"The issue of donor’s anonymity in German and Greek legal system"

The issue of anonymity of donors of genetic material within the heterologous fertilization is a complex and multidimensional problem for which there is no consensus in the scientific world. Indeed, today there is a disagreement on this issue. The first opinion is in favor of the anonymity of donors of genetic material, thus strengthening the social affinity, while the second considers the child’s right to know its origin, an integral element of human dignity and personality, considering thus donor anonymity constitutionally impermissible.¹

The Greek law, when the progressive Law 3089/2002 for assisted reproduction was introduced, adopted the model of donors’ anonymity, in order to consolidate social affinity.² However, other jurisdictions, such as Germany, recognize the children’s right to know their biological parents. Given the fact, that already in other countries is recognized such a right of the child, who was born via heterologous fertilization, to know the donor’s identity, the opinion that everyone is entitled to know his roots is gaining ground, but it is not based on convincing arguments. The question therefore arises as to whether the Greek legislator should amend the relevant legislation abolishing the anonymity for donors of genetic material.

¹ For this opinion see A. Kotzabassi, “The anonymity of sperm donor in artificial fertilization as a legal and ethical issue” (Η ανωνυμία του δότη σπέρματος στην τεχνητή γονιμοποίηση ως νομικό και ηθικό ζήτημα) in Armenopouloς (Αρμ 2000), p. 713-714.

The issue of access to the identity of donors of genetic material is closely related to the law of affinity. In my opinion, in order to decide for or against donor anonymity is worth considering the legal consequences of abolishing the anonymity of donor if we apply in Greece, a model similar to the German, which allows the child to find its biological father. According to the German Civil Code, the child who is born with genetic material of a donor has the right to contest paternity according to § 1600 section 1 and 5 of the German Civil Code (BGB) and to be legally connected with his biological father, namely the donor, acquiring in case of successful contestation of paternity, the right of maintenance as well as inheritance rights against the donor. In Germany, there is not just the possibility to discover the donor’s identity, as this right was recognized by decisions of 18.01.1988 and 31.01.1989 of the Supreme Constitutional Court, but equally the right to contest paternity, which means a total overthrow of the established affinity with the social father.

In fact, in order to have this situation, the child should rather have been informed by his mother and his social father that it was born with genetic material of a donor, while it is also necessary that the doctor has preserved the relevant files with donor’s identity. The lack, however, of a national database of donors combined with the frequent occurrence of non recordkeeping by doctors, although they are obliged to keep records of donors for at least 30 years, finally makes it rather impossible for the child to find the identity of its biological father. This, of course, would be even more difficult to happen if the donor was a citizen of another country when private international law issues would also bring about. It is therefore more a theoretical possibility, without so much practical application so far.

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3 D. Coester-Waltjen, Familienrechtliche Überlegungen zur Rolle des Samenspenders-Die drei kritischen Us (Unterlagen-Unterhalt-Umgang), in Spendersamenbehandlung in Deutschland- Alles was recht ist?!, 2014, p. 86, R. Ratzel. Beschränkung des Rechts auf Fortpflanzung durch das ärztliche Berufsrecht, in Reproduktionsmedizin- Rechtliche Fragestellungen, 2010, p. 52-53
5 The obligation to keep medical records for at least 30 years is stipulated in § 10 MBO (Muster-Berufsordnung für die deutschen Ärztinnen und Ärzte) as well as in § 13a and 16a of TPG (Transplantationsgesetz), See also R. Ratzel, op.cit., p. 53-54
6 P. Thorn, T. Wischmann, German guidelines for psychosocial counselling in the area of gamete donation, Human Fertility, 2009, 12(2), 77, (Muster) Richtlinie zur Durchführung der assistierten Reproduktion, Bundesärztekammer, Novelle 2006, Deutsches Ärzteblatt, Jg.103, Heft 20, 19.Mai 2006, s. A1402, where it is highlighted that in cases doctors do not adhere to the prescribed obligation by the guidelines of the German Medical Association, the child can not ultimately find the identity of the biological father.
7 A number of theorists in Germany, argue that so far no problems have been encountered as previously doctors had no obligation to keep records of donors and was therefore absolutely impossible to find evidence of his identity. Today, however, there is such an obligation, and given that, if not all, certainly
In the same direction moves the German jurisprudence. Thus, recent judgments of the German courts are in favour of the child’s right to know its origin, without taking into account any problems that arise regarding the affinity. Thus, in case of OLG Hamm 06.02.2013\(^8\), the court concluded that the child who is born with donor’s sperm, has the right to know the identity of the biological father, and any contract between the doctor and the child's parents for non-disclosure of the donor’s identity is invalid\(^9\). In a more recent judgment of the German Supreme Court BGH\(^10\), the Court recognized the right of children to know their biological parents, without requiring the completion of a minimum age limit to request this information. The court even acknowledged entitlement of access to donor’s identity to the parents in order to inform the child, even at a time shortly after the child's birth.

After this brief analysis of the German legal system on the issue of anonymity of donors, it is worth considering the rules of the Greek Civil Code. The Greek legislator chose the system of anonymity of donors and is therefore stipulated at Article 1460 of the Civil Code that people wishing to have children with genetic material of third party can not have access to the donor's identity. The same is stated for the child to be born, with the exception of the recognition of access in donor’s records for health related reasons. Equally, the donor is excluded to obtain information on the identity of the child who was born with its own genetic material and its parents. Furthermore, of great importance is the provision of article 1471 para. 2 sect. 2 of civil code, where is stipulated that nobody can contest the paternity of a child born with heterologous fertilization\(^11\), while Article 1479 para. 2 of civil code

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\(^8\) OLG Hamm of 06.02.2013, NJW 2013, 1167

\(^9\) See “A Comparative Study on the Regime of Surrogacy in EU Member States, European Parliament”, 2013, p. 269

\(^10\) BGH of 28. 01. 2015 - XII ZR 201/13, openJur 2015, 5945

precluded judicial recognition of paternity even if the donor’s identity is known\textsuperscript{12}. A different rule would totally overthow the law of affinity as such a change would mean that the social father who would have grown up with affection and love the child, might be estranged from it and the donor would take his place as biological and legal father the child, even without the latter’s wish. On the other hand, an intermediate solution could certainly be argued. According to it, the child should have just the right to know the donor’s identity without being legally connected with him, a solution that lies between the Greek and German law. The question in both cases is whether the child has something to gain from knowing the origins or whether it is a false dilemma.

The above analysis shows the different way in which the German and Greek legislation regulate the question of anonymity of donors of genetic material. Each of those legislative options gather arguments for and against. Those who are against the anonymity of donors\textsuperscript{13} focus on the right to know the origin and the biological truth, while the proponents of anonymity\textsuperscript{14} consider knowledge of biological truth outdated and argue that social affinity overrides the biological origin. Furthermore, proponents of “known” donors believe that it avoids the risk of incest and that in any case it is


better for the child to learn its origin from his parents rather than by a third party. The argument, however, that the child should have the right to know the biological truth as it is the case in adoption, has no basis because they are two completely different situations that can not have similar legal treatment. From a practical standpoint, the majority of parents would not reveal to the child that it was born with genetic material of a donor, fearing that the child will alienate from them and the obligation to inform the child about this, could not be imposed by law. Let alone, even if stipulated by law, it would be difficult to check whether they apply this.

After a cost-benefit balance I think that it is obvious that any change in Greek legislation regarding donor anonymity, would rather have dire consequences for both the child and the social father as well as the donor, because social affinity, upon which the progressive Greek law on assisted reproduction was constructed, would be weakened. The situation until today, however, shows that the anonymous donation of genetic material, has worked well in Greece and social affinity is strong, ensuring peace in the family, as was the intention of the legislator in 2002. In my opinion, the access to the donor’s identity is contrary to the interests of the child to be born and together with the absence of counseling in the field of assisted reproduction, in Greece, the consequences would be disastrous, both for the child, which will face an identity crisis and for the parents. The Greek law, therefore, should maintain the safeguards provided by Articles 1471 para. 2 sect. 2 and 1479 para. 2 of Civil Code and could be an example for changes in legislation of other countries.

Access to donor’s information is, from my point of view, a brake on heterologous fertilization, which the legislator should take seriously into account, at least in countries where there is debate about modernization of legislation on assisted reproduction. In any case, the revelation of the donor’s identity creates a “cloudy landscape” on assisted reproduction, as it is shown through previous practice in countries, such as Germany. Besides, we could say that the anonymity of donors, as correctly many argue, offends the child’s right to know its biological origin, and consequently the free development of his personality, but further if we leave the purely doctrinal level of constitutionally guaranteed rights, it would be socially and

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15 V. Pournaras, op.cit. in Ap. Georgiadis "SEAK" (ΣΕΑΚ), p.798 where it is stated that after the acceptance of social affinity by the legislator, the return in biological origin could lead to dead ends.
morally unacceptable to allow the child to contest the affinity with the social parents, who ultimately gave him a superior good, that of life.