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WHO IS MY
GENETIC PARENT?
Donor Anonymity
And Assisted Reproduction:
A Cross-Cultural Perspective

Edited by

BRIGITTE FEUILLET-LIGER

*Professeur à la Faculté de droit et de science politique de Rennes
Membre de l'Institut Universitaire de France
Directrice du CRJO (IODE, UMR CNRS n° 6262)*

KRISTINA ORFALI

*Associate Clinical Professor of Bioethics in Pediatrics
University of Columbia, New York (USA)*

THÉRÈSE CALLUS

Senior Lecturer, University of Reading, UK

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CHAPTER 12

**ANONYMITY IN ASSISTED REPRODUCTION:
GENDER EQUALITY
AND A PRONATAL REPRODUCTIVE POLICY
IN HUNGARIAN LAW**

BY

JUDIT SANDOR

LAWYER, PROFESSOR AND DIRECTOR
OF THE BIOETHICAL AND LEGAL INSTITUTE AT CEU,
CENTRAL EUROPEAN UNIVERSITY (HUNGARY)

Before 1997, Hungarian law did not deal with the legal questions of assisted reproduction except for decrees dealing with artificial insemination. However, later in the same year – within the framework of a comprehensive legislative health reform – a new law was adopted to replace the obsolete law Act II of 1972 which was voted during the state socialist era. The new Health Act CLIV of 1997 regulates ART (1) procedures in chapter IX. Compared to other European laws, this law is considered among the most liberal, since it authorizes gamete donation and even embryo donation. Initially, in the law of 1997, surrogate motherhood was also considered among the most liberal laws. However, two years later, before this new law was enacted, the provisions dealing with surrogacy were altered and from then on the practice was prohibited. Indeed in 1997, this law was seen as modern, however it is by no means certain that it is still considered so today, given that the approach to ART procedures – and society as well – have changed considerably (2).

(1) In this chapter I will use the term assisted reproduction or ART although the literal translation of the Hungarian legal expression (“Az emberi reprodukcióra irányuló különleges eljárások”) is not assisted reproduction but “special procedures for the purposes of human reproduction”.

(2) More and more children live in mono-parental family or families which are restructured after divorce. There are lots of “singles”, but often couples anticipate having children later on – it is true that they prepare themselves much more consciously than in previous years.

The Hungarian legislator's pro-IVF approach is reflected not only in the 1997 Act but also in the 2005 Parliamentary Act No. LVII which, from an employment law perspective, protects individuals participating in assisted procreation procedures. Thus the employer can neither dismiss an employee during medically ART treatment, during the pregnancy, or in the three months after the birth, or during maternity leave (3). Moreover "for the duration of ART treatment, as provided by a special law, the employee is exempt from her obligation to work".

Despite the fact that IVF procedures applied in Hungary have already a history of more than twenty years, the general public still has little awareness about the application and efficiency of these different methods, as well as the ethical implications associated with different procedures.

I. – ETHICAL ASPECTS OF THE LAW ON ASSISTED REPRODUCTION

As it became obvious that no serious harm to the health of the offspring was to be considered, the focus of the debate shifted onto the question of how the new interventions would affect family relations, and what problems might arise in connection with the right of disposal over gametes and embryos (4).

In Hungary, ART procedures may be performed on heterosexual couples, married or unmarried, on the condition that it is impossible for them to procreate naturally following infertility of one person in the couple. In the case of an unmarried couple, ART procedures may be carried out on the condition that neither member of the couple is married to anyone else (5). Later the law was modified to allow single women to request ART treatments.

The specificity of Hungarian law (6) is such that even after a couple's divorce (or separation), if the egg has already been insemi-

(3) Law LVII of 2005 modified part d) paragraph (1) of Article 90 of law XXII of 1992 (Employment Code).

(4) J.A. ROBERTSON, "Procreative Liberty and Harm to Offspring in Assisted Reproduction" (2004), *American Journal of Law & Medicine*, 30, 7-40.

(5) Health Act, paragraph (1), article 167.

(6) This specificity of the Hungarian law was also mentioned by the European Court of Human Rights in the Evans case (*Evans v. the United Kingdom* (application No. 6339/05)), 42.

nated, the ART procedure may still continue for the woman on her own (7). However if insemination is carried out *in vitro* and the embryo has not yet been implanted in the uterus, then the couple, before starting the procreative procedure can request a prohibition on continuing the procedure in the event of one of the spouse's death (8). The specificity of Hungarian law is reflected not only by the fact that women can unilaterally continue with the medically assisted reproduction procedure, but also by the fact that single women have had the right to seek this procedure since 2006. However – as we shall see below – this same philosophy is also found within the practice of authorizing egg donation between close family members.

ART can only be carried out after it has been proven that all other forms of medical treatment for infertility have failed, and on the condition that with the applied method, the chances of reproduction – thus the birth of a healthy child – are medically indicated.

The Hungarian Health Act guarantees the possibility for women to proceed with embryo implantation after divorce or death of the spouse (9). Any couple may reject this option before the start of the treatment cycle, and thus couples should be advised in relation to this legal regulation in advance. With this provision, the law recognizes that from a medical ethics perspective, sperm donation differs considerably from egg donation, which presents a surgical component and thus represents a much more serious intervention for the donor. In addition, this practice is often preceded by hormonal therapy (ovarian stimulation).

(7) J. SANDOR, "A terápiától a szelekcióig: Jogi és etikai viták a reprodukciós beavatkozások új módszereiről" (From Therapy to Selection: *Legal and Ethical Debates on the New Methods of Assisted Reproduction*) (2005) *Acta Humana*, vol. 16, No. 4, p. 3-20.

(8) J. SANDOR, "Reproductive rights in Hungarian law: a new right to assisted procreation?" (2000), *Health and Human Rights*, 4(2), 196-219 (Harvard school of Public Health, Centre for health and human rights).

(9) At the time, having studied French case law in particular, the drafters of the Health Act concluded that it was necessary to ensure the possibility of continuing a procedure already started, in the interest of the mother and the child to be born, in the case of the father's death or the couple's divorce. It is known that a number of procedures were started because often, the mother often remained single after many long years of painful treatment. Since French law does not consider the demand of these couples with regards to embryo implantation, these women cannot therefore continue the ART procedure on their own and must restart everything from the beginning with a new partner. To solve this problem, the Hungarian legislator, in 1997, authorized a single woman to continue with the ART procedure and even allowed her to request embryo implantation.

II. – THE SPECIFICITIES OF EGG DONATION

The Hungarian legislator created specific rules with respect to anonymity in egg donation. In other fields of medical law, embryo donation, organ donation, blood donation and even sperm donation belong to the domain of strict secrecy: they are anonymous acts, and thus any personal information of donors may only be handled by the given medical institution for confidentiality reasons and the recipients may not be informed of any biological traits regarding the donors. Although, for sperm donation, the law allows the selection of the donor on the basis of certain physical characteristics in order to have the donor resemble the couple applying for the reproduction procedures, the identity of the donor may not be revealed.

In Hungary, gamete donation and – consequently – egg donation are both permitted. In effect, until 2005, Hungarian law dealt with sperm and egg donations in the same way, and thus made no distinction between these two forms of gamete donation. Nevertheless, under the legislative act enacted in 1997, they are only permitted if the identity of the donating mother is not known to the parents. Under the current Health Act, it is possible to donate gametes for ART procedure or for medical research; however they should be used exclusively for the very purpose for which they have been donated.

The law also provides that gamete donations cannot justify any compensation or payment. However costs which are both necessary and justified, including the donor's loss of salary which is linked to the donation, must be reimbursed according to the conditions fixed by the decree.

The law CLXXXI of 2005 which was enacted in 2006 ended the exclusive anonymity for egg donation, and permitted women from within the same family to donate eggs both secretly and openly.

In terms of paragraph (1) of the article in the Health Act, every competent person has the right to donate gametes within the conditions defined by the specific law. In the case of donations within the framework of ART, the donor must be less than 35 years old.

Furthermore, in the egg donation declaration, the following should be indicated: surname (maiden name), first name, address, date of birth, as well as physical characteristics and any illnesses known by the donor.

Before the law's amendment, the media, professional bodies, and the Committee on Human Procreation all began an intense debate concerning the conditions for egg donation. Many professionals such as gynaecologists supported the idea of authorizing donations between friends, because in Hungarian families, close family members were few and far between, and there was a real risk of significant pressure being put on an only sister to donate.

The 1997 Act seemed untenable because it stipulated that the gamete donor's identity should be kept secret from the sterile couple. As a result, in the case of egg donation, it is only by somehow circumventing or expressly violating the law that a revelation of the donor's identity can be made for the recipient couple. Furthermore, on a medical level, sperm donation and egg donation do not represent the same level of intervention for a donor. Egg donation can only be carried out by means of an invasive surgical operation, and furthermore, eggs are difficult to freeze. Therefore, only "fresh" eggs may be used successfully. "Anonymity" was therefore difficult to maintain (10). As such procedures represent a very serious intervention for the donor, the recruitment of voluntary egg donors becomes difficult. In addition, since couples undergoing ART request a physical resemblance with the genetic parent, it is up to the doctor to select the donor.

On this matter, in Europe we find very variable rules. In Sweden, anonymity ended in 1985 (11). Although in the light of the new regulations the number of gamete donors dropped in the beginning, it started to increase later, and thereafter reached the earlier level.

In Great Britain (12), in 2003, the Human Fertilisation and Embryology Authority (HFEA) conducted a survey on disclosing the gamete donor's identity (13). In the study, the responses of 140 donors and 42 clinics in total were analysed. In Great Britain, where in the past, the gamete donor's personal information could not be released to the recipient couple, the rules have recently been changed with regard to a child's right to know his or her origins.

(10) I note that it is not justified to use the notion of anonymity in the case of gamete donation because in reality, the donor's information is recorded in a coded format (as with many medical tests carried out on donors requiring identification in a legal sense, it is a question of coding and not really anonymity).

(11) See *supra*, Chapter 17, p. 247.

(12) See *supra*, Chapter 10, p. 175.

(13) <http://www.dh.gov.uk/assetRoot/04/01/89/77/04018977.pdf>.

Thus, children born after April 2005 from sperm or egg donations, have the right to know the donor upon reaching their majority (18 years old). This new provision did not have retroactive effect on past donations, thus as a consequence, the identity of those who donated gametes under the old rules cannot be disclosed to the recipients.

Sperm donation and egg removal are interventions which carry various significant risks. Thus, from a legal aspect, the different laws in place for the two types of gamete donation can be justified. As the effectiveness of subsequent uses of frozen ovules is not proven, freezing and storing the eggs in a freezer is still at an experimental stage. This means that the donation can only be used a minimum of six hours after its removal. Thus, the cycles of both the recipient and the donor must be harmonised. The two patients must each adapt to the other (14).

For the donor, drug therapy to control the embryo lasts for four weeks and requires several injections a day. At the end of the treatment cycle, the follicles and ovules are removed under a short general anaesthetic. During this stimulation period, the patient will be absent from work for around five to ten days at the minimum. As with any sort of anaesthetic, the intravenous sedation carries potential risks (15).

Since egg donation represents such a commitment for the donor, it can happen that the latter, being the child's biological mother will request to be recognized as the mother. According to provisions in the Hungarian family code, every person claiming to be the child's mother can ask the court to officially recognise this maternity (16). On the other hand, if the child is born through ART the law states that it is impossible to ask the court to recognise the maternity of the egg or embryo donor. In my opinion, this impossibility does not on the other hand prohibit the female donor from asserting her maternity. Given that for a female, egg donation represents a much more serious intervention than what is required for

a sperm donor it may be that the female donor genuinely desires to be the mother of the child born from ART (17).

In conformity with paragraph (1) of article 179 of the current Health Act, a child who is created and born through ART with gamete or embryo donation has the right – when reaching majority – to learn of the circumstances surrounding his or her conception and birth, based on available information. Currently, this provision is interpreted as follows: the child created as a result of IVF has the right to learn that he or she was born within the framework of ART and not by natural procreation, but this does not mean that he or she has the right to know the identity of the genetic parents (the donors). For now, there has not been such a request; whilst in the case of adoption the adopted child has the right to know his or her biological parents through the institutional body which carries such authority.

III. – LEGAL AND SOCIAL EFFECTS OF SUPPRESSING “ANONYMITY”

Suppressing anonymity in egg donation can have two different types of consequences: first infertile couples may themselves want to know the identity of the sperm donor, and then, the child having reached majority may also want to know her biological parent under increased pressure of laws recognizing children's rights to know their origins. It would be possible to put an end to sexual discrimination by arguing that if the child can learn of her biological mother, why should she not be able to learn of her biological father? As a result, even though the difference between the two types of gamete donations appears fundamental, the legal distinction seems difficult to maintain in the long run if the recipient couple can know the egg donor's identity whilst not being able to know the identity of the sperm donor. It is likely that if anonymity does become suppressed, sperm donation will decrease because the donor may fear the consequences from a family law perspective, or may simply fear that the child, on reaching majority, will want to contact her biological father (18). In the case of egg donation, the sit-

(14) These aspects of the question are described in the project on egg donation by Dr. J. KONCZ, presented before the HRB.

(15) *Idem*.

(16) Article 40 of the Family Code. Parliamentary Act No. IV of 1952 on Marriage, Family and Tutelage (Family Code).

(17) Same results obtained by O. CSIKY and E. FİLÓ (2003), in *Family law in Hungary* (Budapest: HVG-ORAC), p. 197.

(18) Such situation occurred in 1990 in Glasgow where out of a population of 660.000 inhabitants, only one person volunteered to donate sperm.

uation is not the same: it is precisely because of the rule of anonymity that egg donations are rare.

In Hungary in 2005, professionals have debated at length the question of knowing which people should be allowed to donate openly (no longer maintaining anonymity). One of the positions defended that only females participating in ART procedures should be allowed to do so. In reality these women endure hormonal treatment and egg removal in order to get IVF. Since several eggs are removed, several embryos will be conceived by IVF. Surplus embryos may then be donated. This method also guarantees the protection of the embryo. Of course, it is not possible beforehand to guarantee that the egg taken from the female donor and the participant of the IVF program will be successfully fertilized, or that the embryo implantation will be a success, or even that the child will be born healthy. According to experts, if the donor (who donated the eggs which created the child) herself remains childless despite treatment, it can lead to serious psychological suffering. However it is necessary to insist that egg donation remains altruistic. Therefore, even if there exists particular causes which prevent embryo implantation or the carrying of a foetus by the woman having recourse to ART, it can be assumed that the latter can all the same help other women by donating their eggs or embryos.

An alternative approach has been suggested. It is necessary to allow eggs to be donated from women who are not involved in an IVF program, but who are close enough to the infertile couple, for example sisters or sisters-in-law. As Hungarian law, in conformity with the Oviedo Convention (19), authorizes the donation of organs and human tissue as long as they remain without financial gain, a philanthropic intention to help seems all too natural. It remains to be seen if in small families where there is no sister or sister-in-law available, assistance from another person such as a friend, can be authorized.

From the point of view of the child's right to know her origins, a distinction between sperm and egg donation cannot be maintained; the child has, in every case, the right to know the circum-

stances of his or her conception. It is important to emphasise that this right to know one's identity does not justify a right to alimony or to any other parental obligations on the part of the gamete donor.

Gamete donation is voluntary and is justified by the declaration of a written agreement signed by the donor after a detailed presentation of the intervention and its consequences. The agreement can be withdrawn any time up until the start of the procedure. The information given to the egg donor has to include the provision stating that the donor cannot legally be considered as being the child's mother and that there is no ground to impose on her any obligation such as paying for child support.

Finally, after lengthy debates the Act was modified in 2005, and accordingly only close relatives may donate eggs to other family members in non anonymous way. In the terms of this new law, only close family members can donate eggs to other family members in non anonymous way. In all other cases, anonymity is maintained. Preserving anonymity in sperm donation is an interesting aspect of the current law.

IV. - OTHER CASES OF ANONYMITY IN HUNGARIAN LAW

Clinics which practice organ transplants cannot reveal information concerning either the donors or the recipients. In conformity with the law, organ transplants are entirely anonymous and consequently, requests from individuals who wish to obtain information such as names and the donor's family are always rejected. However, since in Hungary, the volume of this type of intervention is low- if the donor's family declare that their relative's organ can be transplanted, the recipient can, after the intervention, identify the donor from the scheduled date of surgery. This is not forbidden by the law either for the donor, or for the recipient.

In the realm of family law, the question of the child's right to know her origins is particularly prominent within adoption. Under Hungarian law, revealing the child's origins is authorized by the guardianship authority (20). The biological parent can agree to

(19) Law VI of 2002 on the proclamation of the Convention of Oviedo, 4th April 1997, Council of Europe for the protection of Human Rights and Dignity of the Human Being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, as well as a complementary protocol on the prohibition of human cloning, Paris, 12th January 1998.

(20) Paragraph 1 of Article 48 of Law IV of 1952 on family, marriage and guardians.

adoption even if she does not know the adopting person's identity (21). The consent procedure can be done even before the child's birth. Until the child is six weeks old, the biological parent has the right to withdraw her agreement – and it is necessary to inform her beforehand, of this right.

Since 1997, an adopted child has been able to seek information about her biological parents (22). During the adoption procedure, it is necessary that both parties be informed of this right. In order to provide this information, the biological parent should be heard alongside the adopting parent or any other legal representative if the adopted person is still a minor. However if the biological parent is not competent, if he or she resides at an unknown address, or if this hearing is impossible then the hearing is not compulsory.

The majority of women give birth in hospital, and in this case it is not possible to give birth anonymously. However sometimes it happens that the child is abandoned in an incubator placed in front of the hospital. If the two parents are unknown; immediately after the birth or if the father's identity is unknown or at any time upon the request of the mother and in all other cases, after the child reaches three – *ex officio* actions are to be taken towards the registration of fictitious persons as the parents or father of the child on the birth certificate (23).

The comparison between ART and adoption appears to be clear. While in the case of adoption, the child has the right to know her biological parents; it is unlikely that we will be able to maintain anonymity for a long period of time in the case of ART. Indeed the better solution is that the child's biological origin should never surpass the parent-child relationship which is based on love and the child's education. We fear that this danger is due to over-emphasizing genetic links, although it is a problem which already exists in areas other than just law. The law itself cannot deprive children of their right to know their origins.

It seems that nowadays there is a shift in both our legal concepts and in the public expectation toward ending anonymity; there is an

increased recognition of a right to know the identity of genetic parents, from both the donor and the recipient's perspective (even so regarding the biological link constituted by means of transplantation) which seemed to be confirmed in various fields of law.

(21) *Idem*, 48, s3.

(22) *Idem*, 53/A, s1.

(23) *Ibid.* Section (1) of Article 41.