 2). If a child is not born after the procedure, the remaining donated reproductive tissues and/or cells and embryos can be used for the assisted reproduction treatment of another couple or a single woman (Article 48 para. 3).

According to Article 58 para. 1 of the RS ITBAFP Act, data on the donors of reproductive tissues and/or cells and embryos, as well as the recipient of reproductive tissues and/or cells and the recipient of embryos and the donor-conceived child, are protected and represent a professional secret, in accordance with the regulation governing health care. The obligation to keep professional secrecy is regulated by the RS Health Care Protection Act, which stipulates that health workers and health associates are obliged to keep as professional secrecy all facts and data about a citizen's state of health (Article 169).

The RS ITBAFP Act prescribes that the information about reproductive tissue and/or cell donors and embryo donors cannot be communicated to the recipients (Article 58 para. 2). The Act stipulates that access to the data from the donor's medical documentation is permitted to a physician who places reproductive tissues and/or cells or an embryo into a recipient, if medically justified reasons exist. However, a physician may access no identifying data (Article 58 para. 3). As prescribed by Article 58 para 4 of the Act, a donor's personal data must be replaced by the identification code, which the donor of reproductive tissues and/or cells and embryos receives when registering and entering data into the unique database maintained in the health institution that has a Center for Biomedically Assisted Reproduction (CBAR), or in the Bank of Reproductive Tissues and/or Cells and Embryos (BRTCE) (the procedure for establishing the BRTCE is provided by Article 15 of the Act). The protection of the donor’s personal data shall be carried out in accordance with the regulation governing the protection of personal data (Article 58 para 5 of the ITBAFP Act).

The RS ITBAFP Act emphasizes the need for ensuring the traceability of reproductive tissues/cells and embryos used in medically assisted reproduction procedures. According to Article 25 para. 1 of the Act, the CBAR is obliged to ensure the traceability of reproductive tissues and/or cells and embryos of married or extramarital spouses in homologous in vitro fertilization, while the BRTCE ensures the traceability of donated reproductive tissues and/or cells and embryos.

Data on donors/recipients of reproductive tissues and/or cells or embryos, as well as all medical documentation and records on the assisted reproduction procedure, need to be stored in written or electronic form for at least 50 years after the use of reproductive tissues, cells, or embryos. These data shall be stored in a health institution that includes the CBAR and the BRTCE, and should be destroyed within one year from the expiration of the 50-year period (Art. 59).

The Act provides for the establishment of the Republic Registry under the Ministry of Health of the RS, which will contain data on the donation of reproductive tissues, cells, and embryos (the data kept in the Register are stored permanently) (Article 60 of the RS ITBAFP Act). Data from the Republic Register can be submitted to the court and public prosecutor's offices in accordance with the criminal procedure act (Article 61).

Selection and evaluation of donors of reproductive cells, tissues and embryos, as well as the conditions for being a donor, are regulated by the Rulebook on the selection, testing and assessment of married or extramarital spouses in homologous assisted reproduction, as well as recipients of reproductive tissues and/or cells and recipients of embryos in heterologous assisted reproduction in the CBAR, and donors of reproductive tissues and/or cells and embryo donors in heterologous assisted reproduction in the Bank, adopted by the RS Minister of Health and Social Protection.

3. The right of a child to know his/her origin in the law of Bosnia and Herzegovina

The European trend towards the disclosure of a donor's identity reflects the growing importance given to the rights of a child (*See* Correia, Rego, Nunes, 2021: 71). The UN Convention on the Rights of the Child (CRC) "celebrated as one of the most significant steps taken toward improving the lives of children throughout the world" (Todres, 1998: 159), contains several provisions related to the child's right to know his/her origin. Article 7 of the CRC provides for the child's right to know, as far as possible, his/her parents. According to Article 8 para. 1 of the CRC, state parties shall respect the right of the child to preserve his/her identity, including nationality, name, and family relations as recognized by law without unlawful interference. The family relations referred to in the aforementioned article "form the basis for knowledge of parents, both legal/social parents, and biological or gestational ones" (Kraljic, 2021: 101). The CRC is one of the international human rights instruments listed in Annex 1 of the BiH Constitution, which are to be applied directly in BiH.

The Constitution of Bosnia and Herzegovina and the entity constitutions do not provide for the right of a child to know his/her origin (although, as stated above, the CRC is introduced in BiH legal order through Annex 1 of the BiH Constitution). Relevant provisions related to the child's right to know his/her origin are contained in the entity family laws. The Family Act of the FBiH provides for the obligation of adoptive parents to inform the adopted children of their adoption. According to Article 92 para. 2 of the FBiH Family Act, adoptive parents are required to inform the adopted child about the adoption no later than the child's seventh birthday, or immediately after the adoption if the child is older than 7 years. However, the Act does not provide for any mechanisms for the implementation of the aforementioned obligation, or sanctions for failure of adopted parents to act in accordance with the Act's provisions. Article 112 para. 3 prescribes that an adult adoptee, an adoptive parent and a parent of a child who has given consent for the adoption in accordance with Article 98 of the Act will be allowed to inspect the files of the adoption case. The guardianship authority will also allow an underage adoptee to inspect the file if it concludes that it is in the interest of the adopted child (Article 92 para. 4).

The new Family Act of the RS, adopted in 2023, does not include any provision explicitly referring to the right of the children to know their origins. However, the RS Family Act prescribes the right of the adopted child to be informed about the adoption. According to Article 165 para. 1, the child has the right to know that he/she is adopted, in accordance with his/her age and maturity. The official of the guardianship authority shall inform the future adopters that they have the obligation to tell the child the truth about his/her origin, taking into account the child's age and maturity (Article 165 para 2). Like the FBiH Family Act, the RS Act does not regulate the mechanisms for the implementation of this obligation.

Proponents of abandoning the model of donor anonymity often draw a parallel between donor-conceived children and adopted children. The fact that the entity family acts prescribe the obligation of parents to inform the adopted child of the fact of adoption could be relevant if amendments to the assisted reproduction acts are taken into consideration, i.e., it could serve as an argument for abandoning the model of absolute donor anonymity. Also, it should be noted that none of the entity assisted reproduction acts provide for the obligation that a child born through assisted reproduction procedure be informed about the circumstances of his/her conception (including the fact that a child is born through third-party reproduction). As some authors argue, the right of the child to know the circumstances of his/her conception represents a component part of the right to know the identity of his/her gamete donor (Firth, 2001: 476).

Entity family laws also contain provisions on the possibility of determining the maternity or paternity of children conceived through assisted reproduction, which are directly related to the possibility of determining the identity of the donor of reproductive cells/tissues or embryos. The FBiH Family Act provides for the prohibition of judicial examination or disputing the maternity and paternity of a child conceived in the procedure of medically assisted fertilization (Article 89 para. 1). Exceptionally, a woman who gave birth to a child conceived using another woman's ovum can contest her maternity if, in the process of medically assisted fertilization, the child was conceived without her written consent (Article 90 para. 1). Also, the mother's husband can dispute the paternity of a child born in wedlock, or within a period of up to 300 days from the end of the marriage, if in the procedure of medically assisted fertilization the child was conceived with the sperm of another man, without the husband's written consent (Article 90 para. 2). Given that heterologous assisted reproduction is not allowed in FBiH, the aforementioned provisions could be applied exclusively in relation to the procedures carried out outside the territory of this entity.

The Family Act of the RS stipulates that the paternity of a child conceived by biomedically assisted fertilization cannot be established (Article 153). A husband can dispute the paternity of a child born by his wife, if the conception by biomedically assisted fertilization occurred with the sperm of another man without his consent (Art. 154 paragraph 1). The Act stipulates that its provisions on disputing paternity shall be applied accordingly to disputing maternity.

In BiH, genetic testing can be carried out for the purpose of establishing paternity and maternity of a child. Genetic testing is also available to private persons, but the results of such tests are not legally relevant and cannot be used in court. One of the controversial issues is the absence of mechanisms to make testing mandatory for parties to the proceedings (although the fact that the defendant refused to submit to the testing will be considered relevant to the outcome of the dispute; Order of the RS Supreme Court no. 780P02781619 Rev). According to Article 162 of the RS Family Act, in the procedure for establishing and challenging paternity or maternity of a child, the provisions of the Civil Procedure Act are applied, unless otherwise specified by the Act.

4. Conclusion

Third-party reproduction has enabled a large number of couples worldwide to achieve parenthood. Although an important means of overcoming infertility problem, this type of medically assisted reproduction raises numerous ethical and legal dilemmas. One of the controversial issues of third-party reproduction is whether to allow the donor-conceived child to learn the identity of the gamete donor. A reason for “the growing legislative support for non-anonymous gamete donations is the belief that donor-conceived children have a fundamental moral right to know their genetic origins and that the right should be legally protected by policies that prohibit anonymous donations” (Melo-Martin, 2014: 28). The right of a child to know his/her identity is also emphasized in relevant international documents on children’s rights, as well as in the case-law of regional human rights courts. On the other hand, the aforementioned child’s rights need to be balanced with the privacy rights of donors, which makes regulating the issue of gamete donor’s anonymity extremely complex. An attempt to at least partially overcome the tension in exercising these rights is the introduction of the “double track” system in some countries, such as Denmark, the Czech Republic, and Iceland (Koustas at all, 2020: 466; Blyth, 2006: 251), which implies that gamete donation can be anonymous, or with the disclosure of the donor’s identity. This way, both donors and recipients may exercise choice (autonomy), at the time of donation and conception respectively, although the future options available to any donor-conceived child are restricted by the choice made by his/her parents (Blyth, 2006: 251). A particularly controversial solution, from the perspective of protecting the privacy, autonomy, and dignity of gamete donors, is to retrospectively enable access to donors’ identifying data without a donor’s consent (which is a model that was introduced by the Assisted Reproductive Treatment Amendment Act 2016 of the state of Victoria (Australia); Kelly, 2019).

The analysis of the laws governing the field of assisted reproduction in Bosnia and Herzegovina showed certain weaknesses in the adopted legal solutions. In the FBiH, the basic weakness of the existing legal framework refers to the impossibility of carrying out heterologous fertilization, using donated gametes or embryos. One of the controversial solutions is also the ban on women who are not married or in extramarital community to undergo artificial fertilization. Given that this solution limits the possibility of exercising reproductive freedom for a number of couples/individuals in this entity, it can be considered particularly problematic. The RS ITBAFP Act defines the legal framework for third-party reproduction, but the application of the aforementioned model of assisted reproduction is still in its infancy. Only after the establishment of the appropriate regulatory framework for third-party reproduction in both BiH entities, and its more widespread application in practice, can one expect an intensification of the public debate on the justifiability of the model of donor anonymity (and possible legislative changes regarding this issue).

5. In Sum:

Changes to entity legislation in Bosnia and Herzegovina are necessary. This particularly refers to the Act on Infertility Treatment by Biomedically Assisted Fertilization Procedures of the Federation of Bosnia and Herzegovina (FBiH), which prohibits heterologous insemination (this form of assisted reproduction should be allowed). Also, an explicit prohibition in the FBiH that women not married or cohabiting can be subjected to artificial insemination cannot be considered acceptable. In the Republic of Srpska, whose law allows heterologous fertilization, it would be justified at this point to consider the introduction of the so-called double-track system, which would create an opportunity to realize the children's right to know their own origins (at least some of them), while maintaining respect for the right to privacy and individual autonomy/dignity of a donor, as well as for the parent's right to privacy.

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Chapter 4

The Law in the US

Donor's Anonymity and the Right to know One's Genetic Identity in the United States

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1. Introduction

Developments in assisted reproductive technology and the increasing use of donor gametes have challenged traditional assumptions about family formation. While the law in the United States has moved to recognize new means of establishing legal parenthood, there has been minimal legal reform on the child's identity rights when donor gametes are used. (Cahn, 2023). This lack of regulation may be due, in part, to the structure of the formal fertility market; unlike many other countries, the United States allows donors to be paid for their gametes. A second factor is undoubtedly the politics surrounding reproduction in the US, with significant regulation, even banning of abortion in some states (now made legal by the Supreme Court decision *Dobbs v. Jackson Women's Health Organization*), but with some reluctance to interfere directly with assisted reproductive technologies which are expensive and more often accessed by people with means.

The attitudes of former Vice-President Mike Pence exemplify that perspective: he is staunchly opposed to abortion, yet he and his wife underwent several rounds of in vitro fertilization (Owens and González 2022).

A third factor may be based on US Supreme Court opinions, which have held that the decisions of parents concerning their children deserve "special weight" and deference; that special weight might well include choices concerning the identity of donors (Troxel v. Granville, 2000). The Court's jurisprudence would protect parental rights concerning disclosure, at least while the child is a minor.

Consequently, when donor-conceived offspring and their families have contacted one another, or learned the identity of their donors, this has been done without governmental involvement. A number of developments have resulted in increasing efforts at law reform in the United States. Moreover, the ability to "promise" anonymity is illusory, given technological advances. First, as the number of donor-conceived people grows, and as more donor-conceived offspring learn about their origins (either as children or as adults), they are increasingly advocating for additional information about their donors, leading to more public awareness of, and engagement, with these issues. For example, the U.S. Donor Conceived Council, which describes itself as a "voice for donor conceived people," is one such example of this growing advocacy.[30] (U.S. Donor Conceived Council, 2023).

Second, with growing numbers of single-parent and same-sex families, there is increasing public discussion about the use of donor gametes. A 2022 study of the use of anonymous donor sperm donor at a fertility reproductive center in the Southeast of the US found that nearly 75% of the recipients were single (23.5%) or in a same-sex relationship (50.3%). (Diego et al., 2022).

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[30] In the interests of full disclosure, we are both members of the organization's Advisory Committee.

Third, changing technology, such as the broad availability of direct-to-consumer genetic testing and the increasing sophistication of internet searching, enable offspring to find siblings and the donor – and, for those who did not previously know, to find out they were donor conceived. Moreover, future technologies may reduce, if not eliminate, the need for donor gametes, allowing for the use of the intending parents' own gametes through, for example, in vitro gametogenesis (IVG).

Finally, legislation and proposed laws (e.g., provisions in the Uniform Parentage Act (UPA) 2017, adopted by or under consideration by some states, and a new law passed in Colorado, SB22-224) directly address the possibility of identity disclosure and education around these issues. While the UPA allows the donor to veto disclosure in the weaker form of such laws, Colorado's law takes the stronger form in mandating disclosure. Some in the United States, however, oppose additional regulation, raising questions not just about the pragmatic issues of compliance, but also about constitutional issues, such as privacy (Trachman, 2022a). The concerns about regulating in the reproductive sphere have only heightened after the Supreme Court overturned the constitutional right to abortion in *Dobbs* (Kraschel et al., 2023).

This chapter provides an overview of the regulation of donor conception in the United States, addressing laws concerning anonymity, legal recognition of genetic ties, and it addresses the development of new technologies that may render "third-party reproduction" irrelevant.

2. The Legal Framework of Gamete and Embryo Donation and Donor's Anonymity in the United States

The United States is a federal system, in which each state has jurisdiction over health regulation and parentage issues. Each state sets its own procedures for determining the parentage of children, including children born through ART. The federal government has played a limited role in oversight of the ART industry, and it has only stepped into parentage determinations to ensure that states meet constitutional standards.

At the federal level, two distinct sets of regulation provide minimal oversight of the formal fertility market. First, the US Congress mandates that clinics provide annual reports on the success of their fertility cycles and requires the Centers for Disease

Control and Prevention (CDC) to publish an annual compilation of said data (Fertility Clinic Success Rate and Certification Act, 1992). The CDC defines assisted reproductive technology to include all techniques involving eggs or embryos. It collects self-reported clinic data on when an egg or embryo is used. According to the CDC, 2% of babies born each year were conceived via ART (CDC 2023). Only 5% of ART cycles involve gestational carriers (CDC Fig. 8 2020, fig. 8). By contrast, the CDC does not track children born through sperm donation. The purpose of the data is to measure success and safety. It includes which "cycles" – that is, which single attempts at IVF – use a donated egg rather than the patient's egg.

Second, the Food and Drug Administration (FDA) applies the same regulations to donor gametes as to other human tissue, requiring gametes to be tested for a variety of communicable and sexually transmitted diseases and then quarantined for six months before they can be used to avoid transmission of those diseases.[1] There is no mandated genetic testing, although individual clinics and consumers can undertake their own and some sperm banks do such testing. While records related to gamete donations must be kept for ten years (21 CFR, 2021), donors may not learn whether their gametes resulted in any offspring, and no system tracks the children born through the use of any particular donor's gametes. Nor are donors required to report any medical conditions that develop after donating gametes. Further, federal law does not require verification of donors' information.

One of the few lawsuits considering donors' misrepresentations concerned James Aggeles, who provided sperm to Xytex, an Atlanta based sperm bank. At the time of donation, Aggeles claimed he had graduated from college, had a master's degree, and was pursuing a Ph.D." (Doe 1 v. Xytex Corp., 2017). The court observed that "[n]one of this was true . . . [as Aggeles had actually dropped out of school at that time … had also been hospitalized and diagnosed with psychotic schizophrenia, narcissistic personality disorder, and significant grandiose delusions." (Ibid) Relying on these misrepresentations, Xytex approved Aggeles as a donor within two weeks (Ibid). So far, the sole recourse for such misrepresentations has been private law, in the form of tort suits, although states have begun enacting fertility fraud laws. These developments address the intending parents, the donor, and the entities that collect and sell gametes.

While developments in the fertility fraud area do not address anonymity, the private market and, as discussed below, some states have begun to address this issue. First, sperm banks themselves offer genetic testing and identity disclosure, and some, like The Sperm Bank of California (n.d.), do not sell anonymous sperm. California Cryobank, which claims to be one of the largest banks, offers Anonymous, Open, and ID Disclosure donors (California Cryobank, n.d.). Although Reproductive Medicine Associations of Connecticut (RMACT) also allows for open identity and anonymous egg donors, it cautions somewhat threateningly that, with respect to anonymous donations, "both parties … must agree not to seek information concerning the other" (Reproductive Medicine Associates of Connecticut, n.d.). In addition, an increasing number of sperm banks in the US have developed their own registries (e.g., Seattle Sperm Bank) (US Donor Conceived Council, 2022).

Some sperm banks have, however, had difficulty ensuring or maintaining anonymity by restricting contact between recipients and donors. One case that drew national attention involved arose after Danielle Teuscher, a donor recipient, made contact with her donor's relatives. When she purchased sperm from Northwest Cryobank, she clicked on a box agreeing not to try to contact her donor or learn his identity (other than through the seller). However, Teuscher after pursuing ancestry genetic testing through 23&Me for her donor-conceived daughter, she found a close relative on the site who had indicated that she was "open to contact." Teuscher reached out to the relative who replied, "I don't understand." Teuscher made no further efforts to contact the relative. Nevertheless, Northwest Cryobank sent her a "cease and desist" letter, prohibiting her from contacting the donor or trying to "learn more information about his identity, background or whereabouts." It also threatened to seek liquidated damages of $20,000, and refused to allow her to use the remaining four vials of the donor's sperm – for which she had already paid so she her daughter could have full siblings (Mroz, 2019; Trachman, 2019). Although the legality of the Cryobank's actions is murky, the case indicates that anonymity is serious business.

3. The right of a child to know their origins

In the past, parents were told not to let anyone know that they had used donor conception, and there was even some question about whether their children would be considered illegitimate, even if they were married. (Cahn, 2012, pp. 391-92). Much has changed, and parents are now encouraged to let their offspring know they are donor-conceived, but there are still numerous levels of secrecy.

First, even though parents have become increasingly likely to tell their children that they are donor-conceived, many offspring simply do not know that they are donor-conceived. Second, donor conception agreements from the past, as well as from today, may continue to assume anonymity. There is little legal precedent on the validity, and enforceability, of these documents (Cahn, 2012, p. 737; Entrikin, 2020, p. 833).

The first type of secrecy – failure to disclose donor conception – is under pressure (Samuels, 2018: 447). The Ethics Committee of the American Society for Reproductive Medicine (ASRM), an international fertility organization based in the US that provides ethical and practice-oriented guidelines for its members as well as legislative advocacy on fertility, recommended in 2013 (and again in 2018) that it "strongly" encourages parents to disclose that they have used donor gametes to their offspring.[31] But these are non-binding guidelines, so it is unclear how clinics actually encourage parents to disclose this information. For example, no information is automatically available to offspring about their donor conception, even on birth certificates.

The second type of secrecy - identifying information about donors – is beginning to dissolve.

While the federal government has not yet taken action regarding donor identity disclosure, individual states and the Uniform Law Commission (a national organization that seeks to develop model or uniform laws for state adoption) have taken some steps forward on the issues. This section gives a brief description of the few cases and statutes relating to identity disclosure.

a. Caselaw

State courts have considered requests to disclose a donor's identity but so far, no court has ordered disclosure.[32] In Johnson v. Superior Court, for example, the issue

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[31] At both times, it noted that disclosure is "ultimately the choice of recipient parents" (Ethics Committee of the American Society for Reproductive Medicine, 2013, p. 45; see also ASRM, 2018, p. 601).

[32] For example, in Johnson v. Superior Court, the court recognized that the state's interests outweighed those of the donor (2000, pp. 878–79; see also Cahn, 2014a, p. 1124; Doe v. XYZ Co., 2009, pp. 123–24). Other countries have chosen different approaches to anonymity (Allan, 2016).

concerning disclosure of the sperm donor's identity only arose in the context of a tort suit against a clinic for allegedly providing defective sperm (2000).[33] The court held that information concerning insemination, "including a sperm donor's identity and related information contained in those records" could sometimes be disclosed. The court did not, however, reach the question of whether the offspring could obtain that information because the case concerned tort claims brought by the parents. Nevertheless, the court did state that disclosure might be allowed in certain situations, leaving open that possibility (Cahn, 2009, p. 211).

With respect to half-siblings, there is little law regarding their right to identifying information or to remain in contact. The United States Supreme Court has never ruled that there is a constitutionally protected associational right, even for full siblings. States, however, may have laws that preserve such relationships (Cahn, 2012; Hasday, 2012). As donor conception has increased, many minors who share a donor (a form of half siblings), have formed close relationships. But those relationships often arise through the use mutual consent registries and generally involve parents who are supportive of such relationships (Kramer & Cahn, 2013). Although, increasingly initial contacts are made through direct-to-consumer ancestry testing.

The few cases to consider the rights of donor-conceived half-siblings concern familial-type claims (visitation), not information disclosure.

While federal legislation recognizes siblings' associational claims in foster care (Mandelbaum, 2011, p. 14; Post et al., 2015, p. 329), it rarely recognizes such claims in other contexts (Hasday, 2012; Jones, 1993, p. 1195; Scharf, 2015, p. 125). This (non)recognition of sibling rights at the federal level shows the importance of state law (*Nejaime, 2017).*

b. Statutes

Legislatures in an increasing number of American states have begun to address issues involving donor disclosure, and, as of 2023, the trend in many US states seems to be moving toward the approach of other countries. In 2011, the State of Washington was the first state to enact a statute requiring disclosure of donor-identifying

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[33] The relevant law allows for "inspection" of records relating to the insemination "only upon an order of the court for good cause shown" (Johnson v. Superior Court, 2000).

information and medical history when a child turns 18. Under the law, however, donors could sign an affidavit of nondisclosure at the time of donation, effectively preventing disclosure.[34]

Six years later, the 2017 Uniform Parentage Act provided a template for this approach by modeling itself on the Washington state law (Cahn & Suter, 2022b). While it, too, does not mandate disclosure, it does require fertility clinics to collect the donor's identifying information and the donor to sign a "declaration" as to whether the donor agrees to disclosure. Even if the donor does not consent to disclosure, the clinic must make a "good faith" effort to provide non-identifying information to any donor-conceived child who requests it and also to notify the donor of any request for information (including identifying information), allowing the donor to reconsider the disclosure declaration (UPA, 2017e). A donor who consented to disclosure at the time of donation cannot subsequently withdraw consent because "the equities weigh in favor of holding the donor to his or her original position permitting identity disclosure" (UPA, 2017d; see also Davies, 2020). Indeed, the parents may have relied on the agreement to disclose and discussed that with their children. Regardless of the content of the declaration, the donor is not considered a parent, and has no parental rights or obligations (UPA, 2017b).[35]

In the first few years after promulgation of the Uniform Parentage Act, it was enacted by six states (Uniform Law Commission), with most including the provisions relating to donor conception (Cahn & Suter, 2022b). Regardless of how many more states adopt it, the proposals relating to donor identity disclosure bring attention to the issue and may also change clinics' record-keeping requirements.

The new Act does not mandate identity disclosure, and, of course, offspring who do not know they are donor conceived may not even know to ask about the non-identifying medical history information. A new Uniform Law Commission Study Committee is addressing whether to amend the model act.

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[34] Wash Rev Code § 26.26.750 (2017) was repealed (by Laws 2018 c 6, § 907(75), effective January 1, 2019) when Washington adopted the newest UPA and incorporated the Article 9 provisions for donor identifying information and medical history into § 805; see also S.B. 6037 (2017) on the Uniform Parentage Act.

[35] The Act precludes a donor from using genetic testing to establish legal parentage (UPA, 2017c).

The final development in identity-release legislation is a Colorado law, enacted in 2022. The statute has a number of innovations, although it applies only in Colorado. It would:

- ensure that donor-conceived persons could learn the identity of the donor upon reaching adulthood;
- limit the number of families that can create a child through any particular donor;
- require the availability educational materials to be available to guide people through the process of using a donor to conceive a child; and
- require ART agencies to collect and maintain the donor's identifying information and medical history and to make a good-faith effort to maintain current contact information and updates on the donor's medical history by requesting updates from the donor at least once every three years.

This legislation has prompted concerns that eliminating donor anonymity would (1) affect the supply of donors, (2) compromise their privacy, and (3) increase the cost of gametes. Studies, however, have found to the contrary.
Other states may follow suit.

c. Opposition to Ending Anonymity

The limited regulation concerning anonymity in the United States can be explained by several factors. First, the United States' market-oriented outlook on reproduction eschews governmental control as much as possible. Moreover, with no federal health care system like that of many other countries, each of the states in the US are free to regulate on their own.

An additional barrier to regulation is the strong opposition from the multibillion-dollar fertility industry, which claims it is already highly regulated. But the regulation the industry points to is not compulsory; instead, it is a form of self-regulation. For example, no federal law requires fertility clinics or banks to verify information submitted by donors or to track their medical issues (Cahn & Suter, 2022a) or prohibits anonymity. Not surprisingly, the industry believes that self-regulation is preferable to governmental regulation (Suter & Cahn, 2022a).

A second factor explaining limited regulation in this sphere are concerns about maintaining an adequate supply of gametes. In an effort to test the effect of ending anonymity in the United States on men's willingness to donate sperm, Glenn Cohen and his colleagues conducted a study with actual donors (2016). The study found that approximately 29 percent of active donors would choose not to donate under a disclosure system, and, among those who would, the average *increase* in payment they would want to donate was $60 (Cohen et al., 2016, pp. 470, 482).

The study, by design, is somewhat speculative. It is impossible, however, to estimate what the potential financial implications would be without knowing how large the current donor supply is. Because there are no records on donor sperm in the US, apart from those related to medical testing (Kramer & Cahn, 2013), we do not have that information. Moreover, concerns about supply tend to ignore the possibility of new, innovative recruitment efforts; banks may be able to recruit donors less concerned about money and more concerned about helping create families. Until we better understand the various factors that can motivate donations, it is hard to know the precise impact of various policies. In Australia, for example, the supply of donor sperm increased after anonymity was removed. (Adams et al., 2016).

A third factor that helps explain the limited regulation is politics. Anti-abortion legislation, particularly after the U.S. Supreme Court's 2022 opinion rejected a constitutional right to an abortion, potentially threatens assisted reproductive technology. An additional fear is that regulating families created through ART might restrict who can form families in this manner, with particular concerns that same-sex couples or single individuals might be excluded (Joslin, C.G., Kraschel, K.L, & NeJaime, D., 2023). A related concern is the potential undermining of US conceptions of privacy and autonomy (Suter & Cahn, 2022a) if donors must consent to the prospective release of information. Education, counseling, and informed consent, however, may address those concerns and protect decisional privacy.

d. New Technologies, the Informal Sperm Market, and Donor Disclosure

Two technological developments may move us closer to mandated donor disclosure. The first is the vanishing ability to guarantee anonymity. The second is the prospect of technologies that may eliminate the need for gamete donation in the first place, thereby eliminating concerns about anonymity. In addition to new technologies, the increasing use of an informal sperm market also may move us away from donor anonymity.

The development and proliferation of consumer DNA testing have challenged the ability to maintain secrecy about donor conception, and even donor identity. Millions of people have used these companies to find genetic matches, and that number will only keep increasing (Mendoza & Diallo, 2020; see also Harper et al., 2016). The widespread use of this technology undermines the possibility of preserving anonymity. Banks can promise confidentiality to donors,[36] but genetic testing could easily allow people to learn the identity of the donor, which is something parents and donors must consider when they "choose" anonymity (e.g., Harper et al., 2016; Johnston, 2016; Ishii et al., 2022). In fact, this technology has led to people's discoveries of their donor conception, even when they had no cause reason to question their origins (Copeland, 2017; Crawshaw, 2017). The new reality is that although sperm banks and egg agencies can guarantee that they will not release records, they can no longer guarantee that offspring will not discover the donor's identity through other means. This fact may create a duty on them to counsel gamete donors adequately (Borry et al., 2013).

Notwithstanding the ubiquity of direct to consumer genetic testing, there are risks to using this genetic testing, which may affect its impact on secrecy and donor conception.[37] The two main federal laws that protect genetic privacy, the Genetic Information Non-discrimination Act (GINA) and HIPAA, are, respectively too narrow in scope or only apply to a limited number of actors.[38] Requests for DNA data from law enforcement and courts are already happening, and although testing companies stress that DNA data is "de-identified," data shared with researchers can be re-identified in many cases. As technologies advance, it is unclear whether it will be truly possible to de-identify genetic information in any meaningful way. There are also concerns that a lack of strict legislation could disproportionately impact communities of color, who are already disproportionately in contact with the police.

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[36] For example, as one bank explains, "becoming a Non-Id Release sperm donor means your information will always be confidential and Cryos will never release your identity" (Cryos, n.d.).

[37] https://www.cnbc.com/2018/06/16/5-biggest-risks-of-sharing-dna-with-consumer-genetic-testing-companies.html.

[38] State genetic privacy laws may offer greater protection, although it is not clear how much they would protect in this sphere.

The second set of future technologies may largely eliminate the need for donor gametes. For example, the development of intracytoplasmic sperm injection (ICSI), which allows for the injection of sperm into an egg, may free many infertile heterosexual couples from needing to use sperm donation. The use of mitochondrial replacement, which does require a donor egg, to treat certain forms of infertility or to prevent some genetic diseases is now possible, although this technologically complex procedure (now unavailable in the US) will not require a large number of donors. Moreover, the nucleus of the donor egg would be removed, preventing the transmission of the bulk of the donor's genetic information to the resulting child.

Another potential future reproductive technology, in vitro gametogenesis, would enable the creation of sperm or egg cells through the use of adult cells. This procedure would allow labs to produce an unlimited supply of sperm and eggs genetically related to the intended parents. (Suter, S.M. 2016). Not only would this altogether eliminate the need for donor gametes as a response to infertility, it could also allow same-sex couples to have genetically related children, if, as is theoretically possible, an adult's cells could be used to produce egg and sperm (Suter, 2016).

Finally, the increasing number of single people or those in same-sex relationships who need donor gametes to procreate is changing the dynamic underlying gamete donation. It becomes more difficult to hide the role of a gamete donor when a child has two mothers or two fathers. Further, the recent expansion of the informal markets, where recipients find donors through Facebook or other online sites (Cahn & Suter, 2023) means that the parents are more likely to know the identity of the donor.

The result of these current and potential technological developments in reproduction, changing approaches toward gamete donation, and demands of donor-conceived people, will inevitably work together to influence and shape the future of sperm and egg donation.

4. Conclusion

For various reasons, the United States is slowly moving towards donor identity disclosure. As genetic testing becomes more prevalent, sperm and egg banks increasingly offer open ID donors, and as more countries end anonymity, as a pragmatic matter, anonymity seems unlikely to continue in the United States. As the law begins to catch up to technology and respond to the interests of donor-conceived people, we will continue to see new legal approaches. For providers and sperm banks, a pressing question will be how best to counsel donors, the intending parent(s), and donor-conceived offspring about their options (Cahn, 2017, pp. 379–80).

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Chapter 5

The Law in Israel

Gamete Anonymity

A Review of the Current Landscape in the State of Israel

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1. Introduction

In the domain of assisted reproductive technologies (ART) and family law, Israel emerges as a distinct focal point, where the convergence of innovation, history, and legal dynamics has profoundly influenced discussions on gamete anonymity. Beyond its cultural diversity, Israel's trajectory in this sphere is an intricate narrative shaped by technological advancements, historical nuances, and legal complexities. This paper unravels the layers of this trajectory, tracing the evolution from the inception of reproductive technologies to recent legal shifts. Within these phases lie insights into broader societal changes, where scientific innovation intersects with shifting notions of family, privacy, and identity.

Israeli society stands out for its notable birth rate of 2.9 children per woman,[39] Securing the highest position among OECD countries concerning the average number of children per family.[40] Interestingly, while ultra-orthodox Jews and Muslim Arabs are often regarded as the leading minority groups in terms of population growth, the surge in birth rates is also attributed to an increase in fertility within the secular and traditional population segments.[41]

The high birth rate in Israel is influenced by a complex interplay of various sociological factors, making it challenging to pinpoint a single exclusive explanation for these demographic characteristics.[42] Several sociological theories attempt to shed light on Israel's unique situation in this context. One crucial factor lies within the religious aspect, where a belief in the Jewish commandment ("Pru Urvu" mitzva), underscores the significance of parenthood and the propagation of the procreation. This belief system emphasizes the importance of bearing children for the continuity of Judaism

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[39] The Israeli Central Bureau of Statistics. (2020) Birth and Fertility in Israel. Link.

[40] OECD. (2022) Country Statistical Profile - Israel. Link.

[41] The Taub Center for Social Policy Research in Israel. (2019, February). Why Are There So Many Children in Israel?, Feb. 2019. Link. See also Almog, S., & Bassan, S. (2018). The politics of pro and non-reproduction policies in Israel. J. Health & Biomedical L., 14, 27.

[42] id.

and for the greater goal of an independent and strong Jewish state.[43] Additionally, the communal nature of Israeli society – marked by multiple holidays and close geographic proximity that makes the community significant in the lives of its people, plays a significant role as children and families hold a central position within this community fabric, leading to a strong desire and importance to bring children into the world.[44] Furthermore, parenting in Israel is viewed as a cultural norm or "default." The societal expectation to have children is deeply embedded, and individuals often perceive parenthood as an integral part of their identity and role within the community.[45]

Although the precise social factors behind the high birth rate in Israel may not be fully elucidated, the country's explicit pro-natalist ideology undeniably influences and reinforces the prevalence of childbirth and related practices.[46] Embracing this ideology, the State of Israel has implemented various practices aimed at encouraging childbirth and supporting child-rearing.[47] One such practice, relevant to this discussion, is the liberal approach toward facilitating access to fertility treatments, including to same sex female couples and single mothers who require sperm donations, along with extending financial support to those pursuing these treatments.

The prevalence of assisted reproductive technology (ART) has been steadily increasing, primarily due to a rise in difficulties in conceiving. This is partly attributed to women postponing childbearing and a growing desire to enable parenthood in non-traditional family structures. While some of these medical procedures, such as artificial insemination, including sperm donation insemination, have been in use for many years, others, such as IVF and its advanced modalities, have evolved over the years. In-vitro fertilization (IVF) and its advancements offer treatment options that allow both partners to have genetic offspring. However, there are instances where intended parents still rely on a third-party genetic source, such as a sperm or egg donor, or both. Using a third-party genetic precursor may become necessary to overcome difficulties in conceiving, address genetic conditions, or enable parenting for same-sex couples or single parents.

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[43] Donath, O. (2010). Pro-Natalism and its 'Cracks': Narratives of Reproduction and Childfree Lifestyles in Israel. **Israeli Sociology: A Journal of the Study of Society in Israel**, 11(2), 417-438, 423.

[44] Shapira-Rosenberg, E (Host) Nathan, E (Guest author). (2020, Feb 15). Are Kids a Joy?. 15 [Audio podcast episode]. The Tip of the Iceberg: Divisive Issues on the Israeli Agenda. Beit Avi-Chai Productions. Link.

[45] *Supra* note 7, 418.

[46] *id.*

[47] See *id.*

The utilization of a third-party gene pool introduces us to the topic of anonymity, which will be explored in this paper.

Israel, for years, has demonstrated a remarkable commitment to public investment in fertility treatments.[48] As of today, the accessibility to these fertility technologies is nearly unrestricted, welcoming individuals from various family structures. Consequently, Israel boasts some of the world's highest use rates of these technologies.[49] On the other hand, other means of expanding families, like adoption, involve a cumbersome bureaucratic process and stringent criteria, making it considerably more challenging compared to the easily available and subsidized fertility treatments.[50]

The notion of a "natural family," which centers on the significance of genetic affiliation in establishing parental bonds, significantly influences the state's policies regarding gamete donors' anonymity. This concept becomes evident in the state's approach of "blurring" the donor's identity by mixing the donor’s sperm with the intended father’s sperm in previous days[51]. Additionally, there is a tendency to refer to the use of gametes as a "last resort," only after exhausting all attempts to conceive with the intended parent's genetic material.[52] Maintaining the anonymity of the donor is seen as a way to preserve the absent parental genetic connection, perpetuating the illusion of a "natural family."

In this paper, we will delve into the subject of gamete usage, with a particular focus on the anonymous practice in Israel. We will examine its historical development, both in terms of legal and legislative aspects, and analyze the current legislative measures in place. Furthermore, we will outline what we consider to be a desirable approach concerning identity discovery for gamete donors, considering the "right of the offspring to trace his or her genetic roots" as a fundamental right.

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[48] Birenbaum-Carmeli, D. (2009). Cheaper than a Newcomer: on the political economy of IVF in Israel. **Mitaam**, 18, 65-78, 66-67.

[49] Goldin, S. (2007). *The Joys of Technology: Navigating Fertility in a Pro-Natalist Welfare Nation*. In Y. Yona, A. Kemp, THE CITIZEN DIVIDE: EXPLORING IMMIGRATION, FERTILITY, AND IDENTITY IN ISRAEL. (165-204). J. Van-Leer and the United Kibbutz.

[50] *Supra* note 12, 67-69.

[51] i*d*, 74.

[52] i*d*, 73.

2. Sperm Donations

History and Current State

The use of sperm donations in the State of Israel can be traced back to the early 1970s. During this period, the practice was unregulated and primarily carried out in private clinics, which independently recruited donors and utilized fresh sperm. This approach catered mainly to heterosexual couples facing male fertility issues.[53] Despite the biological disconnect between the father and the resulting child, the anonymity factor allowed couples to raise the child as their own, devoid of any acknowledgment of external genetic contribution. No outward signs or official records indicated the presence of third-party genetic contribution. In the late 1970s, the Ministry of Health introduced regulations that transferred the administration of sperm banks from private clinics to public hospitals.[54] However, even with these regulations in place, informal private treatments persisted[55] until the late 1980s when the Ministry of Health Director General's circular was issued expanded the regulatory framework and imposed a complete ban on private sperm donation.[56]

Starting from the late 1970s, the management of sperm banks and the procedures related to sperm donation have been governed by the People's Health Regulations (Sperm Bank), 1979, along with the periodic Ministry of Health Director General's circulars issued by the Ministry of Health. However, it's worth noting that the definitive resolution of this matter is still pending in the primary legislative framework of the Knesset, the Israeli parliament. The latest circular was updated in 2007, and predominantly addresses criteria for the recognition of sperm banks, while also outlining regulations concerning sperm preservation, the documentation retention process related to both sperm and donor records, and the preservation of anonymity.[57] Emphasizing the importance of anonymity, section 24 of the circular explicitly mandates:

> *“The identity of the donor and the identity of the woman receiving the sperm donation are prohibited from disclosure. This information will*

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[53] i*d*, 67.
[54] Israel’s Public Health Regulations (Sperm Banks) 1979-5739. Link.
[55] *Supra* note 12, 67.
[56] Israel’s Ministry of Health Director General's circular - Operations of Sperm Banks 6/89 Link.
[57] *id.*

> *not be disclosed to the child born as a result of this procedure or to any other person."*

While the demand for donor anonymity remains prevalent and the responsibility of selecting a sperm donor lies solely with the attending physician, the practical implementation differs from this ideal scenario. It has become customary to share certain non-identifying characteristics of the donor, including height, eye color, skin color, and profession, as part of the donor selection process.[58] This practice, however, is made at the discretion of the physician and the sperm bank personnel as it conflicts with Section 20 of the circular, which mandates that the physician should choose the donor without involving the recipients of the donation (as there is no selection process) – recipients are required to sign a consent form wherein they agree not to receive any information about the donor.

In the past, medical professionals aimed to match specific attributes of the intended father, such as skin color, eye color, and even blood type. However, the present approach has shifted, with the "client" – often women, whether single or in same-sex partnerships – expressing their desired characteristics for the donor.[59] This change can be attributed to a shift in the target demographic of sperm banks, which increasingly cater to women without an intended father figure, thereby altering the criteria for donor selection.[60]

This shift in the target demographic of sperm banks is also influenced by scientific advancements, such as Intracytoplasmic Sperm Injection (ICSI), which now provides options for men with infertility issues to conceive genetic offspring under circumstances that would previously have necessitated sperm donation.[61] Couples presented with this subsidized option by the state often opt for it. Medical professionals testify to insisting on this method,[62] and analysis of previous circulars indicates instances where the directive was that "no artificial insemination will be performed from the sperm of a donor ... Only after it became clear that despite the accepted medical

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[58] Zafran, R. (2005). Secrets and Lies: Examining the Right of Sperm Donor Offspring to Discover Their Biological Father's Identity. **Mishpatim**, 35, 519-600, 532.
[59] *Supra* note 12, 73.
[60] *id*, 69.
[61] *id*.
[62] See *id*, 73.

methods, a woman cannot conceive with her husband's sperm alone".[63] Although this directive is absent in the current circular, it reflects the inclination towards a genetically "natural" family, as discussed earlier. Another manifestation of the desire for a "natural" family, or at least an attempt to approximate it, when possible, is evident in section 22 of a previous version of the circular, which stipulates that sperm donation for heterosexual couples should be mixed with the husband's sperm before use. The rationale behind this was to intentionally obfuscate the identification of the specific sperm responsible for the child's conception. This intentional "blurring" was designed to introduce an element of uncertainty into the anonymity, thereby creating a chance (even if statistically minor) that the legal father could also be the biological father. Although Carmeli's research indicates that this directive was scarcely implemented before its removal, it nonetheless underscores the prevailing sentiment and the underlying motivation driving the demand for anonymity.[64]

While the prevailing regulations in Israel permit only anonymous sperm donation, an avenue exists for utilizing non-anonymous sperm donations, albeit from donors located outside the country. Israeli sperm banks can import sperm samples, but individuals also have the option to independently purchase and import sperm, subject to appropriate approval and intermediation through a sperm bank. In instances like these, donors from abroad who are willing to share information about themselves, up to identify to the child resulting from their donation at the appropriate age, can do so.[65]

The egg donation process involves in vitro fertilization (IVF), gained prominence with the advancements in fertility treatments towards the latter part of the 1980s. Around a decade ago, legislative actions were initiated, triggered by a crisis that emerged at the close of the preceding millennium due to irregularities detected in the donation of Israeli eggs. Consequently, the practice of egg donation from Israeli women underwent a

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[63] *Supra* note 18, section 19(a).

[64] Birenbaum-Carmeli, D. (2009). The politics of 'The Natural Family' in Israel: State policy and kinship ideologies. **Social Science & Medicine,** 69(7), 1018-1024, 1020.

[65] Blecher-Prigat, A, Zafran, R. (2016) *Children are Joy: achieving Parenthood for Same-Sex Couples with the Help of Artificial Procreation Techniques*, 404-405. In E. Morgenstern, Y. Loshinsky, A. Harel, THE RIGHTS OF THE LGBTQ COMMUNITY IN ISRAEL: LAW, SEXUAL ORIENTATION AND GENDER IDENTITY. (395-436). Zafririm.

significant decline, and to this day, a shortage persists, despite the fact that legal regulations were established in 2010 to govern egg donation and to incentivize it.[66]

Historically, the matter of egg donation was governed by Public Health Regulations (IVF) 1987. According to these regulations, egg donation was permissible only when sourced from a donor undergoing fertility treatments due to a medical necessity, and these treatments included egg extraction for the donor's personal use.[67] In some instances, women were prompted to donate "surplus" eggs that they did not utilize, sometimes under the influence of their doctors and potentially even through deceptive means by medical professionals. Donations of this nature were carried out discreetly with the doctor's participation[68], maintaining anonymity. This trend, which was widespread but relatively concealed in its extent during the 1990s, experienced a notable decline in the late part of that era due to the emergence of similar irregularities within egg donation practices.

The lack of proper regulations, coupled with a scarcity of available eggs and ensuing irregularities, prompted the creation of a committee consisting of both public and professional members (known as the Halperin Committee). This committee was entrusted with the task of devising recommendations to assist the Minister of Health in establishing a regulatory framework for egg donation. However, a significant time lapse of ten years occurred between the formulation of the committee's suggestions and the implementation of the Eggs Donation Law in 2010. Amidst this period, a response to the scarcity of accessible eggs within Israel came about. An amendment was introduced to the Public Health Regulations, allowing for the importation of donated eggs from foreign women who were not undergoing any form of treatment.[69] In contrast to the emphasis on anonymity surrounding domestic egg donations in Israel, the circular issued regulating the import of eggs aspect did not include a requirement for anonymity, so the donation of eggs from abroad was not subject to the same anonymity stipulations but to the identity regulations of the country from which they were obtained.[70]

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[66] *Supra* note 29, 409.

[67] Public Health Regulations (IVF)1987-5747, Section 4

[68] Atias, A. Yolezri, M. (March 2014). Why do women in Israel not donate eggs, and who pays the price. Haaretz. Link.

[69] Public Health Regulations (IVF)1987-5747, Section 2(a)

[70] Public Health Regulations (IVF)2001-5762.

Today, egg donations in Israel are subject to the Egg Donation Law 2010, which establishes a standard of anonymity for both donors and recipients.[71] The law outlines a range of criteria and conditions that both donors and recipients must adhere to. A notable change introduced by this law, is the inclusion of women who are not undergoing fertility treatments for themselves, as potential egg donors. However, the practical implementation of the law was not without challenges and the number of women willing to undergo the invasive egg donation process remained relatively limited.[72]

While the law enforces the principle of anonymity, a provision exists to accommodate identified donations, wherein a donor designates certain eggs for extraction with a predetermined recipient in mind. However, this form of non-anonymous donation necessitates approval from a review board.[73] Section 22 of the Law, specifies that such approval should be contingent upon considering "religious or social reasons that justify egg donation.".[74] The exact scope of these social justifications is not explicitly defined, although a reference to this issue can be found in the case of ***Moshe v. The Committee for Approval of Agreements for the Carrying of Embryos***, further elaborated upon in the subsequent discussion.

The Egg Donation Law also had ramifications for the prevalent arrangement among female couples, in which one partner acted as both the egg provider and genetic mother, while the other partner carried the fetus resulting from the egg donation, serving as the gestational mother. This arrangement enabled them to both contribute as biological mothers to the child. Initially, the Attorney General granted approval for this type of non-anonymous egg transferences,[75] it was subsequently revoked a few years later after the law's enactment due to the contradiction between the demand for anonymity and the specific medical requirements for receiving an egg donation.[76] A later attempt to challenge this revocation through a petition (which we will discuss below), made by a

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[71] Egg Donation Law, 2010-5770, section 1.
[72] *Supra* note 29, 409.
[73] Egg Donation Law, 2010-5770, section 20(a)1.
[74] Egg Donation Law, 2010-5770, section 22(a).
[75] Blecher-Prigat, A. (2015). *Same-Sex Relationships and Israeli Law*, 156. In saez, M. IUS GENTIUM (pp. 131-161) Vol. 42. Springer Science and Business Media B.V.
[76] *Supra* note 29, 411.

female couple seeking to reinstate the non-anonymous donation, was ultimately unsuccessful and the petition was eventually rejected.

3. Common Law

The matter of genetic information access has received limited attention in Israeli rulings. Furthermore, discussions regarding this topic within family courts to the extent that they occur, have remained mostly confidential, with only minimal publication as most family courts rulings in Israel are. As a result, we lack comprehensive insight into these discussions. Nevertheless, the issue has been tangentially addressed in the Supreme Court (whose rulings are published) in the case of ***Doe vs. the Minister of Health***[77].

The case revolved around a single woman who sought to use sperm donation from a man named Ari Nagel, known to be married and the legal father of three children, as well as the genetic father of dozens of offsprings, to conceive a child through artificial insemination. However, as the process commenced, the hospital realized that Mr. Nagel did not wish to be registered as the father of the unborn child, leading to the cessation of the procedure due to the non-anonymous nature of the sperm donation. It was proven that their intent was for the mother to be the sole legal parent while representing otherwise. The court's ruling took into account various exceptional circumstances of the case. Notably, it highlighted that the designated donor, Mr. Nagel, was a serial donor and that there were misleading statements about his personal situation as well as a deceptive representation agreement (declaring mutual parenthood). The court explicitly stated that accepting a non-anonymous donation contradicted the existing legal frameworks and such an acceptance was deemed contrary to the core principles of the matter, conflicting with public policy, and adverse to the best interests of the child as it would recognize a father who would not be involved in the child's life.

The ***Moshe v. The Committee for Approval of Surrogacy Agreements*** case revolves around an endeavor to reinstate a non-anonymous egg “donation” arrangement in Israel,

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[77] HCJ 4645/18 **Doe v. Minister of Health.**

specifically among same-sex female partners.[78] An extended panel of nine Justices deliberated on the case, leading to a 6 to 3 majority verdict that rejected the endorsement of such a donation (or more accurately – transfer) arrangement. This decision was reached based on its inconsistency with the language and objectives of the law. In this arrangement, one partner would “donate” an egg, which would then be fertilized with an anonymous sperm donation and implanted into the other partner's body to carry the fetus. This approach, which aimed at achieving "co-parenting", was deemed incompatible with the typical disconnection of disengagement of parental bonding in usual cases[79] (established through elements such as the anonymous arrangement outlined in section 39 of the Law). Furthermore, in this specific case, the partner receiving the egg did not fulfill the eligibility criteria outlined in the law, as she lacked a medical need as mandated by the legislation.[80] Justice Rubinstein, who wrote the majority opinion, believed that if the legislature intended to endorse a public health policy that supports joint biological parenthood through egg transfer, it should be explicitly stated by the legislature[81] and that as long as these provisions do not infringe upon the constitutionally protected right to parenthood (as alternative options were available for them) the court should refrain from intervening or granting remedy to the petitioners.[82] The minority opinion, advocating for allowing the requested birth arrangement for same-sex female partners, was divided in its reasoning. Pertinent to our discussion is the viewpoint expressed by dissenting Justice Melcer. He argued that section 22(a)2 of the law, which outlines the factors to be evaluated by the exception review board for non-anonymous donations, should be applicable in this context. He believed that in this particular case, it should be regarded as a pertinent societal factor to be taken into consideration.[83] Nonetheless, this perspective was not embraced, and as far as current knowledge goes, no such egg donation arrangement has been approved by the review board committee up to the present time.[84] It is worth noting that despite this legal stance within Israel, certain female couples have chosen to pursue their joint

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[78] HCJ 5771/12 **Liat Moshe v. The Committee for Approval of Agreements for the Carrying of Embryos.**

[79] *id,* para. 32-35 to the opinion of Justice Rubinstein.

[80] Egg Donation Law, 2010-5770, section 13(e)2.

[81] *Supra* note 42, para. 23 to the opinion of Justice Rubinstein.

[82] *id,* para. 53 to the opinion of Justice Rubinstein.

[83] *id,* para. 6 to the opinion of Justice Melcer.

[84] *Supra* note 40.

parenting aspirations by undergoing fertilization procedures outside the borders of the country.

4. Proposed Law

As previously explained, artificial insemination and the management of sperm banks, including sperm donations, lack primary legislation despite the significance of the matter due to the intricate personal and legal complexities involved, along with the potential impact on fundamental rights. Attempts have been made over the years to address these issues through various bills proposed in 2010, 2016, and 2022. However, none of these bills advanced to a parliamentary vote; they have remained in preliminary discussion stages. Furthermore, even in terms of substance, these bills do not adequately address the concerns of those advocating for the recognition of the right to trace one's genetic heritage.

The 2016 government bill pertaining to this matter maintained the practice of anonymous sperm donation. Under this bill, the only right to information granted to adults pertained to general details, such as whether they were conceived by donation and whether the offspring’s partner/friend/ acquaintance, involved in a joint application, is a sibling. The bill did not provide guarantees for detailed, identifiable, or non-identifying information, leaving the issue of tracing genetic origins largely unaddressed.

5. The Right to Genetic Identity

The entitlement for a person to ascertain the identity of his or her biological progenitor (termed as the entitlement to genetic identity) is an acknowledged prerogative, as comprehended, within the framework of the UN Convention on the Rights of the Child (CRC). Article 7 of the CRC delineates that "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents".[85] Article 8 states that: “States Parties are committed to upholding the child's right to preserve

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[85] UN Convention on the Right of the Child (1989).

their identity...”. The latter part of the article underscores the obligation of state parties to ensure its enforcement when the right is restricted or compromised: “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”. Israel ratified the Convention in 1991, making it a legally binding interpretive foundation for legislation, rulings, and administrative determinations.

In the absence of legislation that expressly or tangibly bestows the right upon an offspring conceived through sperm or egg donation to ascertain their origins, and considering the normative guidelines outlined earlier, asserting the foundation of this right within the Israeli framework becomes challenging. Nevertheless, we contend that the groundwork for acknowledging this right exists, both within the constitutional framework and the context of common law.[86]

Israel’s constitutional landscape does not include a comprehensive Bill of Rights. Nonetheless, it is essential to acknowledge the presence of two Basic Laws within its governance framework, serving as pivotal underpinnings for a wide spectrum of rights. The Basic Laws and their interpretation, as developed through case law over the past three decades, have established a framework that facilitates the recognition of a broad spectrum of human rights. Preeminent among these rights, explicitly articulated in Basic Law: Human Dignity and Liberty,[87] is the right to Human Dignity. This right has been expansively construed to encompass a range of essential human and civil rights. In a notable instance, the Supreme Court addressed paternity claims pursued by a child through his mother against a man alleged to be the biological father. The court established that the right to biological identity is derived from the right to human dignity. In the words of former Supreme Court Chief Justice Meir Shamgar:

> *"The minor is also entitled to human dignity... Among other dimensions, this entitlement extends to preserving personal and human dignity, and to ensuring the realization of other rights in property law and within Jewish family law applicable in Israel. It includes the right to not be*

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[86] Zafran, R. (2005). Secrets and Lies: Examining the Right of Sperm Donor Offspring to Discover Their Biological Father's Identity. **Mishpatim**, 35, 519-600, 532.
[87] Basic Law: Human Dignity and Liberty.

> *recognized as a fatherless child and the demand to ascertain one's paternal identity."*[88]

Since then, the right of children to identity, allowing them to trace their biological parent, has been acknowledged multiple times in similar situations within legal cases.[89] Nonetheless, it is evident that this right, in this specific context, aligns with a child's right to know their parents and actually to *have parents,* which is only tangential to the right to know the genetic donor.

However, the concept and right of "biological identity", in a sense, is still aligned with the focus of this paper – the entitlement to information pertaining to genetic heritage (distinct from the legal parental attribution of genetic material) – was acknowledged, to a certain extent, within the Israeli context, particularly in the realm of adoption, decades ago. The Israeli Adoption Law grants adoptees the prerogative to "unseal the adoption record," affording access to information preserved by the governing body overseeing adoption procedures in Israel.[90] However, access to identifying details, which encompasses the possibility of meeting the biological parent or parents, is contingent upon the explicit agreement of the biological parents themselves, thereby being more limited.

Regarding offspring conceived via gamete donations, the issue of their right to trace their origins has yet to engage in direct and thorough constitutional discourse. Interestingly, the directives stipulated by the Ministry of Health's Executive Director in this context, as well as the regulations outlined in the Egg Donation Law, have not been subject to examination by the Supreme Court. The predominant stance upheld by medical teams opposes the provision of identifying information due to concerns that it could significantly deter donor participation, potentially diminishing the already limited

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[88] CA 5942/92 **Doe v. Doe**, 48(3) 837.

[89] *id*, the opinion of former Chief Justice A. Barak; FC (Tel-Aviv Municipality) 87471/00.

[90] The Child Adoption Act 1981-5741Section 30(a) stipulates that: "*Upon the request of an adoptee who has reached the age of 18, a social worker is permitted to grant the adoptee access to peruse the register pertaining to them under the Adoption Law; In instances where the social worker declines the request, the court is authorized to permit the review subsequent to receiving a report from a social worker in accordance with the provisions of the Adoption Law*". The previous Child Adoption Act from 1960 recognized the right indefinitely. It established in section 27 an unconditional right for the adoptee to review their register when the child reaches the age of 18. In many cases, the adoption registry also includes identifying information regarding the adoptee's biological parents.

Israeli donation "market".[91] The maintenance of anonymity may also align with the preferences of the parents who used these gamete donations and may be worried about their parental status destabilizing and from the potential disruption of the constructed family unit by the donor's involvement. It is worth noting that the absence of challenges to the existing arrangement might be attributed to the increasing availability of independent information in recent years.

Despite the Genetic Information Law's requirement for a family court order to conduct genetic tests for clarifying familial relations[92] (and to confer legal and formal recognition upon their outcomes), practical avenues exist for obtaining information outside of this formal process. Acquiring a genetic test online for personal use is one example of a simple and accessible option. While this self-administered test does not directly guarantee the identification of the donor (unless they are present in the genetic database), due to the extensive number of donations often stemming from the same donor, coupled with heightened curiosity among donor offspring, locating half-siblings becomes quite feasible. Combined with online searches via social networks, in many cases there are means to connect with other relatives. This approach can culminate in the successful identification of not only relatives but potentially the donor, a prospect often pursued with significant determination. Closed Facebook groups within Israel also serve as platforms for locating half-siblings.[93] Once a connection is established, information regarding the donor or relevant details found is openly exchanged. Sometimes finding a half-sibling is enough to satisfy the curiosity and ease the urge to know.

The prevailing conservative stance evident in the regulation of gamete donations and the omission of formally granting rights to offspring appears to harmonize with the prevalent Israeli societal emphasis on cherishing and safeguarding the institution of the “natural” family, which is actively cultivated to secure and promote the right to parenthood. The medical community's argument that the prospect of identifiable donations might discourage potential contributors serves as a deterrent to the

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[91] *Supra* note 2, 567.

[92] Genetic Information Law 5761-2000, section 28(a).

[93] In a conference titled "Sperm Banks in Israel: Medical, Legal, and Bioethical Aspects" held in Netanya Academic College, in Israel on February 20th, 2018, a group of donor-conceived children clamored for the right to know their genetic origins. Several of them were genetic-siblings, who found each other through social media

reformation of the law. Consequently, the prevailing consensus leans towards upholding a steady supply of donations and facilitating the actualization of the right to parenthood, even if it means potentially compromising the welfare or rights of future offspring.

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Chapter 6

The Law and Practice in India

The legality and propriety of anonymous gamete donation, including the impact of new DNA identification technologies

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As an Obstetrician & Gynecologist, I realize there are unfortunate disparities in clinical care provided to various groups of patients. I have also trained in hospital administration and qualified as a lawyer to give a voice to all patient groups. I specialize in Consumer Law, Cyber Forensics and UNESCO Bioethics programmes, and advise clinicians of their duties, whilst supporting patients in asserting their rights. As a qualified Mediator, Arbitrator and Counsellor, I was able to engage with both parties and use their perspectives to achieve early resolution of litigation thus reducing costs and delays. I am regularly involved in conducting CME programs for doctors and carrying out medical camps for the benefit of the under-privileged.

1. Introduction

Medically Assisted Reproductive Technology has been a boon to infertile couples. At the same time certain unethical practices have taken place [in India] which has necessitated the regulation of the services. Two of the most controversial issues raised is the donor's interest in maintaining anonymity of the donated reproductive tissue in an ART [Assisted Reproductive Technology] program and the child's interest in finding out the identity of the genetic parent.

2. Current State of Affairs

Existing Statutory Law: The Assisted Reproductive Technology (Regulation) Act 2021 was enacted for the purposes of regulating and supervising assisted reproductive technology clinics and assisted reproductive technology banks, and to prevent misuse of gametes. Further, its purpose is to ensure the safe and ethical practice of assisted reproductive technology services, addressing issues of reproductive health, including freezing of gametes, embryos, and embryonic tissues. It was also enacted to regulate and supervise research.

The key features of the ART Act, 2021 include registration of ART Clinic and ART Banks, consent of couples to treatment, eligibility of the donors and commissioning couples, prevention of sex-selection, and duties of assisted reproductive clinics in maintenance of records and rights of the child born through assisted reproductive technology. It also has ruled on maintenance of records. The applicable regulations are as follows:

- Eligibility criteria for donors- Only in a bank can a donor donate reproductive tissue. A bank can obtain semen from males between 21 and 55 years of age, and eggs from females between 23 and 35 years of age. An egg donor should be an ever-married woman with at least one alive child of her own who is a minimum of three years of age. The woman can donate eggs only once in her life and not more than seven eggs can be retrieved from her. A bank cannot supply the gamete of a single donor to more than one commissioning party who maybe either a married couple or single women seeking services, or a divorcee or widow.
- Conditions for offering services- ART procedures may only be carried out with the written consent of the commissioning parties and the donor. The commissioning party will be required to provide insurance coverage in favour of the egg donor to cover any loss, damage, or death. Clinics are strictly required to check for genetic diseases before any donation is made by an individual and are prohibited from providing any sex-selective services. This service cannot be availed by couples in a live-in relationship.
- Rights of a child born through ART- A child born through ART will be deemed to be a biological child of the commissioning couple and will be entitled to the rights and privileges available to a natural child of the commissioning couple. A donor will not have any parental rights over the child.
- Duties of ART Clinics and ART Banks- ART clinics and the bank must share information with the National Registry related to:
    a. All acquired data related to the commissioning parties and donors.

    b. All the procedures undertaken.
    c. The outcome of the procedure.

Further, they must maintain records of all donations made for at least 10 years, after which the records must be transferred to the National Registry.

- Offences and penalties- Offences under the Act include:
    a. abandoning, or exploiting children who are born through ART.
    b. selling, purchasing, trading, or importing the collected human embryos, or gametes.
    c. The exploitation of the commissioning couple, woman, or the gamete donor in any form.

These offences will be punishable with a fine between five and ten lakh rupees for the first contravention (6000$ to 12000 $). For subsequent contraventions, these offences will be punishable with imprisonment between eight and twelve years, and a fine between 10 and 20 lakh rupees(12000$ to 24000$0. A court will take cognizance of an offence only on a complaint that is made either by the National or State Board.

3. Common Law:

Using donated sperm in India is usually a private matter as couples do not want their infertility revealed, disturbing the harmonious connection between mother, father, and child (Bharadwaj, 2003). It has been suggested that the use of donated gametes is taken casually by the medical community and there are practices like sperm mixing, transplantation of embryos without consent, or the discarding of embryos by mistake in India (Aquil, 2006). Donor sperm being used in artificial insemination and IVF without the commissioning couple's consent has also been reported (Srinivasan, 2004).

The Assisted Reproductive Technology Act 2021 enacted for regulation of ART clinics in India, states that no ART procedure will be done without the spouse's consent use of sperm or eggs donated by a relative or known friend of either the wife or husband shall not be permitted; the ART clinic will be responsible to obtain sperm from appropriate banks and eggs and provide the couple with information on height, weight, skin colour, educational status, profession, family background, freedom from known diseases like Hepatitis B or AIDS, racial origin. The regulations also state that semen mixing is not permitted; the ART clinic cannot be party to any commercial element in donor programmes or gestational surrogacy and that the child does have a right to seek information about the genetic parent or surrogate and the donor's identity will not be revealed. These rules have been formulated to protect patients as it is believed that several ART clinics are functioning without an infrastructure adequate to deliver these services, and that services rendered may be 'highly questionable' and unethical.

The financial burden on the patients must be considered before they make a decision. The cost for donor sperm range between Rs. 200-600 (5-15 USD) per sample, but it has also been reported in the media that sperm donors receive up to Rs. 5000 (125 USD) and an egg donor between Rs. 10000-20000 (250-500 USD) per sample, which doctors disguise as travelling expenses (Dutta, 2002). The law does not permit actual sale of gametes. The Clinics on behalf of the patients must acquire sperm samples directly from the banks.

The identifying records on donors are maintained by ART banks or the egg/sperm donation agency. However, there is no law requiring donors to update their records when donors marry, change their name, relocate, or acquire new information about themselves. Unfortunately, donors do not contact the agency or bank where they donated gametes if they discover some medical trait or become ill, and do not find it necessary to document the condition for donor offspring.

4. Proposed Law

In balancing the interests of donor offspring and donors, the authors of law must consider whether it is reasonable to hold donors accountable indefinitely for decisions that were more than twenty years earlier, when the donors were much younger. and likely in a different relationship status than at the time their identity is sought by the done.

5. Can Donors Change Their Mind?

Allowing donor offspring to access identifying information about the donor inevitably provides the donor offspring with an opportunity to initiate contact with the donor. Unlike in the Surrogate Law context, where a birthmother is permitted to change her mind about giving up a child at any point up until the birth of the child, a gamete donor loses control over the gamete well before a child is ever conceived. A gamete donor is thus denied the ability to reflect on the decision and to change his or her mind. The reasoning behind this practice is that the interest of the child and the intended parents prevail. But if the law is going to equate the gamete donor with that of birthmother, as in adoption law or surrogacy, changes in the law should mandate giving the gamete donor the autonomy to decide if he or she wishes to maintain anonymity or not.

6. Cultural Determinants of Acceptability

ART healthcare professionals offer information on seven criteria i.e., height, build, colour of eyes, colour of hair, blood group, social background and educational status. If recipients require more information, they are provided with information about marital status, number of children and husband's status.

Healthcare professionals have reported that the commissioning couples' main apprehension about using donor sperm is the lack of a genetic link. The man's concern is about his status in the joint family. One healthcare professional shared a case of a couple where the husband, even after agreeing to using donor sperm, abandoned his wife. Though most healthcare professionals feel that there has been a change in attitude towards using donated gametes, especially if secrecy can be maintained, the use of donated materials is still perceived as socially unacceptable. Some feel that couples did not focus as much on caste and colour as before in the desperation to have a child. But concerns are expressed about education, professional status, religion, and medical history of the donor. It is believed that couples are so hardened by the process of going through infertility testing and treatment that they usually don't ask too many questions about the donated sample, and they readily accept donor eggs, donor semen, donor 'everything'.

However, it has also been observed by healthcare professionals that donated materials are not accepted easily by uneducated and conservative patients, and if they do, it is usually a coercive process. There are some patients who prefer to remain childless or choose not to use donated materials due to religious concerns.

Concerns regarding donor eggs are fewer, though patients are worried about religion, physical characteristics, background, family, medical history and some about caste.

More than half of healthcare professionals who allow the use of donated material in their practice felt that the use of relatives or friend's gametes should not be allowed, since the use of such materials may lead to problems within the families about paternity and property. A case was filed in the court when a woman was deserted by her husband as he started living with the woman who had a child with his donated sperms.

7. Arguments in Favour of Disclosure of Identity of Donor

Advocates for laws permitting or requiring disclosure of donor identity argue that children created by means of ART have an interest in finding both their genetic heritage and the identities of their genetic parents. In addition, a child may desire an opportunity to initiate a relationship with a genetic parent or to find out whether he or she has any siblings. While the above-referenced interests may be considered legitimate, they should be balanced against the donor's interest in maintaining anonymity. Those who support the enactment of laws providing donor offspring with the right to access identifying information argue that such knowledge is necessary to a child's positive upbringing and that states should implement such legislation to do what is in the "best interest" of these children. It is the general consensus that such arguments are flawed because they rely on the assumption that disclosure of the donor identity to the child is in the best interest of all donor offspring. However, no evidence exists establishing that knowledge of identifying information is necessary to the well-being of all donor offspring, nor is there evidence that knowledge of such information is always beneficial.

8. The Rights of the Donor

It is very important to consider the rights of the donor. If it was not for him [sic], the child would not have been conceived. It is a well-known fact that the donor would not agree to be a part of the IVF program, if he or she were not guaranteed privacy and confidentiality of the agreement. Privacy is a fundamental right guaranteed under Constitution of India. (The right to privacy is included as a part of Article 21 'Right to life'. The State would never want to enact any legislature which would abrogate this fundamental right. Moreover, the fear of disclosure would diminish the number of donors, which could considerably affect the IVF program.

In sum, it is unrealistic to expect that donors who agreed to be anonymous donors would welcome disclosure laws. In fact, it is likely that donors would not react positively if confronted by donor offspring later in life.

9. The Rights of the Child

In support of their position in favour of disclosure, the courts often draw parallels between donor offspring and adoptee children and attempt to impute the same line of reasoning as to why knowledge of biological information is necessary to children.

However, unlike adoptees, donor offspring are, in most cases, biologically related to one of their parents. Therefore, the argument that such children need to find out where they came from is not as strong in the ART context. This argument also ignores the fact that donor offspring are likely to have been raised in a positive and nurturing family environment, while the trust, bonding and love between the adoptive children and adoptive parent are likely to be less complete -- especially if there is a racial difference. Knowledge of the donor's identity might not be beneficial for the child if such knowledge causes tension between the child and his or her intended parents. The argument that laws permitting or requiring disclosure of donor identity are in the "best interest" of donor offspring is also problematic because it overemphasizes genetics and underemphasizes the bonds created by a lifetime of nurturing from the child's actual caregivers (intended parents). It has been observed that a genetic relationship is not essential for good social parenting or for the satisfactory social and emotional development of children. Disclosure laws might also have a negative effect on future generations of donor offspring as they could encourage donor offspring to seek to establish relationships with donors at the expense of potential harm to the child's family when donor offspring might never have wanted such information. The donor offspring’s siblings may find it embarrassing to maintain social relationship with each other. Although some Counsellors suggest that knowledge of this identifying information is necessary to a donor offspring's wellbeing, it is not always true. Knowledge of a donor's identity might also stigmatize the child and could have other negative consequences if, in case a donor offspring contacts his or her donor and is rejected.

10. The Interests of the State

It is erroneous to maintain that the State has an obligation to give donor offspring the right to access identifying information about donors. Enacting a state law on this issue requires the State to interfere and assert that it has a strong interest that outweighs the interest of the donor in maintaining his or her anonymous status, essentially giving the donor offspring a positive right. As set forth above, many advocates for laws allowing for disclosure of donor identity urge state legislators to look to adoption law for guidance. However, the State plays a very different role in adoption law than it does in gamete donation. The State is already involved in adoption proceedings because "adoption is a state-created process and status." Therefore, it is easier for the State to show that it has a strong interest in regulating identifying information about adoptee birthparents than to show it has a compelling interest in regulating gamete donation. In the gamete donation context, the State has not been a party to the contract. The State has not denied donor offspring the right to find out their genetic origin. Rather, it has merely left itself out of an already crowded contractual relationship.

Advocates for disclosure cannot simply point to the fact that the State has been able to show that it has a strong interest in regulating disclosure of such information in the adoption law context to support an argument that states will be able to establish a strong interest in the context of gamete donation. Aside from some of the more obvious interests previously addressed, donor offspring may have rather specific and distinct interests at different points in time. At some point a child might have an interest in contacting the donor if he or she needs a bone marrow transplant or perhaps is in need of financial support. The court does not suggest that a child would be able to assert a claim for bone marrow or financial aid. Rather, it has been argued that the specific interests of each donor offspring child are unique, and in some cases a child's interest in finding out identifying information about the donor may be sufficient to satisfy objections of mere curiosity. Perhaps in certain limited circumstances this interest would override the donor's interest to remain anonymous. Proper adjudication of these cases must involve balancing the individual child's interests against his or her donor's interest in privacy. In forming a balancing test, it may be appropriate for legislatures to look to how some courts have decided whether "good cause" is shown to permit adoptees to access their original birth certificate. It is always better for the judge to weigh the interests of different parties on a case-by-case basis before forming a decision.

11. Arguments in Favour of the Rights of Intending Parents

As there is no law mandating disclosure, couples are free to decide whether or not to share this information with their children. If laws are enacted permitting or requiring disclosure of donor identity, more families might decide not to inform their children of their genetic background.

The practical implication of such laws might result in less information being given to donor offspring and that even more attention to privacy should be considered by legislatures when analysing this issue. Therefore, if laws permitting or requiring disclosure of donor identity are enacted, parents might have legitimate reasons for not informing their children of their genetic origin. For example, they might not think it would be in their child's best interest to know such information, especially if it could lead to their child's rejection by the donor. Another reason might be a concern that a relationship between the child and donor could undermine their own relationship with their child. The intended parents have an interest in keeping their family together and protecting their children. These parents would likely also object to the enactment of laws that permit or require disclosure of donor identity on the grounds stated above, that such laws overemphasize the importance of knowledge of identifying donor information and are misleading in that they could give donor offspring a false hope that donors will welcome contact and relationships with them.

Additionally, the donor’s family and siblings may not want to have a friendly relationship with the offspring. They might have an apprehension that it may lead to sharing of property and subsequent financial burden. While the intended parents' interest is different than that of the donor offspring or the donor, it is nevertheless important. This interest should be considered as part of the balancing of the child's interest and donor’s interest. As a policy matter, it is appropriate to respect the intended parents' status as the legal parents and not to exclude their interest in the balancing of interests when deciding on an individual basis.

In sum, the third party to an IVF procedure, the intended parents, have yet another interest in the enactment of laws permitting or requiring disclosure of donor identity. Their interest should not be undermined in the balancing of the competing interests at stake because, as a matter of public policy, the State should not discourage people from having children, even in the most unconventional of ways. In the ART context, the intended parents have been through a great struggle. The intended parents have likely invested a great deal of time, energy, and money to conceive a child they planned to raise and provide for. In many cases, the intended parents went through several cycles of IVF prior to their decision to use a donor and only then decided to use donor gametes after it was determined that this was the only way to achieve a pregnancy. The intended parents' interest is unique in that it is two-sided. This party has an interest that encompasses aspects of their being individuals, as well as their being parents and wanting to do what they believe is best for their child. As it has been observed, many couples that have undergone IVF have decided not to inform their children of their genetic origins, despite almost universal recommendations urging parents to disclose this information. Parents' reasons for nondisclosure differ greatly and it is personal.

12. State of DNA identification technology, whether it is legal and under what conditions.

a. *Legality of DNA testing in India*

DNA paternity testing is the use of DNA profiling to determine whether two individuals are biologically parent and child. The testing is performed by collecting buccal cells from the inside of person’s cheek using a Buccal swab or cheek swab. The collector rubs the inside of a person’s cheek in order to collect as many Buccal cells as possible. The Buccal cells are then sent to a laboratory for testing. DNA profiles are obtained using PCR or RFLP processes. Identification of similar genetic markers are done and test results is correlated.

b. *History*

In the 1980's, Indian courts were of the strict opinion that DNA testing hampers the privacy between the parties to the marriage and cannot be relied upon. In paternity testing, DNA allows positive determination of parenthood but the Supreme Court of India refused to rely on the results of the DNA test and instead valued Section 112 of the Indian Evidence Act, 1872. This clause states that any person born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate son or daughter of the parties to the marriage, unless non-access between the parties to the marriage is satisfactory proved. Will this principle be applied also for a child born through ART technology using donor sperm is matter that remains to be seen.

c. *Current Practice*

In India, it is not legal to conduct a DNA paternity test without prior consent. DNA paternity testing done for personal purposes at home using DNA testing kits cannot be used as evidence in a legal court. But now courts have allowed the testing in cases of child abandonment cases, inheritance, property disputes, maintenance, rape etc where there is judicial necessity to intervene to avail justice. Thus, DNA testing has received legal sanctity in 1989. However, a judgement of the Supreme Court of India in 1993 also highlighted the fact that there is no provision in the Indian laws to force or compel people to undergo blood tests or any other type of DNA testing. DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given. But on 27th April 2012, the Delhi High Court in '*Rohit Shekhant Vs Narayan Dutt Tiwari* settled the issue that such a mandatory testing upon an unwilling person is not violative of the Right of Life or Privacy of a person under Article 21 of the Constitution though the power to direct a DNA test should be exercised after weighing all the "pros and cons" and satisfying the test of 'eminent need' through a court order.

d. *Ease/ Facility/Cost*

The time for denial of admitting DNA evidence is over. In the recent case of *State through CBI vs Amerami Tripathi*, the paternity of a six-month old foetus in the womb of deceased was conclusively established with the help of DNA test. Further, the courts these days is heavily relying in scientific proofs, as in cases of murder and rape. Conviction is made by following the medical evidence. When the criminal courts have accepted the probability of conclusive evidence, it should not be difficult for civil courts to follow the same. But as mentioned before, it should satisfy the test of ‘eminent need’ through a court order.

There are lots of companies doing this service with the cost of about US$ 100/ testing (Rs 8000 INR) and the result being validated in a week’s time.

13. Recommendation and position, Author’s view

My recommendations are that the interests of the Gamete donor, donor offspring and the intending parents should be balanced and due consideration begiven to each of them, before the court takes a final decision. The gamete donor should have the autonomy to decide if he or she wishes to maintain anonymity or not.

Sometimes the specific interests of each donor offspring are unique and so in some cases, the child’s interest in finding out identifying information about the donor maybe more than able to satisfy mere curiosity and may even override the donor’s interest to remain anonymous. The courts may need to balance the individual child’s interest against his or her donor’s interest to privacy. Finally, it is for the judges to weigh the interests of different parties before taking a decision.

The intended parents may have different reasons for nondisclosure of donor identity, and it may be appropriate to respect their status as the legal parents and not to exclude their interests when deciding on an individual basis.

It is not appropriate for legislators to enact laws permitting or requiring disclosure of donor identity. Rather, legislators should evaluate the known competing interests and formulate a balancing test and standards which the courts can apply to individual cases. In this regard, legislators may look to adoption law and the "good cause" standard as a guiding principle. The court should decide the case on an individual basis weighing the merits and demerits in each situation before deciding on favouring either party. The State should continue to allow donor offspring to access information about their genetic heritage and medical history, if *necessary*, but should not extend this right to knowledge of identifying information about donors.

The State should refrain from fulfilling a child's perhaps misconceived short-term wish to access identifying information about his or her donor and should instead focus on what is fair for all parties, our society in general and the future of medical science. If laws are enacted in the future permitting or requiring disclosure of donor identity, states will most likely be required to take further action requiring donors to update key information. If a donor changes his or her name or marries, medical providers will arguably need to modify donor information until the donor offspring reaches majority.

The debate should continue. The ethics behind the testing needs to be deliberated taking the opinions of concerned parties before the anonymity issue is laid to rest.

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Chapter 7

The Law in Portugal

Revisiting Gamete Donor Anonymity in Portugal: Rights, Reasons, and Ramifications

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1. Current State of Affairs

a. Existing Statutory Law: A Short History

With the enactment of Law n. 32/2006 on July 26, 2006, Portugal saw the regulation of Medically Assisted Reproduction (MAR) techniques for the first time. This legislation filled the legislative void that existed before its implementation. MAR techniques encompass a range of procedures, including artificial insemination, in vitro fertilization, intracytoplasmic sperm injection, embryo, gamete, or zygote transfer, pre-implantation genetic diagnosis, and other similar laboratory techniques for gametic or embryonic manipulation (as outlined in Article 2 of the law mentioned above). Despite prior regulatory efforts, Portugal had yet to address these matters effectively.

A decade later, Law n. 17/2016, dated June 20, introduced amendments to Law n. 32/2006, broadening the scope of access to Medically Assisted Reproduction (MAR) techniques. Presently, eligible recipients of these reproductive methods include heterosexual couples and female couples who are married or cohabiting under conditions akin to marriage, as well as single women, irrespective of marital status or sexual orientation (refer to Article 6, paragraph 1). Additionally, recipients must be at least 18 years old unless, due to health, disability, or behavioural reasons, they cannot exercise their rights personally, thoroughly, and conscientiously or fulfil their responsibilities (refer to Article 6, paragraph 2).

As one of the fundamental principles guiding the implementation of these techniques is respect for human dignity, specific regulations regarding free and informed consent are in place. Consent must be explicit and documented in writing in the presence of the responsible physician (refer to paragraph 1 of Article 14). Furthermore, consent plays a crucial role in determining the parentage of the resulting child. The child will be recognised as the offspring of both the recipient and the consenting party. Parentage is established through personal registration or presentation of the consent document. Conversely, the absence of consent for Medically Assisted Reproduction (MAR) allows a spouse or partner in a *de facto* union with the recipient to contest parenthood [1].

In its original form, Law n. 32/2006 established the principle of gamete donor anonymity, as outlined in Article 15, albeit with certain exceptions. Anonymised data could be disclosed only under specific circumstances, such as for health-related purposes concerning the individual born through Medically Assisted Reproduction (MAR). The National Council for Medically Assisted Procreation was also authorised to release information regarding legal impediments to planned marriages, such as verifying consanguinity between the prospective bride and groom. The donor's identity would only be disclosed if contacted and provided express consent. [2]. Furthermore, revealing the donor's identity could be mandated if a court decision acknowledged substantial reasons.

Following Constitutional Court Ruling n. 225/2018 on April 24 [3], which deemed the protection of donor anonymity unconstitutional, Portugal's legislation transformed. Law n. 48/2019, dated July 8, revised Article 15 as follows:

"Article 15

Confidentiality

> 1 – Individuals who become aware of the identities of participants in Medically Assisted Reproduction (MAR) techniques, including surrogate pregnancy situations, are obligated to maintain confidentiality regarding their identities and the MAR procedure itself.
>
> 2 – Individuals born as a result of MAR procedures involving gamete or embryo donation may access genetic information from competent health services once they reach 18 years of age. Additionally, they may obtain information regarding the donor's civil identification from the National Council for Medically Assisted Reproduction.
>
> 3 – Individuals born as a result of MAR procedures utilising gamete or embryo donation may access information about potential legal impediments to their planned marriage once they reach the age of 16.
>
> 4 – For the purposes of paragraph 2, 'civil identification' refers to the donor's full name.
>
> 5 – Notwithstanding the above paragraphs, disclosure of the donor's identity may be permitted for substantial reasons recognised by a court decision.
>
> 6 – The birth record, regardless of the circumstances, including surrogate pregnancy, cannot indicate that the child was born through MAR techniques.

With this updated wording, effective on August 1, 2019, Portugal transitioned to a regime of requiring disclosure of donor identities[94]. However, the law continues to safeguard the anonymity of surrogate pregnant women.[95,96]

b. *Common Law (legal cases)*

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[94] Legally, parents are not obliged to disclose genetic information voluntarily if the individual requests it upon reaching 18 years of age. Nonetheless, individuals conceived through MAR procedures involving gamete or embryo donation have the opportunity to request genetic information from relevant health services if they become aware or suspicious of their origin. Moreover, they can access information about the donor's civil identity from the National Council for Medically Assisted Procreation.

[95] Even before the cessation of the anonymity protocol in Portugal, Law n. 25/2016 of August 22 (which also amended Law n. 32/2006) permitted surrogate pregnancies under specific conditions, stipulating they must be non-commercial and only permissible in cases where there is an absence of a uterus, injury, or illness of this organ that unequivocally and permanently prevents the woman from conceiving, or in clinical circumstances warranting such action (refer to Article 8/2). Despite the modifications introduced by Law 48/2019 of July 8, Article 15 now encompasses surrogate gestation within the realm of confidentiality, a provision that endured even after the aforementioned legal amendments. However, paragraph 3 persisted in permitting the disclosure of the donor's identity for substantial reasons acknowledged by a court decision, thereby excluding the potential divulgence of the pregnant woman's identity from this exception. Rafael Vale e Reis [2] critiques this approach, advocating for a parallel treatment of the two scenarios: the protocol for revealing the donor's identity should extend to disclosing the pregnant woman's identity. According to the author, additional legal clarity is recommended here because failure to interpret the law in light of constitutional provisions safeguarding the fundamental rights at stake may render the law susceptible to being deemed unconstitutional.

[96] It bears emphasising that the current wording of Law n. 32/2016 covers all subsequent legislative amendments. Law n. 59/2007, of 4/09; Law n. 17/2016, of 20/06; Law n. 25 /2016, of 22/08; Law n. 58/2017, of 25/07; Law n. 49/2018, of 14/08; Law n. 48/2019, of 08/07; Law n. 72/2021, of 12/11, and Law n. 90/2021, of 16/12) https://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=903&tabela=leis [accessed on 01.08.2023].

Portugal belongs to the Civil Law legal tradition, also known as the Roman-Germanic family, which originated in Europe. Within this legal framework, the incorporation of Roman law, mainly through applying the *Corpus Iuris Civilis*, stands as a pivotal historical element that unified Roman-Germanic legal traditions. In contrast to other legal systems, the Civil Law family is characterised by a codified legal system where written statutes serve as the primary source of law, taking precedence over other sources. While legal principles hold a secondary position about statutory law, it is essential to note that laws are inherently grounded in legal principles that cannot be disregarded as they represent fundamental ideals inherent to the concept of law itself [4]. The foundation of the Roman-Germanic legal system lies in a systematically organised body of legal norms, with judges playing a crucial role in their interpretation and application. In this legal tradition, where law is the principal source, legislation and jurisprudence complement each other in shaping the legal landscape.

Additionally, while legal doctrine does not directly create law, it holds significant importance, particularly in the education and training of legal practitioners participating in the judicial process.

Frequently, doctrinal discussions surrounding specific legal principles can influence jurisprudence, transforming particular theoretical perspectives into judicial interpretations. From our viewpoint, theory and practice must collaborate harmoniously to ensure a consistent and coherent evolution of the law [5]. An illustrative instance can be found in Constitutional Court Ruling n. 225/2018, dated April 24.[97] This ruling

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[97] This ruling:

i. Declared the unconstitutionality, with broad mandatory effect, of specific provisions of Law n. 32/2006, dated July 26, specifically paragraphs 4, 10, and 11 of article 8, and consequently, paragraphs 2 and 3 of the same article, concerning the allowance of commercial surrogacy with prior authorisation; paragraph 8 of article 8, in conjunction with paragraph 5 of article 14 of the same Law, regarding the lack of provision for revoking the surrogate mother's consent until the delivery of the child to the intended parents; consequently, paragraph 7 of article 8; paragraph 12 of article 8; and paragraph 1 of article 15, insofar as it imposes an absolute confidentiality obligation regarding individuals born from medically assisted reproduction processes using donated gametes or embryos, including surrogate pregnancies, concerning the recourse to such procedures or surrogacy, and regarding the identity of participants as donors or surrogate mothers, as well as article 15 paragraph 4.
ii. Did not declare the unconstitutionality of the remaining provisions of Law n. 32/2006, dated July 26.
iii. Stated that the effects of the declaration of unconstitutionality do not extend to surrogacy contracts authorised by the National Council for Medically Assisted Reproduction, provided that the therapeutic processes of medically assisted reproduction mentioned in article 14 paragraph 4 of Law n. 32/2006, dated July 26, have already commenced.

represents a ground-breaking departure from the previously established legal stance (anonymity), marking a significant shift in perspective concerning the issue of donor anonymity in heterologous Medically Assisted Reproduction (MAR) [2]. Indeed, the national legal discourse had extensively deliberated the right to access genetic origins for years, a point underscored in the ruling.

In this instance, a group of Parliament members petitioned the Portuguese Constitutional Court for the declaration of unconstitutionality, with binding effect, of Article 15 of the MAR Law, specifically paragraphs 1 and 4 (in conjunction with Articles 10, paragraphs 1 and 2, and 19, paragraph 1), on the grounds of infringing upon the rights to personal identity, personality development, and genetic identity (as stipulated in Article 26, paragraphs 1 and 3 of the Constitution of the Portuguese Republic, hereinafter referred to as the CPR), as well as contravening the principle of human dignity (Articles 1 and 67, paragraph 2, subparagraph e) of the CPR), the principle of equality (Article 13 of the CPR), and the principle of proportionality (Article 18, paragraph 2 of the CPR). Some proponents argue that the previous declaration of unconstitutionality regarding the anonymity provision signifies the Constitutional Court's interpretation of Article 26 of the Constitution of the Portuguese Republic as granting every individual the right to know and preserve their identity. [6].

In this regard, the status quo dictates that individuals conceived through assisted reproduction techniques possessed the entitlement to their "biological truth", i.e. the right to be informed about their direct biological lineage. Consequently, there is a legal acknowledgement of the right to access genetic origins in Portugal, constituting an integral facet of the right to personal identity closely intertwined with the autonomous development of one's personality. Put differently, within the context of assisted reproduction, there are no interests deemed so critical that would warrant restricting this right. Consequently, concealing the donor's identity from the offspring cannot be justified. [6].

Furthermore, given contemporary considerations regarding the significance of understanding one's origins as a fundamental aspect of identity formation, the Constitutional Court concluded that safeguarding the anonymity of donors (albeit non-absolute) and surrogate pregnant women (in which case, an absolute rule applies) warrants constitutional disapproval. This signifies that the existing law failed to adhere to constitutional principles and necessitates modification [3].[98]

The declaration of the unconstitutionality regarding the protection of donors' anonymity, with broad mandatory force, has been in effect since the enactment of the rules deemed unconstitutional, dating back to 2006 [2,3].

2. Arguments and Consequences of the Position

a. Arguments in Favour of Anonymity

Arguments were presented in favour of preserving family harmony and protecting the privacy of donors. It was argued that revealing the donor's identity might spark the curiosity of the offspring to seek contact with their biological ancestor. This potential integration of the donor into the family structure could disrupt its stability. Such concerns are believed to deter potential donors, as lack of secrecy is often associated with a decline in donor participation. [6]

Anonymity is linked to donors' rights to self-determination, the unhindered development of their personality, and the establishment of their identity, as our sense of self is inherently influenced by our origins or lack thereof. Primarily, anonymity is intertwined with the right to privacy and family life. [7].

Several authors contend that maintaining anonymity in Medically Assisted Reproduction (MAR) procedures does not constitute arbitrary discrimination against the equality of citizens. They argue that disclosing identities can impinge upon donors' rights and also have adverse effects on non-biological parents. For example, Correia, Rego and Nunes say that the reasons for maintaining confidentiality in gamete donation differ significantly from those related to paternity or adoption inquiries. They highlight that these scenarios have unique historical contexts, where gamete donation lacks the

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[98] The Constitutional Court concludes that by reconciling the demands arising from the essence of these rights with the standard set by the principle of proportionality, such an approach appears unnecessary, even concerning the protection of other fundamental rights or constitutionally safeguarded values, which can always be adequately protected through a legal framework that adopts the opposite stance: allowing anonymity of donors and surrogate mothers solely— and exclusively—when compelling reasons justify it, to be assessed on a case-by-case basis. [2,3]

social and relational aspects present in paternity or adoption. As gamete donation involves solely a biological contribution facilitated by a technique devoid of social relationships, individuals conceived through such means may not inherently have the right to know the donors' identities. It may be sufficient to disclose the origin, method of conception, and genetic traits upon request, particularly to prevent consanguinity. While disclosing genetic heritage respects personal identity and personality development, revealing the donor's identity lacks justification. In this case, mandating donor identification is considered unnecessary for protecting personal identity and may jeopardise other fundamental rights. Additionally, advocating for disclosure in the name of curiosity could pose severe threats to donor rights. Moreover, the potential for claims asserting the right to data deletion presents a compelling argument supporting the non-disclosure of identifying information about gamete donors despite the contrary international trend favouring disclosure rights [7].

It is important to note that according to Article 10, paragraph 2 of the MAR law, donors cannot be considered as the parents of the child to be born.[99] Similarly, Article 21 acknowledges that "[the] semen donor cannot be regarded as the father of the child to be born, with no rights or responsibilities regarding the child." Therefore, the termination of donor confidentiality does not imply the establishment of parentage.

Regarding the argument about the challenges in recruiting donors, Rafael Vale and Reis argue that experience demonstrates that regimes lacking anonymity face difficulties in attracting donors, a circumstance that, while not undermining the operation of MAR, nonetheless presents challenges. Transitioning to a non-anonymous model may initially lead to a gradual decline in donors. Still, it will inevitably occur (at least until adjustments to the donor profile are made to restore balance) [2]. For instance, the Portuguese MAR system struggles with recruiting donors, necessitating the utilisation of biological material from overseas as an alternative. Altogether, abolishing anonymity

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[99] An exception has been outlined in Law no. 72/2021, dated 12th November, which permits the utilization of medically assisted procreation methods involving insemination with the semen of a deceased donor, provided there's explicit consent for parental projects. This amendment, constituting the seventh alteration to Law no. 32/2006 of 26th July (concerning medically assisted procreation), aims to facilitate the realization of planned and consented parental projects. Therefore, following a period designated for thorough consideration of the decision, it is permissible, after the demise of the husband or de facto partner:
a) To proceed with post-mortem embryo transfer;
b) To undergo insemination using the semen of the deceased individual.

exacerbates this situation further. Furthermore, MAR stands to gain from a wider pool of biological materials. With more gametes accessible, healthcare professionals can make more informed decisions regarding the biological material used in MAR, ultimately enhancing success rates [2]. In essence, anonymity could prove beneficial for the beneficiaries.

Conversely, certain authors argue that the concern regarding a decrease in gamete donors is unwarranted. They posit that past experiences have shown the opposite trend: after an initial decline, the number of donors actually increased. Moreover, these donors are perceived to possess higher ethical standards, as they are aware that their donation will be associated with identification. [6].

b. Arguments Against Anonymity

Over the past twenty years, democratic nations have increasingly acknowledged the rights of individuals conceived through assisted reproductive technologies involving donor genetic material to learn about their origins. Consequently, the global consensus on maintaining the anonymity of gamete donors has weakened, with a growing movement advocating for the prohibition of donor anonymity **[7]**.

In Portugal and within the proceedings relating to the Judgment of the Constitutional Court n. 225/2018, of April 24, Article 26, paragraphs 1 and 3 of the Constitution was raised by the applicants in the request for a declaration of unconstitutionality, having been invoked its violation by the regime then in force. We re-iterate the wording of these provisions:

> Article 26
>
> (Other personal rights)
>
> 1 - All individuals are entitled to the rights of personal identity, personality development, civil capacity, citizenship, good name and reputation, image, word, private and family life privacy, and legal protection against discrimination.
>
> (...)
>
> 3. The law shall ensure the personal dignity and genetic identity of human beings, particularly in the creation, development, and utilisation of technologies and scientific experimentation.

As previously elucidated elsewhere [8], according to Paulo Otero, the right to personal identity (outlined in Article 26, paragraph 1 of the CPR) is intended to “ensure what distinguishes each individual as a unique, singular, and irreducible entity.” This right encompasses two distinct dimensions: a) Personal identity possesses an absolute or individual dimension – each individual has a self-defined identity, representing the distinct, indivisible, and non-replicable nature of each human being. Consequently, every human is unique, with an individuality that sets them apart; b) Personal identity also encompasses a relative or relational dimension – each individual’s identity is equally shaped by their ancestors’ familial connections, with particular emphasis on their respective parents. This aspect can be described as a “right to personal history.” [8].

Regarding the absolute or individual dimension of personal identity, it is crucial to emphasise the incorporation of the right to genetic identity. This dimension acknowledges that while human nature remains constant, it finds exclusive expression in each individual, respecting their genetic makeup’s distinctive and diverse nature at the core of their inherent dignity. Regarding the relational dimension of personal identity, it is essential to remember that, as previously mentioned, personal identity also encompasses a notion of connection: each individual, in addition to their inherent and exclusive uniqueness, has their identity shaped, concurrently, by the ‘history' or ‘memory’ within which their existence is situated about other individuals. Thus, personal identity in this dimension encompasses awareness of the ‘history’ of each individual. [8]

According to Giovanna Canellas [6], the right to personal identity, along with other rights outlined in Article 26 of the Constitution of the Portuguese Republic, represents the most distinct expression of human dignity, as articulated in Article 1 of the legal document. Consequently, the rights delineated in Article 26 of the CPR should always be interpreted in alignment with the overarching right to personality, as they represent specific instances of its realisation. The 1997 constitutional revision directly mentioned the right to genetic identity in Article 26, expanding the scope of the right to personal identity. However, its effectiveness depends on the legislative framework defined by the legislature. In contrast, the right to personal identity does not necessitate any specific legal pathway for its enforcement. Therefore, the Constitution advocates for the right to knowledge of genetic ancestry as an integral aspect of the right to personal identity. Consequently, the confidentiality of the donor's identity in the context of MAR becomes problematic.

In summary, as articulated by the same author [6], the analysis of this issue must be conducted in light of the constitutional guarantee provided in Article 26 of the Constitution.

Diogo Leite de Campos asserts that the preservation of the donor's anonymity is unconstitutional and lacks justification from any interest of the individual who requires protection whose dignity and identity must be safeguarded, particularly the child. The child has the right to know their biological parents, as this knowledge is integral to their identity as a human being. To borrow an expression from another source, one could argue that the child represents the advancing past, and a significant part of this past comprises their parents [9].

Supporters of non-anonymity also cite literature showing that numerous individuals conceived through donation techniques desire to connect with their siblings [7], a factor that could pose challenges in specific scenarios [10].

In the current situation in Portugal, Article 15 delineates the disclosure of donor identities upon request while protecting the anonymity of surrogate pregnant women. According to the revised law, individuals born from Medically Assisted Reproduction (MAR) procedures can obtain genetic and civil identification details about donors upon reaching 18 years of age, if requested. Moreover, upon request, they are informed about potential legal impediments to marriage once they attain 16 years of age.[100]

3. State of Technology of DNA identification

The regulation of genetic testing in Portugal is primarily governed by Law n. 12/2005, which defines genetic information and outlines the conditions under which genetic tests related to health can be offered and carried out. Genetic information is considered health information that reveals hereditary characteristics, and its use in medical contexts

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[100] For example, if they contemplate marrying a genetic half-sibling who shares the same gamete donor, although this circumstance is uncommon.

is limited to specific diagnostic and treatment purposes. Decree-Law n. 131/2014 further expands on the regulations established in 2005, outlining conditions for offering and carrying out genetic tests, reporting test results, restrictions on direct sales and promotion of genetic tests, and protocols for the conservation, protection, and destruction of biological material used in testing.

Under this regulatory framework, the direct sale of health-related genetic tests to the public is prohibited, and such tests must be conducted within the healthcare system under appropriate medical supervision. Promoting and disseminating information about genetic tests must accurately represent the tests' characteristics and limitations. Additionally, biological material used in genetic tests must be destroyed after testing unless otherwise specified in the initial consent obtained from the individual.

However, there is an exception for paternity tests, which can be sold directly to the public. Regular paternity tests typically cost around 149€, while paternity tests with legal validity cost around 324€.

4. Conclusions

Portugal's regulation of Medically Assisted Reproduction (MAR) techniques underwent significant changes with the enactment of Law n. 32/2006, followed by amendments under Law n. 17/2016. These laws expanded access to MAR, defining beneficiaries and establishing principles of consent and parenthood. Initially, donor anonymity was upheld, subject to exceptions for health purposes and legal requirements. However, Constitutional Court Ruling n. 225/2018 declared donor anonymity unconstitutional, leading to a revision of the law (Law n. 48/2019) mandating donor identity disclosure.

Regarding legal precedents, Portugal's legal system, rooted in Civil Law, emphasises codified legislation but acknowledges the role of jurisprudence and legal principles. The Constitutional Court's decision in Ruling n. 225/2018 reflects evolving societal perspectives on the right to personal identity and genetic ancestry, invoking constitutional guarantees supporting donor identity disclosure.

Anonymity advocates cite concerns for family peace, donor privacy, and potential negative impacts on donation rates and non-biological parents. They argue that anonymity safeguards donors' rights to self-determination and privacy while preserving the integrity of family units. Additionally, anonymity may not facilitate donor recruitment or ensure a diverse genetic material pool for MAR.

Anonymity opponents highlight international trends favouring disclosure of genetic origins. They assert that the right to personal identity, enshrined in constitutional law, includes access to genetic ancestry information. Advocates for disclosure emphasise the individual's right to know their biological heritage, which is integral to personal identity and development. The Constitutional Court's ruling underscores the importance of aligning legislation with constitutional guarantees of personal dignity and genetic identity.

Genetic testing in Portugal is regulated under Law n. 12/2005 and Decree-Law n. 131/2014, ensuring genetic information's validity, accuracy, and ethical use. Paternity tests, with legal implications, are subject to specific regulations to maintain integrity and confidentiality.

5. Recommendation and Position

Over the past two decades, democratic countries have increasingly recognised the rights of individuals conceived through Medically Assisted Reproduction (MAR) techniques involving donor genetic material to access information about their origins. Consequently, the once prevalent practice of donor anonymity is fading internationally, with growing support for banning it. This stance is rooted in the fundamental rights to personal identity and personal history, affirming that an individual's identity encompasses knowledge of their genetic origins, including donor identification data, to understand their truth.

In the European Union, including Portugal, legislation acknowledges the absence of a legal relationship between descendants in cases of MAR involving donor genetic material, a fundamental principle in MAR. Given established jurisprudence, legislation, and international recommendations, reverting to a model of donor anonymity would be challenging. Nonetheless, certain principles must be upheld:

a. Individuals over 18 years old generally have access to donor identification or the legal age permitted for marriage when relevant to impending marriage, ensuring the protection of the child and public interest in marriage.
b. Except for embryo transfer or insemination with semen following the donor's demise within an expressly consented parental project, there exists no legal parent-child relationship between the donor and the child conceived through Medically Assisted Reproduction (MAR). Additionally, no other familial legal ties are established between potential donor offspring, ensuring clarity and security for all parties involved in the genetic material supply process.

The judiciary plays a crucial role in assessing whether to reveal or withhold the donor's identity on a case-by-case basis, respecting each country's jurisdiction and addressing abusive conduct that violates donor privacy.

Considering evolving legal precedents, international norms, and constitutional guarantees, maintaining donor identity disclosure is advisable in Portugal. This approach upholds personal identity and genetic ancestry rights while preserving family integrity and ensuring the ethical use of genetic information. Judicial discretion should guide individual cases, balancing the rights of donors, recipients, and offspring while respecting privacy and dignity.

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Chapter 8

The Law and Practice in Argentina

Anonymity in Assisted Reproduction in Argentina

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1. Current state of Affairs

In these times of changing global conception about individual and collective rights and family planning aimed at the health of the individual, assisted reproduction technology (ART) is highlighted, along with the evolution of its concepts, scope, and limits.

In many countries ART regulation is not regulated by law, but in the specific case of Argentina, it is currently provided for in Law 26.862/2013 [1]. Later, that law became the object of additional provisions in the Civil and Commercial Code of the Argentine Republic (Law 26,994 of 2016) [2] and other regulations. The difficulty of regulating the matter was justified, especially because of the relatively new techniques and complex technical, ethical and scientific issues that arose in the interim [3].

ART regulation in Argentina covers age limitations in heterosexual couples, homosexuals, and singles. Free access to Argentine citizens and inhabitants with permanent residence is provided, regardless of health, with full coverage of necessary medications, as well as donation of gametes and/or embryos either via non-profit or commercial establishments duly authorized by the Ministry of Health. A single registry of health establishments oversees the techniques and also provides a database registering those born using gametes from third parties with the aim of assuring them, later, of the knowledge of their origin.

Regarding the anonymity of the donor, the legislation provides for two different forms of information. One category is non-identifiable, which include data related to health, and a second pertains to those with identifying data. Depending on the data to be accessed, judicial authorization is still necessary, as will be explained in greater detail below. Thus, in Argentina the anonymity system is still adopted, and only in special and judicial cases can the identity of the donor be revealed.

Argentine Legislation also provides for publicizing authorized public and private reference centres and public information campaigns, with the objective of providing greater access of the procedures to the population, and promoting education and training of specialized human resources in providing these procedures and techniques.

2. Existing Statutory Law

Prior to 2013 (more specifically before Law 26.862 on “medical assisted reproduction” of June 26, 2013 was passed), the province of Buenos Aires, Argentina had its own regulations through the 2010 Law 14.208 [4]. These were not as comprehensive as the current one because they did not apply to homosexual couples and singles who aspire to have children via the technique, allowing only for heterosexual couples and homologous fertilization.

The advances in rights were significant with the publication of the new Argentine law, which in many respects surpassed laws in other South American countries, such as

Chile and Uruguay, which still did not have a specific law on the subject, only bills in progress. Subsequently, Uruguay enacted Law 19.167/2013 [5].

The changes in Argentine law are concerned with improvement of practices and obedience to ethical and bioethical principles, searching for greater equality, safety and efficacy of medical treatments and procedures, as well as making anonymity more flexible, yet still governed by the judicial process.

This paradigm update provided Argentine citizens and inhabitants with permanent residence with free access to assisted reproduction technique procedures, regardless of health, including low and high complexity techniques and donation of gametes and/or embryos by non-profit or commercial entities subject to authorization by the Ministry of Health of the Nation (SECTION 4 – Law 26.862/2013) [1].

Another novelty adopted by the Ministry of Health, was the creation of a single registry to register all health establishments authorized to carry out medically assisted reproduction procedures and techniques.

The law does not set an age limit for those who want to adopt the technique. However, one resolution provides that medically assisted reproduction treatment with ones' own eggs will be carried out in women up to 44 (forty-four) years of age, unless otherwise prescribed by a doctor, and, in the case of donated eggs, carried out in women of up to 51 (fifty-one) years of age (Resolution 1044/2018) [6].

In Argentina, the Civil and Commercial Code also regulates access to donor information. According to (LIMA, 2019:603-8) [7], "gamete considered altruistic", meaning that it is a spontaneous donation which is not linked to a specific patient, and that the donor spontaneously appears to contribute to maintaining the semen stock without any affective bond with the recipient. This means that the process portrays a spontaneous act of giving simply to help and alleviate the suffering of another person.

Another relevant aspect is that the law foresees and encourages the publication of the list of authorized public and private centres, with a view to facilitating the population's access to procedures and encouraging information campaigns with the aim of promoting fertility care for women and men and providing education and continuous training of human resources specialized in medically assisted reproduction procedures and techniques.

3. Legislative proposals

After the Statutory Law of Assisted Reproduction in Argentina – LRAA (Law 26.862/2013) was signed into law [1], Normative Decree nº 956/13 [8] was enacted, aimed especially at comprehensive access to medical assistance procedures and techniques for medically assisted reproduction.

As previously mentioned, the Argentine Civil and Commercial Code was concerned with regulating access to information about the donor, creating a specific chapter, for the "General rules relating to filiation by assisted human reproduction techniques"., additionally provides in CHAPTER 6, entitled "Affiliation Actions. General Provisions." and CHAPTER 7, ("Affiliation Complaint Actions") [2].

Another rule on the subject is Resolution 1.045/2018 [9], which determines the coverage of 100% (one hundred percent) of drugs for assisted reproduction treatments by the agents listed in art. 8th. of the LRAA, which are:

> The Agents of the National Health Insurance System covered by Laws nº 23.660 and nº 23.661, the Entities of Prepaid Medicines (Law nº 26.682), the National Institute of Social Assistance for Retirees and Pensioners (Law nº 19.032), the Social Work of Judicial Power of the Nation, the Directorate of Social Assistance for National Congress Personnel, the Institute of Social Work of the Armed Forces, the University Social Works (Law nº. 24.741) and all agents who provide medical assistance services regardless of their legal status.

Oher Argentine administrative practices also address comprehensive issues involving ART, including the financial support module for highly complex techniques (Resolution 1709/2014) [10]; qualification and inspection of establishments (Resolution 1305/2015) [11]; creation of the national medically assisted reproduction program depending directly on the secretariat for promotion, health programs, and community health. (Resolution 2190/2016) [12], inclusion of medical procedures and

Resolution 1 - E/2017 [13], approval of the informed consent text to be provided all persons undergoing ART treatment (Resolution E 616/2017) [14]; creating of an advisory committee was established by (Resolution E 679/2017) [15]; along with the network of public establishments for medically assisted reproduction (Resolution E 1831/2017) [16] and provides for the treatment of medically assisted reproduction with one's own eggs carried out in women up to 44 (forty-four) years of age when accessing this treatment unless otherwise prescribed by a doctor (Resolution 1044/2018) [17]. This provision also establishes criteria for abortion determination for officials and employees of the nation's judiciary council (Resolution 7/2021) [18].

4. Pending bills

Some of the bills currently being processed by the Argentine legislature include: a) special license for the rights of public and private workers who undergo ART, provided that it is prescribed by a doctor (EXPEDIENTE: 2541-D-2021) [19]; b) regulating the legal consequences and procedure of pregnancy by surrogacy (0445-D-2022) [20]; c) regulating cryopreservation of gametes and embryos for High Complexity Medically Assisted Reproduction Techniques (5353-D-2019) [21]; and d) post mortem fertilization (2149-D-2020) [22]. Finally, we mention a project that has been in progress since 2017, the Comprehensive Law on Medically Assisted Human Reproduction Techniques (0091-D-2017-3431) [23].

5. Arguments and Consequences of the Position

a. Arguments in favour of anonymity

Two main aspects involve the dilemma of anonymity and non-anonymity. These issues have been pondered by legislators around the world, due to concerns related to family feelings and experiences, and the rights of children of assisted reproduction techniques, donors, and adoptive parents, themselves. Currently, several countries seek to safeguard the updating of legislation by considering the rights of the child conceived by ART, so that, as adults, they can know their identity and access their personal origins (such as the new Law in France, which grants the right to children, over 18 years old to request information regarding the donation [24]).

MACHIN expresses citing (Gottlieb et al,. 2000) that the legislative advance in favor of anonymity may not change attitudes, pointing out that "Considering the situation in Sweden, the first country to abolish anonymity, studies indicate that there has not been a significant opening in the position of parents in talking about conception using a donor for their children (Gottlieb et al,. 2000)" (MACHIN, 2016:92) [25].

According to LIMA E ROSSI [8]:

> The paradigm of donor anonymity has changed in many countries around the world and, to make a more accurate analysis, the contextual, legal and regulatory particularities of each society must be reviewed. The treatment that each society makes about the affiliation of donors, whether from an anonymous or non-anonymous system, observing the particularities of the different regulatory systems - for example, in the case of semi-anonymous or relative anonymity systems, introduces an analysis inclination that we could call of "public".

Argentine legislation is based on two distinct forms of information about donor data, one of these is non-identifiable data, which include health-related data (relevant medical data). The second is identifying data, depending on the data you want to access from the donor.

The data of gamete donors and people born of ART are regulated by the Commercial and Civil Code in Argentina) CCCA [2]:

> a) by gametes from third parties must be registered in the corresponding base file for the registration of the birth (art. 563);
> b) information about the donor's medical data can be obtained from a) the intervening health center, when relevant to health; b) the identity of the donor is disclosed, for duly substantiated reasons, evaluated by the judicial authority through the quickest procedure provided for by local law(art. 564);

> c) the determination of filiation derives from prior, informed and free consent, granted in accordance with the provisions of this Code and the special law. When gametes from third parties are used in the reproductive process, no legal bond is generated with them, except for purposes of matrimonial impediments under the same terms of full adoption(art.575).
>
> d) (...) Those born from assisted human reproduction techniques are children of the person who gave birth and the man or woman who also gave their prior, informed and free consent (...) (art. 562); It is
>
> e) When gametes from third parties are used in the reproductive process, no legal bond is generated with them, except for the purposes of matrimonial impediments under the same terms of full adoption(art. 575).

It should be noted that the CCCA makes no distinction between children with regard to filiation, whether arising from marriage or not, natural, adoptive, or by means of assisted reproduction (Art. 558) [2].

This Code also deals with the donation of genetic material by third parties for assisted reproduction. The genetic criterion is placed in second place (art. 575 of the CCCA), giving priority to the person who has given prior consent (art. and freely (article 560 CCCA) [26].

Thus, in summary, the right to donor identification information is already a reality for Argentineans. As a mandatory measure, the ART information must be registered in the base file corresponding to the birth record. Data appearing as non-identifiable designations can be requested by the interested party at any time at the health centre that performed the procedure (relevant medical data). But, to know who the donor is and other identification data, only by means of a judicial measure, provided that it is justified.

However, to obtain identification information, it is still necessary to resort to the judiciary. This request must be based on sufficient reasons to allow the judge a solid basis to invoke the breach of anonymity assured to the donor. It is also observed that no legal bond is generated between the donor and those born from the reproduction technique, except for the purposes of matrimonial impediments and full adoption, regardless of who contributed the gametes. Additionally, those born by third-party gametes must be registered in the corresponding base file for the birth registration, to ensure that the person is aware that he/she was born by Assisted Human Reproduction Technique – (AHRT) with third-party material.

In Argentina, going back about twenty years, maintaining the anonymity of donors was accepted by society, that is, anonymity, was already recognized in the 70s, as explained by LIMA and ROSSI, and a model was adopted for paternity in heterosexual marriage:

> Faced with the proven sterility of the husband, couples resorted to the help of a "lover" to get the wife pregnant and, according to the principle *pater is est quem nuptiae demonstrant,* convert the husband into the father. The introduction of technical assistance in sperm donation prevents adultery, separating sexuality and procreation. In turn, the anonymity to which the physician was committed guaranteed that "nothing had happened"13. [8].

Today, modern thinking considers the importance of children knowing their genetic origin as healthy determinants, especially in relationships with a non-heteronormative family construction. Nevertheless, it is recognized that anonymity must be broken in cases of ART when the process is demystified and understood by society and meets specific legal and regulatory particularities [8].

There are several arguments in favour of maintaining anonymity. According to BARBAS [27], "The defenders of anonymity allege, among other reasons, that:

> - It guarantees the value of the intimacy of private life.
> - It promotes a "possible" well-being of the child (by sparing them from possible traumas resulting from the discovery of a third person in their procreation).
> - It encourages gamete donation.
> - It represents a means of disclaiming the paternity of the anonymous donor.
> - It is a guarantee for the social parents of the impossibility of the anonymous donor to claim any right over their biological child.

> - The disclosure of certain elements about the biological origin of the child may cause some donors to hide essential characteristics for prenatal diagnoses.
> - The attribution of paternity to the spouse of the inseminated woman can be called into question with knowledge of the identity of the donor." [27].

Undoubtedly, there is a conflict between the advocacy of donor anonymity and the rights of human beings generated by ART to know their biological origin and genetic heritage. The dilemma is in the weighting of values, including considering socio-affective affiliation above biological affiliation.

In 2003, GAMA already warned about the purpose of anonymity in preventing discrimination against children resulting from heterologous assisted procreation [28]:

> [...] the principles of secrecy of the procedure (judicial and medical) and the anonymity of the donor have as essential purposes the protection and promotion of the best interests of the child or adolescent, preventing any hateful treatment in the sense of discrimination and stigma relatively to the person [...] resulting from heterologous assisted procreation. (2003, p. 903)

In turn, the constitutional guarantee to the anonymous donor is considered relevant. As GALLO and GRACINDO point out when commenting on Brazilian Provisions 21/2015-CGJ-PE and CNJ 52/2016 [29]:

> The obligation imposed by the provision of a declaration revealing the identity of the donor of the genetic material of a child with AR violates the constitutional guarantee of the anonymous donor, who may seek civil reparation from those responsible for the breach of anonymity. In addition, it results in disciplinary and criminal punishment for breach of professional secrecy, in addition to legal uncertainty in the doctor-patient relationship.

b. Arguments against anonymity

In the opposite direction, defenders of the right to personal and genetic identity understand that “heterologous insemination always involves an attack on the right to an unmanipulated genetic heritage and secrecy in relation to the donor [This] is in clear contradiction with the provisions of the first part of the article 26 of the Constitution of the Portuguese Republic, which recognizes everyone's "the right to personal identity” [30].

SEVERINO explains the basis to justify the right to genetic identity [31]:

> The principle of human dignity overrides the right to anonymity, referring to the recognition of the genetic origin, despite donating his genetic material in order to have their data kept confidential, the semen donor will not have his right sustained when he confronts the right to recognition of the genetic origin.
>
> However, when recognized, the right to genetic origin will not bring any link between the donor and the recipient, and no type of obligation will be transferred to the donor of the genetic material.

With regard to child protection, BARBAS questions: “It is true that anonymity protects the donor and also the recipient. But, does it protect the main target: the child?. [27].

The author argues: “Anonymity:

> - violates the child's right to knowledge of their Genetic Heritage; collides with the fundamental right to know one's biological origins, which constitutes a facet of the right to personal identity (Article 26, number 1 of the Constitution of the Portuguese Republic).
> - conditions the establishment of affiliation.
> - offends the essential right to the person's identity by subalternating it to a debatable right of infertile people to have a child; this is thus instrumentalized.
> - can be a source of future incest.
> - does not allow trying to define, in some concrete cases, the form/procedure of hereditary transmission of certain diseases (some of which may be of late expression and in relation to which it is

> necessary to know how they will also be transmitted to the offspring of the person in question. The spread of known and serious genetic defects and diseases through semen is a given and implies compliance with certain donor requirements.
> - prevents acquiring knowledge of the donor's genetic heritage which is essential to detect genetic diseases and serious anomalies..." [27**].**

In this regard, LÔBO defends the practice [32]:

> Every person has a fundamental right, in the form of a personality right, to claim its biological origin [...] It is one thing to claim the genetic origin, another to paternity investigation. Paternity derives from the state of filiation, regardless of origin (biological or not). The advance of biotechnology allows, for example, heterologous artificial insemination, authorized by the husband [...]. In that case, the child can link the genetic data of the semen donor that appears in the archives of the institution that stored it, for purposes of personality rights, but it cannot do so with the scope of assigning paternity. Consequently, it is inappropriate the use of the paternity investigation action, for this purpose." (2004, p. 54).

Furthermore, total secrecy can have serious consequences, namely when the doctor asks the patient about the clinical "history" of his ancestors [7].

Another reflection involving the theme is that the confidentiality obligations of the parties involved do not include the child born to the technician, who at no time signed any contractual term referring to anonymity. This fact is highlighted by VASCONCELOS, LUTOSA et al. [33].

Added to this provision, according to article 7 of the Universal Declaration on the Human Genome and Human Rights, also from UNESCO, that genetic data associated with an identifiable individual, stored or processed for use in research or for any other use, must having their confidentiality ensured, under the conditions established by law 22. It happens that donor subjects and those who intend to have children are in agreement, but not the children themselves, resulting from these heterologous techniques.

Therefore, it is essential to reflect on the rights of the third party in heterologous artificial fertilization and the right of those who were conceived by this technique.

6. The Rights of the Child - and solutions to the lack of redress

Paradigm shifts are driven by promoting openness and genetically-related communication according to the American Society for Reproductive Medicine [34], the Nuffield Bioethics Advisory Board [35], and the UK Authority on Embryology and Human Fertilization [36]. For example, in the United Kingdom, donation has ceased to be anonymous since 2005. The Human Fertilization and Embryology Act has allowed those conceived by medically heterologous procreation techniques (donated semen, eggs or embryos) to request identification information about donors, after reaching 18 years [36]. Another example is the United States where legislation is statewide and there is already a growing tendency to address questions about donor disclosure, in 2011, the state of "Washington was the first state to enact a law requiring the disclosure of donor information. donor identification and medical history when a child turns 18. Under the law, however, donors can sign a nondisclosure statement at the time of donation, effectively preventing disclosure." (Cahn & Suter, 2022b)[101]

The Convention on the Rights of the Child, approved by the General Assembly of the United Nations, on November 20, 1989, and ratified by Portugal on September 12, 1990, in article 7, determines that the child has, as far as possible, the right to know her or his parents and to be educated by them. [37], The European Parliament Resolution on In Vivo and In Vitro Artificial Fertilization, of March 16, 1989, and the UNESCO Universal Declaration on the Human Genome and Human Rights, enshrined the right to genetic identity as of November 11, 1997 [38]. The German Federal Constitutional Court, following an action to challenge paternity brought by an adult daughter against the mother's husband, in a Judgment of 31 January 1989, considered, based on subparagraph 1 of article 1 and subparagraph 1 of article 2 of the German Constitution, that the right of every individual to know his genetic origins is a fundamental one. [39][102]

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[101] See Chapter 4 by Prof. Cahn and Suter for a further discussion on American law.

[102102]See Chapter 2 by Prof. Margaria for a further discussion on German Law

Argentina itself signed the Convention on the Rights of the Child (CRC) on June 29, 1990 and ratified it on December 4 of the same year before the United Nations Secretariat, and which became effective on January 3, 1991. Internally, Argentina approved the CRC through Law No. 23,849/1990, granting it constitutional status within its legal system [40].

These paradigm shifts may have repercussions on the rights of Argentine children, certainly driving an update in Argentine legislation. These updates would include conditioning donation on allowing identification of donors after the child reaches 18 years of age, removing the requirement for judicial determination and providing for a more open regime with full access to data. Thus, the regulation may move from an anonymous system to a non-anonymous one, not least because the current law already provides for a database to register those born using gamete donation via ART.

However, it is necessary to study the legality of infringing the rights of the donor, which, under the terms of the Argentine law in force, guarantees secrecy. This balancing act would weigh the infringement of accessing the donor’s data (identification information) and the child's right to have access to their own information, as the breach of anonymity currently can only be determined by judicial authorization based on sufficient reasons given to the judge by the interested party.

7. The Rights of Parents - and Remedies for Lack of Reparation

In the context of the procedure, we have complicated situations invoking complex issues.

In the case of AHR, there are also: a) biological parents, who are donors of germinating material; b) socio-affective parents, who are those who used RHA techniques and who had the effective intention of having children; c) the person born, who now claims for knowledge of his historicity. [33]

Would the knowledge of the biological origin, or the social, subjective, and genetic identity of the child born from ART harm the non-biological mothers or fathers?

It is a fact that, in the affective aspect, family relationships are not ensured by biological ties. The family is constituted within criteria of spontaneous love, and the preponderant factor for the establishment of the affectionate relationship is the harmonious coexistence.

Nevertheless, as in the adoptive relationship, there are several cases in which the child, before or after reaching the age of majority, is curious of, not to say needs to know, his or her biological parents, and, in not rare cases, seeks to establish emotional ties with the biological parent.

MOREIRA FILHO argues that the "right to recognition of the genetic origin is a very personal right of the child, not subject to obstacle, waiver or availability by the mother or father [41]. Therefore, for non-biological parents the breach of anonymity can have unexpected consequences, involving emotional dilemmas and even rejection of their own child, including having to accept family life which now includes the biological father or mother.

An inverse situation can also occur when donors who did not have the opportunity to be parents, or even lost their children, may be motivated to seek a possible affectionate relationship with the child they helped generate and, freely and spontaneously wish to leave part of the inheritance to their genetic child. This is possible under the laws of several countries, by will. These cases can also bring annoyance to non-biological parents. as well as the rest of the non-biological family unit, including siblings.

FRITZ argues that sperm or egg donors, by making their genetic material available to banks, do not wish to assume the generated child as a child. When someone donates or sells genetic material so that others can have children, they often do so confident in their anonymity and with the certainty that they will not be responsible for that child. Breaking anonymity is also claimed to make the heterologous insemination system unfeasible, as few will risk donating knowing that in the future someone may knock on their door in search of acknowledgment of paternity [42].

Thus, a dilemma is created, which the legislation of each country can and should assess in a way that does not superimpose one right on the other. With such considerations, we illustrate that if Argentina advances (in the most acceptable ways) the practice of breaching anonymity, which seems to us to be the most legal and socially acceptable approach, it will be able to update its legislation under the terms of the new French Law, which grants the right to children born by TRA, aged 18, to request information regarding their donation [25].

However, to support this new perspective, it is necessary to create a donation- culture, demystifying the process of genetics in heterologous affiliation, and, above all, developing public information campaigns and broad social outreach.

8. State of DNA identification technology (for example, 23 and Me, an American version of DNA identification technology), whether it is legal in each country and under what conditions.

In Argentina, genetic data can be accessed on the Family Tree website and entities similar to 23andme Company. These are sites that offer “online genetic information services, where, with no more than a saliva sample, different types of information related to ancestry can be accessed. Specifically, one company offers, for relatively little money, a deoxyribonucleic acid (DNA) analysis and decoding service in ancestry and family history reports.” [7].

LIMA comments on the Argentine Civil and Commercial Code (ACyC) [7]:

> “But then, this data that was initially negligible – the gamete data – becomes a central component on which the identity of the born is based. The ACyC promotes and protects all information so that the person knows that the TRHA was born with third-party material that, unfortunately, is subject to the type of training, intervention and approach that the health center has had so that people understand that it is a right for the child to know how it was conceived.”.

The National Genetic Data Bank (BNDG or NGDB), formulated 35 years ago, is a public and systematic archive of genetic material and biological samples from relatives of people kidnapped and disappeared during the Argentine military dictatorship [43]. This illustrates that Argentina provides an example of a pioneering experience in forensic genetics.

On September 4, 2018, the BNDG or NGDB published on its website its intent:

> “With the aim of exploring issues related to the increasing incorporation of identification through DNA profiles in judicial processes and analyzing comparative law, the workshop “Genetic identifiers for forensic use: bases for the elaboration of a normative framework in the Argentine Republic” will be held. ". [44].

In a related workshop, participants pointed out the need to “generate knowledge that provides for a bill that unifies the currently disparate criteria that provincial forensic genetic databases have in our country.” [44].

In general, in Argentina, two public gamete banks were founded, but they still do not have the purpose of helping the search for people born of the Assisted Human Reproduction Technique (AHRT). The National Genetic Data Bank (BNDG or NGDB) was reserved for biological samples of relatives and victims of the last military dictatorship to further identification of children kidnapped during the last military dictatorship. Further, it was used to strengthen collaborative mechanisms with forensic geneticists working on the identification of human remains. The National Registry of Genetic Data Linked to Crimes against Sexual Integrity (RNDG or NRGDL) was created to house active biological samples to determine genetic fingerprints that allow convicting or acquitting defendants of sexual crimes [45].

DNA identification technology in Argentina is well-developed and legal. Implementation of criteria for genetic databases is inevitable. However, the process does not now cover children born through assisted reproduction, which makes it impossible to search for people born before the Argentine law that created a database for such records [1].

a. *Cost*

Many countries are developing public DNA databases, as opposed to private ones owned by companies such as 23andMe, as reported by BBCNEW BRAZIL, on May 7, 2019 [46]. Apparently, private tests are not excessively pricey, but still, for many people, they are not feasible. For example, the sale value of the DNA test kit from the company 23andMe, it is US$ 200 [46].

Through an initiative of a North American laboratory and several foundations, a genetics center in Argentina offers a free study that normally varies between 500 and 2,000 dollars, according to T*he Infobae Newspaper*, an electronic site news outlet, on May 14, 2021 [47]. Therefore, as it seems private tests do not have a high price, twhich should be the subject of a cost/feasibility study for the optimization of the technique in the Public Health System of Argentina.

9. Recommendation and position

In the context of genetic identification, it is important to reconcile and harmonize interests that do not always coincide: i.e., the genomic truth with the social truth and the child's interests with those of the biological and social parents. In so doing, it is critical to reaffirm fundamental principles such as justice and equity, non-maleficence, and human autonomy.

The scientific possibility of accessing biological progeny through genetic testing has had numerous repercussions on the right of biological affiliation in the case of assisted reproduction.

Currently, in several legal systems, there is a strong concern with these biological affiliations. Changes have changed and the discovery of this truth has been increasingly privileged. Many are those who defend the right to knowledge of the genetic heritage. However, one must get in touch with the cultural values of each society so as not to weaken the person most interested in this context, which is a child conceived through this technique. As previously warned (25), as an example, in the case of Sweden, where anonymity has already been released in situations of genetic material donation and there is no interest of parents in revealing the identity of the donor and that there are already studies that indicate that “ the literature mentions the children's feelings of confusion and aggressiveness, especially when information is brought to them in adult life about an unknown fact in their history (Snowden; Snowden, 1998; Jadva et al., 2010).(25, p .89)”.

> The establishment of biological affiliation will always be the subject of fundamental choices regarding the elements that should serve as a basis for kinship based on values and interests considered preponderant in time and space. The first of which, the right of the child, in which genomic truth assumes a prominent place. However, it cannot, logically, be the only data taken into account. The balance or correct articulation of the essential cultural values of each society is always under constant construction.…It is precisely here that the great difficulties for the legislator and the magistrate who have to choose and decide. However, "the problem sometimes resides not so much in the choice of biological affiliation, but in the one that seems most desirable for the child".[48]

As we mentioned earlier, the right to information is already a reality for Argentines who want to use technology. But taking everything into account, fulfilment of two criteria is necessary. The information must be recorded in the corresponding base file for the birth registration. Non-identifiable information can be requested by the interested party at any time at the health center that performed the assisted reproduction technique procedure, subject to judicial approval.

To obtain identification information and breach anonymity of the donor, it is still necessary to resort to the judiciary, that is, judicialization of the case. This, in turn, must be based on demonstrating sufficient reasons by the interested party.

It is also observed that no legal bond is generated between the donor and those born from the reproduction technique except for the purposes of matrimonial impediments and full adoption, being children of the one who gave birth and the man or woman who gave prior informed consent, regardless of who contributed the gametes.

The thesis that knowledge of genetic roots is worthless because social affiliation is always more important, is open to criticism. It is one thing to recognize the relevance of social paternity, it is another to postpone the right to genetic identity. This right to identity does not translate into rights with patrimonial effects. Furthermore, if knowledge of the genetic heritage is stripped of legal heritage effects, what pejorative consequences would this identification have for the donor, to the point of making donations unfeasible? This statement of ours in no way diminishes the extremely relevant and noble importance of social affiliation.

It seems important to emphasize that the change in legislation to make the right to genetic identity possible cannot have retroactive effects. That is, in the legal systems in which the principle of anonymity prevails at the time the child was generated, retroactive secrecy cannot be broken under penalty of violating the constitutional guarantee of the anonymous donor. The latter may seek civil reparation from those responsible for the breach of anonymity. In addition, it results in disciplinary and criminal punishment for breach of professional secrecy, in addition to legal uncertainty in the doctor-patient relationship" [27].

In summary, we present the following proposal for legislation:

> "Proposal for legislation"
> Article ...
> Right to genomic identity
> 1 - The individual born by ART via donated gametes has the right, after reaching the age of majority, to know his identity.
> 2 - For the purposes of the preceding paragraph, an application must be submitted by the person himself.
> 3 - Non-identifiable information may be requested by the person concerned (or by his/her legal representative) at the health centre that performed the procedure.
> 4 - If there are serious reasons of a medical nature recognized by a judicial decision, the representative of the interested party may request information regarding the donor's genetic characteristics during his/her minority, including, if necessary, his/her identification.
> 5 - The request referred to in the previous section must be supported by reasoned opinions from two medical geneticists from different institutions.
> 6 - The semen/egg donor cannot be regarded as the father/mother of the unborn child, not having any powers or duties in relation to the child.

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Chapter 9

The Law and Practice in Brazil

Anonymity of Sperm Donors in Brazil

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In Brazil, there is still no law regulating assisted human reproduction (ART). In the National Congress, fifteen bills on the matter were processed, which are now consolidated into Bill No. 1184/2003, awaiting its regular progress. The Brazilian Civil Code contains rules regarding filiation, but they are still insufficient to regulate the issue.

The Federal Council of Medicine (CFM) issued the first Resolution on the matter in 1992, which remained in force until 2010, when Resolution No. 1952/2010 was enacted, later amended by Resolution No. 2013/2013, which, in turn, was amended by Resolution No. 2121/2015, revoked by Resolution No. 2168/2017, and replaced by Resolution No. 2294/2021 and the currently in-force Resolution No. 2320/2022, which outlines the ethical rules to be followed by doctors working in the field.

The National Council of Justice (CNJ), in turn, issued Provision No. 63/2017, which established norms on the civil registration of people born through assisted human reproduction techniques, streamlining the process to enable registration without the need for prior judicialization. In Brazil, the system adopted by the Federal Council of Medicine since 1992 guarantees the anonymity of the donor, with the caveat that, in special situations, information about the donors may be provided exclusively to physicians while preserving the donor's civil identity.

This has been the guidance followed by doctors since 1992. The currently effective Resolution 2320/2022 introduced only one exception, which allows for the disclosure of the donor's identity in cases of donations between relatives, while maintaining the rule of anonymity.

Bill No. 1198/2003, which also aims to regulate the matter, recognizes in Article 9 that the confidentiality may be broken in cases authorized by this law. In these cases, the health service responsible for assisted reproduction must provide the requested information, maintaining professional secrecy and, when possible, anonymity.

Paragraph 1 states that the person born through the assisted reproduction process will have access, at any time, directly or through a legal representative, and upon expressing their free, conscious, and informed will, to all information about the process that generated them, including the donor's civil identity. The health service responsible must provide the requested information while preserving professional and judicial secrets.

It is important to highlight that Resolution No. 2320/2022 of CFM, like the previous laws, limited the donation to the production of a maximum of two pregnancies of children of different sexes in an area of one million inhabitants, which makes the occurrence of incest more difficult. However, while the Federal Council of Medicine admits the disclosure of the donor's identity exclusively to physicians and in special situations, adopting the system of absolute secrecy, the National Council of Justice, through Provision No. 63/2017 currently in force, removed the need for such documentation, but maintained, in Article 17, Paragraph 3, the possibility of knowing the biological ancestry without any restriction, only excepting any legal effects between the donor and the person generated through assisted reproduction, thus causing a collision between the systems of absolute secrecy instituted by the ethical norms of the Federal Council of Medicine.

In practice, therefore, with no formal law on the matter, the issue is subject to the casuistic examination of the courts, resulting in legislative gaps and legal uncertainty on the subject. As a consequence, organizations such as the Federal Council of Medicine and the National Council of Justice, in their eagerness to act as lawmakers, end up regulating the matter beyond their competencies. Therefore, it can be said that the Brazilian scenario regarding this matter is entirely murky.

This mixture of colliding norms demonstrates the true instability that permeates the issue of assisted human reproduction in Brazil: on one hand, ethical norms that doctors must follow; on the other hand, norms that civil registry offices in the country must follow, along with the absence of specific legislation on the matter.

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Chapter 10

Conclusion

Anonymity in Gamete Donation: It's Not so Simple

Professor Barbara Pfeffer Billauer JD MA PhD

In Jules Verne's tale, Phileas Fogg and Jean Passpartout travelled *Around the World in 80 days*, visiting countries whose idiosyncratic values shaped their lives. Our "voyage" through the practices and perspectives incident to anonymity in gamete donation was limited to eight countries. Yet, the culture and history of these countries similarly reflect the reproductive practices in each country, illustrating the broad range of approaches which may affect our lives.

Initially, our debate coalesced into weighing or balancing the rights of the offspring of ART to know their identity (as a corollary of the UNESCO Declaration Right of Human Dignity), versus concerns for donor privacy. along with the subsidiary consideration regarding the nexus between anonymity and sufficient adequate supply of the "product" i.e., gametes- for the betterment of all. But the submissions here add another and poorly addressed concern: the rights and sensibilities of the family unit.

1. Arguments Fostering Anonymity: Fostering Gamete Supply

Those favoring preservation of anonymity claim that its requirement fosters gamete supply, and disclosure would deter donations, reducing "product" availability. The supply argument is nuanced. The claim that gamete 'supply' is a function of anonymity seems driven by the policy of the country in a process of circular reasoning or outcome-determinedness. While many presume that mandated disclosure will diminish supply, Australia, for example, which requires disclosure, found supply increased once the disclosure policy was enacted, upending the supply-side argument of anonymity. By comparison:

> The attitudes of ART patients [in Brazil] about anonymity are conservative, with most participants believing that family relationships may be affected if the child is aware of the origin of his/her conception. These patients also believe that the identity of the gamete donor should not be revealed to the child.[103]

2. Donor Privacy

The privacy of the donor, whose circumstances may have changed since donation rendering disclosure possibly embarrassing in ways that could not be contemplated at the time of donation, might be offset by adequate compensation, which is allowed in the US, but not other countries. Regardless, sperm banks in the US generally allow anoymous sperm donation, some even going to great lengths to preserve that promise, even threatening patrons who use direct-to-consumer testing and social media to evade their contractual promise to refrain from identifying the donor.

By comparison, in India, privacy is a constitutionally protected right. This holy grail leads to expectations of gamete donor anonymity along with a presumed virtual certainty that supply would be diminished if this protected right were vitiated by disclosure. In short, the outcome-determinedness and social constructs and explanation of the policy, and societal expectations, seem to influence the result.

3. Do New Technologies Moot Disclosure Requirements?

Newer technologies, such as direct-to-consumer genetic testing (e.g., 23 and Me), are also claimed to vitiate the potency of anonymity requirements, as it allows children to identify their gamete donor autonomously, rendering legal disclosure requirements moot. This option, however, is virtually ignored by those insisting on anonymity.

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[103] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10471945/#:~:text=Despite%20the%20global%20tendency%20towards,origin%20of%20his%2Fher%20conception

As Dr. Vivek Mady vividly demonstrated in his chapter on India, the requirement for anonymity is far from moot, even with the advent of direct-to-consumer genetic testing, if only because those in countries requiring anonymity are not even cognizant of the possibilities afforded by these new technologies. Another possibility is that states might outlaw such testing (without court order), again attenuating its use.

More important than direct-to-consumer testing, however, might be the advent of even newer technologies, such as IVG, which may effectively facilitate natural conception even in those for whom advanced IVF techniques have failed, thereby obviating the entire gamete donation process. Nevertheless, the commercially viable use of IVG may be long in coming,[104] and hence it behooves us to see if some uniform method of addressing gamete donation can be achieved if only to avoid reproductive tourism and complex international conflict of law questions. Other technologies, which are more likely to be commercially feasible, such as in vitro oocyte rejuvenation (IVOR) might further enable mooting the practice.

4. The Best Interests of the Child

By comparison, the needs of the child to know their biological identity, and even meet their birth family, is poignantly raised by children denied such information, even in countries where anonymity is the rule, such as Israel, as pointed out by Professors Zafran and Becher-Prigat. A testament to the need for biological knowledge is written by neurosurgeon Eban Alexander, once learning the identity of his adoptive parents – is noteworthy:

> [M]eeting my birth family was the first time in my life that I felt that things *were*, somehow, okay. Family mattered, and I'd gotten mine… This was my first real education in how profoundly knowledge of one's origins can heal a person's life in unexpected ways. Knowing where I came from, my biological origins allowed me to see, and to accept, things in myself that I'd never dreamed I'd have been able to.

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[104] Jeremy Thompson The new fertility technology IVG is supposed to change everything. Don't count on it yet, STAT News. Oct. 2, 2023 https://www.statnews.com/2023/10/02/ivg-ivf-replacement-reproductive-technology-hype/

> Through meeting them, I was allowed to throw away, at last, the negging suspicion that I'd carried around without even being aware of it: a suspicion that, wherever I *had* come from, biologically speaking, I had not been loved or cared about. Subconsciously, I had believed that I *didn't deserve* to be loved, or to even exist (…)"[105]

5. New Issues Arising from Disclosure Which May Harm Children

Similar sentiments have been offered by offspring of gamete donors desperate to know a parent's identity[106]. However, simply requiring disclosure may not be the optimal solution without a more thought out and better constructed protocol for managing expectations, understanding, and the handling of sudden knowledge of adverse genetic information, something which seems absent in countries mandating disclosure – or recognized by disclosure's proponents [107].

6. Disclosure is Not a Panacea

Disclosure itself, as experts in the UK have discussed,[108] invokes additional problems such as knowledge of genetic anomalies which requires counselling and support. Indeed, a systematic disclosure requirement is yet to be promogulated in countries favoring abrogation of anonymity.

Laura Bridgens, director of Donor Conceived UK and co-chair of the Donor Conceived Register's Registrants Panel summed up the state of view in countries requiring disclosure, such as the UK:[109]

> Anonymity is arguably now defunct, due to direct-to-consumer DNA testing, meaning that all cohorts of donor-conceived people, donors

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[105] Eben Alexander, Proof of Heaven p. 56, 66

[106] As exemplified by the contributions of the childrens' organization offered at the Netanya and Ayala symposium in 2018.

[107] https://www.londonspermbank.com/blog/ancestry-dna-tests-and-the-implications-on-sperm-donation-and-anonymity/

[108] Id; see also PET news

[109] Opening the Register: How to Handle Disclosure of Gamete Donor Information, PET BioNews RSS - Full (Custom) (cmail20.com), Oct. 2, 2023, as this goes to press.

> and their families need support. Second, … the complexity of the issues arising from donor conception, such as the psychological implications of meeting new relatives, navigating changing family dynamics and the pain of kinship loss. Third, … life-long support is vital, since donor conception leaves lifelong intergenerational legacies, meaning that it affects generations of families connected to both the donor-conceived person and the donor.

Thus, disclosure poses additional problems which have yet to be fully recognized, including generating additional needs facing the children. A recent conference convened by the PET BIONEWS network identified a host of such considerations incident to disclosure, including a need for on-going genetic counselling,[110] something absent in countries been reviewed here. Attention to the "how-to" disclose, the "when-to" disclose, and the "what-to" disclose requires a provision for ongoing support to the offspring. This provision might be well-considered by countries considering abrogating the anonymity rule.

7. The Best Interest of the Child

Another curious phenomenon is that basic doctrine is interpreted in diametrically antithetical views, depending on the favored outcome. For example, the overriding maxim where children are involved, i.e., the "best interest" test, is interpreted according to the positions of those in favor or against anonymity. Where anonymity is favored, the benefits of non-disclosure are deemed more favorable to the child, for example, if the child reaches out to the genetic parent and is rejected. Also, the social stigma of artificial reproduction carries embarrassment in some countries, such as India and to a lesser extent Israel, a stigma that may be borne by the child as well as the rearing parent. By comparison, those fostering disclosure cities its benefits, such as ties to one's past history or legacy manifest in knowledge of one's genealogy.

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[110] Katherine Wade, Opening the Register: How to Handle Disclosure of Gamete Donor Information PET BIONEWS, Oct. 2, 2023

8. Adoption and the Family Unit

The laws of adoption are another instance where its use will be interpreted according to the desired outcome.

While it might be supposed that adoption creates a similar situation and we can such turn to such laws for guidance in gamete donation disclosure in some countries, Dr. Mady demonstrates perceived differences in the adoptive context and that of the gamete donor context in India.

Dr. Mady also points out that the adoption situation (which generally directs disclosure) is distinguishable from gamete donation. Firstly, he reminds us that "unlike adoption, donor offspring are, in most cases, biologically related to one of their parents. Therefore, the argument that such children need to find out where they came from is not as strong as in the ART context," rendering a medical need for genetic information which is allegedly weaker in ART than adoption.

Differences in laws of adoption (which generally mandate identity disclosure at a certain age) from gamete donation manifests in cultural differences. As Dr. Mady informs us, in India, "[u]nlike adoptees, donor offspring are, in most cases, biologically related to one of their parents….[Hence] donor offspring are more likely to have been raised in a positive and nurturing family, environment, while the trust, bonding and love between the adoptive children and adoptive parent are likely to be less complete --- especially if there is a racial difference."

Dr. Mady also argues that the donor disclosure requirement is not necessarily in the "best interest of the child", because it overemphasizes genetics and underemphasizes the bonds created by a lifetime of nurturing from the child's actual caregivers (intended parents). He further notes that "it has been observed that a genetic relationship is not essential for good social parenting or for the satisfactory social and emotional development of the children." This approach would alternatively also support the claim that the laws of adoption make a good prototype for laws of disclosure of identity of gamete donors. Here we see graphically that the same laws and practices can be interpreted in two ways, fostering diametrically opposite outcomes. Again, we see culture driving the interpretation of cultural norms as well as the end-result.

Dr. Mady also makes an eloquent case that disclosure might well disrupt the existing family unit, inviting rivalries and jealousies of outsiders. Finally, Dr. Mady reminds us that the State is already involved in regulating adoption, and hence it has a vested interest in its outcome. By comparison, in IVF, the involvement of the state in legislating disclosure is more tangential, and hence should be "merely left … out of an already crowded contractual relationship."

9. Solutions

A more internationally unified platform would help minimize reproductive tourism and obviate inequities in gamete donation. Several of our contributors, including Professor Igor Milinkovic, suggested a "double track system." Various renditions of this approach provide for dual tier programs, where anonymity would be allowed under various conditions, such as medical need. Other renditions of this approach translate into enhanced payment for non-anonymous product, such as furnished by sperm banks in the US where – for a premium – identity disclosure is possible. A similar situation exists in Israel. Another approach is a case-by-case resolution, where each case is determined based on the particular needs of the child, made by a judicial determination, a situation reportedly existing in Argentina, rather than an across-the-board legislative solution such as a one-sized fits all approach recently enacted in the UK. In sum, as Professor Milinkovic notes, legislative changes are necessary to foster more equitable availability, to balance the "child's right to know", to consider the donor's right to privacy and autonomy, and to preserve the family unit. Finally, bifurcating the disclosure requirement into genetic versus social identity might prove useful. Genetic identity would provide information which might be necessary or helpful in fostering a child's health, providing the best treatment for disease or advising the children on advantageous and genetically-compatible mates, while protecting a donor's biological identity, privacy, and preventing dissemination of socially disruptive information which would affect the donor's present life-style. By comparison, disclosure of social identity also generates problematic concerns, such as where rejection by the biological parent is may not be offset by "human" curiosity and knowledge of one's roots or genealogical knowledge.

In sum, it might be useful to generate scientific studies before ultimate social solutions are engineered to address the "best interests of the child", recognizing that social mores of the country of origin, which may differ from than of a self-professed "enlightened" advocate, itself, is an exercise of human dignity.

As time marches on, we learn more, and morės change. While once the sanctity of the (imaginary and 'regular') family unit and that of parents -whether biological or child-rearing- was given prominence, the needs of the children are becoming more visible and gaining traction. After learning about his biological identity well into adulthood, one neurosurgeon wrote:

> In an instant my view of myself had been totally changed. After that phone call I was, of course, still everything I'd been before: still a scientist, still a doctor, still a father, still a husband. But I also felt, for the first time ever, like an orphan. Someone who had been given away. Someone less than full, 100% wanted. I had never… really thought of myself that way—as someone cut off from my source. I'd never defined myself in the context of something I had lost and could never regain. But suddenly it was the only thing about myself I could see….."[111]

As we bring this project to a close, the FDA is proposing to remove the ban on gay men contributing sperm.[112] This "comes as IVF is more in demand than ever, with a record 86,000 babies born via the procedure in the US in 2021, the latest year available. That's up more than 62 percent from the 53,000 in 2012 when records began — with doctors saying this figure is set to increase."[113]

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[111] Eben Alexander, Proof of Heaven p. 56, 66

[112] https://www.dailymail.co.uk/health/article-13273343/fda-lifts-ban-gay-bisexual-men-donating-sperm.html.

[113] DA to axe ban that prevented gay and bisexual men from donating their sperm, Current rule blocks men who have had sex with other men from sperm donations, But the FDA is now seeking to replace this rule with screening questions LUKE ANDREWS SENIOR HEALTH REPORTER FOR DAILYMAIL.COM 4 April 2024.

Children born of IVF may have an interest or even need to learn a parent's sexual orientation,[114] Hence disclosure may become even more of a necessity. Fringe groups promoting sperm by unvaxxed donors are also developing,[115] further inviting – or even necessitating- inquiry by children of the provenance of their progenating gametes[116]. Black Market sperm groups are proliferating[117] calling for the need for regulation. And this brings us back full circle. Whose needs will be prioritized? Child or Parent?

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[114] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10471945/#:~:text=Despite%20the%20global%20tendency%20towards,origin%20of%20his%2Fher%20conception

[115] *Demand for 'unvaxxed' sperm spikes: Women are turning to shady Facebook groups looking for donors who refused to get the Covid shot*, Jonathan Rinaldi started his own unvaccinated sperm donor Facebook group, The group perpetuates false beliefs that the Covid shot affects fertility. **CAITLIN TILLEY, HEALTH REPORTER FOR DAILYMAIL.COM** 5 November 2023 https://www.dailymail.co.uk/health/article-12699293/unvaccinated-sperm-shady-donors-Covid-shot.html

[116] Id.

[117] *Facebook's black market sperm industry exposed*: Wannabe moms too poor to afford $30,000 IVF are being lured into having unprotected sex or forced to meet men they met online in parking lots to swap semen samples, CAITLIN TILLEY, HEALTH REPORTER FOR DAILYMAIL.COM PUBLISHED: 10 August 2023,https://www.dailymail.co.uk/health/article-12370461/Facebooks-black-market-sperm-donation-industry-exposed-Wannabe-moms-poor-afford-30-000-IVF-lured-having-unprotected-sex-forced-meet-men-met-online-parking-lots-swap-semen-samples.html

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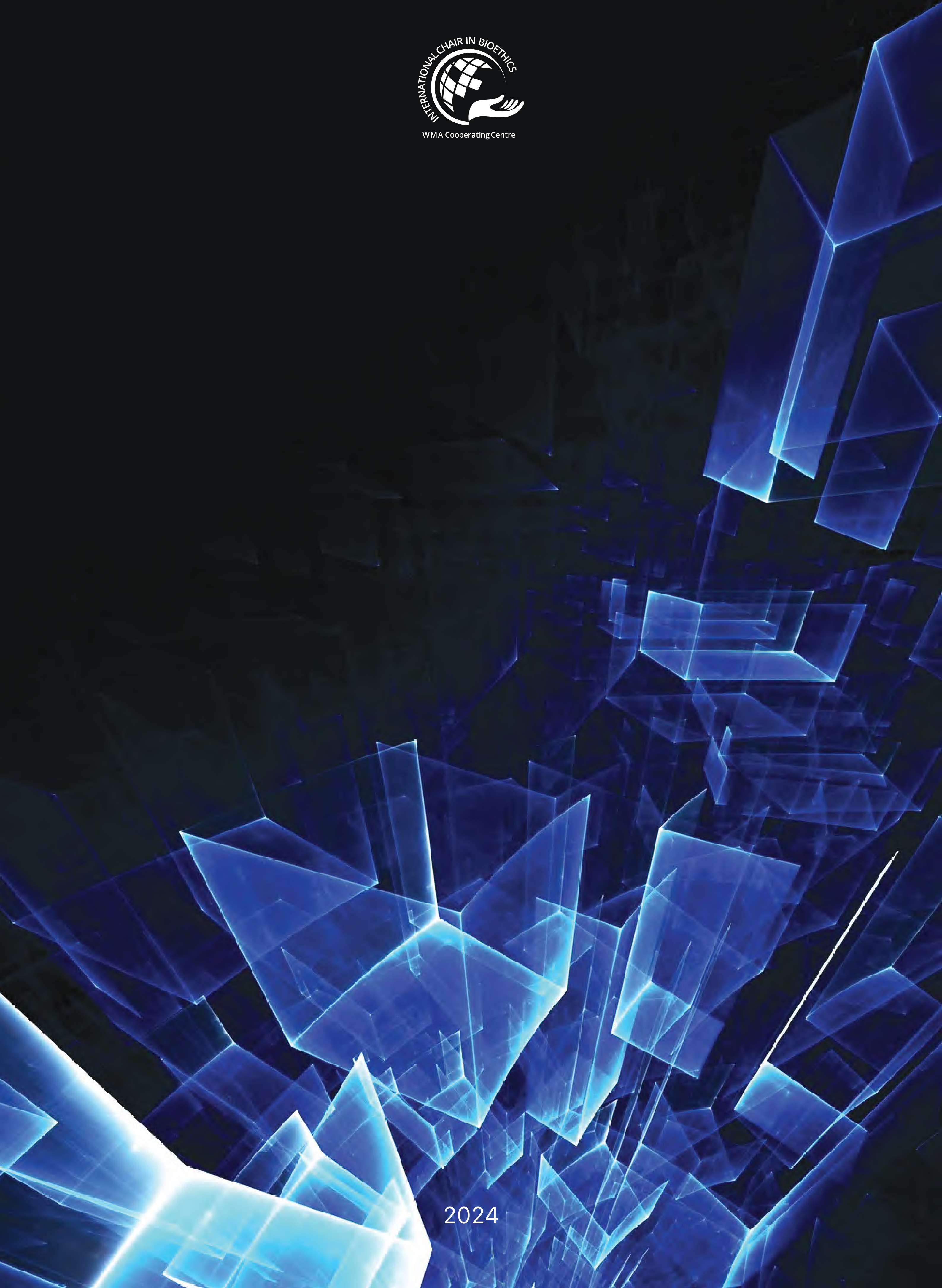

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