

The Scope of Donor-Conceived Person's Right to Access Information about the Gamete Donor in Europe – A Comparative Review

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Abstract

Legal regulations concerning infertility treatment differ among European jurisdictions. Broadly speaking, three types of gamete donation are distinguished – anonymous donation, identifiable donation, and known donation. However, using only these terms during a debate on international standard of gamete donation is a significant simplification. Even in those jurisdictions in which the same model of gamete donation occurs, the scope of information about a donor that is accessible for a child differs. Moreover, in some jurisdictions, the law permits donors and recipients to choose between two or more types of gamete donation. This paper therefore analyses the extent to which the donor's data is accessible to a donor-conceived person within these different regimes. It argues that a balanced international standard for data exchange concerning gamete donation could be acceptable for all European countries. This paper concludes that it would be a positive first step to harmonise legal framework of gamete donation in Europe to reach a position that would be acceptable for countries in which donor's anonymity is protected, as well as in countries in which the donor's identity is always open for a donor conceived-person.

Keywords: anonymous, donor, gamete donation, law, non-anonymous

1. Introduction

A donor-conceived person's right to identify the donor of sperm and/or ova (their biological parent(s)) is one of the most controversial issues connected with gamete donation. In several jurisdictions in Europe, the practice has been, and remains, that anonymous donation is the only permitted type of donation. However, during the last few decades, there has been an increasing change in the approach to this matter from secrecy to openness in numerous countries, recognising the rights of people born as a result of donor-conception to information. Some countries now permit a choice between anonymous and open identity ('identifiable') donation, others mandate only identifiable donations. 'Known' donation is also an option in several jurisdictions.

When considering access to information about a donor by a donor-conceived person in Europe, it is thus not as simple as distinguishing between anonymous 'identifiable' or 'known' donation. Further access to data by a donor-conceived person about the donor depends not only on the type of donation but also on how these types of donation are interpreted in a specified jurisdiction, noting variable amounts of data may be available within these classifications. Of course, complicating the matter is that notwithstanding the legal regulations, cross-border medically assisted reproduction (MAR) means that some people will travel to other jurisdictions to circumvent laws in their own country. At the same time, the ability to maintain secrecy surrounding the identity of donors is changing because of new technologies, such as direct to consumer DNA-commercial testing.

Given that different European jurisdictions recognise the primacy of different values – anonymity or identification of gamete donors – it is the view taken in this article that it is unlikely that European laws will be unified any time soon that would allow *only* identifiable donation. For this reason, this paper does not include well-researched and lively debated arguments presented in the disputes about anonymity and disclosure of donor's identity.¹ Rather, it

¹ *Inter alia*: K.R. Daniels & K. Taylor (1993). Secrecy and openness in donor insemination, *Politics and the Life Sciences*, 12(2), 155-170; L. Firth (2001). Beneath the rhetoric: the role of rights in the practice of non-anonymous gamete donation', *Bioethics*, 15(5/6), 473-484; M. Dennison (2008). Revealing your sources: The case for non-anonymous gamete donation, *Journal of Law and Health*, 21, 1-27; N. Cahn (2012).

focuses on examining the different types of donation and what they mean in a variety of jurisdictions, and considers whether it would be possible to find a legal standard which would be acceptable for countries which have chosen the anonymous model of gamete donation as well as countries in which a donor-conceived person is able to identify their donor. Such a standard should enable donor-conceived people to receive access to the greatest extent possible non-identifying information about their donor, regardless of donation type; while also not precluding national permission for identification of donor and contact if both involved parties (donor-conceived person and donor) are agreeable to such contact.

Note, as a donor-conceived person's right to find out some information about their donor often depends on the time of donation,² the scope of this article is limited only to a comparative analysis concerning gamete donations which are currently taking place.

2. Terminology

In Europe, the laws differ significantly across jurisdictions regarding access to information about the donor. The starting point for distinguishing between approaches is three basic types of gamete donation – 'anonymous' donation, 'identifiable' donation, and 'known' donation. In both, anonymous and identifiable donation the recipients and the donor do not know each other, whereas in 'known' donation the donor is known to the recipient.

The difference between 'anonymous' and 'identifiable' donation is connected with the child's right to find out the donor's identity. In 'anonymous' donation, a child does not have access to identifying data about the donor, such as the name and surname, but sometimes he or she could receive some non-identifying information about the donor. In 'identifiable' donation, a child has access to identifying data about the donor. In 'known' donation the recipients and the donor know each other from the beginning, for instance the donor is a family member, friend, or another known person.

Somewhat confusingly, another term used in the literature is 'non-anonymous' donation. In practice, the term is used differentially – sometimes in reference only to identifiable donation,³ sometimes to refer only to known donation,⁴ and sometimes to define both.⁵ It is obvious that this distinction could lead to misunderstandings. For instance, the term non-anonymous donation is used in the ESHRE Final Report 'Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies' to describe the legal systems which regulate gamete donation in a different way. The Final Report indicates the UK and Belgium as the countries where 'non-anonymous' donations occur. However, while British legislation allows both identifiable and known donation, Belgian law permits known donation, but not identifiable donation. For this reason, the term non-anonymous donation is not used in the further analysis in this article.

At the time of the research presented in this article, the European IVF-monitoring Consortium (EIM) for the European Society of Human Reproduction and Embryology (ESHRE) was working on comparative research concerning MAR. According to 'Survey on ART [Assisted Reproductive Technology] and IUI [Inter-Uterine Insemination]: legislation, regulation, funding and registries in European Countries' there are four models of gamete donation in Europe: strict anonymity, anonymity just for recipients (not for children when reaching legal adulthood age), mixed system (anonymous and non-anonymous donations) and strict non-anonymity.⁶ Whatever the merits of this research, this again misses the nuances or variations within such categories. That is, it is necessary to distinguish two criteria of typology. The first one is focused on the scope of information about the donor which is accessible for a donor-conceived person. For instance, anonymity donation is regulated by European laws in various ways and the donor's non-identifying data is disclosed to differing degrees (from no information at all to a great amount of information). The second one is connected to options available for donors and recipients when

The new kinship, *Georgetown Law Journal*, 100(2), 367-430; G. Cohen (2012). Response: Rethinking sperm-donor anonymity: Of changed selves, nonidentity, and one-night stands, *Georgetown Law Journal*, 100(2), 431-447; S. Allan (2017). *Donor conception and the search for information. From secrecy and anonymity to openness*, London, Routledge Taylor & Francis Group.

² For instance, in the United Kingdom it is different for children born before 1 August 1992, different for children born between that day and 31 March 2005, and different after this date.

³ For example: Dennison, *supra* note 1, 1-27.

⁴ For example: D. Van Berkel, A. Candido & W.H. Pijffers (2007). Becoming a mother by non-Anonymous egg donation: secrecy and the relationship between egg recipient, egg donor and gg donation child, *Journal of Psychosomatic Obstetrics & Gynecology*, 28(2), 97-104.

⁵ For example: G. Pennings (2016 non-anonymous sperm donor: What do we know and where do we go?, *Médecine de la Reproduction*, 18(2), 116-22.

⁶ C. Calhaz-Jorge, Ch. D. Geyter, M. S. Kupka, C. Wyns, E. Mocanu, T. Motrenko, G. Scaravelli, J. Smeenk, S. Vidakovic & V. Goossens (2020). Survey on ART and IUI: Legislation, regulation, funding and registries in European countries. The European IVF-monitoring consortium (EIM) for the European Society of Human Reproduction and Embryology (ESHRE), *Human Reproduction Open*, 9, Supplementary Table SII Anonymity regimen in third-party donation.

choosing to donate or use donor-conception respectively (anonymous, identifiable, and known donation).

This article presents the types of gamete donation with examples, taking the above criteria into consideration.

3. Access to the Donor's Data for Donor-Conceived People

Legislation concerning MAR using third party donors of gametes has developed differently across Europe. Regarding access to the donor's data, the most fundamental distinction has been a division between non-identifying and identifying information about the donor which is strictly connected with the type of gamete donation (anonymous or identifiable). However, the content of records concerning the donor is not the same across jurisdictions even when they refer to 'anonymous' or 'identifiable' donation. Some jurisdictions may mandate 'anonymous' donation, but they allow a wide range of non-identifying data to be released. Others enable access to a small amount of non-identifying data or do not permit them at all. Jurisdictions in which anonymity of donation has been banned also differ regarding the content of identifying data which is accessible for a child. Additionally, in some countries, the law permits access to information about genetically related persons by donor-conceived people, such as information about donor-conceived siblings⁷ or incest between prospective spouses or partners (for example, see Portugal⁸ or the UK⁹). In fact, access to information may be divided into six types: 1) no information or not mentioned; 2) no information, but potential exceptions; 3) access to non-identifying information; 4) access only to non-identifying information, but identifying data is open if a specific requirement is fulfilled; 5) access to non-identifying information, but identifying data is open depending on the donor's choice; 6) access to non-identifying and identifying information as a rule.

3.1 No Information or not Mentioned

A lack of a donor-conceived person's right to find out non-identifying information could be seen to reflect the view that confidentiality regarding the donor's role in MAR is the most important value.¹⁰ Such an approach has been observed in some legal systems.¹¹ For instance, despite the Constitutional Tribunal judgement, which enables third party reproduction, Italian law does not mention a donor-conceived person's right to obtain any data about their donor.¹² Another example is Iceland, where the donor has the right to choose to be anonymous. In this case, a child conceived as a result of the gamete donation is not able to request access to the records about the donor, which are collected in a special file.¹³

3.2 No Information, but Potential Exceptions

In some jurisdictions, confidentiality of non-identifying information about the donor is also treated as a rule, but with one relevant exception. For instance, the Greek law permits to disclose medical information about the donor, which is kept in a confidential file, without the donor's identifying data. Access to this file is allowed for a child only because of health reasons.¹⁴

3.3 Access to Non-Identifying Information

Access to non-identifying information about the donor is treated as a rule in some countries. Nevertheless, anonymity of gamete donation remains supported by law and it is still prohibited to open records about the donor's name and surname for the child. A donor-conceived person who seeks to obtain non-identifying data about the donor does not have to comply with any requirements, others than their age limit. Provisions regarding a person's

⁷ Section 31ZE of the Human Fertilisation and Embryology Act, no. 2008 c. 22.

⁸ Article 15.3 of the Act on Medically Assisted Procreation, no. 32/2006 and article 2 of the Act on Confidentiality Regime for Medically Assisted Procreation Techniques, no. 48/2019,

⁹ Section 31ZB of the Human Fertilisation and Embryology Act, no. 2008 c. 22.

¹⁰ G. Pennings (2007). Belgian law on medically assisted reproduction and the disposition of supernumerary embryos and gametes, *European Journal of Health Law*, 14(3), 256.

¹¹ G. Pennings (2002) An overview of the regulation regarding the collection and provision of information about persons involved in sperm donation in jurisdictions outside the UK. Expert report made for the Human Fertilisation and Embryology Authority and the Secretary of State for Health, 5.

¹² The Rules on Medically Assisted Procreation, no. 45 of 24th February 2004. Constitutional Tribunal, Sentence no. 162/2014: Illegality of the ban on heterologous fertilisation (Constitutional Tribunal decided also about possibility to use regulation about adoption in reference to gamete donation); G. Banagiano, V. Filippi, S. Sgargi & L. Gianaroli (2014). Italian Constitutional Court removes the prohibition on gamete donation in Italy, *Reproductive BioMedicine Online*, 29(6), 662-664.

¹³ Article 4 of the Act on Artificial Fertilization and Use of Human Gametes and Embryos for Stem-Cell Research, no. 55/1996, (translated by the Icelandic Ministry of Welfare).

¹⁴ Article 1460 of the Greek Civil Code and the Act on Medical Assistance in Human Reproduction, no. 3089/2002; G. Leon, A. Papetta and C. Spiliopoulou (2011). Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework, *Reproductive BioMedicine Online*, 23, 820-823.

right to find out some non-identifying information include a different scope of identifying information. For instance, in Poland a donor-conceived person has access to information about the donor's date and place of birth and some medical information.¹⁵ Another example is the Estonian law, which permits a donor-conceived person to receive the following non-identifying information about the donor: nationality, skin colour, education, marital status, whether he or she has got any children, height, constitution, hair colour, and eye colour.¹⁶

3.4 Access only to Non-Identifying Information, but Identifying Data is Open if a Specific Requirement is Fulfilled

Generally speaking, donor anonymity is not banned in Spain, which means that it is similar to the legal systems described above (access to non-identifying information). However, it is permitted to disclose the donor's identity in exceptional circumstances. Only exceptionally, in extraordinary circumstances that pose a certain danger to life or health of the child or if it is in accordance with criminal procedural laws, the identity of the donors could be disclosed, provided that such disclosure is essential to avoid danger or to achieve the proposed legal purpose.¹⁷

3.5 Access to Non-Identifying Information, but Identifying Data is Open Depending on the Donor's Choice

A donor's choice is a condition for disclosure of identifying data about the donor in some legislatures. For instance, in the Netherlands a person who knows or suspects that he or she was conceived as a result of artificial donor fertilization and who has reached the age of twelve years has access to the following non-identifying information: physical characteristics (body length, weight, skin colour, colour of the eyes, hair colour and hair type), education and occupation as well as information about the social background (age, marital status, family composition), and a description, drawn up by the donor himself or herself, of characteristic features and traits. Additionally, the donor's personal identifying information (first name, last name, date of birth, social security number and place of residence) could be provided to the person who knows or suspects that he or she was conceived as a result of artificial donor fertilization and who has reached the age of sixteen, after the donor has given his or her written consent. If the donor does not agree to this, the provision will only be banned if, considering the consequences that non-provision could have for the applicant, the donor would have serious interests that the provision should not take place.¹⁸ It means that if there is a lack of consent, then the interests of the donor and the donor-conceived person have to be weighted. However, because of the legal principle of the best interests of the child, the donor's interests could be protected only in extraordinary circumstances.¹⁹

On the other hand, in contrast to the Dutch legislation, the Icelandic law protects a donor who chooses to be anonymous. There are no additional conditions which could enable them to disclose the identity of a donor in opposition to his or her choice. Identifiable donation is treated as a general rule, but a donor could decide that he or she wants to be anonymous. According to the Icelandic law a child conceived as a result of gamete donation, in which the donor did not request anonymity may acquire information about the name of the donor.²⁰ It means that if a donor does not choose anonymity, he or she must be aware of being treated as an identifiable donor.

3.6 Access to Non-Identifying and Identifying Information as a Rule

A number of jurisdictions have introduced laws which provide a donor-conceived person's access to non-identifying as well as identifying data about their donor. Laws granting access to identifying information about a donor are increasingly popular.

The first legislation which gave a donor-conceived person's the right to identify the donor was passed in 1984 in Sweden.²¹ According to the Swedish law, a donor-conceived person who has attained a sufficient maturity has the right to access information about the donor recorded in the hospital's special journal.²² The content of the data collected in the hospital's special journal should be related to the donor's personal identity, such as name, personal

¹⁵ Article 37.2 and 38.2 of the Act on Infertility Treatment, no. 2015/1087.

¹⁶ Section 27 and section 28 of the Artificial Insemination and Embryo Protection Act, no. RT I, 28.12.2017, 35.

¹⁷ Article 5.5 of the Law on Assisted Human Reproduction, no. 14/2006; Y. García-Ruiz & D. Guerra-Díaz (2012). Gamete and embryo donation: a legal view from Spain. In: M. Richards, G. Pennings & J.B. Appleby (eds.), *Reproductive donation. Practice, policy and bioethics*, Cambridge, UK, Cambridge University Press, 117-118.

¹⁸ Article 2 and article 3 of the Artificial Fertilization Donor's Data Act, no. BWBR0013642, article 2 and article 3 of the Decree on Artificial Fertilization Donor's Data, no. BWBR0015455.

¹⁹ P.M.W. Janssens, A.H.M. Simons, R.J. van Kooij, E. Blokzijl & G.A.J. Dunselman (2006). A new Dutch law regulating provision of identifying information of donors to offspring: Background, content and impact, *Human Reproduction*, 21(4), 853, Allan, *supra* note 1, 109.

²⁰ Article 4 of the Act on Artificial Fertilization and Use of Human Gametes and Embryos for Stem-Cell Research, no. 55/1996.

²¹ Law on Insemination, no. 1984/1140, replaced by the Genetic Integrity Act, no. 2006/351.

²² Chapter 6 section 5 and chapter 7 section 7 of the Genetic Integrity Act, no. 2006/351; J. Stoll (2008). *Swedish donor offspring: and their legal right to information* (Doctoral thesis, Uppsala Universitet, Uppsala, Sweden.). Retrieved from <http://uu.diva-portal.org/smash/get/diva2:398198/FULLTEXT01.pdf>

identification number, address, telephone number. However, non-identifying information, such as body composition, hair colour or profession, also could be collected and it may be accessible for a donor-conceived person.²³

Legal systems which guarantee a donor-conceived person access to identifying and non-identifying information about the donor sometimes constitute a precise scope of data which is accessible to a child. According to the British legislation a donor-conceived person who reaches 16 has the right to obtain the following non-identifying information about the donor: (a) sex, height, weight, ethnic group, eye colour, hair colour, skin colour, year of birth, country of birth and marital status of the donor; (b) whether the donor was adopted; (c) the ethnic group or groups of the donor's parents; (d) the screening tests carried out on the donor and the information on his personal and family medical history; (e) where the donor has a child, the sex of that child, and where the donor has children, the number of their children and the sex of each of them; (f) the donor's religion, occupation, interests and skills and why the donor provided sperm, eggs or embryos; matters contained in any description of himself or herself as a person, which the donor has provided; (g) any additional matters which the donor has provided with the intention that it be made available to an applicant. In addition, if a child reaches the age of 18 he or she has the right to receive access to the following data: (a) any matter specified in sub-paragraphs (a) to (h) of paragraph (2); (b) the surname and each forename of the donor and, if different, the surname and each forename of the donor used for the registration of his birth; (c) the date of birth of the donor and the town or district in which he or she was born; (d) the appearance of the donor; (e) the last known postal address of the donor.²⁴

Note there is no separate regulation concerning the disclosure of the known donor's data. If a donor-conceived person is not informed about a method of conception by the parents his or her knowledge about the donor depends on a general model of access to information about the donor in a specified legal system. Sometimes known donation is limited only to family members. For example, according to the Ukrainian law, the only type of known donation which is permitted is egg donation by a close relative.²⁵ However, in numerous jurisdictions known donation is not limited to any specified persons. For instance, in Iceland a physician providing treatment should choose a suitable donor, which means that it is possible to choose also a known donor, such as a family member or another person.²⁶

4. Options for Donors and Recipients – Do They Have Any Choice?

In addition to the above differences regarding what information may be made available in 'anonymous donation', 'identifiable donation', and 'known donation', it is noted that different jurisdictions vary in the type of donation permitted, and/or whether more than one option is available. The legal systems concerning the types of gamete donation could thus further be divided into:

- 1) A triple track system (anonymous, identifiable, and known donation), e.g. Iceland,
- 2) A double track system (in a wide meaning):
 - a. Anonymous or known donation, e.g. Belgium, Ukraine,
 - b. Identifiable or known donation, e.g. the UK, Sweden,
- 3) A single-track donation
 - a. Anonymous donation, e.g. Poland,
 - b. Identifiable donation e.g. Portugal.

Donors and recipients could be flexible in their choice of the type of gamete donation in the so-called triple track system.²⁷ For example, according to the Icelandic law a donor can choose whether he or she wants to be an anonymous or identifiable donor. Additionally, the general provision which enables a physician to choose a proper donor opens a possibility to use also a known donor, for instance a family member.²⁸

²³ The Government Bill Treatment of Involuntary Childlessness, no. 2001/02:89, 62; the Government Bill Modern Rules on Assisted Fertilization and Parenting, no. 2017/18:155, 83.

²⁴ Section 2(2) and section 2(3) of The Human Fertilization and Embryology Authority (Disclosure of Donor Information) Regulations 2004, no. 1511, section 31ZA(1) and section 31ZA(4) of the Human Fertilization and Embryology Act 2008, no. 2008 c. 22.

²⁵ Section 5.4 of the Decree of the Ministry of Health on Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine, no. 787of 9th September 2014.

²⁶ Article 4 of the Act on Artificial Fertilization and Use of Human Gametes and Embryos for Stem-Cell Research, no. 55/1996.

²⁷ Pennings, *supra* note 5, 121.

²⁸ Article 4 of the Act on Artificial Fertilization and Use of Human Gametes and Embryos for Stem-Cell Research, no. 55/1996.

In 'double track systems', unlike the common delineation as this meaning a choice between anonymous and identifiable donation,²⁹ this paper notes it may also include a system in which choice between any two types of donation is possible.

Further complicating matters, the above divisions do not reflect differences that may exist between sperm donation and egg donation. For example, some jurisdictions regulate both in the same way, such as Poland or Belgium. However, sometimes laws differentiate possibilities of choice depending on the kind of reproductive cells which are used during infertility treatment. For example, in Ukraine it is possible to choose between anonymous or known egg donors but regarding semen donation it is permitted to use only an anonymous donor.

An analysis of laws in a variety of European jurisdictions therefore leads to the conclusion that there are a lot of various combinations of types of gamete donation among European countries. In some laws it is possible to choose between an anonymous and known donor (e.g. Belgium, Ukraine) in other ones the choice is between identifiable and known donation (Sweden, UK). In Belgium, anonymous donation is a basic type of donation, but according to Belgian law 'non-anonymous' (as in 'known') donation resulting from an agreement between the donor and the recipient(s) is authorized.³⁰ The Ukrainian law regarding egg donation enables usage of an anonymous or known donor who is a close relative.³¹ However, semen donation is still only anonymous in Ukraine. In Sweden, identifiable donation is strictly regulated by law, but known donation is permitted, because of general regulation, which enable physician to choose a suitable donor.³² In the United Kingdom, identifiable donation has been regulated precisely by law since 2004,³³ but known donation is also practised,³⁴

The term single track donation is useful to describe legislation which provides only one type of donation for recipients and donors. When considering this classification, it is noted that most jurisdictions with 'single track' gamete donation take a conservative approach and still maintain the secrecy of donor identity (anonymous donation). For instance, according to the Polish law, reproductive cell donors are always anonymous, which means that neither identifiable nor known donation is permitted.³⁵ The same attitude towards disclosure of the donor's identity was governed by the Portuguese law. However, the Portuguese Constitutional Tribunal decided that anonymity of donors is unconstitutional.³⁶ As a result of this judgment, the Portuguese Law was amended.³⁷ Nowadays, the Portuguese legal system concerning gamete donation is also a single-track system. However, identifiable donation is the only option for donors and recipients, which means that anonymous donation, as well as known donation are prohibited.

5. Factors Influencing Factual Access according to the Types of Gamete Donation

The above discussion highlights that European laws differ not only regarding the types of donation permitted ('anonymous', 'identifiable' or 'known'), but also in the meaning given to each. The level of information available therefore varies considerably across jurisdictions. Beyond this, it must be noted that purposeful choices by recipients to engage in cross-border MAR may determine the ease or difficulty a person born as a result of donor-conception has in finding information about their donor. That is, it must also be noted that while some legal systems uphold principles of identification and/or disclosure, this may be weakened in practice as a result of cross-border

²⁹ G. Pennings (1997). The *double track* policy for donor anonymity, *Human Reproduction*, 12(12), 2839-2844.

³⁰ Article 57 of the Law on Medically Assisted Procreation and the Destination of Supernumerary Embryos and Gametes, no. 2007023090; Pennings, *supra* note 5, 117-119; before enacting this regulation: P. Baetens, P. Devroey, M. Camus, A.C. Van Steirteghem & I. Ponjaert-Kristoffersen (2000). Counselling couples and donors for oocyte donation: The decision to use either known or anonymous oocytes, *Human Reproduction*, 15(2), 476-484.

³¹ Section 5.5. of the Decree of the Ministry of Health on Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine, no. 787of 9th September 2014.

³² Chapter 6 section 4 and chapter 7 section 6 of the Genetic Integrity Act, no. 2006/351. *Supra* note 22, 58.

³³ L. Frith, E. Blyth & A. Farrand (2007). UK gamete donors' reflections on the removal of anonymity: implications for recruitment, *Human Reproduction*, 22, 1675-80; E. Blyth & L. Firth (2008). The UK's gamete donor 'crisis' - A critical analysis, *Critical Social Policy*, 28(1), 74-95; I. Turkmendag, R. Dingwall & T. Murphy (2008). Removal of donor anonymity in the UK: The silencing of claims by would-be Parents, *International Journal of Law, Policy And The Family*, 22, 283-310; Allan, *supra* note 1, 114-120.

³⁴ V. Jadvá, P. Casey, J. Readings, L. Blake & S. Golombok (2011). A longitudinal study of recipients' views and experiences of intra-family egg donation, *Human Reproduction*, 26(10), 2777-2782.

³⁵ Article 30 and article 36 of the Act on Infertility Treatment, no. 2015/1087; A. Krawczak (2016). Patient Monitoring in Polish Assisted Reproductive Technology Centres, *Reproductive BioMedicine and Society Online*, 3, 77-89.

³⁶ Constitutional Tribunal, Sentence no. 225/2018.

³⁷ Medically Assisted Procreation Act, no. 32/2006, Confidentiality Regime for Medically Assisted Procreation Techniques, no. 48/2019).

MAR undertaken to circumvent such laws.³⁸

While cross-border MAR is not always supported by IVF clinics, given some jurisdictions and clinicians allow (or even encourage) this, the choice remains with recipients. In this sense, the legal system of gamete donation where the recipient resides is supplemented by the jurisdiction in which cross-border gamete donation occurs. For instance, from the legal point of view, the Belgian law allows only anonymous and known gamete donation. Nonetheless, IVF clinics sometimes inform patients about a possibility to take part in an identifiable donation procedure in other countries. This is the reason why the Belgian law is sometimes classified as a country in which the triple track system occurs.³⁹

Of course, the practical realities must now also be placed in the context of the development of modern technologies, not least of which that direct to consumer DNA testing has opened a way to disclose the gamete donor's identity without his or her consent – even in those legal systems which strongly uphold the rule of the donor's anonymity.⁴⁰ Facial recognition using artificial intelligence may also be a possible and growing way to identify donors. As such, anonymity of the donor cannot be guaranteed in the future by IVF clinics, nor by the law. However, this does not mean we can predict how this will impact donor anonymity as a lack of certainty of the donor's anonymity in the following years does not mean that anonymous donation as currently practised has come to an absolute end.

It is still therefore, necessary to discuss a legal model of gamete donation, based both on the fact that people may travel to jurisdictions to circumvent laws in their own country, and that new technologies may mean that the donor's anonymity would not be protected in the future. Moreover, it may be recognised that finding out the donor's name and surname does not mean that a donor-conceived person will also receive all the information that is important to him or her. The information about the donor's name and surname is important for a donor-conceived person, but without access to other information about the donor and without the donor's will to exchange this information, the donor-conceived person still does not have full knowledge of his or her origins.

6. Conclusion

The focus of this article is to explore various models of gamete donation among a variety of European jurisdictions. It is important to consider which model could be acceptable for most of the European countries taking various approaches to this matter into consideration. According to the Recommendation no. 2156 (2019) of the Parliamentary Assembly of the Council of Europe 'Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children':

Anonymity should be waived for all future gamete donations in the Council of Europe Member States, and the use of anonymously donated sperm and oocytes should be prohibited. This would mean that (except in special cases, when the donation is from a close relative or friend) the donor's identity would not be revealed to the family at the time of the donation, but only to the donor-conceived person upon their 16th or 18th birthday⁴¹.

This statement is accepted by many European laws.⁴² However, it may be unlikely that some conservative countries will decide to disclose the donor's identifying data in the near future. Anonymity of gamete donors is still considered a basic rule in several jurisdictions. In recent years, content of article 8 of the European Convention on Human Rights has also been considered in relation to the child's right to know their origins, in the context of

³⁸ *Inter alia*: F. Shenfield, J. de Mouzon, G. Pennings, A.P. Ferraretti, A.N. Andersen, G. de Wert, & V. Goossens (2010). Cross border reproductive care in six European countries, *Human Reproduction*, 25(6), 1361–1368; K. Nygren, D. Adamson, F. Zegers-Hochschild & J. de Mouzon (2010). Cross-border fertility care—International Committee Monitoring Assisted Reproductive Technologies global survey: 2006 data and estimates, *Fertility and Sterility*, 94(1), e4-e10; M. Salama, V. Isachenko, E. Isachenko, G. Rahimi, P. Mallmann, L.M. Westphal, M.C. Inhorn & P. Pasquale (2018) Cross Border Reproductive Care (CBRC): A growing global phenomenon with multidimensional implications (a systematic and critical review), *Journal of Assisted Reproduction and Genetics*, 35(7), 1277–1288; Ethics Committee of the American Society for Reproductive Medicine, American Society for Reproductive Medicine (2016). Cross-border reproductive care: an Ethics Committee opinion, *Fertility and Sterility*, 106(7), 1629-1633.

³⁹ Pennings, *supra* note 5, 116-22.

⁴⁰ *Inter alia*: P. Borry, O. Rusu, W. Dondorp, G. de Wert, B.M. Knoppers & H.C. Howard (2014). Anonymity 2.0: direct-to-consumer genetic testing and donor conception, *Fertility and Sterility*, 101(3), 630–632; J.C. Harper, D. Kennett & D. Reisel (2016). The end of donor anonymity: How genetic testing is likely to drive anonymous gamete donation out of business, *Human Reproduction*, 31(6), 1135–1140; M. Crawshaw (2018). Direct-to-consumer DNA testing: The fallout for individuals and their families unexpectedly learning of their donor conception origins, *Human Fertility*, 21(4), 225-228; G. Pennings (2019). Genetic databases and the future of donor anonymity, *Human Reproduction*, 34(5), 786–790.

⁴¹ In the past the rule of donor's anonymity was expressed by the Council of Europe. See: Principles set out in the report of the ad hoc committee of experts on progress in the biomedical sciences (CAHBI, published in 1989).

⁴² E. Blyth & L. Firth (2009). Donor-conceived people's access to genetic and biographical history: An analysis of provisions in different jurisdictions permitting disclosure of donor identity, *International Journal of Law, Policy and the Family*, 23, 174-191.

adoption. For example, the European Court of Human Rights in judgments concerning adoption has held that this right is not absolute, because interests of the other parties should also be considered.⁴³ It is noteworthy that the European Court of Human Rights is considering legal prohibition to access donor's identity for persons born of sperm or ova donation.⁴⁴

What is clear is that statements that indicate disclosure of donor's data as being the most important value all over the world are too-far reaching, in that there appears to be continued demand by at least some recipients for 'anonymous' donation. Nevertheless, it must be reminded that it is dominant direction of changing laws in a lot of legislations is to emphasise children's rights, rather than recipient (or donor) choices or demands for anonymity. To this end, the tendency to disclose biological parents' data becomes stronger. An increasing number of countries have enacted laws that prohibit anonymous donation. Some, such as the United Kingdom, and Germany, have been influenced by judgements that have found in favour of donor-conceived peoples' rights.⁴⁵ In addition, the development of modern technologies could be a breakthrough in favour of identifiable donation in the future.

Given the tension between those jurisdictions that aim to ensure the donor's right to remain anonymous, and the move by others to mandate disclosure of information to donor-conceived people, it may be necessary to propose at the very least a minimum international standard. The question is whether there is a standard that might be accepted by all the European legal systems, and further whether this would uphold the rights of the respective parties involved.

One approach would be to develop a standard that is based on the concept for gradual extension of access to the donor's data, in which wide access to non-identifying data about the donor must be the first stage of a further enhanced protection of donor-conceived people. The second step would be to enable parties to use a mutual consent system to identify the donor. The legal system should guarantee instruments which will open access to identifying information about the donor if he or she gives consent to it. Such a solution may be found in some laws, in which anonymity of donors was banned towards donors who took part in procedures of gamete donation, before regulating identifiable donation as a rule. For example, in the United Kingdom people conceived thanks to gamete donation before 1st April 2005 can find out the identity of the donor if he or she also seeks it.⁴⁶ The last stage would involve encouraging governments to amend their legislation for the model proposed in the Recommendation no. 2156 (2019). Of course, this three-stage standard would not be binding for the states, as well as Recommendation no. 2156 (2019). A time-frame in which the first, second, and third stages of this model would be introduced should be set.

On the other hand, it may be that if the rights of the child to access information are considered paramount, then a minimum level of information to a donor-conceived person may not be enough. It would be important therefore to consider what chance it would give him or her to find out relevant information about their origin and if it is possible also have the ability to identify, and if mutually agreeable, have contact with, the donor.

It is important to recognise that the many different approaches taken within European jurisdictions provide no consistency regarding the types of gamete donation available nor how 'anonymity' 'identifiable' or 'known' donation are interpreted. Meanwhile, the conflict between anonymity and disclosing identity remains. It is argued that a consideration of the various typologies indicates the need to strengthen the position of donor-conceived person, even if the respective values shown across jurisdictions cannot be resolved or unified. While this paper has not investigated whether donor-conceived people would be satisfied with anything less than full disclosure, it may be that providing access to a wide possible scope of non-identifying information is an imperative. That is, this data, even absent of identifying information, could be crucial for a donor-conceived person's awareness of their self's identity and health.

It must also be noted that even if amendments of laws among European countries lead to end of legislated donor anonymity, this would not be enough if the problem of access to non-identifying information is not resolved. A name on its own, may be of little value unless that person can be contacted, or additional information is known that is relevant and current to medical information history. This discussion has shown the importance of how types of donation are defined, and 'identifiable' donation would be lacking if a broad array of information was not disclosed.

This paper thus concludes that it would be a positive first step to harmonise legal framework of gamete donation

⁴³ *Odievre v. France* (Application no. 42326/98), *Godelli v. Italy* (Application no. 33783/09).

⁴⁴ *Gauvin-Fournis v. France* (Application no. 21424/16) and *Silliau v. France*, (Application no. 45728/17)

⁴⁵ *Rose & Anor v. Secretary of State for Health Human Fertilisation and Embryology Authority* [2002] EWHC 1593

⁴⁶ *Allan*, *supra* note 5, 115-120.

in Europe to reach a position that would be acceptable for countries in which donor's anonymity is protected, as well as in countries in which the donor's identity is always open for a donor conceived-person. It is the view of the author that while maybe identification of gamete donors will be a respected principle among all European countries in the future, it is unlikely that European laws will be unified soon. An approach that moves Europe forward, in a stepwise fashion to recognise the rights of the child may be needed to give a chance for change in all European countries. To then enhance this further, it is imperative to consult with donors, recipients, and donor-conceived people in all nations to ensure any laws are developed with their input, views, and experiences.

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