

**Assisted Reproduction in European Laws:  
Gender Perspectives on Anonymity**

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*Submitted to  
Central European University  
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*In partial fulfillment for the degree of Master of Arts in Gender Studies*

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Budapest, Hungary  
**June 10, 2008**

## **Abstract**

This paper analyzes Assisted Reproduction (AR) laws from several European countries which disclosed gamete donor's identity. The shift in legislation from anonymity towards disclosure addresses several individual rights and stands for gender differences recognition. On one hand, it deals with the right to private life of the donor and the right to private life of the intended parents. On the other it addresses the right of the child to know his/ her origin. This thesis argues that, by emphasizing the genetic ties between people, the change in the law challenges the understanding of family.

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## Introduction

For many people to have a genetically related child is regarded as an important part of personal fulfillment. Through assisted reproduction (AR) infertile couples or, where the law allows it, single persons can reach this fulfillment. Thus, AR practices increased a lot in the last three decades.<sup>1</sup> International conventions recognize the right of a person to form a family<sup>2</sup> but this right, it has been argued, cannot be stronger than what was called the best interest of the child<sup>3</sup>. Through AR practices which engage gamete donation the reproductive process is undertaken with the substantial involvement of a third person who donates his or her reproductive cells in order to help someone else to become a parent. This third person has rights of his/ her own which have to be taken into consideration during the AR process itself and especially after the donation was completed. Therefore, in AR practices which engage gamete donation there are – besides the state (through legislation) and the “technicians” of AR (i.e. physicians, clinics, etc.) – three main involved parties<sup>4</sup>: the child, the intended parent(s)<sup>5</sup> and the donor<sup>6</sup>. All these parties have intertwined interests, so when one analyzes one party, one has to take into consideration the other two. The whole process starts with one or two infertile persons

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<sup>1</sup> After the birth of the first child conceived through in vitro fertilization (IVF) from 1978, the AR practices become very popular among infertile couples or single people. Mary Warnock, *A Question of Life* (Oxford: Basil Blackwell, 1985), 4.

<sup>2</sup> Article 12 of the European Convention on Human Rights states that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” Hellenic Resources Network, <http://18.85.3.140/docs/ECHR50.html#C.Art12> (accessed May 24, 2008).

<sup>3</sup> Article 20 (1) of the Convention on the Rights of the Child 1989 provides as follows: “A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State”. See also the Council for Science and Society, *Human procreation. Ethical aspects of the new techniques* (Oxford: Oxford University Press, 1984), 45.

<sup>4</sup> I use here the generic term of parties since there can be two intended parents which are regarded here as one actor.

<sup>5</sup> I refer to them as intended parents, since they are the ones who want to have a child.

<sup>6</sup> I focus on these three parties because I look at individual rights and at the way in which they are interrelated.

who wish to have a child. If this infertility can be “solved” through gamete donation, then a donor is looked for and an authorized clinic undertakes the AR process.

For many years the donor was kept anonymous in many countries and the clinics were required not to disclose his/ her identity to the intended parents, or to the child. The most important argument for maintaining the donor’s anonymity regards the willingness of people to donate. It has been argued that once the donor’s identity is disclosed there will not be many people to donate, since this could influence their lives and their family members’ lives. On the other side, a strong argument for disclosure was related with the child’s right to know about his/ her origin. In the last decade some European countries have changed their attitude towards disclosure of a donor’s identity. Therefore, the legal bond between parents on one hand and the child on the other has been modified<sup>7</sup> in the legislation as a result of AR practices. Disclosure of donor’s identity might bring other changes in the way family is recognized by the law. This paper looks at these issues from a gender perspective. Its purpose is to see what rights each involved party has and what are the legal relationships between these parties after the disclosure of donor’s identity in the legislation.

I analyze laws regarding medically assisted reproduction, how the AR practice is defined by many states, from Sweden, Spain, United Kingdom, Belgium, Hungary and Switzerland. Each of these countries has a relatively new specific law on AR and each country treats anonymity in a slightly different way. Therefore, I think these are important examples of how anonymity or how disclosure of a donor’s identity can influence the legal bonds between people involved in AR practices. From a methodological perspective this is a qualitative content analysis study<sup>8</sup>. I look

<sup>7</sup> Here I mean that the legal bond is differently defined and this can be seen very clear in Spain, for instance.

<sup>8</sup> Defining content analysis, Yan Zhang quotes Hsieh and Shannon: “a research method for the subjective interpretation of the content of text data through the systematic classification process of [...] identifying themes or patterns”. Yan Zhang, *Content analysis (qualitative, thematic)*, 1, <http://www.ils.unc.edu/~yanz/Content%20analysis.pdf> (accessed May 25, 2008).

at the relations between child and donor, child and intended parents<sup>9</sup>, and donor and intended parents. All these relationships, through disclosure of donor's identity, influence the notion of family, since the egg donor for instance might be regarded as one of the mothers of the child<sup>10</sup>. Since each person involved has rights and performs different social roles which might seem to be overlapping, many ethical and legal dilemmas have to be addressed. In this paper I point out some of them and present several legal solutions analyzing laws on AR from the above mentioned countries, as they are available to me. People involved in the AR process influence each other, as the right of one party interferes with the right of another; it has been argued, for instance, that the right to private life of the donor and the right of the child to know his/ her genetic roots stay one against each other or that they are inversely proportional.

Because these issues are intertwined and influence one another it is rather difficult to talk about them separately, since one needs to have the whole picture in order to follow the links and to understand the interactions between the individual rights involved. However, in order to state clearly my arguments, I choose to separate these issues in four main chapters. The first one describes the donor's anonymity role within the AR practices and the arguments for the maintaining of anonymity in the legislation. The second chapter presents the current laws in the discussed European countries and the arguments for disclosure; in this chapter I also explain why anonymity is an important issue from a gender perspective. The third chapter presents the rights of the involved parties, and the last one analyses the legal and ethical effects of a donor's identity disclosure on the family members' relations.

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<sup>9</sup> It will be shown in the analysis that this relation is changing because of the disclosure of donor's identity.

<sup>10</sup> AR practices involves many people in the reproductive process, and a woman can be the egg provider (biological mother), the womb provider (gestational mother), the social mother (the one who cares and nurtures the child) or all of them.

Assisted Reproduction practices are constantly changing because of the fast advances within the technological methods which can be used for AR processes. These changes have to be addressed by the law in order to protect the rights of the people involved. But changes within the practices can be also determined by the ethical debates regarding AR in general or by ethical debates regarding a particular issue. Anonymity is a particular issue which experienced changes on both of these levels which I address later in this paper. However, by focusing also on legal changes regarding donor anonymity, this paper situates itself within a relatively new area, since the legal adjustments in many European countries have taken place mostly in the last decade and the effects of these adjustments have just begun to be evaluated.

## I. Assisted reproduction and anonymity

### *1.1. Assisted reproduction and techniques which may involve a gamete donor*

Apart from a right to procreate<sup>11</sup>, many people show a strong desire to have a child of their own or genetically related. This desire has been analyzed and divided into other several types of desires – the desire to rear, the desire to bear, the desire to beget, the desire to have a child with a particular person<sup>12</sup> are only few if them. In her famous report, Warnock considers the desire to beget – to pass on genes<sup>13</sup> – one of a crucial importance. This is surely one reason for people<sup>14</sup> who cannot get pregnant through regular intercourse or who cannot bear or deliver a baby to look for alternatives in order to have a child of their own. Here comes into the picture “assisted reproduction [AR] which refers to a number of advanced techniques that aid fertilization”<sup>15</sup> One of the most well known technique is in vitro fertilization.

In this method, the woman takes fertility drugs to stimulate her ovaries to produce more eggs. The physician then retrieves one or more of the eggs by laparoscopy or by passing a needle through the vaginal wall. The partner's sperm is then mixed with the eggs in a petri dish, and fertilization may take place. If fertilization occurs, the embryo is allowed to develop outside the womb for a few days. Then it is implanted in the lining of the woman's uterus with a small plastic tube. Most centers now place two to four embryos in the womb in the hope that one will burrow into the lining and begin to develop normally. Any leftover embryos are frozen to be used later, should the first IVF procedure fail to work. IVF increases the risk of multiple births.<sup>16</sup>

<sup>11</sup> Some authors have interpreted the Article 12 of the European Convention on Human Rights as containing, within the right to start a family, the right to procreate.

<sup>12</sup> Ruth F. Chadwick, “Having Children: Introduction,” in *Ethics, Reproduction and Genetic Control* (London and New York: Routledge, 1994), 9-11.

<sup>13</sup> *Ibid.*, 11.

<sup>14</sup> Using the term people, here I refer to single women and couples as well.

<sup>15</sup> “What Is Assisted Reproduction”, [http://www.ehealthmd.com/library/infertility/INF\\_assisted.html](http://www.ehealthmd.com/library/infertility/INF_assisted.html) (accessed May 26, 2008).

<sup>16</sup> “What Is IVF”, [http://www.ehealthmd.com/library/infertility/INF\\_assisted.html](http://www.ehealthmd.com/library/infertility/INF_assisted.html) (accessed May 26, 2008).



Besides IVF, there are some other techniques which aid fertilization, such as gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT) or intracytoplasmic sperm insertion (ICSI).

GIFT involves ovarian hyperstimulation to obtain multiple eggs as with IVF. However, the eggs are then mixed with sperm and immediately placed into the women's fallopian tubes using a laparoscope. The goal of this procedure is to enable fertilization to occur within the fallopian tubes rather than in a dish in the laboratory.

ZIFT is rather like IVF with fertilization of the woman's eggs taking place in the laboratory. However, unlike IVF the fertilized eggs (zygotes) are injected into the woman's fallopian tubes using a laparoscope.<sup>17</sup>

ICSI is another technique during which "a single sperm [cell] is injected into the egg, and the embryo is placed in the fallopian tubes or uterus". I briefly described these methods of fertilization through the aid of technology in order to bring examples of processes where fertilization might be done with the help of a gamete donor. These examples are technical ones, but where the fertilization is done outside the female uterus, that is in vitro, it can be done with the aid of gamete donation. Therefore, there are three possibilities; the first is when the sperm comes from a man who is not the woman's partner; the second situation appears when the egg comes from another woman and, after being fertilized with the partner's sperm, is implanted into the woman's womb; the third possibility refers to that situation where both the sperm and the egg come from other people than the ones who intend to have a child.<sup>18</sup>

<sup>17</sup> Bio Centre, "Science & Policy History", <http://www.bioethics.ac.uk/index.php?do=topic&sid=2> (accessed May 26, 2008).

<sup>18</sup> Sir David Napley, "IVF and the Law," in *Ethics, Reproduction and Genetic Control*, ed. Ruth F. Chadwick. (London and New York: Routledge, 1994), 63.

## ***1.2 Arguments for maintaining the anonymity***

This paper deals with the kind of situations where the fertilization is done with the help of a donor. This donor can be a man or a woman, issue which will be discussed in the following chapters. The main focus is one aspect of this kind of situation – the donor’s anonymity or, as many laws regarding AR formulate the issue, the disclosure of a donor’s identity. I think one remark has to be made at this point – disclosure of a donor’s identity refers to the disclosure towards the intended parent(s) or the child. The clinics and the physicians undertaking the AR procedure know who the donor is, since they deal with his/ her medical file and they screen the donor for several diseases in order to prevent passing them on to the child<sup>19</sup>. Therefore, the donor is not completely anonymous, in the sense that nobody knows his/ her identity, but the anonymity is in relation with the intended parents and with the child. Identifiable data about the donors was kept in special registries in many countries even before the disclosure towards the intended parents or the child was legally possible. Some of these registries are created at a local level, being undertaken by the clinics themselves, others are created at a national level, a case in which a special regulatory body is taking care of these registries. In United Kingdom, for instance, when the Warnock committee was established, there were no records containing information about the donor and intended parent(s) as gamete recipients. The practice itself was not regulated, so the donor was regarded as the legal father of the child. However, when the child was born the woman’s husband was registered as the father on the child’s birth certificate. This is argued to have been illegal, since the couple was writing false data into the child’s birth certificate.<sup>20</sup>

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<sup>19</sup> I discuss this in the subchapter I.1.

<sup>20</sup> Lucy Frith, “Gamete donation and anonymity. The ethical and legal debate,” *Human Reproduction* 16, no.5 (2001): 820.

To sum up the most important arguments, anonymity played an important role in protecting at least the man's role as the father within the family. Since the husband gave his consent for the fertilization through sperm donation, it meant that he was the father a child should know; since he, as the woman's husband, agreed on the sperm donation, he, most probably, wishes for and cares for the child. Thus, this was one of the most used arguments for maintaining the donor's anonymity.

The next argument, which is strongly connected to this one, supports the idea that anonymity has another very important function – it “protect[s] the donor from parental responsibility”<sup>21</sup>. In other words, if the donor is anonymous the child does not know about the existence of a donor<sup>22</sup>; since there is a little probability for the child to find out, so there is a little probability that the child will make parental claims towards the donor. The same could be said about the mother who, not knowing the donor, cannot make claims related to his paternity, even if she would want that later on. Hence, the first two arguments which support the maintenance of donor anonymity refer to anonymity as being useful for protecting the husband's right as father and protecting the donor from claims regarding his parental status.

If the law establishes clearly who is the father of the child and what rights or duties has the one who becomes donor towards the child, then these two arguments are irrelevant.<sup>23</sup> Thus, there will be no need for anonymity. However, one can say that the donor has no guarantee that the legislation will not be changed so that the child or the child's mother to be enabled to make parental claims. As an immediate consequence, a strong argument for anonymity is the one regarding the willingness to donate. It was claimed that without being anonymous people would

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<sup>21</sup> Ibid.

<sup>22</sup> For now I refer to the sperm donor, since the egg donor is a different case regarding anonymity and which I intend to discuss in the next chapter.

<sup>23</sup> Spain is a good example and I will refer to it in the last chapter.

no longer want to become donors. This would make AR processes that require gamete donation impossible to undertake, so that infertile people could not be helped with this technique. Recent studies on donors' reaction toward disclosure have shown that this fear of donor scarcity is not supported by the data; people have different motivations to donation and for some of them even the idea of meeting the child is not discouraging them from donating.<sup>24</sup>

One well used argument in the field of AR, as in the issues regarding the family law, is the one considering the best interest of the child. In the next chapters this will become clearer, as I will talk about the changes in the European laws addressing AR and which have been supported with the argument of the best interest of the child. This is stipulated in the Article 3 from the Convention on the Rights of the Child:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by the competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.<sup>25</sup>

As the Committee on the Rights of the Child has emphasized in one of its reports, the best interest of the child has been addressed, through other articles from the Convention,

<sup>24</sup> This happened in Sweden, for example, but I will develop further this point in the next chapter.

<sup>25</sup> Office of the High Commissioner for Human Rights, <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed May 27, 2008).

in particular situations in relation to separation from parents [for instance.] The child shall not be separated from his or her parents against his or her will «except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child»; and States must respect the right of the child to maintain personal relations and direct contact with both parents on a regular basis «except if it is contrary to the child's best interests» (article 9(1) and (3))<sup>26</sup>

In a similar way, there are other issues addressing the best interest of the child, such as: “parental responsibilities[,] deprivation of family environment[,] adoption[,] restriction of liberty[or] court hearings of penal matters involving a juvenile”<sup>27</sup>. In all these situations the best interest of the child has to be taken into consideration. However, the way this principle has been interpreted depends very much of the state, since

every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children<sup>28</sup>

In my understanding, this way of applying the best interest principle depends very much on the culture of one state, on the beliefs that one particular society has in respect to the idea of what is best, and on the historical context and tendencies of a given moment. Sweden is a good example of how culture can influence lawmakers' decisions. With a strong “tradition of

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<sup>26</sup> CRC on best interests of the child, *Survey über die Abschließenden Beobachtungen des UN-Kinderrechtsausschusses der letzten Staatenberichte der EU-MS* (Survey about concluding observations of the UN Convention on the Rights on the Child of the last reports from EU-MS) (May 2006), 7, [http://www.kinderrechte.gv.at/home/upload/crc\\_on\\_best\\_interest\\_of\\_the\\_child.pdf](http://www.kinderrechte.gv.at/home/upload/crc_on_best_interest_of_the_child.pdf) (accessed May 27, 2008).

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., 26.

transparency and public access to information”<sup>29</sup>, Sweden was the first country in the world to use identifiable gamete donors in AR practices. And this change was supported using the argument of the best interest of the child. This principle has been changed over time. Studies from the 1980’s and the beginning of 1990’s show that the best interest of the child was used for supporting the donor’s anonymity; it was argued then that “it is not in the best interest of the child to know”<sup>30</sup> because he/ she might experience trauma. In the same way, parents tended to be skeptical to share the way in which they became parents because they thought the extended family might be against the practice and reject the child<sup>31</sup>. Under this umbrella of the best interest of the child there are several other arguments which support the maintenance of anonymity; apart from psychological harm and extended family’s rejection, studies have shown that parents were afraid that the child might be rejected at school and he/ she would have serious social problems.<sup>32</sup>

There are also other reasons for maintaining the donor’s anonymity, not necessary for the best interest of the child, but also for the best interest of other members of a family<sup>33</sup>. It has been argued that it is in the best interest of the father<sup>34</sup> (in case the child was born through sperm donation) that the child is not told, since the relationship between them might be damaged when the child will find out that he is not his/ her biological father.<sup>35</sup>

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<sup>29</sup> Kristina Orfali, *PMA et levée de l’anonymat: la Suède entre une tradition de transparence et un statut novateur de l’enfant* (Medically Assisted Procreation and the Fall of Anonymity: Sweden between a transparency tradition and a new child’s status) in *Procréation Médicalement Assistée et Anonymat* (Medically Assisted Procreation and Anonymity), ed. Brigitte Feuillet-Liger (Bruxelles: Editions Bruylant, 2008 Forthcoming paper), 1.

<sup>30</sup> Frith, *Gamete donation and anonymity*, 822.

<sup>31</sup> Ibid.

<sup>32</sup> Glenn McGee, Sarah-Vaughan Brakman and Andrea D. Gurmankin, “Gamete donation and anonymity. Disclosure to children conceived with donor gametes should not be optional,” *Human Reproduction* 16, no.10 (2001): 2034.

<sup>33</sup> I mainly refer to the nuclear family.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

Another reason against disclosure to the child the mode of conception or the fact he/ she was born through donation addresses the right to privacy of the parents. In other words, the parents have the right not to tell to the child about the way he/ she was conceived.<sup>36</sup> This is relatively easy for the parents in case of sperm donation, since in this case there has been a pregnancy and it is not hard to keep “the appearance of a «normal» family”<sup>37</sup>

### ***1.3. Arguments for creating a donor registry***

So far I discussed issues related to the AR practices which involve a gamete donor as well as the reasons for maintaining the donor’s anonymity. However, since disclosure is now possible in many European countries, it means, as I stated before, that data about the donor is stored somewhere – in local or national registries. Before these registries were established there was the question whether this would have a positive effect on the users of AR practices or not. Since at that time people did not seem willing to reveal the mode of conception, let alone the information about the donor, the existence of a registry was not encouraged by people who wanted to keep the secret of using AR. People worried that the existence of registries will eventually lead to disclosure of donor’s identity. However, there were serious reasons (which still are, even in countries where disclosure of donor’s identity is still not allowed) for creating these registries. One major motive is a medical one. In general, when someone wants to become a donor, he/ she has to declare the entire health family history that he/ she knows. Clinics screen the donors for infectious diseases such as HIV, syphilis, hepatitis B and C and genetic diseases; however, they cannot track down every malady. Therefore, one major usage of a registry is to

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<sup>36</sup> I will develop this issue in Chapter 3 which deals with individual rights.

<sup>37</sup> Frith. *Gamete donation and anonymity*, 822.

keep the record of a donor (and to whom he/ she donated) in order to prevent him/ her from donating again in case the child “was found to have a hereditary disorder”<sup>38</sup>

Another important argument for the existence of a registry is that, when two people want to get married, for instance, they can find out, more easily than with DNA tests, if they are genetically related or not. A further significant reason for which registries were created refers to disclosure. It has been taken into consideration a possible change in the attitude towards donation and disclosure of donor’s identity, which has actually happened.<sup>39</sup>

As it is mentioned in the introduction of this paper, donor anonymity is a particular issue of a bigger field. This particular issue appeared as a consequence of the technical development in AR which made gamete donation possible. The manner one can look at donor’s anonymity today was also changed by the technology which made possible not only sperm donation, but egg donation as well. There is a big and very important difference between the sperm and the egg donation which I believe it had consequences on donor’s anonymity. While sperm donation is done by the man himself, spending time alone in a room full of sexually explicit magazines, egg donation is an invasive and painful process which requires commitment and discipline since the donor has to undertake a daily hormonal treatment. Furthermore, while the sperm can be frozen up to several years, the egg cannot (yet) be stored in a proper manner that could guarantee its efficiency in a later fertilization process. Therefore, the woman who donates and the woman who receive the egg have to be synchronized for a successful donation.<sup>40</sup> It means that, in this case, it

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<sup>38</sup> Ibid., 818.

<sup>39</sup> Ibid.

<sup>40</sup> Judit Sándor, *Anonymat dans les Procédures de Procréation médicalement assistée – Égalité des Sexes et Vision Pronatale dans la Réglementation Hongroise* (Anonymity in the Assisted Reproduction Procedures – Equality among Sexes and the Pro-natal Vision in the Hungarian Regulations) in *Procréation Médicalement Assistée et Anonymat* (Medically Assisted Procreation and Anonymity), ed. Brigitte Feuillet-Liger (Bruxelles: Editions Bruylant, 2008 Forthcoming paper), 6.



is very probable that the donor is not anonymous. In some countries it is possible for the patient to find and bring her own gamete donor.<sup>41</sup>

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<sup>41</sup> I develop this point further in the next chapters.

## II. Changes in European laws

### *II.1. Culture and time as changing factors regarding disclosure*

In the last decade there have been important changes in many European countries regarding the laws on AR, after Sweden being the first one in the world who disclosed the identity of the sperm donor within the artificial insemination by donor (AID) procedure in 1984, for the in vitro fertilization (IVF) in 1988 and for the egg donor in 2003<sup>42</sup>. Identifiable information about the donor is stored for 70 years, and the child, from a certain age, can receive all the information regarding the donor. Sweden has adopted these laws with reference to the best interest of the child; the law allows only the child to obtain this information.<sup>43</sup> It has been argued that the pioneering role of Sweden in disclosure of donor's identity is caused by two important political factors: the tradition of "anti-secret" and the special place of the child as future citizen.<sup>44</sup> Both these aspects are influenced by and influence the legislator's decisions.

Another country which changed the law regarding AR was United Kingdom. UK regulated AR practices in 1991, and the donor was kept anonymous for a long time. Between 1991 and 2004 the children conceived through gamete donation could know about the donor only the following:

Physical description (height, weight, eye and hair color, skin color), year and country of the donor's birth, donor's ethnic group, whether the donor had any children, any other details the donor may have chosen to provide, such as [...] occupation, religion, interests and skills<sup>45</sup>

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<sup>42</sup> Orfali, *PMA et levee de l'anonymat: la Suède*, 4.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., 1.

<sup>45</sup> N. R. Elster, "All or Nothing? The International Debate over Disclosure to Donor Offspring," *Institute on Biotechnology and the Human Future. Commentaries*, <http://www.thehumanfuture.org/> (accessed April 6, 2007).

The Human Fertilization and Embryology Act from 1990<sup>46</sup> created a national registry where non-identifying data about the donor was kept and could have been revealed to the resulted children when they reached the age of 18.<sup>47</sup> The attitude towards anonymity was disputed by two people conceived through gamete donation in 2000; they “jointly initiated a human rights challenge to the legislation in the English High Court”<sup>48</sup>. Meanwhile, a public consultation launched by the government revealed the fact that most people agreed with the disclosure of non-identifying information to the child, and a smaller proportion wanted a complete disclosure of the donor’s identity. More consultations followed and from 2004 the law was changed so that people who donate after 1<sup>st</sup> of April 2005 have to provide additional identifiable information about themselves, such as

the surname and each forename [...] and, if different, the surname and each forename [...] used for the registration of his birth; [...] the date of birth of the donor and the town or district in which he was born; [...] the appearance [and] the last known postal address [...]<sup>49</sup>

Switzerland has a federal law on assisted reproduction created in 1998 and applicable since 2001<sup>50</sup>. In Switzerland only sperm donation is permitted and the donor has to provide identifiable information about himself, so that the child can receive this data, on demand, after

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<sup>46</sup> The institution in charge with these issues in UK is the Human Fertilization and Embryology Authority. “HFEA is a statutory regulatory body established through the HFE Act. The HFEA's principal tasks are to license and monitor clinics carrying out *in vitro* fertilization, donor insemination and human embryo research.” (Nuffield Council on Bioethics, 2000, p. 5).

<sup>47</sup> A. McWhinnie, “Gamete donation and anonymity. Should offspring from donated gametes continue to be denied knowledge of their origins and antecedents?,” *Human Reproduction* 16, no.5 (2001): 808.

<sup>48</sup> Eric Blyth and Lucy Frith. (2008). “The UK’s gamete donor ‘crisis’ – a critical analysis,” *Critical Social Policy* 28, no. 74 (2008): 76.

<sup>49</sup> Human Fertilization and Embryology Authority, “What you need to know about donating sperm, eggs or embryos” (February 14, 2006), <http://www.carefertilityweb.co.uk/spermdonation/HFEAinfo.pdf> (accessed April 1, 2008).

<sup>50</sup> European Society of Human Genetics, “The Interface between Medically Assisted Reproduction and Genetics: Technical, Social, Ethical and Legal Issues” (June 3, 2005): 100, <http://www.eshg.org/BGDocuAfterSevilla030605etAnnexes.pdf> (accessed May 28, 2008).

the age of 18. The egg donation, as well as surrogacy, is strictly forbidden. Switzerland avoided many legal and serious ethical issues by allowing only the sperm donation.<sup>51</sup>

## ***II.2 Arguments for disclosure of donor's identity***

In many countries which changed the legislation regarding AR, the legal deliberation was closely escorted by an ethical debate. The most important and most used argument for disclosure of donor's identity is the best interest of the child, which I briefly introduced in the first chapter. Since states are the ones to implement international conventions (such as the Convention on the Rights of the Child) so that the international provisions are adjusted to the national legal systems, the principle of the best interest of the child gets to be interpreted in various ways. I have already shown that, in different legal cultures and in different historical contexts the argument of the best interest of the child can be used in order to justify a distinct attitude towards the same issue. The arguments of the advocates of donor's identity disclosure are also often made with reference to the best interest of the child. This best interest can be split into two distinct aspects: to be told about the mode of conception<sup>52</sup> and to be able to find out who the donor is. It has been argued that if the child is told about the mode of conception, then he/ she might be saved from the psychological trauma of finding about these issues accidentally.<sup>53</sup> Since the laws in countries I look at does not require the parents to tell their children about the mode of conception, so it might be argued that he/ she might never find out, ethical committees<sup>54</sup> from different countries have recommended to parents to tell as soon as the child can understand reproduction in general.

<sup>51</sup> Switzerland does not get involved in international conflicts and although in Europe, it is not part of EU.

<sup>52</sup> In the next chapter I will explain why the mode of conception is connected to anonymity when it comes to take advantage of one's rights.

<sup>53</sup> The advancement in the genetic tests made this scenario a very probable one.

<sup>54</sup> Such as the Advisory Committee in Belgium.

One more point addresses the relationships within the family which might be altered by accidentally disclosure. Both the parent (who is not genetically related) and the child might suffer, as the child might reject the parent. Further, it has been argued that the child of the child conceived through gamete donation might be affected from not knowing his/ her origin; in case of a medical problem, his/ her doctor would not have access to family records.

## *II.2 Arguments for disclosure of donor's identity*

Argued in a different way, disclosure was defended by the counterarguments for maintaining anonymity. It has been said, especially by physicians, that making identity disclosure mandatory for someone who wants to donate gametes would lead to a significant decrease in the number of donors. Therefore, “the change in the legislation was predicted to [affect] a dramatic impact on service provision [AR through gamete donation]”<sup>55</sup> This argument was supported by important clinicians; in UK for instance, when the legislation was changed, a renowned figure in the field declared: “I can guarantee that as far as egg-sharing<sup>56</sup> is concerned, you might as well forget about the program”<sup>57</sup> These strong reactions were supported with data provided by the clinics, but they were dismissed, at least in UK, by the Human Fertilization and Embryology Authority (HFEA). Data from HFEA (collected from 1991 until the middle of 2006) showed that the effects predicted by physicians had other causes than the change in the law. The studies showed that there is a peak in the number of sperm donors in 1994, a decade before the legislation was changed; in 2001, 3 years before the change, the number of egg donors reached

<sup>55</sup> Blyth and Frith, “The UK’s gamete donor ‘crisis’”, 79.

<sup>56</sup> Egg sharing involves two couples, or two women. One of them has the eggs, but does not have money for the AR treatment, whereas the other has the money, but does not have a donor. Therefore, there is a cooperation between these two parties – one provides the money and the other the eggs. I develop this point in the last chapter.

<sup>57</sup> Blyth and Frith, “The UK’s gamete donor ‘crisis’”, 79.

its minimum. Therefore, at least in UK, the decline in the number of donors cannot be regarded as a direct consequence of the change in the law. In Sweden there were fewer donors after the removal of anonymity for sperm donation in 1984, but this trend changed few years after.<sup>58</sup>

Another counterargument for the change in the law towards disclosure was that parents would not tell their children about “the method of conception”<sup>59</sup> so it can be argued that these children might never know about the existence of a donor. Therefore, it was argued, there is no need to change the legislation since the reason it is changed for – the best interest of the child<sup>60</sup> – cannot be put into practice. Not many studies have been made on intended parents’ attitude towards telling to their child about the mode of conception, attitude which would be determined by the change in the law. However, the opposite is suggested by a study from the Netherlands which allows disclosure. This research on parents’ attitude towards disclosure revealed that most parents (63% in the case of heterosexual couples and 98% from lesbian couples) chose a known sperm donor when they could have chosen an anonymous one.<sup>61</sup> The most recent study on parents’ attitude towards disclosure, which I had access to, was published in January 2008<sup>62</sup>. The study was made on 141 married couples, from Northern California, who had conceived at least one child through gamete donation; 62 couples used sperm donation (“DI couples”) and 79 egg donation. The results have shown that:

Of the DI couples, 20 (32%) couples had already disclosed, 28 (45%) planned to disclose, 10 (16%) did not plan to disclose, and 4 (6%) were undecided. Of the egg donation couples, 18 (23%) had

<sup>58</sup> Blyth and Frith, “The UK’s gamete donor ‘crisis’”, 81

<sup>59</sup> Ibid., 84.

<sup>60</sup> It translates here into enabling the child to know his/ her biological origin.

<sup>61</sup> Blyth and Frith, “The UK’s gamete donor ‘crisis’”, 86.

<sup>62</sup> Dena Shelab et al., “How parents whose children have been conceived with donor gametes make their disclosure decision: contexts, influences, and couple dynamics,” *Fertility and Sterility* 89, no.1 (January 2008): 179-187.

already disclose, 46 (58%) planned to disclose, 8 (10%) did not plan to disclose, and 7 (9%) were undecided.<sup>63</sup>

Although this study was not made in Europe, since the unities of analysis are individuals and couples, the results can be used for similar argumentations concerning people from different regions.<sup>64</sup> Therefore, I believe it is relevant that, out of the total number of interviewed couples, 32% of the DI couples already told their children about the mode of conception and 45% wanted to disclose. This makes more than half of those who used sperm donation in order to have a child. Similarly, most of the egg donation couples told already (23%) or were planning to tell their children about the mode of conception (58%). In conclusion, many parents are willing to disclose the method of conception to their children, which I believe is a strong argument against some of the expressed worries of fertility clinicians.

### ***II.3. Change in the law does not necessarily mean total disclosure***

Spain adopted its current legislation on assisted reproduction in 2006. However, there are other laws which address the issue of anonymity – Law on personal data protection from 1999, Law on patient's autonomy from 2002 and the Royal Decree which created the national registry of gamete donors from 1996. Moreover, the legislator had to take into consideration the European Directive 2004/23/CE regarding cells and tissue donation:<sup>65</sup>

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<sup>63</sup> Ibid., 180.

<sup>64</sup> The study has already taking into account the fact that disclosing decisions can be influenced by many factors, such as: age, education, culture, family, friends etc.

<sup>65</sup> Verónica San Julián, *L'anonymat dans la procréation médicalement assistée en Espagne: une question claire légalement mais controversée parmi les auteurs* (Anonymity in Medically Assisted Procreation in Spain: a clear issue in the legislation but a controversial one among authors) in *Procréation Médicalement Assistée et Anonymat* (Medically Assisted Procreation and Anonymity), ed. Brigitte Feuillet-Liger (Bruxelles: Editions Bruylant, 2008 Forthcoming paper), 4.

It is necessary to increase confidence among the Member States in the quality and safety of donated tissues and cells, in the health protection of living donors and respect for deceased donors and in the safety of the application process.<sup>66</sup>

Therefore, Spain adopted the law from 2006 so that it corresponds with the European regulations and with the previous Spanish laws which address the issue of anonymity. Since this particular article from the European Directive states the fact that each country should protect the donor, Spain chose a “relative anonymity”<sup>67</sup>. This means that the child conceived through gamete donation can obtain some general data about the donor, but not identifiable information. The child can know “general physical characteristics”<sup>68</sup> or data regarding genetic traits such as: the weight, the height, eye color, hair color, blood type. Moreover, the child is entitled to data regarding the social status of the donor, such as: studies, employment or nationality. However, there are two exceptions from this rule. The identity of the donor can be disclosed if the medical condition of the child requests, at a point, a tissue donation from a genetically related parent. The other exceptional situation refers to the health of the child as well; if a donor does not declare all the known diseases which might be passed on to the child, then his/ her identity can be disclosed in order to prevent him/ her from donating.<sup>69</sup>

Belgium adopted its current legislation regarding AR in 2007. Before this law both access to AR practices and the issue regarding anonymity were not clearly legalized. Therefore, fertility clinics had their own practices, so the rules could be different from a fertility center to another.<sup>70</sup>

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<sup>66</sup> Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells, Art. 15, [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32004L0023&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=32004L0023&model=guichett) (accessed June 2, 2008).

<sup>67</sup> San Julián, *L'anonymat dans la procréation médicalement assistée en Espagne*, 4.

<sup>68</sup> Ibid.

<sup>69</sup> San Julián, *L'anonymat dans la procréation médicalement assistée en Espagne*, 5.

<sup>70</sup> Geneviève Schamps and Marie Noëlle Derèse, *L'anonymat et la procréation médicalement assistée en droit belge. Des pratiques à la loi du 6 juillet 2007* (Anonymity and Assisted Reproduction in Belgian Law. The Practice of the



Like in Spain, the Belgian legislator took into consideration the European Directive regarding donation of human tissues and cells. Moreover, the legislator tried to reconcile the right to private life of the donor stated in European Convention on Human Rights and the rights of the child stipulated in the Convention on the Rights of the Child.<sup>71</sup> Consequently, the Belgian law makes a clear distinction between the embryo and the gamete donation. While the former is anonymous, the latter can be a disclosed donation if there is “an accord between the donor and the receiver(s)”<sup>72</sup>. However, if the donor does not wish to be identified, the child or the intended parents cannot obtain this information.

#### ***II.4. Egg donation and disclosure***

There is a fundamental difference between sperm and egg donation which has been regarded as crucial for understanding the effects of gamete donation on the lives of donors or intended parents. The most important difference between sperm and egg donation is that while the former does not require practically any medical treatment, the latter can be done only through painful medication which ends with the invasive practice of extracting the eggs. Furthermore, egg donation is risky for the woman who donates, since this can affect permanently her reproductive apparatus. This has been regarded as the major cause of the egg donors’ scarcity.

There is another distinction between sperm donation and egg donation practices. The freezing technology for sperm cells has already been developed and this is a common storage method. A similar technology has not yet been developed for egg storage. Therefore, an egg

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July 6, 2008 Law) in *Procréation Médicalement Assistée et Anonymat* (Medically Assisted Procreation and Anonymity), ed. Brigitte Feuillet-Liger (Bruxelles: Editions Bruylant, 2008 Forthcoming paper), 13.

<sup>71</sup> I develop this point in the next chapter.

<sup>72</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 13-14.

donation is done simultaneously with the receiving process. The woman who donates has to undertake a daily hormonal treatment in order to produce more eggs than without the treatment, eggs which can be extracted. The woman who receives the cells has to undertake a hormonal treatment as well, so that her body accepts the eggs. Consequently, these two prior donation treatments for these two women have to be synchronized in order to conduct a successful donation process.<sup>73</sup>

These issues have been addressed by some European legislators when they regulated donor anonymity. Belgium, for example, allows identity disclosure of the donor in case there is an agreement between the donor and the recipient(s) precisely because it is easier for the intended parent(s) who need an egg donation to find a donor themselves, than to wait on a list for such a donor. In other words, it is allowed to bring your own donor, who you obviously know, in order to undertake a treatment.

The current Hungarian legislation on AR was adopted in 2005. This law made possible the disclosed egg donation and the egg donation between members of the same family. This comes as a consequence of the scarcity of egg donors. Allowing donation among people from the same family, the probability to find an egg donor is higher, since a fertile woman, for instance, might be willing to help her infertile sister.<sup>74</sup> Therefore, in both these cases, the Hungarian and the Belgian legislators considered the fact that, because of the invasive treatment required by the egg donation, it might be easier for the intended parent(s) to find a donor among family members. However, the Hungarian law has a specific stipulation even from the 1997 law regarding AR, which I think can be mentioned as another example of how the law can address the gender differences regarding AR practice in general. While other countries which I discuss in

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<sup>73</sup> Sándor, *Anonymat dans les Procédures de Procréation médicalement assistée*, 6.

<sup>74</sup> *Ibid.*, 4-5.

this paper regard the biological investment of a man and a woman in an embryo as being equal, Hungary's law stipulates that a woman has the "right to continuation of infertility treatment"<sup>75</sup> regardless her partner's opinion. In other words, if a couple decides to freeze several embryos (her eggs fertilized with his semen) for a later treatment then they can do so through an authorized clinic. In UK for instance, as in many European countries, each partner can change his/ her mind before the beginning of the treatment and the embryos are discarded. The process of extracting the eggs (which are then fertilized in order to obtain some embryos which are then frozen) requires an invasive treatment. In fact, this treatment is very much similar to the one undertaken by the woman who donates the eggs to another woman, only that in this situation the eggs are fertilized and use by the same woman. Taking into consideration the fact that in order to produce those eggs the woman has to carry out a hormonal treatment and the invasive extraction process can have permanent side effects, Hungarian law recognizes a woman's investments in the production of an embryo as being higher than a man's investment. Therefore, "woman who are widowed or divorced after medically assisted fertilization has begun" can proceed with the treatment.<sup>76</sup>

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<sup>75</sup> Judit Sándor, "Reproductive Rights in Hungarian Law : A New Right to Assisted Procreation?" in *Health and Human Rights* 4, no. 2, ed. Sofia Griskin (Boston : Harvard School of Public Health, 2000), 212.

<sup>76</sup> Ibid.

### III. Conflicting rights

This legal change from gamete donor's anonymity towards a total or partial disclosure of donor's identity has occurred in many of the countries I discuss with the argument of the best interest of the child. I will not say once again what is/ was regarded as the best interest of the child and who defines it, but I will return to the explanation in order to present first the child's right to know about his/ her origin and second the donor's right to private life which are standing one against each other<sup>77</sup>. In other words, when the child's right is broadening, the donor's right is narrowing down and vice versa. The intended parents' right to private life is standing somewhere in between. Intended parents are the ones who can determine, with a high probability, the degree to which the child can make use of some of his/ her rights. My intention is not to present these rights as completely one against each other, or that the people involved are fighting for a bigger slice of the same cake. However, the donor's right to privacy seems to stand against the child's right to know his/ her genetic parent, right which seems to stand against the intended parent(s)' right not to tell their child about the mode of conception<sup>78</sup>.

#### III.1. *Child's rights*

It has been argued that children conceived through an AR practice which involves gamete donation have two distinct rights when it comes to information they can have about themselves. One is the right to know about the mode of conception and the other is the right to know the

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<sup>77</sup> I refer here strictly to rights which are connected with the AR practice and not to the general child's rights or human rights.

<sup>78</sup> I will address this issue, of whether there is such a right and if there is what could this mean, later in this chapter

donor's identity. In fact, these are strongly interrelated since one cannot make use of the latter and abandon the former. However, I will treat these two issues separately.

### **III.1.1. The right to know about the mode of conception**

This issue is not clearly addressed by the legislation in any of the countries I discuss. However, many regulatory bodies and ethical committees which have been involved in the law making process have encouraged parents to tell their children about the mode of conception as soon as they are capable of understanding reproduction in general.

As I will later present, disclosure of the mode of conception is not enforceable, so parents cannot be obliged to tell as long as they do not want to. Within the ethical and legal debate generated by the issue of anonymity, this disclosure is extremely important, as it enables the child born through gamete donation to make use of another right which has been argued that is included in the Convention on the Rights of the Child – the right to know his/ her biological roots. In other words, it can be argued that if one does not know about the way he/ she was conceived<sup>79</sup>, one cannot find out about the existence of a donor; consequently, the donor remains anonymous and the child does not know his/ her genetic roots.

Another scenario could be that the child finds about the mode of conception accidentally, when he/ she might need a special tissue donation from a genetically related parent. Moreover, “the child has a medical need to know his/ her genetic history [...] as genetics play an increasingly large role in the diagnosis and treatment of disease and reproductive decision”<sup>80</sup>. Therefore, there is a growing probability that the child finds out the mode of conception at one

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<sup>79</sup> Here I refer strictly to the fact that the child was conceived through gamete donation.

<sup>80</sup> McGee, Brakman and Gurmankin, “Disclosure to children conceived with donor gametes”, 2034.

point in his/ her life. This might come as a shocking news for the person resulted through gamete donation as he/ she might feel disappointed by his/ her own parents<sup>81</sup>. The Belgian Advisory Committee on Bioethics<sup>82</sup>, for instance, reached the conclusion that it is not necessary to regulate the disclosure of the mode of conception since, it has been argued, the right of the child to know about the method he/ she was conceived is weaker than the right of the parents to private life. Consequently, this should be the intended parent(s)' decision.<sup>83</sup>

In a similar way, the 2007 governmental report on Paternity and AR from Sweden encouraged parents to reveal the mode of conception to their children, emphasizing the fact that this represents a moral duty of the parents.<sup>84</sup> Like in other countries, Swedish law does not make the disclosure of conception mandatory. Telling or not to the child, it has been argued, should depend on intended parent(s)' decision since this affects their lives as well.

In many countries the lawmaker decided to treat the issue of conception separately from the donor's identity per se. In Hungary, for instance, the current law states that

the child conceived and born through a procedure of gamete or embryo donation, [after becoming 18] has the right to know the circumstances of his/ her conception and birth on the bases of the available data.<sup>85</sup>

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<sup>81</sup> Which I refer to as intended parents.

<sup>82</sup> The Belgian Advisory Committee on Bioethics has been working since January 15, 1993, when the Belgian Communities have signed a cooperation agreement. The duties of this Advisory Committee are: to analyze the social, ethical and legal problems that might occur from research in biology and medicine, to give advice regarding these problems, respecting human rights and to inform the wide public about these issues. (Belgian Federal Public Service, 2008, 1-2) These are important since they draw a general framework for national legislations regarding human and child rights.

<sup>83</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 8.

<sup>84</sup> Orfali, *PMA et levée de l'anonymat: la Suède*, 6-7.

<sup>85</sup> Judit Sándor, *Anonymat dans les Procédures de Procréation médicalement assistée*, 7.

This is currently being interpreted as the right to know about the mode of conception which is different and does not involve the right to know the donor's identity.<sup>86</sup> Similarly, Swiss law does not regulate this issue and one can imply that disclosing the nature of conception depends exclusively on the intended parents.

### **III.1.2. The right to know who the donor is<sup>87</sup>**

Although, at least in Hungary, the right to know about the mode of conception does not include the right to know who the donor is, I think they are strongly interrelated and they should not be treated separately. If one knows the identity of the donor (that is the name of the genetic parent), one knows the mode of conception. From the other way around, when one knows about the mode of conception, one knows there must be a donor out there and the chances to meet this donor are, if the child wants this, are considerable higher. Having this information a child can then know the identity of the donor, in countries where the law allows it.

In Belgium, as in many other countries, the change in the law on AR was supported with the argument of the best interest of the child. Thus, the Convention on the Rights of the Child was taken into consideration and its articles were analyzed. The legislator looked at the 7<sup>th</sup> and the 20<sup>th</sup> article from the Convention<sup>88</sup>:

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 to be cared for by his or her parents. States parties shall ensure the implementation of these rights in accordance with their national law and their

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<sup>86</sup> Ibid.

<sup>87</sup> This subchapter addresses the child's right to know the identity of the person who donated the gamete from which he/ she was born.

<sup>88</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 9.

obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless<sup>89</sup>

A child temporarily or permanently deprived of his/her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.<sup>90</sup>

These articles have been interpreted as including all children regardless of the mode of conception. However, when it comes to the right to know his/ her genetic parents (genetic origin), it has been considered that the expression “as far as possible” leaves the State Parties space to interpretation. Moreover, the notion of “parents” it is not defined in the article. Therefore, these parents do not necessarily have to be biological parents, but they can be “socio-educative parents”.<sup>91</sup> Consequently, the Belgian law chose, as a general rule, the anonymity of the donor, but it leaves open the possibility of disclosure in the case of an “accord between the donor and the [intended parents]”<sup>92</sup> This was justified mainly by the fact that, in the case of egg donation, the intended parents(s) have to find their own donor who cannot thus be anonymous.

In Spain, the general<sup>93</sup> rule of maintaining the donor’s anonymity does not leave much information for the child. The child or the intended parents can obtain general data about the donor, but not identifiable information. This can be interpreted as a way of encouraging parents to tell their children about the mode of conception. As disclosing a donor’s identity is not possible<sup>94</sup>, the parents do not have reasons, at least theoretically, to be skeptical about revealing the nature of conception. Since it is not possible that a person would ring their door bell one day claiming that he/ she is the “real” parent of the child, it can be argued that intended parents do not have the worry of losing the love of their child. However, there is another side of this

<sup>89</sup> Convention on the Rights of the Child, Article 7.

<sup>90</sup> Ibid., Article 20 (1).

<sup>91</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 8.

<sup>92</sup> Ibid., 14.

<sup>93</sup> The donor’s identity can be known if this could save the child’s life or if the donor has a disease and he/ she has to be stopped from donating.

<sup>94</sup> In the sense it is not legal.



scenario. The parents might feel helpless, if they would choose to reveal the mode of conception, since they cannot provide more information about the donor. Therefore, they might just not do it at all.

In general, in countries where the disclosure of donor's identity is possible children themselves can go to specialized institutions and obtain information about their donors, once they know they have been conceived through gamete donation. In Sweden, for instance, governmental reports have encouraged social services to offer support and guidance to someone that might come to them wondering about his/ her origin and suspecting that he/ she might have been conceived through an AR method.<sup>95</sup> Therefore, after a certain age – 18 in Switzerland, “maturity”<sup>96</sup> in Sweden<sup>97</sup> - the child can go by him or herself to the institution in charge and obtain information about the donor.

In Hungary the right to know the circumstances of one's birth do not translate into the right to know the biological roots, or at least this is today's interpretation.<sup>98</sup> In Switzerland the law states explicitly the right of a child to know “the identity of the donor and his physical aspect”<sup>99</sup>. The same law specifies the fact that the child can obtain this information before the age of 18 if this is justified. Furthermore, the child can meet the donor if the donor wants that; if the donor refuses to meet the child and if the child proceeds with the requirement of information, then the information will be passed on.<sup>100</sup> In other words, the donor does not have the obligation to meet the child upon request, as the child does not have the right to meet his/ her genetic father, but to know who he is.

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<sup>95</sup> Orfali, *PMA et levee de l'anonymat: la Suède*, 6.

<sup>96</sup> It is defined by directives on the National Committee of Social and Sanitary Affairs.

<sup>97</sup> Kristina Orfali, *PMA et levee de l'anonymat: la Suède*, 3.

<sup>98</sup> Sándor, *Anonymat dans les Procédures de Procréation médicalement assistée*, 7.

<sup>99</sup> The Federal Authorities of the Swiss Confederation, *Loi fédérale sur la procréation médicalement assistée* (LPMA) (Federal Law on Medically Assisted Reproduction), Chapter 2, Section 4, Article 27, [http://www.admin.ch/ch/fr/rs/c810\\_11.html](http://www.admin.ch/ch/fr/rs/c810_11.html) (accessed May 26, 2008).

<sup>100</sup> Ibid., Article 27.

In all countries where identifiable data about the donor can be obtained, the law emphasizes the fact that there is no legal paternal link between the child and the donor. Moreover, the lawmaker wanted to clearly specify the fact that the only parents recognized by the law are the intended parents, since the mode of conception assumes the fact that the donor gave his/ her consent for the gamete donation. Therefore, the donor agrees with the fact that a child will be born thank to his/ her donation and that the child would be considered other people's son or daughter.<sup>101</sup>

### ***III.2. Donor's rights***

If the child has the right to know about the nature of his/ her conception and the right to know his/ her origin, it has been argued that the donor has the right to private life. Advocates of donor's anonymity are using the right to private life as one main argument supporting the maintenance of anonymity.<sup>102</sup>

In Belgium, for example, before the current law was adopted in 2007, the AR clinics kept the donor anonymous since disclosure in such matters was seen as an infringement of the doctor's obligation not to reveal the professional secret. Thus, anonymity was part of a deontological practice. On one hand, intended parents have expressed their will not to know who the donor was, in order to feel safe from this donor's interference in the resulting child's life. On the other hand, donors did not want to face any claims from the intended parents or the children.<sup>103</sup> The current law established anonymity maintenance as the general rule. However,

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<sup>101</sup> I will come back to this point in the next chapter of this paper.

<sup>102</sup> The other important argument for maintaining the donor's anonymity addressed the scarcity of number of donors once they have to agree with the identity disclosure.

<sup>103</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 12.

the donor's identity can be disclosed if there is an agreement between the two parties. This possibility for disclosure in case of gamete donation comes as a solution to the scarcity of egg donors which have to be found by the intended parent(s) themselves.<sup>104</sup> But another important reason for maintaining donor's anonymity was regarded the donor's right to private life. The Belgian Advisory Committee supported the fact that the Article 8 of the European Convention on Human Rights has to be taken into consideration:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>105</sup>

It can be argued that, through anonymity, two private spheres were maintained. First, the family of the resulting child and intended parents was protected from donor's claims to paternity. Second, the donor was protected from future claims of the child to biological link. In order to protect this right to private life, the new Belgium law for instance, states that the donor or the resulted child cannot claim any familial connections between them that would stand against the intended parents.<sup>106</sup>

In order to find a balance between the child right to know his/ her origin and the donor's right to private life, the Belgian Advisory Committee proposed the "double track"<sup>107</sup> solution. This is nicely summarized by Lucy Frith:

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<sup>104</sup> Ibid., 13-14.

<sup>105</sup> European Convention on Human Rights, Article 8.

<sup>106</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 16.

<sup>107</sup> Frith, "Gamete donation and anonymity", 823.

In the future, it might well be that a choice has to be made between a reduced, non-anonymous programme that respects the children's right to know and a much wider, anonymous programme that seeks to benefit a greater number of childless couples.[...] Such a programme would, though, while widening parental choice, still leave the provision of information at the discretion of the parents. However, [...] unless a non-anonymous programme incorporates a formal mechanism to inform the children this too leaves the decision to the discretion of the parents.<sup>108</sup>

The Belgian Advisory Committee considered the idea of having two different programs – one with anonymous donors and one with non-anonymous donors. This solution would offer the people who want to donate gametes the option of being anonymous or not. Similarly, the intended parents could choose between an anonymous donor and an identifiable one. The Belgian Advisory Committee did not consider the fact that the anonymous program has to be wider or smaller than the program with identifiable donors, but it brought the “double track” solution as a middle way between the donor's right to private life and the child's right to know his/ her origin.

### ***III.3. Intended parent(s)' rights***

It has been argued that intended parents have, after deciding to become parents through gamete donation<sup>109</sup>, several rights which cannot be overlooked. One is the right not to tell the child about the mode of conception and the other considers the choice of the donor. After analyzing more AR laws, I believe one can conclude that the donor's right to privacy is stronger than the intended parent(s)' right to choose the donor. Regarding the child, I believe that his/ her

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<sup>108</sup> Ibid.

<sup>109</sup> I do not discuss here the right of someone to form a family, but I address the intended parents' rights in relation to the child and the donor.

right to know his/ her origin is regarded as a weaker right than the intended parent(s)' right to private life.

The choice to pick the donor has been addressed by many national laws especially from a practical perspective. In Spain, for instance the intended parent cannot choose the donor, since this is regarded as the medical doctors' task. Non identifiable information about the donor can be given to the woman who receives the egg or the sperm only after she gave the consent for the procedure to continue. The physicians choose the donor in order to reach the maximum compatibility between the recipient and the donor in terms of genetic characteristics.<sup>110</sup>

In Belgium the intended parent(s) cannot choose the donor. Donation is, in general, anonymous. However, before the current law was adopted, fertility clinics accepted non-anonymous egg donors in order to solve the problem of the scarcity of these donors. For that reason, the Belgian lawmaker decided to maintain open the possibility to of disclosed donations, if there is an accord between the recipient and the donor.

Another issue that might be considered as a right of the recipients would be the right not to tell the resulted child about the mode of conception. In Belgium there is no clear rule regarding the disclosure of the mode of conception. The decision belongs, thus, to the intended parents. However, the Belgian Advisory Committee on Bioethics has recommended that parents should tell the resulted children as soon as possible, in order to avoid the eventual trauma.<sup>111</sup> Therefore, the parents do not have a right in this sense, but they have a moral obligation. In Sweden, in a similar way, there is no law that could require the parents to tell the resulted child about the mode of conception<sup>112</sup> since this is regarded as belonging to the private sphere of the intended parent(s). As argued before, the fact that parents can tell or not their children about the

<sup>110</sup> San Julián, *L'anonymat dans la procréation médicalement assistée en Espagne*, 4-5.

<sup>111</sup> Schamps and Derèse, *L'anonymat et la procréation médicalement assistée en droit belge*, 8.

<sup>112</sup> Orfali, *PMA et levée de l'anonymat: la Suède*, 7.

mode of conception influences children's chances of making use of a right they already have, where the law allows it, – to know who the donor is. For this reason, it can be concluded that the right to know his/her origin is weaker than the right to private sphere of the intended parent(s).

## IV. Implications on family and gender

Thus far I talked about AR methods which involve gamete donation, the way in which the donor is regarded in legislation from several European countries (anonymous or not), and the rights of the people involved in the AR process – the child, the donor, the intended parent(s). This chapter analyses the way in which donor's identity disclosure affects the understanding of family and the way in which disclosure of donor's identity stands for recognition of gender differences. From a legal perspective, it can be argued that in many countries there is a general change from anonymous donation towards a disclosed<sup>113</sup> one. One of the few differences in drawing the notion of family which I could observe in these laws, as they were available to me, regards the application of the law on the AR process itself. In other words, the donor can be regarded as the legal father and the child can make parental claims which address the donor if the donation itself has been done in an unauthorized clinic or medical center for these procedures. The Swiss law, for instance, mentions that child-parent link is

Admissible if the donor made an intentional sperm donation to someone who is not authorized to practice medically assisted procreation, to preserve the donated sperm and to give [the sperm to a recipient]<sup>114</sup>

If the donation and the AR practice is done through an authorized center the legal parents of the child are the intended parents and no parental claims which regard the donor can be made. In case of adoption, legal parents are the adoptive parents because they wanted the child. Similarly, in case of gamete donation, the legal parents of the child are the intended parents since they initiated the AR process, thus they want the child. Nevertheless, I want to emphasize the

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<sup>113</sup> This can be total disclosure – the child and/ or intended parent(s) can know the donor's identity – or a relative disclosure – the child and/ or the intended parent(s) can obtain non-identifiable data about the donor.

<sup>114</sup> The Federal Authorities of the Swiss Confederation, LPMA, Article 23 (2).

fact that by making available identifiable information about the donor, different national laws are recognizing the important donor's role in the child's life. Therefore, the donor is brought into some relation with the family life by the law. The comparison of this mode of conception with adoption stood as basis for more arguments supporting disclosure:<sup>115</sup> If the biological parent in case of adoption is regarded as important, and the adopted child has the right to know his/ her biological parents, why then the child conceived through gamete donation should not have this right?

AR as such changed the way family members are identified in national laws. After the 1978 Constitution, the Spanish legislator adopted the principle of biological truth which constructs juridical filiations through biological links. The AR law introduced important exceptions from this principle. In accordance with the fact that the procedure itself requires time and emotional investment, the legislator preferred to define the child-parent bond on the basis of will, not on the basis of nature.<sup>116</sup> Maternity is determined in the Spanish law by the delivery act, which conforms to the traditional principle of “mater semper certa est”<sup>117</sup>. However, the right of a child to find his/ her biological roots cannot be denied by a voluntary act of the mother who does not want to care for the child and thus rejects the child (who does not take the responsibility of the child).<sup>118</sup> In other words, an adopted child can search his/ her biological parents. But, as disclosure in case of adoption can make a difference in a child's life, disclosure of donor's identity might also lead to the involvement in the child's life of another person who can be regarded as mother or another person who can be regarded as father (both from a biological

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<sup>115</sup> Gamete donation has been compared with the practice of adoption, since at least one person from a couple – the woman or the man – is not genetically related to the child, but cares for the child. Another point of resemblance between these two types of family refers to the fact that both have to deal with the disclosing issue, which is to tell or not to tell the child about his/ her origin.

<sup>116</sup> San Julián, *L'anonymat dans la procréation médicalement assistée en Espagne*, 6-8.

<sup>117</sup> Ibid., 7.

<sup>118</sup> Ibid.



perspective). However, many laws specify, like the Swiss one, the fact that the child or the donor can make no claims that would undermine the familial link between the recipient's partner (who agreed with the mode of conception) and the child resulted through gamete donation, if the sperm donation was done according to the law.<sup>119</sup> Donor's anonymity maintained the understanding of mother<sup>120</sup> as the one who cares for the child rather than the one who is genetically related to the child. It has been argued, in most of these countries, that disclosure is being done in the best interest of the child which includes, as I have shown, the right to know his/ her biological roots. If legislators have almost unanimously agreed with the fact that it is important for someone to be allowed to know his/ her genetic roots, it means that the genetic parent(s) are considered to be important so they have to be taken into consideration. Therefore, disclosure of donor's identity might move the focus from a social definition of parenthood towards a genetic one.

A study on the understanding of family for English 8-14 years old children showed that they prioritize "the quality of relationships between family members ('love, care, mutual respect and support') and the role performed by family members rather than on structure (such as marriage and the 'norm' of the nuclear family or biological relatedness)."<sup>121</sup> This supports the idea that family is based on love and care, an idea which is recognized by most of the national laws regarding A.R through the fact that intended parents are the ones regarded as legal parents. However, creating the possibility of someone else (the donor) to get involved into the child's life (therefore, into the family life) might go towards what Arlene Skolnick calls "new biologism [which supports the idea that] the true essence of a person is rooted in the primordial differences

<sup>119</sup> The Federal Authorities of the Swiss Confederation, LPMA, Article 23.

<sup>120</sup> As in Spain, for instance.

<sup>121</sup> Darren Langdridge and Eric Blyth, "Regulation of assisted conception services in Europe: Implications of the new reproductive technologies for 'the family'," *Journal of Social Welfare and Family Law* 23, no. 1 (2001): 47.

of gender, race, ethnicity, genes”<sup>122</sup> Moreover, it has been argued that the emphasis on genetic links rather than on bonds based on affection and compassion represent a masculine way of defining relationships between people while the feminine model is represented by love and care. The point is very nicely summarized by Katz Rothman, cited by Joan C. Callahan:

Genetic connection was the basis for men’s control over the children of women. The contemporary modification of traditional patriarchy has been to recognize the genetic parenthood of women as being equivalent to the genetic parenthood of men, genetic parenthood replaces paternity in determining who a child is, who it belongs to. I believe it is time to move beyond the patriarchal concern with genetic relationships.<sup>123</sup>

I do not want to claim here that patriarchy is the general pattern which can explain everything or that it is the best one. However, I believe this is an issue which deserves some attention. As pointed out earlier, by admitting as legal parents the intended parents, the lawmakers are drawing clear lines between the rights of people involved in the gamete donation process<sup>124</sup>. Still, by disclosure, the model of prioritizing legal bonds between people tends to undermine the model prioritizing care and affection etc.

Legislators have recognized the gender differences which exist between egg donation and sperm donation. They changed in the law towards disclosure of egg donors’ identity for a practical reason. Since the egg donation requires a much more invasive practice and lots of commitment from the part of the donor, not many women are likely to donate. So, couples or, where the law allows it, single people should be free to find an egg donor by themselves. In this case, the donor can no longer be anonymous. This is the main reason for introducing the

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<sup>122</sup> Ibid.

<sup>123</sup> Joan C. Callahan, “Reconsidering Parenthood. Introduction,” in *Reproduction, Ethics and the Law*, ed. Joan C. Callahan (Bloomington and Indianapolis: Indiana University Press, 1995), 20.

<sup>124</sup> Langdrige and Blyth, “Regulation of assisted conception services in Europe”, 47.

exception from the rule of anonymity in case of Belgium or Hungary, for instance. As argued in the previous chapter, Hungary is an exceptional example in recognizing gender differences in AR, since it introduced the “right to continuation of infertility treatment”<sup>125</sup> for the woman alone.

The technical development of the donation practice itself is important from a gender perspective. It is possible, and it has been successfully done already, to freeze sperm cells for later use. Therefore, couples or single people can decide to conserve sperm cells for later use of themselves or for other people’s use. This is the functioning principle of sperm banks. However, this technology has not yet been developed for egg conservation. Therefore, the egg donation procedure has to be facilitated in a very short period of time. The implantation of the eggs in the recipient woman’s womb has to be done not long after the extraction of the eggs from the woman who donates. Consequently, it is more difficult to keep the anonymity of the donor because the treatments for both women – the donor and the recipient – have to be synchronized in order for the donor to be able to donate in the same time when the recipient can receive.

One more important issue regarding anonymity is illustrated by men and women’s attitudes towards disclosure. It has been argued that the egg sharing practice<sup>126</sup> might disappear once the donor’s identity has been disclosed. This argument is stronger in case of women who share their eggs but do not manage to have a child during their own treatment. In other words, a woman might prefer not to share her eggs because she might face the reality that while her treatment was unsuccessful, her eggs helped someone else to have a child. However, studies on egg donors and sperm donors’ reaction towards disclosure showed that women are much more

<sup>125</sup> Sándor, “Reproductive Rights in Hungarian Law”, 212.

<sup>126</sup> Egg sharing, practiced in UK, is a method through which a woman who has money for the AR treatment and needs eggs finds a woman who needs an AR treatment and has eggs, but not the financial means. Therefore, the woman who has money received some eggs from the one who needs the money for her own treatment. This has been done so far in a semi-anonymous environment – they both went to a clinic where they were mingled among other patients. So, the woman who donated the eggs did not know the woman who received them.

open than men when it comes to providing identifiable data about themselves. Moreover, these studies prove

that not only have UK egg donors tended to provide more information about themselves for potential offspring than have sperm donors, but that the nature of (ostensibly non-identifying) information provided by some past egg donors could enable their identity to be discovered.<sup>127</sup>

This passage refers to the fact that even before the change in the British law from 2005, egg donors had the tendency to give more information than sperm donors. This gendered differences in the attitude towards disclosure have been explained by the fact that “contrasted with sperm donation, egg donation is unlikely to be perceived as quasi-adulterous”<sup>128</sup> and because it requires a more invasive practice is often depicted as heroic. Therefore, women might have better experience than men when they find out about the existence of their offspring of whom they did not know about, since women presented themselves as being more willing to interact with their offspring conceived through an earlier egg donation.

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<sup>127</sup> Blyth and Frith, “The UK’s gamete donor ‘crisis’”, 84-5.

<sup>128</sup> Ibid., 83.

## Conclusions

Having a genetically related child has been regarded as a great achievement in people's lives. Technological development within the field of AR made this achievement possible for more and more people. Infertile couples or single persons can have a genetically related child with the help of different methods of conception. One of them, gamete donation, raises important ethical and legal questions by bringing a third person in the reproductive process (apart from physicians, who are involved in any AR method).

This paper analyzed the way in which anonymity and disclosure of gamete donor's identity affect the understanding of family. Precisely, it dealt with several conflicting individual rights which tend to change the roles played by family members within the family. It explored the way in which the change in European laws from anonymity towards disclosure affects certain rights of the people involved in the process of gamete donation. It has been attested that the child's right to know his/ her origin stands against the donor's right to private life. Furthermore, I argued that the intended parent(s) right to private life stand between these two since the child's chances to make use of the right to know his/ her origin depend, to a certain extent, on a right of the intended parents – the right not to tell about the nature of conception (which is a dimension of the right to private life).

The way these people interact and make use of their rights might vary according to gender differences, as women donors expressed their willingness to meet their offspring more than men donors did. Moreover, gender differences between the sperm donation and egg donation seem to be important factors which have caused changes in the law. In countries like Belgium or Hungary, where the general rule maintains gamete donation anonymous, egg donation can involve a non-anonymous donor. This exception from the rule takes into account

the fact that, since egg donation requires an invasive practice (which is not the case in sperm donation) there are not that many egg donors. In order to make the practice possible, lawmakers took into consideration the feasible option that people might find their own egg donors. In this case the donor cannot be anonymous.

The general trend in changing the law from anonymity towards disclosure made clear the fact that lawmakers see genetic ties between people as being extremely important; sometimes, they are more important than the social ones, as the child can ask about his/ her mode of conception and biological roots even if the intended parents choose not to reveal the nature of his/ her conception. It has been argued that this mode of perception of biological ties as more and more important is a masculine one which stands against the feminine one, based on love and care.

AR is a fascinating field which deals with important issues from both ethical and legal perspectives. The fast technical advancement challenges lawmakers to address them while considering the individual rights of the people involved. So, they have to consider not only the right of people who begin and contribute to the parental process, but also the right of a not yet born child. This props up a high responsibility which requires the understanding of AR practices and thus, which ask for constant research. Since the field is a new one and the issue regarding disclosure of gamete donor's identity is even newer, the challenges and responsibilities are greater.

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