COLLISION OF INTERESTS IN THE ASSISTED HUMAN REPRODUCTION WITH DONOR SPERM IN GERMANY AND BRAZIL.

Dissertation
zur Erlangung des Grades
eines Doktors der Rechtswissenschaft
der Fakultät für Rechtswissenschaft
der Universität Hamburg

vorgelegt von
Maiara Giorgi
aus Bento Gonçalves - Brasilien.

2020

Erstgutachter: Prof. Dr. Markus Kotzur

Zweitgutachter: Prof. Dr. Marion Albers

Datum der Disputation: 09. September 2021

ABSTRACT

The present research aims to contribute to the discussion on the collision of rights that arise from the use of assisted human reproduction treatments with donor sperm. It will analyze how the law and the judiciary are promoting and protecting the rights and interests of those involved in an assisted human reproduction treatment with donor sperm, as well as establish which interests can lead an individual to want to know his or her genetic origins and if those interests should prevail over the rights of the donor. A parallel between Brazil and Germany, regarding the rights of the child conceived with donor sperm will be presented. The controversy about the anonymity of the donor and the right of the child to know his or her origins is still a topic that causes divergence in the discussions about assisted human reproduction in Brazil. Since there is still no specific law to regulate the topic, assisted reproduction treatments with donor sperm in Brazil are carried out based on the guidelines of the Resolution n. 2.121/2015 from the *Conselho Federal de Medicina* (Federal Council of Medicine), which currently establishes the obligation to keep donor information confidential. The thesis also aims to demonstrate the relevance of the right to know the genetic origins as a right of the personality. In this sense, the researcher will reflect on the right of the child to know his or her origins and the donor's right to anonymity, as well as on other rights related to the subject. The Sperm Donor Registry Act (*Samenspenderregistergesetz*) was introduced in Germany in 2018 and can be considered a major step forward in the regulation of the subject in the country, because it created a central register of sperm donors, which can be accessed by children conceived with donor sperm at the age of 16 years old or at any time by his or her legal guardians. Brazil still defends donor anonymity, just as Germany used to do until not so long ago. Therefore, understanding the reasons that led Germany to change its position and enact a law on assisted human reproduction with donor sperm gave interesting inputs to improve the arguments for the need of a law regarding assisted human reproduction and sperm donation in Brazil. The German and Brazilian scenarios were analyzed with the study of the rights that have relation to the subject, as well as laws and court cases, with the objective of reflecting on the limits and criteria that should integrate possible instruments in Brazil for the protection of the rights of those involved in assisted human reproduction treatments. The theme was developed under an international and comparative perspective, as the German legal perspective on the topic can help rethink the way the Brazilian legal system can approach it in the future. Taking the German's legal perspective into account can also contribute to the amplification and definition of the theme in the Brazilian context.

Keywords: Assisted Human Reproduction; Sperm donation; Right to know the origins; Donor anonymity.

ZUSAMMENFASSUNG

Die vorliegende Arbeit soll einen Beitrag zur Diskussion über die Kollision von Rechten leisten, die sich aus der Verwendung von Spendersamen in Behandlungen zur assistierten Reproduktion ergeben. Es wird analysiert, wie das Gesetz und die Gerichte die Rechte und Interessen derjenigen fördern und schützen, die an einer Behandlung der assistierten Reproduktion mit Spendersamen beteiligt sind, ob eine Person Rechte hat, ihre genetische Abstammung zu erfahren sowie ob diese Rechte Vorrang vor den Rechten des Spenders haben. Es wird eine Parallele zwischen Brasilien und Deutschland zu den Rechten des mit Spendersamen gezeugten Kindes vorgestellt. Die Kontroverse um die Anonymität des Spenders und das Recht des Kindes, seine Abstammung zu erfahren, ist nach wie vor ein Thema, das in den Diskussionen über die assistierte Reproduktion in Brasilien zu Meinungsverschiedenheiten führt. Da es noch kein spezifisches Gesetz zur Regelung des Themas gibt, werden in Brasilien Behandlungen zur assistierten Reproduktion mit Spendersamen auf der Grundlage der Richtlinien n 2.121/2015 vom *Conselho Federal de Medicina* (Bundesärztekammer) durchgeführt, der derzeit die Verpflichtung zur Vertraulichkeit von Spenderinformationen festlegt. Die Dissertation soll auch die Relevanz des Rechts zeigen, die Kenntnis über die einige Abstammung als Teil des Persönlichkeitsrechts anzuerkennen. In diesem Sinne wird der Forscher über das Recht des Kindes auf Kenntnis der Abstammung nachdenken und das Recht des Spenders auf Anonymität, sowie über andere Rechte in Bezug auf das Thema. Das Samenspenderregistergesetz trat 2018 in Deutschland in Kraft und kann als wichtiger Fortschritt bei der Regulierung des Themas im Land angesehen werden, da es ein zentrales Register für Samenspender erstellt hat, auf das Kinder von Spendersamen im Alter von 16 Jahren oder von seinen Erziehungsberechtigten jederzeit zugreifen können. Brasilien verteidigt immer noch die Anonymität der Spender, so wie es Deutschland bis vor kurzem getan hat. Das Verständnis der Gründe, die Deutschland dazu veranlassten, die Rechtslage zu ändern und ein Gesetz zur assistierten Reproduktion mit Spendersamen zu erlassen, liefern wichtige Beiträge zur Notwendigkeit eines Gesetzes zur assistieren Reproduktion und Samenspende in Brasilien. Das deutsche und das brasilianische Szenario wurden mit der Untersuchung der Rechte in Bezug auf das Thema sowie der Gesetze und Rechtsprechungen analysiert, um die Reichweite und Kriterien, die sich mit einer spezifischen Gesetz bringen, sowie die Rechte aller Beteiligten in einer assistierten Reproduktionsbehandlung. Das Thema wurde unter einer internationalen und vergleichenden Perspektive entwickelt denn die deutsche Rechtsperspektive zu diesem Thema kann dazu beitragen, die künftige Herangehensweise des brasilianischen Rechtssystems zu beeinflussen. Die Berücksichtigung der deutschen Rechtsperspektive kann auch zur Erweiterung der Definition des Themas im brasilianischen Kontext beisteuern.

Schlüsselwörter: assistierte Reproduktion; Samenspende; Recht auf Kenntnis der eigenen Abstammung; Anonymität der Spender.

ABBREVIATIONS

AHR	Assisted Human Reproduction
AI	Artificial Insemination
AID	Artificial Insemination by Donor
AIH	Assisted Insemination by Husband
ANVISA	Agência Nacional de Vigilância Sanitária
ART	Artificial Reproductive Technologies
BCTGs	Bancos de Células e Tecidos Germinativos
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BVerfG	Bundesverfassungsgericht
BZgA	Bundeszentrale für gesundheitliche Aufklärung
CFM	Conselho Federal de Medicina
CNJ	Conselho Nacional de Justiça
CRC	Convention on the Rights of the Child
DI	Donor Insemination
DIMDI	Deutsches Institut für Medizinische Dokumentation und Information
ICSI	Intracytoplasmic Sperm Injection
IVF	In vitro Fertilization
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EschG	Embryonenschutzgesetz

GG	Grundgesetz
GIFT	Gamete Intrafallopian Transfer
hESC	Human Embryonic Stem Cell
OLG	Oberlandsgericht
PGD	Preimplantation Genetic Diagnosis
PGS	Preimplantation Genetic Screening
SaRegG	Samenspenderregistergesetz
SchKG	Schwangerschaftskonfliktgesetz
StGB	Strafgesetzbuch
STF	Supremo Tribunal Federal
STJ	Superior Tribunal de Justiça
StZG	Stammzellgesetz
SUS	Sistema Único de Saúde
UN	United Nations
WHO	World Health Organization
ZIFT	Zygote Intrafallopian Transfer

CONTENTS

1. INTRODUCTION

The desire to have children has led many people to look for clinics that provide access to assisted human reproduction (AHR) treatments. The use of artificial reproductive technologies (ART) has successfully helped many couples and women all over the world to achieve their dream of conceiving a baby. However, even though ART have given hope to people who cannot conceive a baby by natural means, it also brings new ethical, social and legal challenges that need to be addressed by society and the Law.

Advancements in the field of ART have led to a good deal of scientific control over the act of procreation, providing not only solutions to cases of infertility or hereditary diseases, but also chances of parenthood for same-sex couples and single women.[1] In these cases, it is a common practice for sperm donors to donate sperm to a prospective mother. But even though AHR is beneficial and has the purpose of assisting in the process of conceiving a child, one cannot forget that it involves a set of techniques that interfere in the natural process of procreation, which can raise delicate questions and discussions.[2]

Reproductive medicine can be considered a young discipline, one that is constantly developing.[3] Although reproductive problems have always been a concern for

[1] ARORA, Puneet. *Right to Access Reproductive Technologies – A Right or A Wrong?* In: Journal of Forensic Medicine and Legal Affairs, vol. 2 (1), 2017, p. 1-2.
[2] TRAPPE, Heike. *Assisted Reproductive Technologies in Germany: A Review of the Current Situation*. In: Kreyenfeld M. *et al* (eds). Childlessness in Europe: Contexts, Causes, and Consequences. Demographic Research Monographs (A series of the Max Planck Institute for Demographic Research). Berlin, Springer, 2017, p. 269-270.
[3] *Id*, at 284.

human beings,[4] it was only in the seventeenth century that the possibility of male sterility was accepted.[5] Despite subsequent research and discoveries, the first insemination with donor sperm occurred only in 1884.[6] AHR techniques did not improve at a quick pace. It was only in the 1970s that humans started manipulating gametes and embryos and directly interfered in human procreation.[7] This led to the birth of Louise Brown, famous for being the first baby conceived by *in vitro* artificial insemination.[8]

Indeed, developments in the field of AHR continue to help many people to fulfil their desire to conceive a baby, but it can also raise controversies, especially regarding the conflict between the right of the child to know his or her origins and the right of the donor to have his identity protected.

Many countries, including Germany, have already taken steps to regulate issues arising from the use of AHR with donor genetic material. The Sperm Donor Registry Act (SaRegG – *Samenspenderregistergesetz*[9]) was introduced in Germany in 2018 and can be considered a major step forward in the regulation of the subject in the country. One of the biggest innovations of the SaRegG is that it created a central register of sperm donors, which can be accessed by children conceived with donor sperm from the age of sixteen, or at any time by his or her legal guardians.[10]

According to data from the *Rede Latino-Americana de Reprodução Assistida*[11] (Latin American Network of Assisted Reproduction – REDLARA) and the *Agência Nacional de Vigilância Sanitária*[12] (Brazilian Health Regulatory Agency - ANVISA), Brazil

---

[4] LEITE, Eduardo de Oliveira. *Procriações artificiais e o direito (aspectos médicos, religiosos, psicológicos, éticos e jurídicos)*. São Paulo: Revista dos Tribunais, 1995. p 302.
[5] FERNANDES, Silvia da Cunha. *As Técnicas de Reprodução Humana Assistida e a Necessidade de sua Regulamentação Jurídica.* Rio de Janeiro: Renovar, 2005, p. 35.
[6] ROSSI, Brooke V. *Donor Insemination.* In: GOLDFARB, James M. Third-Party Reproduction. A Comprehensive Guide. New York: Springer, 2014, p. 133.
[7] MACIONIS, John J. and PLUMMER, Ken. *Sociology. A Global Introduction*. 4th ed. England: Pearson Education Limited, 2008, p. 755.
[8] *Id*, at 755.
[9] *Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen* (Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm), July 17th, 2017, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt), Teil I, Nr. 48 from July 21st. 2017, p. 2513.
[10] *Id.*
[11] ZEGERS-HOCHSCHILD, Fernando *et al (2020)*. *Assisted Reproductive Techniques in Latin America: The Latin American Registry,* 2017. In: JBRA Assisted Reproduction, v. 24, n. 3, 2020, p. 362-378.
[12] Agência Nacional de Vigilância Sanitária – ANVISA (2019). *13 Relatório do Sistema Nacional de Produção de Embriões (SisEmbrio)*, 2019.

leads the Latin American ranking of countries that have undergone the most treatments with the help of ART. It is estimated that more than 10,000 children are generated each year with the help of AHR treatments in Brazil and, since 2011, the number of treatments has grown.[13] In addition to Brazil being the most populous country in Latin America, it has the highest concentration of AHR centers, which have high success rates.[14] But even though the number of children born with the aid of ART grows every year, Brazil still does not have specific legislation on AHR and sperm donation. Currently, these matters are regulated by a non-statutory resolution.[15]

The German experience on the subject can help to advance the discussions on the issues of AHR in Brazil. As mentioned above, with the SaRegG Germany has moved ahead in clarifying the issues by comparison to Brazil. And Brazil still defends donor anonymity, as Germany used to do until not so long ago. Thus understanding the reasons that led Germany to change its position and enact a law on AHR with donor sperm can give interesting insights and help strengthen arguments in favor of a law regarding AHR and sperm donation in Brazil.

This subject is not only complex, but also pressing, in view of the quantity of cases involving individuals who wish to know their genetic origin. Therefore, to the extent that knowledge is organized on the issue, it contributes to the dissemination of the importance of the topic and to the rationale of legal instruments or judicial decisions.

Since legal rules do not operate in the abstract but in specific cultural and juridical contexts, the comparison of distinct legal systems allows the researcher and legal practitioners to take another, and why not say, wider perspective on their own legal systems.[16] "What a text means can often be understood from its context,"[17] which means that the background (*"Hintergrund*") and the foundation (*"Untergrund"*) play an important role in the better understanding of texts, theories, rules and practice.[18] Therefore,

---

[13] *Id.*
[14] ZEGERS-HOCHSCHILD *et al (2020)*, *supra n.* 11, at 377-378.
[15] Agência Nacional de Vigilância Sanitária – ANVISA (2011). *Resolução-RDC n. 23/2011.* Published in the Federal Law Gazette (D.O.U.) n. 102, on May 30th, 2011.
[16] BHAT, Ishwara. *Idea and Methods of Legal Research*. 1st ed. Oxford: Oxford University Press, 2019, p. 05.
[17] HÄBERLE, Peter (2006). Role and Impact of Constitutional Courts in a Comparative Perspective. In: STÖBENER, Patricia *et al*. ECLN Conference Berlin 2005: The Future of the European Judicial System in a Comparative Perspective. Baden-Baden: Nomos Verlag, 2006, p. 66.
[18] *Id*, at 66-67.

understanding that the Law cannot be seen only as an independent system of rules and principles, the present research will be carried out considering not only legal aspects of AHR, but also historical, social and cultural aspects.

The aim of this research is to analyze and contribute to the discussion on the collision of rights that emanate from the use of AHR treatments with donor sperm. In particular, the study aims to:

- Analyze how the law and the judiciary are promoting and protecting the rights and interests of those involved in AHR treatments with donor sperm;
- Examine the possible legal consequences of the violation of a right over another;
- Establish which interests can lead an individual conceived with donated sperm to want to know his or her genetic origin, and whether those interests should prevail over the rights of the donor;
- Compare how two different legal systems, the German and Brazilian, are currently safeguarding the interests of people involved in AHR procedures with donor sperm, and ask how the German experience can contribute to the Brazilian context given the absence of specific legislation in Brazil;
- Argue that there is a need for a legal definition of issues arising from the use of donor sperm in order to avoid future conflicts, as well as a need for specific legislation about AHR in Brazil;
- Provide recommendations for the elaboration of specific legislation in Brazil.

In order to fulfill its objectives, this thesis is divided into six chapters, with the Introduction and Conclusion as additional chapters. When analyzing a subject, it is first of all essential to understand it in its diversity of meanings. Initially, in Chapter 2, the historical evolution of AHR will be outlined in order to highlight the changes it has undergone over time and the problems that resulted from this evolution. Next the causes and consequences of infertility will be analyzed, as an introduction to a discussion of the medical aspects involved in each technique, and the purposes that lead women and couples to opt for AHR techniques. Furthermore, the various techniques of AHR will be defined, described, and differentiated, as well as homologous and heterologous insemination.

Chapter 3 undertakes a legal assessment of the subject in order to establish a conceptual framework for the investigation. The relevant fundamental rights, the concept of human dignity, and the AHR in Germany will be considered. The child's right to know his or her origins and the donor's right to anonymity, as well as other rights that are considered relevant and related to these two rights, will be explained.

Chapter 4 delves into AHR in Brazil, the constitutional principles and rights that can support the access to ART, as well as the discussion between the right of donors to anonymity and the right of a child to know his or her origins. Elements of research in doctrine, legislation, and jurisprudence will be used to define the legal issues involved in the subject.

Finally, after examining the German and Brazilian scenarios in Chapter 5, laws and cases in Germany and Brazil are highlighted, with the objective of reflecting on the limits and criteria that should integrate possible instruments for protecting the rights of those involved in AHR treatments with donated sperm. Based on these considerations, suggestions for specific legislation about AHR and sperm donation in Brazil will be presented.

The theme will be developed from an international and comparative perspective, since a comparison with the German jurisdiction – where definitions and discussions of the topic are more advanced – can help us rethink the way the Brazilian legal system is treating the subject, and contribute to the amplification and definition of the theme in Brazilian law. It is important to make clear that this research does not intend to stand against or in favor of reproductive technologies with the use of donated sperm, but rather to propose a discussion within the legal sphere of these respective practices. It also seeks to contribute to reflections and debates on the theme, suggesting new aspects to be considered in the discussion of access to reproductive technologies.

2. ASSISTED HUMAN REPRODUCTION

The evolution and transformation of a society can be seen in the changes in its culture, which are also reflected in the legal system. Research on family law shows that, as a social phenomenon, the family has been transformed over the years and the nuclear family based on marriage between a man and a woman, with the sole purpose of procreating children of incontestable paternity, is no longer considered as the only existing social model.[19] [20] One example is the assisted human reproduction (AHR) with donor sperm, in which a woman receives the genetic material of an anonymous donor through artificial techniques in order to conceive a child.[21]

If we assume that the will and the right to have a child is inherent in human beings, AHR becomes relevant in society, particularly for couples with infertility issues, or even for same-sex couples or single women. Thus, this chapter will present and explain the artificial reproductive technologies (ART).

2.1 THE EVOLUTION OF ASSISTED HUMAN REPRODUCTION

Historically, the concept of human life having a beginning and an end has always

[19] RUCKDESCHEL, Kerstin *et al*. *Unequal Neighbours? A French-German Comparison of Family Size Intentions*. In: Comparative Population Studies, Vol. 43, Wiesbaden, 2018, p. 202.
[20] LÔBO. Paulo Luiz Neto. *Direito ao estado de filiação e direito à origem genética: uma distinção necessária*. In: Revista CEJ, Brasília, Issue 27, out./dez. 2004, p. 49.
[21] OMBELET, Willem and VAN ROBAYS, Johan. *History of Human Artificial Insemination*. In: Facts, Views and Visons in OBGYN. Belgium; Universa Pressa, 2010. p. 01.

been present in medical, biological, philosophical, and religious sciences. It is even possible to say that the development and popularization of artificial reproduction techniques reflect our own society's desire to pursue effective solutions to combat infertility or sterility. And an intense concern with issues of fertility and sterility has been present throughout human history.[22]

Already in primitive art, the pregnant woman used to represent a being able to generate new beings, such as the Mother Nature.[23] In some cultures and indigenous tribes, it is also possible to observe rituals and gods of fertility. It is believed that the Greeks were already doing embryological researches since the 5th century B.C,. The biological experiments and observations made by Aristotle, as well as his book *Historia Animalium*, laid the foundations for all subsequent embryological works. In this book Aristotle describes the embryology of a chicken and its development inside the egg.[24] However, it was only in the 2nd century A.D. that a work by Galen dealt with the formation of the fetus and embryonic development.[25] In literature one also finds mythological passages about procreation through the use of unnatural means. Perseus would have been the first man to be born by artificial insemination when Zeus assumed the form of golden rain to impregnate Danae, whose father imprisoned her to stop her having children since an oracle said that her son would kill his grandfather and usurp the throne.[26]

It is worth pointing out that until the 5th century A.D, it was believed that only women could be sterile. Presumed female sterility was seen as a shame for the family and could even be the cause of annulling a marriage.[27]

The Hindu code from the ancient India Manusmriti or Manu's Code of Law dealt with "the relationships between social and ethnic groups, between men and women, the organization of the state and the judicial system, reincarnation, the workings of karma,

---

[22] LEITE, *supra n*. 04, at 302.
[23] *Id*, at 302.
[24] HARRÉ, Rom. *Great Scientific Experiments: Twenty Experiments that Changed our View of the World.* Mineola, New York: Dover Publications, Inc, 2002, p. 32.
[25] MACHADO, Maria Helena (2008). *Reprodução Humana Assistida: Aspectos Éticos e Jurídicos*. Curitiba: Juruá, 2008, p. 156.
[26] BARBOZA, Heloisa Helena (1993). *A filiação em face da inseminação artificial e da fertilização "in vitro"*. Rio de Janeiro: Renovar, 1993, p. 32.
[27] COULANGES, Fustel de. *The Ancient City: a Study of the Religion, Laws and Institutions of Greece and Rome.* Kitchener-Canada: Batoche Books, 2001, p. 39-40.

and all aspects of the law."[28] In this code, the importance of offspring could already be noted. When the husband was sterile, his brother had the task of giving the couple a son by cohabiting with his brother's wife. The following are articles related to the theme, all from Chapter IX of the Manusmriti.

> "59. On failure of issue (by her husband) a woman who has been authorised, may obtain, (in the) proper (manner prescribed), the desired offspring by (cohabitation with) a brother-in-law or (with some other) Sapinda (of the husband).
> 60. He (who is) appointed to (cohabit with) the widow shall (approach her) at night anointed with clarified butter and silent, (and) beget one son, by no means a second.
> 61. Some (sages), versed in the law, considering the purpose of the appointment not to have been attained by those two (on the birth of the first), think that a second (son) may be lawfully procreated on (such) women.
> 62. But when the purpose of the appointment to (cohabit with) the widow has been attained in accordance with the law, those two shall behave towards each other like a father and a daughter-in-law.
> 63. If those two (being thus) appointed deviate from the rule and act from carnal desire, they will both become outcasts, (as men) who defile the bed of a daughter-in-law or of a Guru.
> 64. By twice-born men a widow must not be appointed to (cohabit with) any other (than her husband); for they who appoint (her) to another (man), will violate the eternal law".[29]

In Rule 59 there is the possibility of obtaining the help of a third party to conceive a child, which needed to be authorized by the husband. In the following four rules, we find that the matter of reproduction with the aid of a third party was somehow minimally regulated, even if that aid was provided by the primary method of reproduction – that is to say, by practicing sexual intercourse. Rule 60 established the method to be used and the number of children. According to Rule 61 the possibility of more pregnancies was only admitted after the approval of a Council formed by wise men knowledgeable in the Law. Rule 62 outlines the treatment that must be stipulated between the one who helps and the one who was helped. Finally, Rule 63 sets out the penalty for the man who deviates the purpose of the act he practices, seeking only his pleasure. Rule 64 states that the Council could not allow a widow or married woman without children to conceive the child by a third party, since if they did, they would be violating the primitive law.

Therefore, these measures could be adopted in case of male sterility. In cases of

---

[28] JAISHANKAR, K. *et al. Manusmriti: A Critique of the Criminal Justice Tenets in the Ancient Hindu Code*- In: *ERCES Online Q. Rev.* n. 3, 2004.
[29] OLIVELLE, Patrick. *Manu's Code of Law. A Critical Edition and Translation of the Manava-Dharmasastra*. New York: Oxford University Press, 2005, p. 195-196.

female sterility, however, the woman should be replaced, as determined in Rule 81: “a barren wife may be superseded in the eighth year, she whose children (all) die in the tenth, she who bears only daughters in the eleventh, but she who is quarrelsome without delay.”[30] It can be seen that at this time reproduction assistance was not available to sterile women, only to sterile men.

The appearance of the first microscope in the late sixteenth century brought technological advances, and in the middle of the seventeenth century, male sterility had become accepted, inspiring scientists to start thinking of methods and techniques to solve the problem.[31]

As a non-scientific antecedent, assisted reproduction techniques began with experiments in pollinating palm trees in ancient Babylon and among the Arabs, in order to produce more plentiful and better fruits.[32] But already in the fourteenth century, Arabs already performed artificial insemination in fish and in silkworms, as well as in mares.[33] Further experiments were made In the eighteenth century, for example by the German jurist and ichthyologist Stephan Ludwig Jacobi, who worked on the reproduction of fish.[34] Then in 1776, the Italian physiologist Lazzaro Spallanzani scientifically registered the first artificial insemination. It was performed on a female dog that gave birth to three offspring. In 1790, research on assisted reproduction in humans began.[35] These initial studies were not successful. It was only in 1883, with the discovery that the ovaries participate in the fertilization process, that researchers were able to conclude that fertilization occurs through the union of a sperm nucleus with the nucleus of an egg, thus paving the way for further advances in research.[36]

Specifically in humans, unofficial historical records claim that the first attempts to artificially inseminate a woman were made in the fifteenth century.[37] In 1495, artificial

---

[30] *Id*, at 198.
[31] FERNANDES, *supra n.* 05, at 35.
[32] MACHADO (2008), *supra n. 25*, at 156.
[33] *Id,* at 156-157.
[34] WEBER, Gregory M. and LEE, Cheng-Sheng. *Current and Future Reprodutive Technologies for Fish Species*. In: LAMB, G. Cliff and DILORENZO, Nicolas. Current and Future Reproductive Technologies and World Food Production. New York: Springer, 2014, p. 35.
[35] MACHADO (2008), *supra n. 25*, at 156-157.
[36] OLIVEIRA, Simone Born de. *Da bioética ao direito: Manipulação Genética e Dignidade Humana*. Curitiba: Juruá, 2002, p. 22.
[37] OMBELET, Willem and VAN ROBAYS, *supra n. 21*, at 01-02.

insemination may have been used in Queen D. Joanna of Portugal, second wife of Henry IV of Castile, nicknamed The Impotent.[38] After six years of marriage she gave birth to a daughter. Since many contemporary historians and chroniclers assumed Henry IV was impotent, the possibility of artificial insemination was suggested. Some years later it was claimed that the princess was not the daughter of the king.[39]

Spermatozoa were first seen and described by the Dutch businessman and scientist Antoni van Leeuwenhoek and his assistant Johannes:

> "Van Leeuwenhoek described the spermatozoa as "zaaddiertjes" or "living animalcules in human semen (...) less than a millionth the size of a coarse grain of sand and with thin, undulating transparent tails. He draws the conclusion that the tails must be operated by means of muscles, tendons and joints. Van Leeuwenhoek did not study Latin, the scientific language of the day. Nevertheless, his paper amazed, and perhaps amused, the reigning King of England. More than 100 years later, in 1784, the first artificial insemination in a dog was reported by the scientist Lazzaro Spallanzani (Italian physiologist, 1729-1799). This insemination resulted in the birth of three puppy's 62 days later".[40]

The first successful scientific experiment is attributed to the English surgeon John Hunter, who in 1790 obtained the pregnancy of a woman by inserting her husband's sperm into her vagina.[41] Later, in 1866, John Marion Sims reported fifty-five inseminations for six couples, but with only one pregnancy, which resulted in a spontaneous abortion.[42]

The artificial insemination by donor (AID) also called heterologous artificial insemination, i.e. with sperm donation from a third party, only occurred for the first time in the late nineteenth century (1884). It was performed by the American gynecologist William Pancoast in Philadelphia on a woman whose husband suffered from azoospermia, or zero sperm count (absence of active spermatozoa in the ejaculated semen).[43] Dr. Pancoast discussed the couple's case with his medical students, and "decided that the 'best looking' of the residents would donate sperm to be used for insemination. Under the guise of performing an exam, the wife was anesthetized and inseminated. She gave birth

---

[38] *Id*, at 01.
[39] *Id*, at 01-02.
[40] *Id,* at 02.
[41] LOPES, Joaquim Roberto Costa. *Tratado de Ginecologia: 63***.** Aspectos Éticos da Inseminação Artificial. Rio de Janeiro: Revinter, 2000, vol. 1, p. 585.
[42] ROSSI, *supra n.* 06, at 133.
[43] *Id*, at 133.

9 months later."[44]

However, the technique was further developed only in 1932 after the discovery of Ogino and Knaus. They described the different phases of the menstrual cycle, and were able to determine the fertile period of the woman.[45]

Kyusaku Ogino from Japan and Herman Knaus from Austria were two gynecologists who independently discovered that ovulation preceded menstruation by about 14 days.[46]

> "Dr. Ogino was the head of gynecology at Takeyama Hospital in Niigata, Japan. As a surgical gynecologist, he observed the ovaries of 118 of his patients during abdominal surgery. He was able to determine (based on the size and condition of the follicle or corpus luteum) when ovulation roughly occurred. When he plotted the 118 menstrual cycles and the estimated days of ovulation out on a graph, the days of ovulation were scattered and made no sense. However, when he counted backwards from the last day of the cycle to the estimated day of ovulation, he was able to notice a pattern and realized that ovulation preceded menstruation by about 14 days. He published his results in a Japanese scientific journal in 1923".[47]

Dr. Herman Knaus used a different approach to estimate the time of ovulation during the menstrual cycle. As the head physician of an obstetrics and gynecology clinic at the German University in Prague, he was able to conduct his research there on a day-today basis.[48] He injected a pituitary extract into women subjects then recorded the activity of their uterine muscles. His research showed that before ovulation the pituitary injection would cause uterine contractions, but after ovulation it did not.[49] He concluded that ovulation preceded menstruation by about 14 days. Like Dr. Ogino, he developed a calendar formula for determining the fertile and infertile periods of the woman's menstrual cycle. He published his findings in a German scientific journal in 1932.[50]

In 1945, the French biologist Jean Rostand noted that sperm subjected to cold, with glycerol, could be preserved for a long time,[51] thus contributing to studies made in

---

[44] *Id*, at 133.
[45] PÉREZ, Alfredo. *General Overview of Natural Family Planning.* Vol. 54, n. 3/4, 1998, p. 75-93.
[46] FEHRING, Richard J. *Under the Microscope: A Brief History of Natural Family Planning*. In: *Natural Family Planning Current Medical Research, vol.* 25, n. 3 and 4, 2016, p. 14.
[47] *Id*, at 15.
[48] *Id*, at 15.
[49] *Id*, at 15.
[50] *Id*, at 15.
[51] ETTINGER, Robert C. W. *The Prospect of Immortality*. Detroit: Ria University Press, 2005, p. 9.

1910 by the Russian biologist Ilya Ivanov and resulting in the creation of sperm banks. But the first successful use of frozen sperm occurred only in 1953.[52] Due to moral and legal controversies surrounding artificial insemination at that time, this achievement was only widely publicized in 1963 at the 11th International Congress of Genetics.[53]

During World War II, between 1940 and 1945, thousands of American children were conceived with the sperm of soldiers who were fighting in the Pacific, which were stored in sperm banks. In 1945, it was reported the birth of almost twenty thousand children by artificial insemination. The Supreme Court of New York considered these children "legitimate."[54]

Despite these discoveries, only in the 20th century did researchers make great discoveries in the field of genetics. The 1970s were particularly decisive for the evolution of artificial procreations, since man-made technologies began to interfere more directly with human procreation. It was in England in 1978 that the first baby conceived by *in vitro* artificial insemination, Louise Brown, was born.[55] The development and improvement of human reproductive techniques dissociated sexuality from reproduction, since humans could start manipulating their own gametes and embryos.

Using this technique, the team of Professor Milton Nakamura also conceived Ana Paula Caldeira, who was born on October 7th, 1984, at Santa Catarina Hospital in São Paulo, Brazil, after 22 attempts. She became the first test-tube baby born in Brazil.[56] In Germany, the first test-tube baby was born at the University Hospital in Erlangen, on April 16th, 1982 and was named Oliver.[57]

With this discovery, research not only advanced, but also spread widely, and came to occupy a prominent place in discussions related to sterility. Sterility has always been seen as a negative factor in people's lives, and even a taboo in certain families and societies, since before it became possible to perform an artificial insemination, no one

---

[52] WIDER, Roberto. *Reprodução assistida: aspectos do biodireito e da bioética*. 1. ed. Rio de Janeiro: Lumen Juris, 2007, p. 53.
[53] ROSSI, *supra n. 06*, at 134.
[54] BARBOZA (1993), *supra n.* 26, at 34.
[55] MACIONIS and PLUMMER, *supra n. 07*, at 755.
[56] PEREIRA, Dirceu Henrique Mendes. *A História da Reprodução Humana no Brasil*. Fêmina, vol. 39, n. 2, 2001, p. 59-64.
[57] VALVERDE, José Luis. *2050: A Changing Europe: Demographic Crisis and Baby Friend Policies*. Vol. 9, Granada: IOS Press, 2007, p. 178.

expected to be able to have a child by means other than natural reproduction. It should be taken into account that the impossibility of conceiving a child by natural means not only affects the sterile individual, but also the couple. And infertility can affect not only men but also women.[58] Therefore, AHR techniques have emerged as an option for people who cannot conceive a child by means considered as natural.

But even though AHR has these benefits, it is the result of human interference in the natural method of human procreation, which turned out to create not only social but also legal consequences. Court cases concerning AHR are not a new phenomenon. Moral, ethical and religious discussions were raised as soon as research on AHR began, especially regarding the family and relationships among its members. Because reproduction was being separated from the sexual act, some feared that the procedure involved an unethical experimentation on human beings. Moreover, some people had doubts about the safety of the procedures.[59]

Nowadays ethical questions focus so much on the safety of the procedures, but more on how AHR has been used, where it might be leading, which limits should be set on it, and what obligations we as a society have to these gametes and early embryos.[60] We can also add to this list of issues the right of the child to know his or her origins and the right of the donor to anonymity.

Ethical and moral discussions about AHR should also consider the future of the children to be born, their parents, their families, and the moral standards of the larger society.[61] This means thinking about "what will benefit the various individuals involved as well as the common good."[62] Therefore ART gives infertile couples, single parents and same-sex couples the possibility to constitute a family.

The first instance of artificial insemination on record is a French case of 1883 from the court of Bordeaux. A doctor claimed 1.500 francs for having performed artificial insemination on the defendant. The court reprimanded the doctor for a breach of the

---

[58] ROSSI, *supra n. 06*, at 138-139.
[59] WYMELENBERG, Suzanne. *Science and Babies: Private Decisions, Public Dilemmas.* Washington: National Academy Press, 1990, p. 148.
[60] CALLAHAN, Sidney. *The Ethical Challenges of the New Reproductive Technologies*. In: MORRISON, Eileen. Health Care Ethics: Critical Issues for the 21st Century. 2nd ed. Sudbury: Jones and Bartlett Publishers, 2009, p. 79-80.
[61] *Id*, at 81.
[62] *Id*, at 81.

confidential relationship of doctor and patient and “for employing means contrary to the natural law, and ones which could constitute a veritable social danger."[63]

> “A Commission appointed by the Société de médicine légale de France to review the matter, agreed that there had been a violation of medical secrecy, but did not agree that artificial insemination was against the natural law and could create a danger to society. The Commission went further and gave the opinion that artificial insemination was the last chance to obtain procreation by a correct operation involving not a single responsibility”.[64]

The next case appeared in 1905 in Dusseldorf, Germany. A husband contested the legitimacy of a child born to his wife in 1904. But after a medical expert examined the man, the court confirmed the legitimacy of the child. He appealed to the higher court of Cologne and another medical expert testified to the impossibility of artificial fertilization. Despite this medical expert's testimony, the decision of the lower court was confirmed in 1907. One year later, in 1908, artificial insemination was recognized by the German Supreme Court as legal. It was decided that a child conceived by homologous artificial insemination, i.e. with the sperm of the husband, was legitimate and that the child had all the rights of a legitimate child.[65]

It should be noted that when the sperm used was that of the husband, courts found no difficulties in dealing with the cases. They took “the position that there may be ethical, aesthetic and sociological aspects involved in homologous artificial insemination, but that legally the practice is unobjectionable.”[66] The difficulty arose in the AHR with donor sperm.

2.2 INFERTILITY: A JUSTIFICATION FOR ASSISTED HUMAN REPRODUCTION

Assisted human reproduction (AHR) can be understood as human intervention in the natural procreation process, in order to enable people with infertility and sterility problems, as well as same-sex couples and single women, to satisfy the desire to achieve

---

[63] LOGATTO, Anthony F. *Artificial Insemination: I - Legal Aspects*. In: The Catholic Lawyer: Vol. 1: No. 3, Article 2, July 1955, p. 174.
[64] *Id*, at 174.
[65] *Id*, at 174.
[66] *Id*, at 175.

motherhood or fatherhood.[67] According to the Medical Dictionary of Thomas Lathrop Stedman, sterility is “barrenness; unproductiveness; disability of fertilization or reproduction (irreversible).”[68] Infertility is relative sterility, a diminished or absent fertility that “does not imply as irreversible a condition as sterility.”[69] According to the World Health Organization (WHO), infertility is "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse.”[70]

Experts say it takes around a year of attempts at trying to get pregnant, with adequate frequency in sexual intercourse, before one can diagnose conjugal infertility and start medical research, since the chances of a couple without problems of fertility to conceive a child while maintaining regular intercourse are approximately 15 to 25% per month.[71]

However, in clinical practice a progressive shortening of periods of waiting for pregnancy to occur has been observed. Assisted reproduction has been proposed in a shorter period of time due to the urgency of couples wishing to have a child.[72]

It is estimated that between 60 and 80 million people worldwide face difficulties in realizing their wishes for paternity and maternity at some point in their lives.[73] Infertility affects approximately 10% to 15% of couples during reproductive age. The causes of infertility may be due to male or female problems, or to a combination of both. But there are also cases where no apparent cause for the problem is found.[74]

Human reproduction is a complex process and depends on basic physiological

---

[67] ALDROVANDI, Andréa *et al*. *A reprodução humana assistida e as relações de parentesco*. Revista Jurídica Consulex, Brasília, ano I, n. 7, 31 out. 2002. p. 40.
[68] STEDMAN, Thomas Lathrop. *Stedman’s Medical Dictionary*, 22nd ed. Baltimore: The Williams & Wilikins Company, 1972, p. 1194.
[69] *Id*, at 631.
[70] ZEGERS-HOCHSCHILD *et al (2009)*. *The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009*. In: STEIRTEGHEM, André Van. Human Reproduction, Vol. 24, No.11, Oxford: Oxford University Press, 2009, p. 2686.
[71] CHEDID, Silvana*. Infertilidade*. São Paulo: Contexto, 1998, p. 20.
[72] *Id*, at 20.
[73] KLONOFF-COHEN, Hillary, CHU, Elaine, *et al*. *A prospective study of stress among women undergoing in vitro fertilization or gamete intrafallopian transfer*. In: Fertility and Sterility*,* Vol. 76, No. 4, October 2001, p. 675-687.
[74] SHARMA, R., Biedenharn, K. R., Fedor, *et al*. *Lifestyle factors and reproductive health: taking control of your fertility*. In: Reproductive Biology and Endocrinology*: RB&E*, 2013, p. *11*.

conditions for fertilization to occur. Among them, we can mention: the fertility period in women between puberty and menopause; good egg and sperm health, as well as their proper meeting; and the ability of the uterus to receive the embryo.[75]

For the diagnosis of female infertility, the first step is to investigate the complete clinical history of the woman, looking mainly at risk factors: age, obesity or excessive exercise, lifestyle, occupational and environmental risks, emotional factors, diseases, problems in the immune system, use of medications, and other clinical conditions. In any case, some basic tests are necessary before starting treatment.[76]

Male infertility is commonly due to deficiencies in the sperm. The presence of few spermatozoa indicates a framework called oligozoospermia, i.e., the man ejaculates but does not produce enough gametes for natural fertilization.[77] One of the causes of male infertility is oligozoospermia associated with asthenozoospermia, because generally the oligozoospermia is accompanied by asthenozoospermia, which means low sperm motility.[78] Other causes of male infertility include testicle infections, sexually transmitted diseases, obstruction of the vas deferens (or ductus deferens), variations in the acidity of the seminal fluid, varicocele, environmental fever, retroejaculation, azoospermia (no sperm), etc.[79]

In this sense, indications for AHR treatments with donor sperm include the following:

> "- Severe male factor infertility, including azoospermia (no sperm), severe oligospermia (very few sperm), or poor motility (movement of sperm). - Women without a male partner. - Couples in which one or both of the partners have a heritable disease. - Couples whose husband has a communicable disease. - Female partner is Rh negative and severely Rh isoimmunised, and the male partner is Rh positive".[80]

---

[75] *Id*, at 11-12.
[76] *Id*, at 11-13.
[77] SHUAI, H-F *et al*. *Comparison of conventional in vitro fertilization and intracytoplasmisc sperm injection outcomes in patients with moderate oligoasthenozoospermia*. In: Andrologia: First International Journal of Andrology, vol. 47, 2015.
[78] ZHENG, Ju-Fen *et al*. *ICSI treatment of severe male infertility can achieve prospective embryo quality compared with IVF of fertile donor sperm on sibling oocytes.* In: Asian Journal of Andrology, Vol. 17, 2015, p. 845–846.
[79] PUNAB, M. *et al*. *Causes of male infertility: a 9-year prospective monocenter study on 1737 patients with reduced total sperm counts.* In: Human Reproduction, Vol. 32, n. 1, Oxford: 2017.
[80] ROSSI, *supra n. 06*, at 134-135.

Despite the importance of determining the causes of infertility as a prerequisite for starting treatment, regardless of whether the infertility is caused by the man or the woman, it will affect the couple. Therefore, it is necessary to consider that the process of investigation and treatment of infertility can be arduous and often interfere in the conjugal relationship. While sex was previously a spontaneous and uncommitted intimate contact, during the research and treatment of infertility it will be regulated by days and times that are convenient for conception, opening the door to potential problems and marital difficulties.[81]

The definitions of conjugal infertility[82] can also make us think about the peculiar feelings that the condition of infertility can originate in couples that face it: feelings of devaluation, impotence, disappointment, shame, and loss. But there is also the possibility that female and male infertility have no apparent cause, and it is natural that couples seek first in themselves possible signs of reproductive disorders before a precise diagnosis of a particular case of infertility can be made. Some studies of infertility began to gain visibility in the 1950s, and research shows multiple, interrelated psychological and personal factors such as stress, feelings of loss, impaired self-esteem, and difficulties in marital and social relationships, as well as social pressure.[83]

Even though most couples or women who look for clinics to do AHR treatments experience infertility, there are also women with woman partners or single women who use donor sperm to achieve pregnancy. Normally these women do not have infertility and could also get pregnant without the use of medications or ART.[84]

One cannot forget that motherhood has a social value for many women and, for some infertile women; it is a necessary condition for their happiness.[85] In any case, what is seen is the maintenance of a social representation of infertility that implies the depreciation and stigmatization of infertile women, and is intrinsically associated with

---

81 BERLINGUER, Giovanni. *Everyday bioethics: Reflections on Bioethical Choices in Daily Life.* Amityville: Baywood Publishing Company INC, 2003, p. 32-33.

82 In the present study, the term “conjugal infertility” will be used in the most colloquial sense of the word, based on the WHO definition as research parameter.

83 OLMOS, Paulo Eduardo. *Quando a cegonha não vem: os recursos da medicina moderna para vencer a infertilidade*. São Paulo: Carrenho Editorial. 2003, p. 40-43.

84 ROSSI, *supra n. 06*, at 135.

85 SCHENKER, Joseph (2011a). *Ethical dilemmas in assisted reproductive technologies*. Berlin: De Gruyter, 2011, p. XVII.

representations of motherhood. The impossibility of becoming a mother can cause anguish, sadness, and even depression.[86] Thus the stigma related to female infertility can generate guilt in women who cannot bear children. As for the impact of infertility on men, the male desire for biological bounds is largely related to the association of male identity and sexuality, i.e, to his own virility. Because of this, in some cases of conjugal infertility, women socially assume reproductive incapacity even when there is a diagnosis of male infertility.[87] In order to deal with infertility issues it is necessary for the couple to be willing to rethink some values and even rediscover the true bonds that support their marriage. All this implies that AHR techniques often appear as the only possible alternative for people or couples who wish to have a child by means other than adoption.

2.3 ASSISTED HUMAN REPRODUCTION AND ITS PURPOSES

Nowadays one can observe the use of medical techniques aimed at artificial fertilization to produce new human beings by the manipulation of genetic material.[88] The main purpose of such practices is to help couples who want to conceive a child and that for various reasons, are not able to do it naturally. They also contribute to the success of various medical researches aimed at the discovery of means for the preservation of human life, such as new cures for already known diseases or techniques for detecting diseases, or by manipulating genetic material to treat structural problems in the human body, creating conditions for the reproduction of organs that may be useful to humans at particular stages of their life.[89]

In the context of the present study, it is understood that the main goal of advances in research on human reproduction is to help people who have been born with or developed fertility problems to conceive a child. In this sense, the search for the health of the baby to be conceived is a primordial consequence.

Also, there has been a growing search for medical procedures aimed at preventing

---

[86] *Id*, at XVII.
[87] ROSSI, *supra n.* 06*,* at 135.
[88] SIMMONS, Danielle. *Genetic* I*nequality: Human* G*enetic Engineering*. In: Nature Education, n. 1, p. 173.
[89] NERY JUNIOR, Nelson *et al*. *Código Civil Comentado*. 5th ed. São Paulo: Editora Revista dos Tribunais, 2007, p. 1036.

family diseases from being passed on to babies by future parents, including those without reproductive problems, in order to guarantee the children a longer and healthier life.[90]

However, to what extent this behavior should be encouraged and how should we ethically evaluate the reproductive technologies are two of the issues frequently debated in ethical discussions.[91] Avoiding congenital or life-threatening diseases is not only a concern of the parents, but is also becoming a concern of doctors and scientists.

On January 9th 2009, the University College London officially announced the first birth in the United Kingdom of a baby that lacked the gene responsible for eighty percent of the cases of breast cancer and sixty percent of cases of ovarian cancer.[92] The news of the English girl's birth quickly gained prominence in the world press as another great achievement of medical science, made possible by the use of techniques of human reproduction. The preimplantation genetic diagnosis allowed the girl to not have to face the possibility of developing breast or ovarian cancer in adult life, and her parents removed the risk of transmitting the disease to her daughter.[93]

Thus, AHR may also have the purpose of preventing the transmission of genetic diseases and ensuring the health of the being that will be conceived. The new procedures, when one sees news like this, seem to be fulfilling their best objectives. However, when one thinks about how new possibilities in the reproductive genetic area might be used to satisfy mere desires of the parents, such as the choice of characteristics like the color of eyes or hair, this may appear as a deviation from its purpose.

In order to identify possible hereditary genetic pathologies when the parents know of a family anomaly, the Preimplantation Genetic Diagnosis (PGD) is done. There is also the Preimplantation Genetic Screening (PGS), where embryos from presumed chromosomally normal parents are analyzed so that possible aneuploidy is discarded; that means a situation in which the number of chromosomes deviates from normal.[94]

---

[90] WEATHERALL, David *et al*. *Science and Technology for Disease Control: Past, Present, and Future*. In: JAMISON, Dean T. Disease Control Priorities in Developing Countries. 2nd ed. New York: Oxford University Press, 2006.
[91] CALLAHAN, *supra n*. 60, at 79.
[92] See:
"University College London. First baby tested for breast cancer form BRCA1 before conception born in UK." Available at: http://www.ucl.ac.uk/news/news-articles/0901/09010802.
[93] *Id.*
[94] DUBEY, Anil *et al*. *The influence of sperm morphology on preimplantation genetic diagnosis cycles outcome*. In: Fertility and Sterility. June 2008, Vol 89, Issue 6, p.1665–1669.

The PGD and PGS consist of the genetic analysis of the embryo with the objective of detecting genetic alterations or anomalies that the embryos may have and transferring to the uterus only those that are healthy.[95]

> "Preimplantation genetic diagnosis (PGD) is a form of prenatal diagnosis that is performed on early embryos created by *in vitro* fertilization (IVF). In comparison to other established methods of prenatal diagnosis, such as chorionic villus sampling and amniocentesis, PGD is not performed on an ongoing intrauterine pregnancy in the late first or early second trimester, but on embryos developing in the IVF laboratory prior to transfer to the uterus. Despite some misconception to the contrary, PGD is not a therapeutic procedure for embryos; there are no changes to the DNA or any other genetic-related structures. It is solely a diagnostic procedure that can identify whether a specific embryo carries a single gene disorder for which the couple is at-risk or a chromosome abnormality that could lead to either failed implantation, subsequent miscarriage or the birth of a child with physical and/or developmental disability. This information is used by the couple and their physicians to make decisions on which embryo(s) should be transferred to the uterus and will with high likelihood result in a normal pregnancy. Since multiple embryos are created in IVF, PGD has a distinct numerical advantage over testing of a single ongoing pregnancy. The greater the number of embryos created, the greater the chance that genetically normal embryos can be identified".[96]

The use of genetic techniques to manipulate the health of the baby has always been controversial. While many people think that their use is good if used to allow genetically disadvantaged people to reproduce as normally as those without genetic risk,[97] the techniques also raise different ethical questions, and it seems that we are far away from reaching a consensus regarding its uses.[98] One of the strongest objections to the use of PGD is related to the waste of normal embryos,[99] since for the treatment it is necessary to produce a large quantity of embryos and discarding those considered to be unhealthy, leading to the problem of the embryo's destination.[100]

Another ethical question is that the use of PGD and PGS do not have a direct

---

[95] ALBORNOZ, Eduardo Osuna Carrillo. *Técnicas de reproducción humana asistida. Comentários a la Ley 14/2006 de 26 de mayo, sobre Técnicas de Reproducción Humana Asistida*. Pamplona: Aranzadi, 2007, p. 436.
[96] STERN, Harvey J. *Preimplantation genetic diagnosis: prenatal testing for embryos finally achieving its potential*. In: Journal of Clinical Medicine, Vol 3 (1), 2014, p. 281.
[97] KULIEV, Anver. *Preimplantation genetic diagnosis in assisted reproduction: medical, ethical, and legal aspects*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011, p. 172.
[98] HUI, Edwin. *A savior child conceived by PGD/HLA: medical and ethical aspects*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011, p. 274-275.
[99] *Id*, at 275.
[100] ASCENSÃO, José de Oliveira. *A lei n. 32/06, Sobre Procriação MedicamenteAssistida*. In: Revista da Ordem dos Advogados, ano 67, III, Lisboa, 2007, p. 1000.

relation to problems of infertility, since their purpose is not human reproduction but the selection of healthy embryos, being in fact a technique complementary to AHR.[101]

Also, when talking about the discussions that surround the AHR and the PGD one cannot ignore the religious perspective, since religious groups are very "active in influencing the public with bioethical positions, and this is particularly evident with issues concerning procreation, abortion, and infertility therapy".[102] The developments in the fertility treatments can raise new ethical questions for different communities and religions that do not always have clear answers.[103] This is why the role of theology in bioethics would ideally be "to clarify, for the different religious communities, the perceived attitudes toward these developments."[104] With regard to women's reproductive health, it is also difficult to dissociate the influence of religion from the influence of culture:

> "As medical knowledge about infertility has increased, the ethics of reproduction is no longer the concern solely of the religious authorities. When infertility was considered a predestined state, infertile couples were probably more influenced by religious interpretations. Religious commentator's objections to some reproductive technology are still having much influence on either the decisions of infertile couples or on the attitudes of the general public. (...) Religious leaders in some countries still exert a powerful influence on the development and practice of reproductive technology. In some countries, religious groups' main influence will stem from their direct influence on medical protocols. Therefore it is important to practitioners in the field of reproductive medicine to understand attitudes toward reproduction that derive from different religions".[105]

Regarding the use of PGD, it has been verified that this practice has also been used as a means to choose certain genetic traits, such as the sex of the baby, its skin color, and its IQ, among other attributes.[106] Analyzing the danger of parenting choices, Allen Buchanan *et al*., American teachers and bioethicists, point to the fact that

> "(…) the primary rationale for limiting parents' freedom of choice in genetic decision making in reproduction is protection of the child. (…) Great care must be taken to avoid paradox, since, in many cases, the particular child 'harmed' by mistaken genetic choices would not have come into existence had the 'mistakes'

---

[101] HUI, *supra n.* 98, at 275.
[102] SCHENKER, Joseph (2011b). *ART practice: religious views*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011, p. 309.
[103] *Id*, at 309.
[104] *Id*, at 309.
[105] *Id*, at 309-310.
[106] ROCHA, Renata da. *O Direito à Vida e a Pesquisa com Células-Tronco*. Rio de Janeiro: Elsevier, 2008, p. 51-52.

not been made". [107]

If we think these genetic choices as a right given to people, we will accept the point that it will be necessary to compensate people for flaws that may occur in the process, as if one could complain about a defective product. Therefore it must be understood that the genetic choices of the parents cannot go down to this level of details, that is, they cannot be given the power to determine the main characteristics of their future son or daughter, as if they were buying a product.[108] It is one thing to worry about the health of the child being conceived, as we saw in the case of medical intervention to eliminate the chances of developing cancer in the future. It is another to use medical techniques as a means of fulfilling the aesthetic desires of the parents, according to their tastes and preferences.

2.4. ASSISTED HUMAN REPRODUCTION AND THE DIFFERENCE BETWEEN HOMOLOGOUS AND HETEROLOGOUS INSEMINATION

Technological innovations in the field of medical and biological sciences have brought a great power to intervene in life, as reflected in the field of human reproduction. ART consists of a variety of procedures "designed to achieve pregnancy without sexual intercourse. They are used by persons physically incapable of reproducing through sexual intercourse, as well as by women who seek to have children without partners of the opposite sex."[109]

Currently, AHR techniques have been diversified and vary according to the needs of the people involved. One of the main differences we can detect is that fertilization can occur inside or outside woman's body. In the case of artificial insemination, fertilization is performed inside the female body, that is, sperm is introduced into the reproductive tract of a woman. But in the techniques that are based on the *in vitro* fertilization procedure,

---

[107] BUCHANAN, Allen *et al. From Chance to Choice: Genetics and Justice.* Cambridge: Cambridge University Press, 2000, p. 324.
[108] GODOY, José Joaquín Ugarte. *El Derecho de la Vida- el derecho a la vida: Bioética y Derecho*. Santiago: Editorial Jurídica de Chile, 2006, p. 518-519.
[109] COLEMAN, Carl H. *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, in 50 UCLA Law Review, vol. 17, 2002-2003, p. 22.

the fertilization of the embryo occurs outside the woman's body.[110] Thus, human reproduction can be divided into intracorporeal (fertilization occurs inside the woman's uterus) and extracorporeal (fertilization occurs outside the human body), and also be divided as homologous (couple gametes are used) and heterologous (both or only one of the gametes is donated).[111]

It is practically impossible to gather in a single research all the questions that arise from the use of assisted reproduction techniques, due to the diversity of discussions that surround the theme. But since the number of children conceived by AHR techniques has been increasing over the years, it is necessary, in order to achieve the purpose of this work, to give some explanations of AHR techniques.

The expression “assisted human reproduction” is used in the field of reproductive medicine to describe a set of techniques for palliative treatment of infertility.[112] Currently, there are different techniques that vary according to the needs of the interested parties. One of the main differences that can be detected, as previously mentioned, is that the fertilization can occur inside or outside the woman's body. Among the main techniques of AHR are Artificial Insemination (AI); In Vitro Fertilization and Embryo Transfer (IVF); Gamete Intrafallopian Transfer (GIFT); Zygote Intrafallopian Transfer (ZIFT); and the Intracytoplasmic Sperm Injection (ICSI).[113]

Artificial insemination as artificial reproductive technology means the attachment of the sperm to the ovule by unnatural means of copulation, and has as its purpose gestation, replacing or facilitating any stage that is deficient in the normal reproductive process:

> “The artificial insemination also called "artificial conception", "artificial fertilization", among other names used, consists in the technical-scientific procedure of bringing the egg to the sperm, without the occurrence of coitus. It is, therefore, in practice, the set of techniques that aim to cause the generation of a human being through means other than the sexual relationship”[114]

---

[110] CÔRREA, Marilena and LOYOLA, Maria Andréa. *Reprodução e Bioética. A regulação da reprodução assistida no Brasil.* Caderno CRH/UFBA. V. 18, n. 43, 2005, p. 103-104.
[111] SOUZA, Marise Cunha. *As Técnicas de Reprodução Assistida. A Barriga de Aluguel. A Definição da Maternidade e da Paternidade*. Bioética. In: Revista da EMERJ, v.13, n. 50, 2010, p 350-351.
[112] CÔRREA and LOYOLA, *supra n. 110*, at 103.
[113] PESSINI, Leo and BARCHIFONTAINE, Christian de Paul de. *Problemas Atuais de Bioética*. São Paulo: Edições Loyola. 2005, p. 296 – 297.
[114] MACHADO, Maria Helena (2011). *Reprodução Humana Assistida: Aspectos Éticos e Jurídicos.* Curitiba: Editora Juruá, 2011, p. 32.

It involves the insertion of sperm into the vagina, the cervical opening, or the back of the uterus. It is mostly used "to overcome problems interfering with the passage of sperm through the reproductive tract, to improve the chances of fertilization for men with low sperm counts, and to facilitate fertilization in other situations in which the causes of infertility may be unclear."[115] Besides this, it is also used for women who just want to conceive a child with donor sperm.

Drugs can also be prescribed to women who do not ovulate regularly or who have hormonal problems. This process is known as assisted ovulation. Even though many women undergoing assisted ovulation try to conceive through sexual intercourse, others combine the drugs with artificial insemination.[116]

In vitro fertilization and embryo transfer are the most widely publicized types of artificial reproduction techniques.

> "(…) [IVF] is a multistage process that involves the stimulation of the woman's ovaries, surgical retrieval of the developing eggs, fertilization of the eggs in a petri dish, and transfer of the resulting embryos into the woman's uterus. An expensive procedure generally not covered by health insurance, IVF is usually a treatment of last resort. Success rates for IVF vary considerably, depending on factors such as the patient's age and the cause of infertility".[117]

IVF is indicated in the following cases: alterations in the sperm; serious problems of ovulation; severe endometriosis, when the woman has fallopian tube obstruction or has done tubal ligation. The GIFT, ZIFT and ICSI techniques are all variants of IVF and have as result test-tube babies.[118]

The GIFT technique follows the same steps of the IVF. A woman's egg is removed, mixed with the sperm, and placed into the fallopian tube. The main difference is that while in the IVF the fertilization will occur in a petri dish and then the fertilized eggs will be transferred direct to the uterus, in the GIFT procedure the eggs and the sperm will be place in one of the fallopian tubes and the fertilization will take place inside the woman's uterus. It is a suitable technique for couples in which the woman has at least one healthy

---

[115] COLEMAN, *supra n. 109*, at 23.
[116] *Id*, at 24.
[117] *Id*, at 23.
[118] ROSSI, *supra n. 06*, at 134.

tube.[119]

In ZIFT, fertilization occurs *in vitro,* in the laboratory, and there is the transfer of zygotes to the fallopian tubes and not of embryos as it happens in IVF. The zygote is transferred to the tubes instead of being placed in the uterus.[120] And, the ICSI is the technique in which an injection of a single spermatozoon into the cytoplasm of the ovule is made through a specially developed device containing microneedles. It is especially used in situations where male problems are the main cause of infertility, for example when the spermatozoa are scarce or do not have sufficient motility for the IVF, or when the man has had a vasectomy.[121]

The word "insemination" comes from the Latin term "*inseminare,*" in which "*in*" means in, and "*seminare*" means to sow.[122] In this way, an insemination is "homologous" when performed with sperm from one's own spouse or partner and "heterologous" when made with a third person's semen.

Inseminations made with a mixture of semen are not included in this qualification. This kind of insemination is also called "confused or combined artificial insemination", because the sperm of the husband and the sperm of one or more donors are mixed in order to promote the *turbatio sanguinis* and always have the uncertainty-possibility of the husband being the father:[123]

> "Men with low sperm counts may ask to have their sperm mixed with the donor's sperm so that it might be theoretically possible that a child resulting from the insemination is his. The state of current paternity testing renders this an almost futile thought, because the genetic father can be easily determined. From a psychological perspective, the request suggests a man who has not come to terms with his own infertility and wishes to deny its existence".[124]

In this sense, it is necessary to clarify that, even though artificial insemination is a simple medical procedure, it can be done in three different ways: by an unrelated donor (AID), which is the most common one; by the husband of the woman being inseminated

---

[119] *Id,* at 134-135.
[120] *Id*, at 135.
[121] *Id*, at 135.
[122] STEVENSON, Angus. *Oxford Dictionary of English*. Oxford: Oxford University Press. 2010, p. 903.
[123] BERRY, Janet J. *Life after Death: Preservation of the Immortal Seed*. Reno: University of Nevada, 1997, p. 236.
[124] PETOK, William D. *Sperm donation: psychological aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A *Comprehensive Guide*. New York: Springer, 2014, p. 166.

(AIH); and with the "confused or combined" semen of both an anonymous donor and the woman's husband.[125]

The homologous artificial insemination or artificial insemination by husband is the introduction of the previously collected spermatozoa of the husband or partner in the womb of the woman. The seminal fluid is injected by the physician when the egg is ready to be fertilized. It is indicated for cases of incompatibility or hostility of cervical mucus, oligospermia (low number or reduced motility of spermatozoa), retrograde ejaculation (retention of spermatozoa in the bladder), hypofertility or subfertility (diminished reproductive capacity), sexual disorders, and secondary sterility after sterilizing treatment.[126]

In the heterologous artificial insemination or artificial insemination by donor, sperm from a donor, not from the husband or partner, usually stored in a sperm bank, is used. The sperm is introduced into the woman's cervix, directly into the vagina, or into the cavity of the uterus.[127] This procedure is suggested mainly for cases of definitive sterility in the man, or when there are hereditary diseases[128]

> "AID developed in response to male infertility. First used in 1884, it was not described in the medical literature until twenty-five years later, and by an observer rather than the physician who undertook the procedure. Addison Davis Hart, whom historian Elaine Tyler May believes was the sperm donor, wrote that Philadelphia physician William Pancoast administered donated semen to a wealthy, anesthetized Quaker woman who had been under his care for the treatment of infertility. Upon discovering the husband to be azoospermic (having no spermatozoa in the semen) Pancoast arranged for the wife to be chloroformed under the pretext of undergoing a minor surgery and he then inseminated her with the sperm of the allegedly "best looking member" of his medical class. The insemination proved successful and the woman was never told how she became pregnant.' Hart's reference to the fact that doctor chose the best-looking donor suggests that even at an early date, AID was seen as offering an opportunity to create a better baby. The fact that the insemination was kept secret suggests that practitioners were reluctant to tread upon the shaky moral and legal grounds on which such a procedure rested".[129]

---

[125] BERRY*, supra n. 123,* at. 236.
[126] AGARWAL, Ashok *et al*. *Artificial Insemination*. In: FALCONE, Tommaso and HURD, William W. Clinical Reproductive Medicine and Surgery. Philadelphia: Elsevier, 2007, p. 539.
[127] ROSSI, *supra n. 06*, at 137.
[128] *Id*, at 140.
[129] DANIELS, Cynthia R. *et al*. *Procreative Compounds: Popular Eugenics, Artificial Insemination and the Rise of the American Sperm Banking Industry.* In: Journal of Social History, Vol. 38, n. 1, Fall 2004, p. 09.

In the beginning doctors implicitly argued that AID was a therapeutic option that had to be carefully controlled. They also had to use good judgment in determining who really required treatment and which families could support and care for a child born by AID without any hardships:

> "Sperm was procured by choosing an appropriate donor and asking for a masturbation sample for pay. When doctors placed the semen in the recipient, they took the risk of creating a pregnancy outside of marriage. Secrecy thus benefited the physician, the woman receiving the sperm, any child born as a result of the procedure (who were called "artificial bastards" by some critics) and the husband whose infertility needed to be masked from public view. By choosing a donor whose physical characteristics resembled those of the husband, the needed secrecy could be maintained". [130]

In order to avoid emotional and physical complications, doctors preferred to use sperm from unknown donors, but there are also cases in literature where the sperm used was from a blood relative of the husband.[131]

The resemblance between the parents and the child was also a concern. For this reason, doctors used to try and match not only the physical but also the social characteristics (such as temperament and background) of sperm donors with the men they would make into fathers, "so that a 'phlegmatic German' would not be bringing up a 'quick, fiery-tempered Italian youngster'."[132] But this concern with social characteristics can open a discussion about stereotypes. What does it mean to be German, Italian or any other nationality? Cultural stereotypes can shape expectations and behaviors. Even though they are normally associated to physical characteristics, they can also be associated with gender, and may lead to biased perceptions of group members, misunderstandings, and prejudice.[133]

Later, the AID practice started to be seen not only as a way of responding to male infertility, but also as offering a means of preventing medical problems. Families were also turning to AID as a reproductive choice that would offer the potential to create better babies through the careful selection of sperm donors.[134]

---

[130] SEASHORE, R. T. *Artificial impregnation*. Minnesota Medicine 21, 1938, p. 643.
[131] DANIELS *et al*, *supra n. 129*, at 09.
[132] *Id*, at 09.
[133] KURTZ-COSTES, Beth. *Families as educational settings*. In: International Encyclopedia of the Social & Behavioral Sciences. 2nd ed. Philadephia: Elsevier, 2015, p. 731-732.
[134] DANIELS *et al*, *supra n. 129*, at 11.

Even though AID was becoming popular, there were still concerns with the law and religion.

> "Until laws conferred paternity upon the husband and kept the wife from being charged with adultery in cases of divorce or in requests for child support, physicians sometimes sought to obtain signed approval from all parties involved before undertaking AID. The author of an article in a 1940s medical journal reported conferring with the Bureau of Legal Medicine at the American Medical Association and their determination that AID was not illegal because it had not been prohibited by law....The popular press followed the controversy in England after the Archbishop of Canterbury appointed a commission to examine artificial insemination and ruled that the procedure was acceptable when the husband was the donor, but not when conception evolved from "extramarital donorship" because it would be a breach of marriage. The press also reported the ruling of the Catholic Church that techniques that helped the husband's semen move from the vagina into the uterus were acceptable, but AID and AIH that involved the collection of sperm via masturbation was not. Despite legal questions and religious objections, AID became a popularly accepted if religiously contested treatment for infertility by the middle of the twentieth century.[135]

But donor insemination did not reach its full medical or market potential until the development of techniques that allowed human sperm to be frozen. This happened only in 1953, when two reproductive physicians reported the births of four children conceived with frozen sperm.[136] The possibility of using frozen human sperm made room for the creation of human sperm banks, and consequently moved the AID practice to a consumer level, since new techniques also started to be developed.

> "As new technologies led to the substitution of fresh donor sperm with vials of frozen sperm, the collaboration of physicians and patients broke down. The power to select donors increasingly rested not with the paternalistic physician but with the consumer who handed over the credit card to pay for the product.... Purchasers continued to select semen according to non-heritable traits of the donors (as well as heritable ones) and, playing to this interest, sperm banks sold their product by advertising the characteristics of donors. What consumers wanted to buy was more than a means of remedying nature's unfairness, they wanted to buy what they perceived to be the best that nature and science could, together, provide".[137]

In this way, the samples at the sperm banks identify factors such as blood type, eye color, hair, etc. so that the physical type of the donor is as close as possible to that of the patient's partner, or the one expected by the woman who chose to do AID.[138]

---

[135] *Id*, at 12.
[136] *Id*, at 13.
[137] *Id*, at 12.
[138] SOUZA, *supra n. 111*, at 352.

Despite the enthusiasm of sperm banking progenitors, most medical practitioners continued to use fresh sperm for AHR procedures during the 1960s and 1970s, and although sperm banks demonstrated their scientific usefulness, their commercial potential was not still recognized. The public viewed them with suspicion, while thawed semen still produced lower rates of conception. Nevertheless, scientists continued to work on methods of freezing and thawing sperm in order to improve rates of conception. Later, with the improvement of sperm banks and the continuing public demand for treatments with door material, sperm banks arose to store indefinitely thousands of specimens in a single location. Customers included not only infertile couples but also men wishing to deposit sperm before undergoing chemotherapy, vasectomies or even before going to war.[139] Sperm storage "is often performed for men before undergoing treatments, such as for testicular or other cancers, that may result in impaired fertility or sterilization."[140]

But there are also alternatives to sperm banks. On the website "Co-Eltern.de," for example, singles and couples with a desire to have a child meet potential sperm donors. If one does not want the service of a sperm bank or if the procedure is too expensive, then the person can find a private donor on Co-Eltern.de. As with to a sperm bank, it is possible to have a look at the profile of the donor then select and contact him. The possible advantage of institutions like Co-Eltern.de is the possibility of direct personal contact between the future parents and the donor.[141]

The discovery of HIV/AIDS played also an important role in the popularization of sperm banks, since freezing the sperm started to be seen as providing greater safety to consumers, "because it allowed for testing for infectious diseases both at the time of deposit and six months later."[142] To ensure that HIV would not be transmitted to the inseminated woman and the baby, doctors started to test men for sexually transmitted infections at the time of donation, cryopreserving and holding the sperm for six months, in order to retest it and confirm an absence of infections.[143] Nowadays, sperm donors are

---

[139] DANIELS *et al*, *supra n. 129*, at 14-15.
[140] FELDSCHUH, Joseph *et al. Successful sperm storage for 28*. In: Fertility and Sterility, Vol. 84, N. 4, October 2005.
[141] See:
„Co-Eltern.de. Wie funktioniert eine Samenbank?" Available at: https://www.co-eltern.de/Samenbank/wie-funktioniert-eine-samenbank-in-deutschland.php
[142] DANIELS *et al*, *supra n. 129*, at 15.
[143] ROSSI, *supra n. 06*, at 134.

tested and screened for evidence of communicable disease agents or diseases. Laboratory tests such as serologic tests are required upon donation or within seven days before or after the recovery of cells or tissue. Afterward, samples are frozen and kept in quarantine for at least six months, and are only released to be used after being retested with negative results. Besides testing for communicable diseases, the screening of sperm donors also includes an evaluation of historical and genetic factors.[144]

Within this context, the fertility industry has let the marketplace dictate donor criteria. To be a sperm donor, a man should generally meet a number of requirements. An "ideal" donor would be a heterosexual man between 19 and 39 years old, college educated, free from diseases, and reflecting "the more admired traits in society—whether or not these traits, such as good handwriting, have any grounding in genotype and can be passed on to offspring."[145]

Sperm banks expect donors to be financially motivated, and when a potential donor contacts a sperm bank for the first time wanting to donate his sperm, the staff initiate an extensive screening process. They ask the applicant various questions, such as his age, height, weight, family health history, genetic diseases, and social characteristics.[146] In order to fulfil its clients' requests, that is, the requests of people who will be inseminated, sperm banks search for some desirable characteristics in potential donors. Most sperm banks do not take, for example, people that are very overweight.[147]

> "It becomes a marketing thing, some of the people we don't accept. Also height becomes a marketing thing. When I'm interviewing somebody to be a donor, of course personality is really important. Are they gonna be responsible? But immediately I'm also clicking in my mind: Are they blond? Are they blue-eyed? Are they tall? Are they Jewish? So [I'm] not just looking at the [sperm] counts and the [health] history, but also can we sell this donor? And anyone that's [willing to release identifying information to offspring at age 18], obviously we will ignore a lot; even if they're not quite as tall as we'd like, we'll take them. Or maybe if they're a little chunky, we'll still take them, because we know that [their willingness to release identifying information] will supersede the other stuff".[148]

---

[144] CORLEY, Stephanie O. and MEHLMAN, Maxwell. *Sperm donation: legal aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A *C*omprehensive *G*uide. New York: Springer, 2014, p. 145.
[145] SEVERSON, Julie R. *Sperm Donation: Ethical Aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A *C*omprehensive *G*uide. New York: Springer, 2014, p. 170.
[146] ALMELING, Rene. *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*. In: American Sociological Review, 2007, vol. 72, p. 325-326.
[147] *Id*, at 325-326.
[148] *Id,* at 326.

In terms of other characteristics, sperm banks try to recruit donors from different races, ethnic groups, and religious backgrounds.

> "Once applicants pass the initial screening with program staff, they are invited to fill out a "donor profile." These are lengthy documents with questions about the donor's physical characteristics, family health history, educational attainment (in some cases, standardized test scores, GPA, and IQ scores are requested), as well as open-ended questions about hobbies, likes and dislikes, and motivations for donating....Sperm banks do not post profiles until donors pass the medical screening and produce enough samples to be listed for sale on the bank's publicly accessible website".[149]

Donor profiles are used to attract recipient clients to sperm banks, but it is the couple or woman to be inseminated who choose the donor, without the interference of the doctor or clinic.[150] The catalogs have data from the donor; here the recipient will have access to the donor's blood group, color of the eyes, skin and hair as well as weight, height, bone formation, ethnicity, religion, education, profession and habits.[151] Research on how recipients select donors indicates that sperm banks are "responding to client interest in attractive and intelligent donors whose phenotypes are similar to their own."[152] But one has also to think that even though these practices "may allow consumers to choose donors who mirror their own family traits, they are reminiscent of eugenic practices with historically subcategorized human value according to dominant class and racial hierarchies."[153]

> "In the early decades of AID, the medical profession fostered popular eugenic beliefs by selecting sperm donors whose physical traits matched those of the husband and whose social background and personal achievements were deemed superior. By the close of the twentieth century, consumer demands, based on misguided beliefs about heritability, shaped the operations of sperm banks. What links the contributors to the modern cryobank to the medical school students offering fresh semen is the belief in what was once called eugenics. Seen from this perspective, eugenics is not simply what its political proponents argued—a tool for bettering society; it is understood as a means of fulfilling individual desires in line with socially determined values".[154]

The anonymity of the donor, which is discussed in detail in Chapters 3 and 4, is

---

[149] *Id*, at 329.
[150] SEVERSON, *supra* n. *145*, at 170-171.
[151] *Id*, at 170-171.
[152] ALMELING, *supra n. 146*, at 326.
[153] DANIELS, Cynthia. *Marketing masculinity: bioethics and sperm banking practices in the United States*. In: FREEMAN, Michael. Law and Bioethics. Oxford: Oxford University Press; 2008. p. 218.
[154] DANIELS *et al*, *supra n. 129*, at 20.

another question that arises from sperm donation. Over the years, a significant debate has taken place on the matter of anonymity.

> "Physicians have long recommended secrecy about donor insemination (DI), with protection of the child and the couple as the primary objective. The presumed protection of the father is related to the inaccurate conflation of fertility and sexual ability. Protection of the child deals with the supposition that knowledge that her/his father was impaired would be psychologically damaging. At the same time, a growing awareness of the needs and rights of children conceived with DI to have access to biological information about their origin has led to laws allowing identification or contact with a donor".[155]

Donor anonymity has been a barrier to a child having access to his or her genetic history. The threat of personal and financial claims against donors is also seen as a reason for maintaining anonymity.[156] Sweden was the first country (1985) to have legislation about anonymity, making it possible for children who are the result of donor insemination to know who their donor is. But according to Swedish law, the donor has no rights or responsibilities toward the child, and no right to know the identity of the child or the couple who used the donated sperm. Even though the child has the right to know who was the sperm donor that made it possible for him or her to be born, it is only at the age of 18 that this child will have the right to contact the donor and access records regarding the donation.[157] It is possible to say that questions regarding the anonymity of sperm donors are perhaps the most complex in the field of AHR.

2.5 FINAL REMARKS

Advancements in procreation technology have led to greater scientific control over the act of procreation, and the development and popularization of the techniques can be seen as an answer to society's demands for solutions to fight infertility. As demonstrated in this chapter, human beings have always shown concern with issues of fertility and sterility,[158] and even though there was already research on reproduction, it was only in the 17th century that male sterility came to be accepted and researchers started thinking

---

[155] PETOK, *supra n. 124*, at 160.
[156] *Id*, at 161.
[157] *Id*, at 162.
[158] LEITE, *supra n. 04*, at 302.

of methods and techniques to solve the problem.[159] The first insemination with donor sperm occurred only in 1884,[160] and despite discoveries in the field of reproduction, it took a while to improve these techniques. The 1970s were particularly decisive for the evolution of AHR, because humans started to interfere directly in human procreation and could start manipulating gametes and embryos, which led to the birth of the first baby conceived by *in vitro* artificial insemination.[161]

It is now possible to both induce and stop procreation, since various scientific and medical technologies are available. Among the different types of AHR described on this chapter, one of the most common ART used today is artificial insemination.[162] It consists in deliberately introducing sperm into the uterus of a woman in order to achieve pregnancy by the use of fertilization.[163] Women in several situations may look to AHR techniques for help. These include those in same sex relationships, single women, women whose male partners have fertility problems, and those whose male partners have been diagnosed with health problems that their offspring could inherit.[164] In any of these cases, it is a common practice for a sperm donor to donate sperm to the prospective mother. The reason is that these women may either not have a male partner or have a partner whose sperm is not considered viable.[165]

As previous explained in this chapter, reproductive treatments can be carried out with genetic material from the husband/partner or from a donor unrelated to the woman or the couple.[166] Thus it is observed that in AHR with a husband's or partner's sperm, no problems concerning filiation will occur, considering that parents who will generate the child will be the same ones who donated the genetic material. But in the AHR with donor sperm, legal problems may arise, since most legal systems do not clearly specify two things: whether the human being conceived by this technique may seek his or her genetic origin, and if the donor of the semen may have his desire for anonymity overridden by the

---

[159] FERNANDES, *supra n. 05*, at 35.
[160] ROSSI, *supra n. 06*, at 133.
[161] MACIONIS and PLUMMER, *supra n. 07*, at 755.
[162] COLEMAN, *supra n. 109*, at 23.
[163] COLEMAN, *supra n. 109*, at 23-24.
[164] RICHARDS, Martin. *The development of governance and regulation of donor conception in the UK*. In: GOLOMBOK *et al*. Regulating Reproductive Donation, Cambridge University Press, 2016, p. 32-33.
[165] *Id*, at 33.
[166] ROSSI, *supra n. 06*, at 137.

right of an individual generated from donated genetic material to know his or her origins.

The use of AHR has been beneficial for women and couples who could not conceive a baby by natural means. However, it can raise discussions, such as the conflict between the right of the child to know his or her origins and the right of the donor to have his identity protected. This collision of rights will be further discussed in the next chapters.

3. FUNDAMENTAL RIGHTS AND ASSISTED HUMAN REPRODUCTION IN EUROPE

The initial chapter of this study gave a comprehensive overview of the research topic and explained various issues associated with the use of donor sperm. This chapter will delve into the issues of fundamental rights that are related to the topic. It will undertake a legal assessment of issues involved in AHR in order to establish a conceptual framework for the study.

The analysis of the rights, laws, and principles relating to AHR refers to constitutional laws as well as to other legal and academic literature that is relevant to the subject. The main aspects of the theme covered in the chapter include the right of the children to know their origin, the right to anonymity for donors, and other related rights that can be connected to these two main ones and that give them some legal justification.

3.1 FUNDAMENTAL RIGHTS AND THE HUMAN DIGNITY

Fundamental rights may generally be defined as a set of rights that have special protection against any form of government or third-party encroachment.[167] The idea behind such rights is that they are basic, and required by all people to make them dignified members of society. Each country has a number of institutions protecting the fundamental rights of people. In European countries it is mostly the Supreme Courts that do this. The

[167] BENKO, Radoslav. *The Impact of the Charter of Fundamental Rights of the European Union on the Constitutional Architecture of the European Union in the Light of Melloni case*. In: Pravnik. Vol. 154, Issue 8, 2015, p. 703.

fundamental rights of people are also likely to be inscribed in the country's constitution, given that the constitution is the highest legal document in European and other countries, such as Brazil.[168]

In the Federal Republic of Germany, fundamental human rights are described and mentioned in the Basic Law (*Grundgesetz - GG*), which had originally only a more provisional character after the Second World War, but now is seen as the fully-fledged Constitution of Germany:[169]

> "Article 1
> [Human dignity]
> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
> (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law".[170]

Article 1 of the GG is the basis of all other legislation. The interest in human dignity (*menschliche Würde*) demands a certain strictness in its interpretation. This is not only a question of jurisprudential seriousness and strength, but also of the quality of the political culture of a state in general.[171]

Immanuel Kant's philosophy is of great importance when trying to define human dignity, and one can say that the conceptual image of the idea of humanity would be only partial if the relevant parts of Kant's philosophy are not considered, since his ideas contribute to a better understanding of the topic.[172] Kant's conception of human dignity is not easy to comprehend,[173] and it is possible to say that he does not precisely gives a definition of humanity. However, he provides some hints as to how one ought to view it.[174]

---

[168] PEERS, Steve *et al*. *The EU Charter of Fundamental Rights: A Commentary*. Bloomsbury Publishing, 2014, p. 322.
[169] ENDERS, Christoph (2010) *The Right to Have Rights: The Concept of Human Dignity in German Basic Law*. Leipzig, 2010, p. 01-08.
[170] *Grundgesetz für die Bundesrepublik Deutschland*. All references in English to the Basic Law (*Grundgesetz- GG*) are taken from https:// www.btg-bestellservice.de/pdf/80201000.pdf, unless indicated otherwise.
[171] ENDERS (2010), *supra n. 169*, at 02.
[172] ATADJANOV, Rustam. *Humanness as a Protected Legal Interest of Crimes Against Humanity. Conceptual and Normative Aspects*. Berlin: Springer, 2019, p. 56.
[173] RACHELS, James. *The Elements of Moral Philosophy*. 7th ed. New York: McGraw-Hill, 2012, p. 139.
[174] ATADJANOV, *supra n.* 172, at 57.

In his "Grounding for the Metaphysics of Morals", Kant introduces the concept of the so-called "categorical imperative". It consists of three different formulations:

> "1. Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction;[175] 2. Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end;[176] 3. Every rational being must so act as if he were through his maxim always a legislating member in the universal kingdom of ends". [177]

Maxims can be defined as policies of action adopted by agents. They are "the primary objects of moral assessment in applying the categorical imperative to determine the rightness or wrongness of actions."[178] When adopting a maxim, the individual will be setting a rule for himself/herself to follow. In other words, a maxim formulates a rule of action and expresses the agent's determination to act by that rule.[179] The point of Kant's universal law formulation of the categorical imperative, as the first formulation is often called, is to "show that an action is morally permissible only if the maxim on which the action is based could be affirmed as a universal law that everyone obeys without exception."[180]

The idea of the second formulation of the categorical imperative is that a person has an intrinsic value which the moral law commands us to respect. Even though some ends are merely instrumental (they serve as "means" to an end) Kant "argues that the moral law must be aimed at an end that is not merely instrumental, but is rather an end in itself."[181] This means that it would be immoral to treat the individual as a thing of merely instrumental value,[182] since a person has an intrinsic, i.e non-instrumental, value. Also, for Kant human beings have "an intrinsic worth, i.e., dignity," since they are rational agents

---

[175] KANT, Immanuel. *Grounding for the Metaphysics of Morals*. 3rd ed. Indianapolis, Cambridge: Hackett Publishing Company, 1993, p. 30, para. 421.
[176] *Id*, at 36, para. 429.
[177] *Id,* at 43, para. 439.
[178] POTTER, Nelson. *Maxims in Kant's Moral Philosophy.* In: *Philosophia,* Bar-Ilan University, July 1994, p. 62.
[179] *Id*, at 62.
[180] JANKOWIAK, Tim. *Immanuel Kant*. In: Encyclopedia of Philosophy, ISSN 2161-0002, available at http://www.iep.utm.edu/kantview/.
[181] *Id.*
[182] ATADJANOV, *supra n.* 172, at 57.

who are capable of making their own decisions, as well as of setting their own goals and guiding their conduct.[183]

Finally, these two sides of the categorical imperative are combined in a third formulation that expresses the idea of a "kingdom of ends." Tim Jankowiak explains that a kingdom of ends would be a kind of perfectly utopian ideal in which all individuals "freely respect the intrinsic worth of the humanity in all others because of an autonomously self-imposed recognition of the bindingness of the universal moral law for all rational agents."[184] This means that the third formulation of the categorical imperative is the idea that one should "act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends."[185]

There is also a relationship between Kant's understanding of humanity and his concept of freedom (free will):

> "On the one hand, the former seems to establish a limitation on the freedom in the ethical conduct of a person who has to follow the categorical imperative (I cannot do everything that I will but only that which is allowed to me by the principle of an end in itself). On the other hand, the very right to freedom of action stems precisely from the Kantian idea of humanity, i.e., "the right to freedom is attributed to every human being by virtue of his humanity"[186], that is, of this inherent and inseparable value in every human being".[187]

Aharon Barak states that human dignity is recognized as a constitutional right in Germany and that the "purpose of the right to human dignity is fulfillment of the humanity of a person as such."[188] For him, human dignity as a constitutional right "is as person's freedom to write her life story. It is her free will. It is her autonomy and her freedom to shape her life and fulfill herself according to her own will than the will of others."[189] Moreover, this humanity would be expressed in the framework of the society in which the individual lives.[190]

---

[183] RACHELS, *supra n.* 173, at 137.
[184] JANKOWIAK, *supra n. 180*.
[185] KANT, *supra n. 175*, at 43, para. 439.
[186] BYRD, Sharon Byrd and HRUSCHKA, Joachim Hruschka. *Kant's Doctrine of Right: A Commentary*. Cambridge: Cambridge University Press, 2010, p. 287.
[187] ATADJANOV, *supra n.* 172, at 57
[188] BARAK, Aharon. *Human Dignity: The Constitutional Value and the Constitutional Right*. Cambridge: Cambridge University Press, 2015, p. XIX.
[189] *Id*, at XIX.
[190] *Id*, at XIX

It is not easy to define human dignity, since it is “essentially an abstract, normative concept, albeit with a philosophical framework.”[191] It is also a broad concept and therefore difficult to define accurately what it means without a factual context.[192] However, as the driving principle of Germany’s legal order it possesses a certain fixed content.[193]

> “At a minimum, for example, it means that the social order must reflect recognition of the equality of humankind. This concept is anchored in Article 3 of the Basic Law. Equality means at least that persons are entitled to "equal worth," and that, accordingly, there can be no slavery or serfdom, racial or ethnic discrimination. Second, dignity means respect of physical identity and integrity, which is textually specified in Article 2(2). This prohibits torture and corporal punishment, and forbids imposing punishment without fault or levying disproportionate penalties. Third, dignity means respect of intellectual and spiritual identity and integrity. This is manifested most dramatically in the protection of personality rights, specified in Article 2…Fourth, dignity means limitation of official power. This is particularly evident in the guarantee of proportionality, which circumscribes governmental means to legitimate ends, and of procedural due process rights, which allow persons affected by official action to be heard and to be able to influence proceedings which concern them. Finally, dignity means guarantee of individual and social existence. Tangibly, this is manifested in the Article 2(2) right to life and in Germany's social welfare state, textually anchored in Article 20(1)”.[194]

The precise meaning of the term “human dignity” in the framework of the German *Gundgesetz*

> "only emerges from the clause’s origin and the constitutional text’s system. The Parliamentary Council (Parlamentarischer Rat) – the political institution that drafted the German Basic Law in 1949 intended the entire regulation of Article 1 to serve as a preamble of the chapter of fundamental rights and to clarify their spirit and purpose.”[195]

The original intentions of the Parliamentary Council have their clear consequences in the constitutional system itself, since the commitment to the principle of human dignity is made at the start of the chapter of the fundamental rights in the German *GG*. [196] In the first line, these are presented primarily as rights of individuals in restricting the authority of the state and defending themselves against its arbitrary power (*Staatsgewalt*). This

---

[191] EBERLE, Edward (1997). *Human Dignity, Privacy, and Personality in German and American Constitutional Law*. In: Utah Law Review, 1997, p. 973.
[192] *Id*, at 975.
[193] *Id*, at 975.
[194] *Id*, at 975-976.
[195] ENDERS (2010), *supra n. 169*, at 02.
[196] ENDERS, Christoph (1997). *Die Menschenwürde in der Verfassungsordnung: Zur Dogmatik des Art 1 GG*. Tübingen, Mohr Siebeck 1997, p. 416.

was a consequence of the violence and awful experiences during the *Third Reich*. Furthermore, Article 1 of the *GG* states that the human dignity is the main reason why the Germans are liable to the human rights in general. Human rights are the effusion of human dignity, which are inalienable (*unveräußerlich*), and mean that the human dignity cannot be given away for other purposes.[197]

As previously mentioned, the German Basic Law was drafted in 1949 as a reaction to the totalitarian dictatorship that ravaged Germany. Politicians based the new constitution on the principle of human dignity (Article 1) and the recognition of human rights:[198]

> "Apart from regulating the constitutional structure of the state, the *Grundgesetz* expresses the fundamental rights acknowledged by the German people. Their codification may be seen as a direct reaction to the atrocities that had taken place under the Nazi regime. This is also apparent from the central position that has been given to human dignity, laid down in Article 1 GG: '(1) Human dignity is inviolable. To respect and protect it is the duty of all state authority. (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world …'Human dignity' indicated the general intrinsic value of man that is based on his personality. On the basis of this principle, the Basic Law recognizes and codifies pre-constitutional and enforceable rights".[199]

As a consequence, human dignity is the girth of the rights from which human rights can be derived. The commitment for guaranteeing human dignity can be seen as a basic constitutional principle. It reminds us of the "*raison d'être*" of the constitutional state under the rule of law (*Rechtsstaat*).[200] But one must also keep in mind that "human dignity cannot be referred to as a '*passepartout*' as this would undermine the carefully worked out interdependency of the explicit provisions set up in the constitution and level their normative differences."[201]

The obligation to respect human dignity in Article 1 of the German GG generates a strong constitutional concept. Article 1 has its origins in stipulating the fact that the

---

[197] ENDERS (2010), *supra n. 169*, at 02.
[198] BRYDE, Brun-Otto. *Fundamental rights as guidelines and inspiration: German constitutionalism in international perspective.* In: Wisconsin International Law Journal. Vol 25, Issue 2, 2005, p.194.
[199] MAK, Chantal. *Fundamental Rights in European contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England.* Kluwer Law International: Rotterdam, 2007, p. 20.
[200] ENDERS (2010), supra n. *169,* p. 03.
[201] *Id*, at 03.

individual and his/her status constitute a legal subject. It means that "each person is valuable *per se* as an end in himself,[202] a value that government and fellow citizens must give due respect."[203] The Basic Law and the law in general must be interpreted from this status and this point of view. As a consequence, the state is subordinated under the rule of law (*Rechtsstaat*). The relationship between the state and its citizens can be described as a relationship of mutual rights and duties, especially concerning social interrelations between the individual citizens. These are all regulated within the framework of the construction of the German *Rechtsstaat*, including the division of powers.[204]

Furthermore, the principle of guaranteeing human dignity and human rights is also a reminder for legislators, courts, judges and jurists in general that the human individual is a self-conscious and ethically valuable being, who must be respected even if he or she is a criminal. This can be derived from the tradition of Enlightenment (*Aufklärung*) since the American Revolution of 1776 and the French Revolution of 1789 with the "Declaration of Independence" and the "Declaration of Human Rights". Human dignity and human rights have acquired a universal importance in our ever more globalized world. The importance of human rights/dignity crosses national borders and is essential for the whole of mankind.[205]

Human dignity is the reason why German people commit themselves to human rights, as stated in Article 1 of the GG, and the Federal Constitutional Court understands the principle of human dignity as the supreme principle of the constitution.[206] Enders says that the "constitutional principle of human dignity recognizes the individual as a moral person and postulates his or her original right to have rights."[207] In this way, if the individual was not the subject of specific rights that he possessed without any presuppositions, he would be a mere object vulnerable to the arbitrary wills of others.[208]

---

[202] This shows the influence of the Kantian maxim "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end."
[203] EBERLE, Edward (2008). *The German Idea of Freedom*. In: Oregon Review of International Law. Vol. 10, n. 01, 2008, p. 3.
[204] ENDERS (2010), supra n.169*,* at 08.
[205] *Id*, at 08.
[206] *Id*, at 03.
[207] ENDERS (1997), *supra n.196*, at 427.
[208] DÜRIG, Günter, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus GG Art 1 Abs 1 iVm Art 19 Abs 2*, AöR, 81, 1956, p. 119-122.

Further, human dignity is violated if man, individually, is degraded to an object, to a mere means, to a fungible factor.[209][210]

Oliver Lembcke says that among German jurists, there is a consensus that human dignity is to be understood as a constituent principle of the constitution.[211] It would represent the "highest value or the first point of reference in the organisation of state power in relation to citizens."[212] In this sense, according to Article 1 (1), sentence 2 of the Basic Law, the State must respect human dignity, which means it must not only refrain from infringeing on human dignity (*status negativus*), but also has a duty to protect it (*status positivus*).[213]

Increasingly, people who wish to have children are using ART. Access to these technologies must be guaranteed to all, based on the rights to health and family planning, ensuring to beneficiaries safe and scientifically approved methods, as well as prior knowledge of the risks involved in the procedures. However, limits are also necessary, and these must also be grounded on the principle of human dignity, in order to protect not only the anonymity of the donor or the right of the child to know his or her origins, but also the life and the rights of the individuals involved and of the person generated through ART. Thus, the observance of prevailing constitutional principles, which comprise the

---

[209] *Id*, at 127.

[210] Günter Dürig's "object formula" (*Objektformel*) theory is still the most successful attempt to define the principle of human dignity (HÄBERLE, Peter (2018). *Human Dignity as Foundation of the Constitutional State and the Political Community*, translated by Katrin von Gierke, in KOTZUR, Markus (ed). *Peter Häberle on constitutional theory: Constitution as Culture and the Open Society of Constitutional interpreters.* Nomos, 2018, p. 197). It is derived from the second formula of Kant's categorical imperative. According to Dürig, if individuals were not subject of specific rights that they possess without presuppositions, they would be mere objects of the arbitrariness of others. This means that the human being is not a mere object of the state, and that human dignity is affected if the individual is reduced to a mere object, since his or her individuality is an aim in itself (DÜRIG, *supra n*. 208, at 119-122). In this sense, the Federal Constitutional Court has already in different times emphasized that it is not compatible with human dignity to be made a mere object of state power. But "there are limits to the effectiveness of the object formula. Humans are often the mere object not only of prevailing conditions and societal development, but also of the laws with which they must comply. Human dignity is not violated simply because someone has become the target of criminal punishment, but rather when the measure which has been chosen fundamentally calls into question the quality of the affected party as a subject. This is the case when the treatment at the hands of a public authority fails to respect the intrinsic value each person has for his or her own sake." (BUMKE, Christian and Voßkuhle, Andreas. *German Constitutional Law: Introduction, Cases and Principles*. Oxford: Oxford University Press, 2010, p. 93-94).

[211] LEMBCKE, Oliver. *Human Dignity – A Constituent and Constitutional Principle. Some Perspectives of a German Discourse*. Archiv für Rechts und Sozialphilosophie (ARSP), Beiheft 137, 2013, p. 210-211.

[212] *Id*, at 211.

[213] MONTEIRO, A. Reis. *Ethics of Human Rights*. Springer, 2014, p. 242.

primordial values of our society, becomes necessary.[214] In this way, it is not possible to disregard the principle of human dignity when discussing the subject.

The human dignity, for its high value, requires that physicians and researchers always respect the human being when using techniques of AHR, since these procedures affect the life of any being involved in this situation.[215] Thus one cannot treat the person as a means to profit financially, since the procedure of assisted reproduction goes beyond laboratory experience. It is a means of achieving the dream of having a child for those who cannot have children by natural means. And, in this way when talking about assisted reproduction, one should not overestimate the possibilities of human dignity. Laws, rules and decisions on the subject should protect the interest of the individuals, but based on the rules of the Constitution of the country and also on the principle of human dignity:

> "In this context, constitutional dogma must constantly be reappraised to prevent an overly narrow assessment, thus revealing that human dignity is a structural standard for both the state and society. Generally speaking, the commitment to respect and protect includes society as a whole. Human dignity affects third parties; it regulates society; it has a horizontal dimension between fellow citizens".[216]

Furthermore, the AID not only uses genetic material from a third party (a donor) but also deals with the life of a child that is about to be generated and who will later create affective bonds with this family. It is precisely for the sake of these bonds that the human dignity of the people involved must always be protected and respected, since questions about genetic and biological origins may be raised in the future. Moreover, human dignity represents the value of the human person, and it is therefore understood that respect for human dignity must guide any decisions and actions that involve the use of AHR techniques.

---

[214] ANDORNO, Roberto. *Human dignity and human rights as a common ground for a global bioethics*. In: HAVE, HENK A. M. J. and GORDIJN, Bert. Handbook of Global Bioethics, Dordrecht: Springer, 2014, p. 52-53.
[215] BRÄNNMARK, Johan. *Respect for Persons in Bioethics: Towards a Human Rights-Based Account*. In: Human Rights Review, n. 18, 2017, p. 182-183.
[216] HÄBERLE, Peter (2018). *Human Dignity as the Foundation of the Constitutional State and the Political Community*. Translated by Katrin von Gierke. In: KOTZUR, Markus (ed). Peter Häberle on Constitutional Theory. Constitution as Culture and the Open Society of Constitutional Interpreters. Nomos, 2018, p. 205.

3.2 RIGHT OF CHILDREN TO KNOW THEIR ORIGIN AND THE ANONYMITY OF THE DONOR.

It is possible to say that the right of children to know their origin is largely an implied right.[217] The reason for this assertion is that there are hardly any explicit rules stated in the constitution of any country, including Germany, that children have the right to know their origin. However, in the absence of an explicit statement of this right, there are several other laws and rights that give a clear indication that children cannot be denied the right to know their origin. In this way, such implied rights and laws amounts to treating the right to know one's origin as an essential right.[218]

One of the first arguments made in the literature about the fundamental right of children to know their origin is the fact that there are laws protecting people against all forms of discrimination based on origin, even if they are not specifically about children. In Germany, Article 3 (3) of the Basic Law states that no one should be discriminated because of his/her origin: "no person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability."[219]

Thus the General Equal Treatment Act of 2006, in its section 1, states that no person can be discriminated on the basis of ethnic origin or race.[220] The Act was actually made in connection with four anti-discrimination directives of the European Union. In Germany this Act is called *Anti-Diskriminierungsgesetz* (Anti-Discrimination Act). It has regulations about the equal treatment of employees at their working-place, protection against discrimination under Civil Law, and defense of Rights, as well as special regulations applying to Public Law, Employment Relationships and the anti-discrimination

---

[217] SARMIENTO, Daniel. *Who's Afraid of the Charter; The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*. In: Common Market Law Review. Vol 50, Iss 5, 2013.

[218] AMORÓS, Esther Farnós. *Donor anonymity, or the right to know one's origins?* In: Catalan Social Sciences Review, 5, Secció de Filosofia i Ciències Socials, IEC, Barcelona, 2015, p. 5-6.

[219] Article 3 (3) *Grundgesetz - GG* – Original text: *"Niemand darf wegen seines Geschlechtes, seiner Abstammung, seiner Rasse, seiner Sprache, seiner Heimat und Herkunft, seines Glaubens, seiner religiösen oder politischen Anschauungen benachteiligt oder bevorzugt werden. Niemand darf wegen seiner Behinderung benachteiligt werden".*

[220] *Allgemeine Gleichbehandlungsgesetz – AGG* (General Act on Equal Treatment of 14th August 2006). Federal Law Gazette I, p. 1897.

agency.[221] It should not be confused with the so-called *Gleichberechtigungsgesetz*, which was put into law by the West-German *Bundestag*, the German Parliament, on May 3rd 1957. This law guarantees the equal treatment of women and men by the State and states that they have the same rights.[222]

The United Nations Committee on the Rights of the Child and the European Court of Human Rights are two international bodies concerned with producing guidelines and enforcing international laws regarding the right to know one's origins. "The United Nations Committee on the Rights of the Child is in charge of monitoring the enforcement of the United Nations Convention on the Rights of the Child (CRC), while the European Court of Human Rights is in charge of reviewing national decisions based on the ECHR."[223]

The CRC basically promotes the idea that all children in the world should have the same rights, such as rights to learn and to go to school, to parenting care, to be informed and heard, to be educated and cared in a non-violent place, to play and have leisure time, to grow up in a healthy environment, to not be exploited, etc.[224]

The CRC represents a treaty that establishes the civil, political, economic, social, health and cultural rights of children. It defines a child as any human being under the age of eighteen, unless the age of maturity is attained earlier under national legislation.[225] The ratifying states are bound to the treaty by international law while compliance with its norms is monitored by a special UN Committee on the Rights of the Child composed of members from countries around the world.[226]

In Article 3 of this convention we find the principle of the best interests of the child, which can also be used to justify the right of children to know their origin. It states that "in all actions concerning children, whether undertaken by public or private social welfare

---

[221] *Id.*
[222] Deutscher Bundestag. *Dokumente: Vor 60 Jahren: Bundestag beschließt Gleichberechtigungsgesetz*, 2017.
[223] CLARK, Brigitte. *A balancing act? The rights of donor-conceived children to know their biological origins.* In: Georgia Journal of International and Comparative Law. Vol. 40. N. 3, 2012, p. 624.
[224] United Nations. *Convention on the Rights of the Child*, adopted 20 January 1989, entered into force 2 September 1990, 1577 UNTS 3.
[225] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, adopted 25 May 2000, entered into force 12 February 2002, GA Res. A/RES/54/263; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted 19 December 2011, entered into force 14 April 2014, A/RES/66/138, art. 1.
[226] CLARK, *supra n. 223*, at 624.

institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[227]

As indicated earlier, the UN Convention on the Rights of the Child does not explicitly mention the right to know one's origin but it ensures other rights such as the right to identity,[228] that cannot be rendered in isolation if the child has the right to know his origin denied. This is because the origin of the child plays an important role in its personality as well as in the identity of the child.

Brigitte Clark states that the reference to parents in Article 7 [229] of the CRC could indicate a right to know one's biological parents. She gives a broad interpretation of Article 7 and understands that "the term 'parents' includes not only social or legal parents, but also biological and gestational parents":[230]

> "Furthermore, if Article 7 is read in the light of the rest of the CRC, in particular Articles 9 and 18, it would appear to guarantee the child's right to have a relationship with her parents, but it is not entirely clear what the right to know and be cared for by one's parents would entail. It might imply the right to contact them as well as knowledge of their identity. On the one hand, it might be argued that there should be legislation imposing this obligation on family relationships, and that such an obligation should be based on a model of scientifically derived genetic truth. On the other hand, it could be maintained that the right to know one's origins is simply a fashionable notion fueled by advances in biomedical sciences. Clearly the biological model of parenthood cannot rank as highly as other types of parenthood, such as those arising from active caring, nurturing, and love".[231]

Article 8 of the CRC can also be taken into consideration together with Article 3 of the same convention. Even though article 8 does not define the concept of identity, it says that identity includes nationality, name, and family relations. Article 3 states that the child's best interest is of primary consideration and imposes limits on the right to know in cases where the information would be contrary to the child's best interests.[232]

Nevertheless, none of the articles cited above settle the issue of which interests should prevail in case of a conflict between a child's interest in knowing her origins and

---

[227] United Nations, *supra n. 224.*
[228] *Id.*
[229] Article 7 – 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. United Nations*, supra n. 224.*
[230] CLARK, *supra n. 223*, at. 626.
[231] *Id*, at. 626.
[232] *Id*, at 627-628.

other rights and interests, for example, the right of the donor to an anonymous sperm donation. Nor do they provide a criterion on how to balance the child's interests with other rights or interests in conflict. [233]

> "It is arguable that the greater balance demonstrated in the jurisprudence of the European Court of Human Rights correlates more closely to that of the original intention of the drafters of the CRC. Both the European Court of Human Rights and the original drafters of the CRC recognized the importance of cultural and social inheritance and a stable family to a child. Article 8(2) of the ECHR expressly acknowledges the possibility that it may be necessary to restrict the right to know one's origins when it conflicts with other rights and outlines the conditions and balancing guidelines that should be respected. The jurisprudence of the European Court of Human Rights has also maintained that the right of a donor-conceived child to know his or her identity is not absolute. Arguably, a state's positive duties resulting from the right to know one's origins are best determined by national efforts to balance that right against the rights of other parties."[234]

Some cases in the body of literature tend to justify calls for laws on the rights of children born through AHR with donor sperm to know their genetic origins. One argument is that children born with the help of donor sperm can grow up and discover health or other medical issues that can only be treated if the genetic origin of the person is known.

> "A significant reason for the growing legislative support for non-anonymous gamete donations is the belief that donor-conceived children have a fundamental moral right to know their genetic origins. Often, however, this right is assumed rather than explicitly justified. Of course, the presumed right to know one's genetic origin is not new. It has been used as grounds to promote openness in adoption records. Nonetheless, a variety of factors, such as the increasing number of children born by means of gamete donation, advances in genetic science and technology that make it easy to discover the identity of a person's genetic parents, and the widespread belief that genetic information is important for protecting people's health, have made this alleged right quite salient, even leading some to challenge the ethical appropriateness of gamete donation practices altogether."[235]

Most of the sperm donations worldwide are made anonymously. For example, in Spain the law 14/2006 explicitly protects the anonymity of the donor.[236] However, the right of the child to know his or her origin is implemented in different ways in other places.[237]

---

[233] *Id*, at 628.
[234] *Id*, at 630-631.
[235] MARTÍN, *Imaculada de Melo. The ethics of anonymous gamete donation: Is there a right to know one's origins?* In: Hastings Center Report 44, n. 2, 2014, p. 29.
[236] *Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana* asistida (Law 14/2006 from May 26th about assisted human reproduction techniques), published in the Federal Law Gazette (Boletín Oficial del Estado) Nr. 126 from May 27th. 2006, p. 19947-19956.
[237] MARTÍN, *supra n. 235, at* 28.

Countries like Sweden, Austria, Germany, The Netherlands, Norway, The United Kingdom, Denmark and Finland have called into question the morality of the anonymity of the donor. They are starting to enact laws allowing children access to identifying information about their gamete donor, or are at least having judicial cases that discuss this question:[238]

> "Today, between 20% and 36% of the sixty countries analysed in a study by the International Federation of Fertility Societies (IFFS) no longer have a system based on donor anonymity. Of these, 36% allow identifying information on the donor to be accessed, 24% allow non-identifying information and between 24% and 36% do not distinguish whether this information is identifying or not. Many European countries have adopted the policy launched by Sweden in 1984 and followed by Austria in 1992, which allows the person conceived via donated gametes to access identifying information on the donor once they are mature enough."[239]

Non-anonymous sperm donation is also happening in some jurisdictions in North America.

> "Most sperm donation that occurs in the USA proceeds through anonymous donation. While some clinics make the identity of the sperm donor available to a donor-conceived child at age 18 as part of 'open identification' or 'identity release programs,' no US law requires clinics to do so, and the majority of individuals do not use these programs. By contrast, in many parts of the world, there have been significant legislative initiatives requiring that sperm donor identities be made available to children after a certain age (typically when the child turns 18)."[240]

In various places around the world, sperm donation is considered an economic venture and therefore an industry of its own.[241] It is estimated that an average of 12.000 children per year are born as a result of AHR in Germany.[242] For each of these, the sperm banks charge a lot of money, and the price is determined by factors including motility, the type of straws, and profile of the donor. The emergence of sperm donation as an industry is one of the major arguments raised when the principle of anonymity is discussed.

---

[238] *Id,* at 28.
[239] AMORÓS, *supra n.* 218, at 4.
[240] COHEN, Glenn *et al*. *Sperm donor anonymity and compensation: an experiment with American sperm donor*. In: Journal of Law and the Biosciences, Oxford University Press, n. 3, 2016, p. 468-469.
[241] FLETCHER, Joseph F. *Morals and Medicine: the moral problems of the patient's right to know the truth, contraception, artificial insemination, sterilization, euthanasia*. Princeton University Press, 1979, p. 30.
[242] See:
SÜTTERLIN, Sabine et al. *Ungewollt kinderlos Was kann die moderne Medizin gegen den Kindermangel in Deutschland tun?* Berlin-Institut für Bevölkerung und Entwicklung, 2007, p. 22-32.

As far as the merits of ensuring anonymity are concerned, it can be argued that on the basis of promoting the personal liberties of donors as part of a constitutional principle that needs to be protected, i.e. anonymity, enforce donor identity disclosure cannot be considered as justifiable.

As much as there are arguments made for donor anonymity, Germany is one of the countries in the world that has opposed donor anonymity. The reason why complete sperm donor anonymity is not allowed in Germany is that priority is given to the right of donor-conceived children to know their origins.[243] In Germany the *Yes-Spender* (Yes-Donor) rule applies. This means that children born through AHR have the right to know the identity of their biological father, and the identity of the sperm-donor must be disclosed if the child requests it after he/she turns 16. [244] Already in 1989, the BVerfG ruled that it is a personal right to know one's genetic origin[245] and a law passed in 2007 made a further innovation and specified that sperm donor documentation must be kept for 30 years instead of 10 years.[246]

This gives couples something to think about when they go to foreign countries to get inseminated. Even though many countries around the world allow donor anonymity, some do not, and this may become an issue in the future. If the couple wants an anonymous sperm donation, they should be fully informed about the rules on anonymity before proceeding.

Unlike arguments for donor anonymity, which are mostly made in legal and scholarly literature, there have been court cases in Germany where rulings were made against donor anonymity. In 2008, a study estimated that since 1970 around 100,000 children were born through sperm donation in Germany,[247] and most of these donors

---

[243] See:
Spenderkinder Verein. *Die Rechtliche Situation*. http://www.spenderkinder.de/infos/dierechtlichesituation/
[244] DUTTGE, Gunnar *et al*. *Heterologe Insemination*. Aktuelle Lage und Reformbedarf aus interdisziplinärer Perspektive. Universiätsverlag Göttigen, 2010, p. 104.
[245] BVerFG, 31.01.1989 - 1 BvL 17/87.
[246] *Gesetz über Qualität und Sicherheit von menschlichen Geweben und Zellen (Gewebegesetz)*, July 20th 2007, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 35 from July 27,th. 2007, p. 1574.
[247] TRAPPE, *supra n. 2*, at 277.

enjoyed absolute anonymity as part of the agreements and arrangements they have made with the sperm banks they donated to.[248]

Margalit states that most parents who had reproductive treatments with donor sperm only tell their children about how they were conceived, but not who their biological fathers (donors) are. However, some parents do tell their children at a young age about their biological fathers, while others wait until adolescence. [249]

The practice of having a minimum age to let children conceived by sperm donation request or know about their biological fathers is also common in Germany. This was dismissed, however, by the *Bundesgerichtshof* (BGH) in 2015 when it decided that children of sperm donors have the right to know who their biological father is at any time.[250] It also means that BGH asserted that the child's right to know its origin has more weight than the donor's right to anonymity. Prior to the decision of 2015, the age to request and disclose donor's identity was 16 years old. Children would only be told who their biological fathers were when the agreement between the donors and the sperm clinics allowed for this.

Though the laws and rules will be further discussed in the fifth chapter of this work, it is worth briefly mentioning here that on February 6, 2013 a regional appeals court issued a verdict that children born from anonymous sperm donors have the right to know the names of their biological fathers. The case was between Sarah P as plaintiff and Thomas Katzorke as defendant.[251]

The ruling was the outcome of a legal battle that involved a 22-year-old plaintiff conceived by a sperm donor who wanted to know the identity of her biological father. Even though she had lost initial cases, the appeals court (*Oberlandsgericht*) in Hamm ruled in her favor. The case made by the court was that the right of a person to know his or her ancestral origin ought to be respected. However, the lower courts that had earlier ruled against the plaintiff were of the opinion that once the right to know her biological father was granted, the constitutional principle that guaranteed the protection of the

---

[248] MARGALIT, Yehezkel. *Artificial Insemination from Donor (AID)-From Status to Contract and Back Again.* In: Boston University Journal of Science & Technology Law, n. 69, 2015, p. 87.
[249] *Id*, at 98-99
[250] BGH, 28.01.2015 - XII ZR 201,13.
[251] OLG Hamm, 06.02.2013 - I-14 U 7/12.

anonymity of her donor was also going to be breached. This was on the basis that the 22-year-old had been able to live until that time not knowing her biological father but without any serious impact on her personality. Thus, for the lower court it was more prudent to look at the impact on the other side of the case, i.e. on the side of the donor who was going to have his identity revealed. The appeal court, however, rejected this argument and did not rule in favor of the donor.[252]

Some jurists disagreed with the case because it also involved the doctor who had performed the artificial insemination. In their opinion, doctors ought to keep their patients' medical records anonymous, and patients must be able to trust that everything they reveal to their doctor will remain confidential.[253] In the case of a sperm donor that his donation will be kept anonymous. As explained earlier, one of the major arguments made in favor of donor anonymity is the issue of doctor-patient relations, as well as professional ethics of doctors. In German jurisdictions, however, court rulings have involved very strong legal interpretations, since the rulings of the courts serve as a reference point for making future arguments in court when similar cases arise. Such rulings do not, however, have the mandate to be considered as fully-fledged laws, requiring that every other person conceived through sperm donation who wishes to know his or her biological fathers would have that right. Indeed in the specific case between Sarah P and Thomas Katzorke, the doctor at the center of the controversy suggested that the ruling would only be theoretical rather than practical one, since he claimed that the clinic did no longer had records of the donation after twenty-two years.

There have been other court rulings that have also granted similar rights to know their biological fathers to people conceived through sperm donation. For example in 2016, the case of a 21-year-old woman who was conceived through sperm donation was heard by a Hanover court, which stated that the child's right to know his or her origin is more

---

[252] *Id.*

[253] The right of the doctor to keep his/her patient's information confidential is part of his/her professional freedom derived from Article 12 (1) of the GG. Also, section 203 of the Strafgesetzbuch (StGB – Criminal Code) penalizes the breach of medical confidentiality. A violation of medical confidentiality can therefore result in imprisonment for up to 1 year or a fine, claims for damages and even professional court measures. The obligation to maintain confidentiality also arises as an ancillary obligation from the treatment contract between the doctor and the patient (§§630a-f BGB). And, the medical confidentiality is also regulated by §9 Abs. 1, MBO-Ä ((Muster-)Berufsordnung: Schweigepflicht).

important than the sperm donor's right to privacy.[254] The relevant cases will be further analyzed on the last chapter.

In 2016, the German government started indicating that it was planning to create a registry of sperm donors. This was interpreted as a clear stand against donor anonymity, since with a registry it becomes easier for anyone who was conceived with donor sperm to discover the identity of his or her biological father by going to the registry to find information about their donors. The German Parliament passed the Sperm Donor Registry Act (SaRegG – *Samenspenderregistergesetz*[255]) on May 18,th 2017, and 2018 a central registry of sperm donors was introduced in Germany. Clinics now have to keep data from the donor and the mother for a minimum of 110 years. However, this registry is only for children conceived after the Act comes into force.[256] The Act can be considered a major step forward from an international perspective.

As indicated before, most children do not ask to find out who their biological fathers are. The reason associated to this is that most of these children grow up accepting the fathers who raised them as their only legitimate fathers.[257] It is important to establish that regardless as the legal justifications that have been given to the right of children to know their origins, there are groups and literature that seek to refute the position taken earlier. In the view of these people the right of children to know their origin cannot be protected in law, as it would go against other laws. More importantly, such people have argued in favor of donor anonymity, claiming that granting children the right to know their origin will directly conflict with the rights of donors.[258] In a current study by Cohen *et al*., the researchers sought to collect data about whether anonymous donors would continue to donate sperm even if the laws prohibited anonymous donations. The results of the study showed that "29 per cent of current anonymous sperm donors in the sample would refuse to donate if the law changed such that they were required to put their names in a registry available to donor-conceived children at the age of 18."[259]

---

[254] AG Hannover, 17.10.2016 – 432 C 7640/15.
[255] *Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen, supra n*. 09.
[256] *Id.*
[257] COHEN *et al*, *supra n. 240*, at 468-469.
[258] *Id*, at 469.
[259] *Id*, at 470.

However, one can understand that between the donor and the child, the right of the donor to anonymity was always existent before the child was born and also possessed any fundamental rights. In this way, the right of the child could not later be used as a premise to deny the donor his right to anonymity.[260]

Another claim that has been made against the right to know one's biological origins is the issue of professional medical ethics and its relationship to law. Clinics and doctors sign agreements with sperm donors who do not wish their identity to be made public. These arrangements could be considered as confidential between a doctor and a patient, where doctors have an ethical and legal obligation to respect the confidentiality between themselves and the patient. The argument against the right to know one's origins is therefore that it puts doctors in a position where they have to compromise their ethical practice when they are forced, even by court to make the identities of the donors known.[261] Following the line of medical arguments, some opponents of anonymous sperm donation have urged that:

> "it be ended in order to fulfill a donor-conceived child's right to know his or her medical history. The other side counters that such medical history can be transmitted and documented without sharing the donor's identity, especially in our current era of low-cost whole genome sequencing."[262]

Finally, there has been significant debate as to whether banning sperm donor anonymity will lead to reductions in the number of men willing to donate sperm, and whether this effect is only short-term or long lasting.[263] The fertility industry, which includes clinics, doctors and sperm banks, is now faced with the responsibility to ensure that both donors and gamete recipients are aware that donor-conceived children may in the future seek their genetic origins; and moreover that, depending on the country where he or she is, these children will have the right to access the data of the donor. In this way, other rights that have relation to the subject, and that give some justification to the right of children to know their origin will be addressed below.

---

[260] *Id*, at 485-488.
[261] JOHNS, Rebecca. *Abolishing Anonymity: A Rights-Based Approach to Evaluating Anonymous Sperm Donations*. In: 20 UCLA Women's Law Journal, 2013, p. 117–118.
[262] COHEN *et al*, *supra n. 240*, at 471-472.
[263] *Id*, at 472.

3.2.1 Reproductive and sexual rights

Recognition and respect for the autonomy of individuals in decisions regarding their sexual and reproductive lives gave rise to reproductive and sexual rights. They are part of the human rights and are internationally recognized in various documents, produced as a result of the struggle of the feminist movement, which brought to the debate the relevance of the topic.[264] It should be taken into account that often the Law cannot keep up with the dynamism in areas such as medicine and biotechnology, whose evolution requires new rights and interpretative efforts on the part of jurists to adapt existing standards to new situations. Thus, reasons to defend access to reproductive technologies can also be sought in the reproductive and sexual rights.

> "The term "reproductive rights" was coined at the 1st International Meeting on Women and Health in Amsterdam, Holland, in 1984[265]. There was, at the time, a global consensus that this designation would convey a more complete and adequate concept than "health of women" for the broad agenda of women's reproductive self-determination. The definition of reproductive rights, therefore, began to be formulated in a non-institutional framework, one of dismantling maternity as a duty through the struggle for the right to legal abortion and contraception in developed countries".[266]

Later on, the expression "reproductive rights" was used in Cairo, Egypt in 1994 at the International Conference on Population and Development, and was used again in 1995 at the 4th World Conference on Women in Beijing, China.[267] The Cairo Conference helped governments, organs and agencies of the United Nations system as well as nongovernmental organizations to "move beyond the confines of traditional family planning approaches."[268]

---

[264] NOWICKA, Wanda. *Sexual and reproductive rights and the human rights agenda: controversial and contested*. In: Sexual and Reproductive Health Matters, Vol. 10, n. 38, 2011, p. 119-120.
[265] Before 1984 the UN International Conference on Human Rights held in Tehran in 1968 adopted, for the first time what can be considered the essence of reproductive rights and considered family planning a human right: "parents have a basic human right to determine freely and responsibly the number and the spacing of their children." (FREEDMAN, L. P and ISAACS, S.L. Human Rights and Reproductive Choice. In: Studies in Family Planning, vol. 24, n. 2, 1993, p. 20).
[266] MATTAR, Laura Davis. *Legal recognition of sexual rights - a comparative analysis with reproductive rights*. In: Sur, Revista Internacional de Direitos Humanos. vol.5, no.8, São Paulo, June 2008, p. 63.
[267] GRUSKIN, Sofia (2000). *The Conceptual and Practical Implications of Reproductive and Sexual Rights: How Far Have We Come?* In: Health and Human Rights, vol. 4, n. 2, 2000, p. 1–6.
[268] GRUSKIN, Sofia (2008). *Reproductive and Sexual Rights: Do Words Matter?* In: American Journal of Public Health. Vol. 98, n. 10, Oct. 2008, p. 1737.

According to Paragraph 7.3 of the Cairo Programme of Action, reproductive rights

> "embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents."[269]

Women's sexual and reproductive health is related to different human rights. Bearing in mind that reproductive rights "embrace certain human rights that are already recognized in national laws, international human rights documents, and other relevant UN consensus documents"[270] and are based on the recognition of reproductive choice, it is possible to say that they are related to rights to life,[271] health, including sexual and reproductive health,[272] personal freedom, security and integrity;[273] the right to be free from sexual and gender-based violence,[274] to decide the number and spacing of children,[275] to

[269] United Nations Population Fund. *Programme of Action*, adopted at the International Conference on Population and Development, Cairo, 5-13 September, 1994, p. 46.
[270] *Id*, at 46.
[271] See:
Article 3 UN Universal Declaration of Human Rights, Article 6 (1) International Covenant on Civil and Political Rights, Article 6, (1) and (2) Convention on the Rights of the Child and Article 10 Convention on the Rights of Persons with Disabilities.
[272] See:
Article 25 (1) Universal Declaration of Human Rights, Articles 10 and 12 (1) and (2) International Covenant on Economic, Social and Cultural Rights, Articles12 (1) and (2), 14 (2) Convention on the Elimination of All Forms of Discrimination against Women, Articles 24 (1) and (2) Convention on the Rights of the Child and Article 25 Convention on the Rights of Persons with Disabilities.
[273] See:
Articles 3 and 5 Universal Declaration of Human Rights, Articles 7 and 9 (1) International Covenant on Civil and Political Rights, Article 37 (a) Convention on the Rights of the Child and Article 14 Convention on the Rights of Persons with Disabilities.
[274] See:
Articles 5 (a) and 6 Convention on the Elimination of All Forms of Discrimination against Women, Articles 19 (1) and 34 Convention on the Rights of the Child and Article 16 (1) Convention on the Rights of Persons with Disabilities.
[275] See:
Articles16 (1) Convention on the Elimination of All Forms of Discrimination against Women and Article 23 (1) Convention on the Rights of Persons with Disabilities.

equality and non-discrimination[276], to consent to marriage and equality in marriage;[277] rights of access sexual and reproductive education and family planning information[278] and to be free from practices that harm women and girls;[279] rights to privacy,[280] the right to not be subjected to torture or other cruel, inhuman, or degrading treatment or punishment;[281] and the right to benefit from scientific progress.[282]

Reproductive choice is thus of great importance, and laws that deny, obstruct or limit access to health services violate basic human rights protected by international conventions.[283] Moreover, "for international human rights law to be truly universal, it must require states to take preventive and curative measures to protect women's reproductive health, affording them the possibility to exercise their reproductive self-determination."[284]

Regarding sexual rights, even though they were discussed at the Cairo conference, the term "sexual rights" was not included in the final document of the Cairo Programme of Action. Nevertheless, these rights were addressed again at the 4th World

---

[276] See:
Article 2 Universal Declaration of Human Rights, Article 2 (1) International Covenant on Civil and Political Rights, Article 2 (2) International Covenant on Economic, Social and Cultural Rights, Articles 1, 3 and 11 (2) Convention on the Elimination of All Forms of Discrimination against Women, Article 2 (1), (2), (5) Convention on the Rights of the Child and Article 6 (1) Convention on the Rights of Persons with Disabilities.
[277] See:
Article 16 (1) and (2) Universal Declaration of Human Rights, Article 23 (2), (3) and (4) International Covenant on Civil and Political Rights, Article 10 (1) International Covenant on Economic, Social and Cultural Rights, Article 16 (1) and (2) Convention on the Elimination of All Forms of Discrimination against Women and Article 23 (1) Convention on the Rights of Persons with Disabilities.
[278] See:
Article 10 (c) and (h) Convention on the Elimination of All Forms of Discrimination against Women and Article 23 (1) Convention on the Rights of Persons with Disabilities.
[279] See:
Article 2 (f) and 5 (a) Convention on the Elimination of All Forms of Discrimination against Women and Article 24.3 Convention on the Rights of the Child.
[280] See:
Article 17 (1) and (2) International Covenant on Civil and Political Rights, Article 16 (1) and (2) Convention on the Rights of the Child and Article 22 (1) Convention on the Rights of Persons with Disabilities.
[281] See:
Article 5 Universal Declaration of Human Rights, Article 7 International Covenant on Civil and Political Rights, Article 1 Convention Against Torture, Article 37 (a) Convention on the Right of the Child, Article 15 (1) and (2) Convention on the Rights of Persons with Disabilities.
[282] This right may also include scientific progress in the area of human reproduction. See:
Article 27 (1) Universal Declaration of Human Rights, Article 7 International Covenant on Civil and Political Rights, and Article 15 International Covenant on Economic, Social and Cultural Rights.
[283] MATTAR, *supra* n .266*,* at 63*.*
[284] *Id*, at 63-64.

Conference on Women in Beijing.[285] According to Paragraph 96 of the Beijing Declaration and Platform for Action:

> "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences".[286]

For the WHO sexual and reproductive health involves five components: "ensuring contraceptive choice and safety and infertility services; improving maternal and new born health; reducing sexually transmitted infections, including HIV, and other reproductive morbidities; eliminating unsafe abortion and providing post-abortion care; and promoting healthy sexuality, including adolescent health, and reducing harmful practices."[287]

Article 16 (1) of the Universal Declaration of Human Rights states that men and women have the right to "found a family,"[288] and the UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have indicated that women's right to health includes their sexual and reproductive health.[289] Article 16, (1) e, of the Convention on the Elimination of Discrimination against Women guarantees women the right to decide "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[290] Also, Article 23, b, of the Convention on the Rights of Persons with Disabilities states that persons with disabilities have the right to "decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education,"[291]

---

[285] *Id*, at 64.
[286] United Nations. *Beijing Declaration and Platform for Action*, adopted at the 16th plenary meeting, Beijing, 15 September 1995, p. 36.
[287] United Nations Population Fund. *Sexual and Reproductive Health for All. Reducing poverty, advancing development and protecting human rights*. September 2010. Available at http://www.unfpa.org/public/home/publications/pid/6526.
[288] United Nations. *Universal Declaration of Human Rights*, adopted 10 December 1948.
[289] DICKENS, Bernard. *The challenges of reproductive and sexual rights*. In: American Journal of Public Health, Oct. 2008, n. 98, p. 1738-1740.
[290] United Nations. *Convention on the Elimination of Discrimination against Women*, adopted 18 December 1979.
[291] United Nations. *Convention on the Rights of Persons with Disabilities*, adopted 13 December 2016.

and Article 25a of the same Convention mentions the right of persons with disabilities to sexual and reproductive health.[292] Therefore, making a comprehensive interpretation of these articles, one can say that besides having the right to found a family, women can also decide how their children will be conceived, whether by natural means or with the help of reproductive technologies. AHR can also help people with infertility problems to "found a family" as guaranteed by the UN Universal Declaration of Human Rights. In this sense, Marcia Inhorn understands that "it is time to rethink the meaning of reproductive "rights" through a framework that includes infertility and the ARTs. In addition to the right to control fertility, reproductive rights must encompass the right to facilitate fertility when fertility is threatened."[293]

The European Convention on Human Rights also guarantees some rights that are related to sexual and reproductive rights, such as right to life (Article 2), prohibition of torture (Article 3), right to liberty and security (Article 5 (1)), right to respect for private and family life (Article 8 (1)), right to marry (Article 12) and prohibition of discrimination (Article 14).[294] In the German context, even though reproductive and sexual rights are not specifically written in the Basic Law, it is possible to find provisions that can be related to reproductive health and rights, in particular the right to free development of personality (Article 2, paragraph 1, GG), the right to life and physical integrity (Article 2, paragraph 2, sentence 1 GG) and the protection of marriage and family (Article 6 paragraph 1 GG). A general right to information and education on reproductive issues cannot be clearly identified in the Basic Law. However, the Federal Constitutional Court has already ruled that family planning and reproductive health matters are part of the state's duty to protect the unborn life,[295] and the Act on Assistance to Avoid and Cope with Conflicts in Pregnancy (*Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten* -

---

[292] *Id.*

[293] INHORN, Marcia. *Right to assisted reproductive technology: Overcoming infertility in low-resource countries*. In: International Journal of Gynecology and Obstetrics, n. 106, 2009, p. 174.

[294] European Court of Human Rights. *European Convention on Human Rights*, adopted 4 November 1950.

[295] Abortion II (Schwangerschaftsabbruch II), BVerfGE 88, 203 (252).
See also:
KLEIN, Laura and WAPLER, Friederike. *Reproduktive Gesundheit und Rechte*. In: Aus Politik und Zeitgeschichte. Zeitschrift der Bundeszentrale für politische Bildung (bpb), n. 20/2019, p. 22-23.

Schwangerschaftskonfliktgesetz – SchKG) also has provisions about reproductive health.[296]

In accordance with this duty of protection and the SchKG, the Federal Center for Health Education (*Bundeszentrale für gesundheitliche Aufklärung* - BZgA) is responsible for promoting health education, which includes reproductive and sex education, as well as family planning. Together with the federal state authorities and in cooperation with family counseling institutions, they develop concepts and elaborate measures for matters that involve sex education and family planning.[297] Some of the subjects addressed by the BZgA are contraception, sexually transmitted infections, family planning (including reproductive medicine), sexual violence, gender identity, and women and children's health.[298]

The recognition of reproductive rights guarantees individuals the right to plan their family, deciding the number of children, and the most appropriate moment for their birth. This right includes both actions directed at contraception and conception, which would also involve treatments through reproductive technologies.[299] Therefore, techniques of AHR can also be considered as instruments for the planning of reproductive life, because when assisting in procreation, they also allow the achievement of the parental project.

3.2.2 Privacy

The right of sperm donors not to have their data disclosed is related to the right to privacy. Esther Amorós states that "one of the most frequent objections to the right for children conceived with donated gametes to know their origins is that this conflicts with the donor's right to privacy."[300] The right to privacy is part of the Universal Declaration of

---

[296] *Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten - Schwangerschaftskonfliktgesetz - SchKG),* July 27th 1992, published in the Federal Law Gazette (BGB1 – Bundesgesetzblatt) Teil I, Nr. 37, p. 1398 from August 4 th 1992.

[297] *Id.*

[298] *Id*.

See also:

Bundeszentrale für gesundheitliche Aufklärung (BzgA). *Tasks and Goals*. Available at https://www.bzga.de

[299] BARROSO, Carmen. *From reproductive to sexual rights*. In: AGGLETON *et al*. Routledge Handbook of Sexuality, Health and Rights. New York, Routledge, 2010, p. 383.

[300] AMORÓS, *supra n. 218,* at 06.

Human Rights[301] and other international documents such as the European Convention on Human Rights.[302] Its main objective is the protection of private and family life.[303]

Because of its nature, AHR requires the involvement of third parties, "which makes necessary regulation of their intervention, even if there is an implied or express authorisation by the couples that undertake the procedure or by a single woman."[304] On one side are the donor and the people using the technique with the right to privacy, on the other side children with the right to know their origins.

Reproductive techniques are relatively new and because of this, related laws are still being discussed and also the regulation of new situations is treated differently in different legal systems. In Europe, most countries have been establishing protection for the children conceived with the help of ART.[305]

The issues related to donor anonymity and right to know one's origin have been attracting attention because they "call into question a society's attitudes on fundamental issues of privacy, personal identity, family, and what it means to be human."[306]

Some countries, including Germany, have put an end to anonymous gamete donor systems in favor of identity-release systems. This allows children conceived by AHR to access information about their donor when they reach a certain age. In accordance with the principle of protecting the most vulnerable parties, the adoption of an identity-release system shows that the health and well-being of the children born through reproductive techniques is given priority, since these children will be able to have easy access to their genetic origins.[307]

Another point that should be taken into consideration is the fact that if the donor makes his donation anonymously, this was probably because he does not want to have

---

[301] Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.
[302] Article 8 - Right to respect for private and family life - 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
[303] VALVERDE, *supra n*. 57, at 178.
[304] *Id*, at 178.
[305] *Id*, at 178.
[306] *Id*, at 178-179
[307] *Id*, at 179

contact with the child who results from his donation as a grown up person.[308] In other words, some donors want explicitly to keep their privacy and are not really interested in the result of their donation.

Under German law, it is possible to say that the right to anonymity and consequently the right to privacy derive from a major one, the right to informational self-determination (*Recht auf informationelle Selbstbestimmung*), which has constitutional status, as it concerns the power of individuals to plan and regulate their private lives, as well as their family planning.[309] It also safeguards "the authority of the individual to decide fundamentally for herself when and within what limits personal data may be disclosed."[310]

The expression *Recht auf informationelle Selbstbestimmung* (informational self-determination) was first used in the so-called "*Volkszählungsurteil*":[311]

> "In December of 1983, the German Federal Constitutional Court declared unconstitutional certain provisions of the revised Census Act (Volkszählungsurteil) that had been adopted unanimously by the German Federal Parliament but were nevertheless challenged by diverse associations before the Constitutional Court. That now classic avant-garde decision ruled, based on Articles 1 (human dignity) and 2 (personality right) of the Constitution, that the "basic right warrants…the capacity of the individual to determine in principle the disclosure and use of his/her personal data." This was one of the first and most famous articulations of a "right to informational self-determination," understood by the Court as "the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others."[312]

Even though the informational self-determination right is not explicitly mentioned in the text of the GG, the German Constitutional Court already understood that it is contained in Article 2, paragraph 1 in combination with Article 1, paragraph 1 of this law.[313] Giving the donor the right to informational self-determination means that the donor decides "for himself which details about his private life to disclose to the wider public."[314]

---

[308] COLLIER, Roger. *Disclosing the identity of sperm donors*. In: Canadian Medical Association Journal, Vol 182 (3), 2010, p. 232-233

[309] EPPING, Volker. *Grundrechte*. 7. ed. Berlin: Springer, 2017, p. 314.

[310] EBERLE, Edward (2012). *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview*. In: Liverpool Law Rev, n. 33, 2012, p. 225-226.

[311] Census Act (*Volkszählungsurteil*), BVerFG, 65, 1 - 15.12.1983.

[312] ROUVROY *et al*. *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*. In: GUTWIRTH, SERGE *et al*. Reinventing Data Protection? Netherlands: Springer, 2008, p. 45.

[313] *Id*, at. 315.

[314] ALLAN, Sonia. *Donor conception and the search for information: from secrecy and anonymity to openness*. New York: Routledge, 2017, p.137.

On this understanding, the donor of genetic material has the right to privacy in his donation, and this right would be guaranteed by the legal system and supported by the constitutional text and the principle of human dignity:

> "It is a fundamental principle of the EU Data Protection Directive that a person should have control over his or her personal data (cf. the Directive's Art. (12)). Some countries have had bad experiences with data collection (e.g. Germany) or lack of provision made for data protection (e.g. the UK). Most likely resulting from the problematic experiences in Germany under totalitarian rule, there was an acrimonious debate about the accomplishment of a population census in the 1980s. It resulted in a landmark decision of the German Federal Constitutional Court which was subsequently very influential for all matters of data protection in Germany. One newly-developed principle of data protection from this decision was a right to informational self-determination".[315]

On the other hand, Blauwhoff takes the view that "the basis of the right to know one's origins (*Recht auf Kenntnis der eigenen Abstammung*) is derived from the right to informational self-determination (*Recht auf informationelle Selbstbestimmung*) which is an aspect of this right."[316] However, this aspect will be further discussed in the last chapter with the analysis of court cases.

Lenk *et al* point out that "in comparison to anonymity, privacy is a much more dynamic notion and it serves slightly different functions. The core element of privacy is to maintain control over personal information, which would be impossible once the data have been anonymized."[317]

Those who support anonymous sperm donation say that telling the child how he or she was conceived will subject the child to social or psychological disorders, which can be unsettling if the child wants to find out more information about the donor but cannot.[318] They also think that anonymous donation "allows parents to maintain the issue of infertility as a private matter…for example, they may be concerned that the child will reject the non-genetic parent, or they may wish to conceal the fact of donation from disapproving family members, especially those from cultures less accepting of sperm donation."[319]

---

[315] LENK, Christian *et al*. *Biobanks and Tissue Research.* Vol. 8. New York:Springer, 2011, p. 04.
[316] BLAUWHOFF, Richard J. *Tracing down the historical development of the legal concept of the right to know one's origins Has 'to know or not to know' ever been the legal question?* In: Utrecht Law Review. Vol. 4, Issue 2, June 2008, p. 99.
[317] LENK, *supra n. 315*, at 14.
[318] GONG, Dan *et al. An overview on ethical issues about sperm donation.* In: Asian Journal of Andrology, Vol 11 (6), nov. 2009, p. 651-652.
[319] *Id,* at 652.

The California Cryobank in the United States of America, for example, is using celebrity look-alike photos to give potential customers some idea of how the donors could look. But this generates another problem. When the parents who are seeking a sperm donation get a supposed photo from the donor, this can create a false sense of intimacy between the parties. The use of photos could blur the lines between person (the donor) and genetics (the sperm donation).[320] Also, if a sperm bank guarantees a donor his privacy and at the same time shows his photo on their websites or to the future parents, they may be able to discover his identity with a suitable app in a fraction of a second. The progress of technology cannot be stopped.[321]

In the age of Internet and advances in genetics, there are new methods, apps and DNA testing that help people find out about their ancestors. The legal situation in some cases is still unclear, and cannot be solved by the fertility industry and the sperm banks alone. Legislators are asked to moderate conflicts of interests between donors and donor-conceived children. It would be negligent for legislators not to seek a regulation for this problem, since it can even generate psychological issues.[322]

3.2.3 Personal identity

The calls for laws that give rights to children born through AHR with donor sperm to know their biological fathers have not only biological justifications, but ethical ones as well. For example a study by Margalit showed that most mothers who had used AID claim that they would never have told their children the fact that they were born through sperm donors if they didn't have to. These mothers, especially those who were living with male partners, said they prefer to tell their children that the men they live with were their biological fathers, rather than a sperm donor.[323] Such claims and thoughts clearly raise ethical questions that make calls for the right to know one's biological father a legitimate one. That is, when children are not told who their biological fathers are, or the means by

[320] COLLIER, *supra n. 308*, at 232-233.
[321] *Id*, at 232-233.
[322] *Id*, at 233.
[323] MARGALIT, *supra n. 248*, at 90-91.

which they were conceived, they would be living with lies for their entire life. Indeed, the right of a child to know his or her biological father is a personal right, and the refusal of this knowledge can be seen as a refusal to disclose his or her identity.[324] Giving children the right to know their biological fathers would be, therefore, tantamount to giving them the right to know their identities.

It is possible to say that the right to personal identity is one of the major rights recognized not only at state or national levels, but also in international law. In international law, the right to personal identity is recognized in a number of legal documents, such as the European Convention on Human Rights (ECHR). Jill Marshall states that Article 8 of the ECHR incorporates the concept of personal identity, and because of advances in AHR it also includes the right to obtain information about a biological father ("right to biological identity").[325] In her view "the information sought went to the very heart of the claimants' identity and to their make-up as human beings."[326] This means that people should be able to assemble details of their identity as a human being, and that an individual's "entitlement to such information is of importance because of its formative implications for his or her personality."[327]

When talking about a right to identity, the jurisprudence of the European Court of Human Rights (ECtHR) is also relevant to the discussion, since it also gives arguments for the right to know the origins. It was in Mikulic v. Croatia[328] that the ECtHR for the first time "expressly recognised that the determination of parentage was an important issue in the development of individual identity"[329] and that "disclosure of information concerning one's parentage has potentially strong formative implications for an individual's sense of identity."[330]

In this case the applicant complained that Croatian courts have failed to reach a conclusion in her case, and that this left her uncertain about her personal identity.[331] Mikulic and her mother filed a paternity suit in Croatia against the man who was allegedly

---

[324] *Id*, at 90-91.
[325] MARSHAL, Jill (2014). *Human Rights Law and Personal Identity*. New York: Routledge, 2014, p.127.
[326] *Id*, at 129-130.
[327] *Id*, at 130.
[328] *Mikulic v Croatia*, Application no. 53176/99, Judgment 4 September 2002.
[329] BLAUWHOFF, *supra n. 316*, at 107.
[330] *Id*, at 107.
[331] *Mikulic v Croatia*, Application no. 53176/99, Judgment 4 September 2002, §§ 1-8.

her father. However, he never appeared at the hearings or at the appointments to undergo DNA tests to establish paternity. After more than three years the court decided that the man was the applicant's father, based only on the fact that he avoided the DNA test.[332] Even though this case primarily concerns Article 6 (right to a fair trial), Mikulic claimed that her Article 8 rights (right to private and family life) had been violated since the Croatian courts had failed to conclude the case about her paternity claim, leaving her uncertain about her personal identity.[333] The ECtHR understood that the facts of her case did fall within the ambit of Article 8 and that "respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality."[334] It was also understood that the Croatian courts had "left the applicant in a state of prolonged uncertainty as to her personal identity"[335] and that has been "a violation of Article 8 of the Convention."[336] From this decision, it seems that the EctHR considers the knowledge of one's biological origin important to one's identity.[337]

However, it was not until Odièvre v. France case that the ECtHR first acknowledged *expressis verbis* that "people have a right to know their origins," viewing this right "from a wide interpretation of the scope of the notion of private life."[338] In Odièvre v. France, the full knowledge of one's origins was seen as "an essential component of one's identity."[339] The applicant, a French national who was born in 1965 and adopted in 1969, was not able to obtain information about her biological family because of rules governing confidentiality about birth. When she was born her mother requested the birth to be kept secret and abandoned her rights to her daughter. Consequently, the applicant, Pascale Odièvre, was placed in the care of the Children's Welfare and Youth Protection Service. In 1990 she consulted her file and only obtained non-identifying information

---

[332] *Id*, at §§ 1-8.
[333] *Id*, at §§ 47 and 49.
[334] *Id*, at § 54.
[335] *Id*, at § 65.
[336] *Id*, at § 66.
[337] MARSHAL, Jill (2009). *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden: Martinus Nijhoff Publishers, 2009, p.127.
[338] BLAUWHOFF, *supra n.* 316, at 109.
[339] MARSHAL (2009), *supra n. 337*, at 132.

about her biological family. Since the Children's Welfare Service refused to provide more details about her biological family, Odièvre tried to apply to the Paris *Tribunal de grande instance* for an order to access information about her birth.[340] As she was not successful, she took the case to the ECtHR.

The applicant complained that her inability to obtain details of her natural family and consequently about her origins, due to the fact that her birth had been kept a secret, amounted to a violation of Article 8 of the ECHR.[341] Because of this, she claimed, she was not able to establish her basic identity. She also maintained that rules on confidentiality governing birth amounted to discrimination on the ground of birth, being in this way contrary to Article 14 of the ECHR.[342] The Court concluded that the applicant had suffered no discrimination regarding her filiation, as she had parental bounds with her adoptive parents.[343] Concerning Article 8, the Court decided to "examine the case from the perspective of private life, not family life"[344] and reiterated that "Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world…The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life."[345] They further concluded that birth and the circumstances in which a child is born form "part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention."[346] Thus the Court decided that there had been no violation of Article 8 because the applicant was given access to non-identifying information about her biological family, which helped her to trace some of her origins.[347] Nevertheless, they said that in their opinion people "have a vital interest, protected by the

---

[340] *Odièvre v. France*, Application no. 42326/98, Judgment 13 February 2003, §§ 1-14.
[341] *Id*, at §§ 24-25-
[342] *Id*, at § 50.
[343] *Id*, at § 56.
[344] *Id*, at § 28.
[345] *Id*, at § 29.
As in Mikulic v. Croatia, the Court stated that "matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Mikulic v. Croatia, Application no. 53176/99, Judgment 4 September 2002, §§ 54 and 64).
[346] *Id*, at § 48.
[347] *Id*, at § 42.

Convention, in receiving the information necessary to know and to understand their childhood and early development."[348]

The cases described above, which have been used in favor of the right to know one's origins,[349] help demonstrate the "developing jurisprudence of Article 8 that is said to include the right to personal development and to 'self-fulfilment' as part of the right to respect for family life."[350] They show that "the issue of access to information about one's origins concerns the essence of a person's identity, and is an essential feature of private life protected by Article 8."[351]

The most fundamental way to give a person his or her identity is through naming and the registration of birth, which usually happens at the time of birth.[352] However, personal identity is as a complex phenomenon that goes beyond a person's origin and names. From a philosophical perspective, the term means a set of conditions that make someone the same person at different times in his or her life.[353] Personal identity is also related to "existence, to living a life, to living a life of dignity and worth, to living without fear, with shelter, in a safe and healthy environment."[354]

The CRC also seeks to promote the right to personal identity, and explicitly recognizes it in Article 8.[355] In Douglas Hodgson's view, the aspects stated in Article 8 (1) (nationality, name, and family relations) suggest that identity relates conceptually to these aspects, but not exclusively, and that identity must encompass more than these three attributes:[356]

---

[348] MARSHAL (2009), *supra n*. 337, at 132.
[349] AMORÓS, *supra n.* 218, at 05.
See also:
Gaskin v. United Kingdom, 7.7.1989; Jäggi v. Switzerland, 13.7.2006 and Godelli v. Italy, 25.9.2012.
[350] MARSHAL (2009), *supra n*. 337, at 132.
[351] *Id*, at 132.
[352] STANHISER, Jamie *et al*. *Psychosocial Aspects of Fertility and Assisted Reproductive Technology*. In: Obstetrics and Gynecology Clinics of North America, vol. 45, 2018, p. 565.
[353] MARSHAL (2014), *supra n.* 325, 7-8
[354] *Id*, at 9.
[355] Article 8 - 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference - 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
[356] HODGSON, Douglas. *The international legal protection of the child's right to a legal identity and the problem of statelessness*. In: International Journal of Law and the Family, Vol. 7, 1993, p. 260.

> "Article 8's drafting history suggests that the CRC drafting committee did not have a solid, concrete definition of identity or identity rights. However, two concepts were central to the original proposal: a principle of authenticity ("true and genuine") and the multi-dimensionality of identity ("personal, legal, and family"). Moreover, despite the specific contexts behind Article 8, the drafters of the CRC opted for an expansive vision of the right to identity. Though nationality, name, and family relations were seen as essential elements of identity, they were not intended to serve as limiting parameters".[357]

In Germany, the Constitutional Court found that

> "the right to know information about one's origins was one of the constitutive facts of the development of personality rights protected under the German Basic Law. Such rights reveal genetic origin. This, it is said by the Court, is to be central to individual identity. However, importantly, the Court also noted that biological origin is only one determinant of personality and that multiple (life) events and experiences are more significant".[358]

Major discussions in many countries are moving toward the view that children must know their origin in order to develop their own identity. This applies to the psychosocial importance of origin, childhood and ancestry.[359] Psychologists also recommend that parents discuss this subject as early as possible, because children start asking questions about themselves at a very young age, which includes the position he or she has in the family.[360] If parents do not have answers to questions concerning identity and origin, the child may even have personality and development problems.[361] Knowledge of their genetic origin can help donor-conceived children "to piece together their sense of personal identity that had been fractured by the knowledge of their donor conception."[362]

---

[357] McCOMBS *et al*. *Right to Identity*. In: University of California, Berkeley School of Law, Law Clinic reports, Nov. 2007, p. 8.

[358] MARSHAL (2014), *supra n.* 325, at 130.

See:

Right to Heritage I, 79 BVerfGE 256 (1989) and Right to Heritage II, 90 BVerfGE 263 (1994).

"Right to Heritage I adds to the range of substantive personality rights by holding that knowledge of one's heritage is integral to healthy personality development and self-identity" and Right to Heritage II "(…) confirmed the Court's conclusions in Right to Heritage I". (EBERLE (1997), supra n. 191, at 962) However, "the Court noted that biological origin is not the only determinant of personality. More significant are multiple [life] events and experiences." (…) "As an individual character trait, ethnicity and knowledge of heritage offer individuals important connections to understanding and development of their own individuality". (EBERLE (1997), supra n. 191, at 1026-1027).

[359] LAMB, Michael and LERNER, Richard. *Handbook of child psychology and developmental science*. Vol 3, 7th ed. Hoboken: John Wiley & Sons Inc, 2015, p. 445.

[360] BLYTH, Eric. *Discovering the 'facts of life' following anonymous donor insemination.* In: International Journal of Law, Policy and the Family, v. 26, n. 2, 2012, p. 153.

[361] LAMB and LERNER, supra n. 359, at 445-446.

[362] BLYTH, *supra n.* 360, at 149.

Eric Blyth affirms that early disclosure is not only seen as "a means of avoiding the challenges to a functional family life posed by deception and secrecy, but also as providing an opportunity for offspring to affirm their parents' choice of donor conception as a means of family building."[363]

It is understood here that the right to identity is an independent and fundamental human right that is protected in international law.[364] Thus legal documents, international treaties, jurisprudence, and scholarship view identity as "the individual's profile of significant and knowable personal attributes and social ties, and oblige States to protect these interests through both positive and negative duties."[365]

3.2.4 Free development of personality

The right to free development of personality (*Recht auf freie Entfaltung*) is defined in Article 2, paragraph 1 of the GG: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law".[366][367] It can also be found in Article 22[368] of the Universal Declaration of Human Rights, "which provides for the right of all members of society to enjoy economic and social rights indispensable for the free development of their personality."[369]

> "On the one hand, the right to free development of personality has been considered the natural extension of the right to human dignity, insofar as the latter implies the creation of a political, economic, social, cultural and legal framework capable of favouring the thorough fulfilment of each individual. On the other hand, it has been considered the right that equality and solidarity truly aim to protect. Consequently, the right to free development of personality seems to be the

[363] *Id*, at 153
[364] McCOMBS, *supra n.* 357, at 23-24.
[365] *Id*, at 24.
[366] *Grundgesetz für die Bundesrepublik Deutschland*, *supra n. 170*.
[367] Article 2 (1) *Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz vertößt.*
[368] Article 22 - Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
[369] FERREIRA, Nuno. *Fundamental Rights and Private Law in Europe. The case of Tort Law and Children*. London: Routledge, 2011, p. 85.

> ultimate fusion of human dignity, equality and solidarity as ground values of our social, political and economics structures".[370]

The term "free development of personality" suggests something related to the right to privacy and the right to private autonomy, an intimate sphere of autonomy into which the state is forbidden to intrude.[371] As already stated, in German Law the right to free development of personality is written on Article 2, paragraph 1 of the GG. It guarantees that all persons have this right as long as they do not violate the rights of others or offend against the constitutional order or morality.[372] But this does not mean that it has no limits. Besides the internal limits inherent to each person, the right to free development of personality is "limited by the economics and development of the society where individuals live, the legal duties of individuals towards each other, and the right to free development of personality of everyone else."[373]

German courts have widely recognised this right,[374] and in the case of AHR with donor sperm, it is understood that the right to free development of personality is more important than the anonymity of the donor. The decision of the case of Sarah P.[375] discussed in section 3.2, was based on the importance of the human dignity of the child conceived by AID and the right to free development of personality over the anonymity of the donor, because the knowledge of one's origin can give important starting points for understanding of one's familial context and for personality development.[376] The impossibility of clarifying one's origins can significantly burden and confuse the individual.

In summary, respect for the right to free development of personality requires the attempt to meet "all necessary socio-economic conditions for individuals to determine and develop their personality and life, thus intimately connecting this right to political, economic, social, and cultural rights alike."[377]

---

[370] *Id*, at 85.
[371] CHURCH, Joan *et al*. *Human rights from a comparative and international perspective*. Pretoria: University of South Africa, 2007, p. 108.
[372] FERREIRA, *supra n. 369*, at 86.
[373] *Id*, at 86.
[374] *Id*, at 86.
[375] OLG Hamm, 06.02.2013 - I-14 U 7/12.
[376] BRÄHLER, Christa. *Familie, Kinderwunsch, Unfruchtbarkeit: Motivationen und Behandlungsverläufe bei künstlicher Befruchtung*. Darmstadt: Westdeustche Verlage, 1990, p. 64.
[377] FERREIRA*, supra n. 369*, at 87.

3.5 FINAL REMARKS

This chapter sought to explain the child's right to know his or her origins and the donor's right to anonymity in the European and German context, as well as other rights that were considered relevant and related to these two rights.

More and more people who wish to have children but are not able to conceive are seeking the help of ART. Even though access to these technologies, which can also be sought in the reproductive and sexual rights,[378] is beneficial and can help couples or single women to achieve pregnancy, it is also understood that limits are necessary. The observance of prevailing rights and constitutional rules is necessary to protect not only the right of the child to know his or her origins or the anonymity of the donor, but also the life and the rights of the individuals involved, and the person who will be generated with the help of AHR techniques. In this way, human dignity is of great importance when discussing the subject.[379] And since respect for human dignity means that "all human beings possess equal and inherent worth and therefore ought to be accorded the highest respect and care,"[380] the respect to human dignity must guide any decisions and actions that involve the use of AHR technologies.

Most of the sperm donations worldwide are still from anonymous donors, and one can find in the literature various justifications for donor anonymity, for example that it derives from the right to privacy;[381] that clinics and doctors sign agreements with sperm donors not to disclose their identities and that doctors have an ethical and legal obligation to respect the confidentiality between them and the patients;[382] that genetic and medical history can be transmitted without sharing the donor's identity;[383] and that ending donor anonymity will reduce the number of men willing to donate sperm.[384] However, many

[378] BARROSO, *supra n. 299*, at 383.
[379] ANDORNO, *supra n.* 214, at 52-53.
[380] *Id*, at 45.
[381] AMORÓS, *supra* n. 218, at 06.
[382] JOHNS, *supra n. 261*, at 117–118.
[383] COHEN *et al*, *supra n. 240*, at 471-472.
[384] *Id*, at 472.

countries including Germany[385] have already enacted laws to change this scenario and allow children access to information about their sperm donors.[386]

The right of children to know their origin can be considered an implied right, because there are hardly any explicit rules stated in the constitution of the countries that children have this right.[387] Nevertheless, in the absence of an explicit statement of the right to know the origins, other laws and rights addressed in this chapter give indications that children cannot be denied the access to information about their origins.[388]

Additionally, one can say that children need know their origins in order to develop their own identities and give them the right to know their biological fathers would therefore be synonymous with giving them the right to know their identities.[389] Thus the right to personal identity, recognized not only at state or national levels but also in international law, is also relevant to the discussion. And one cannot forget the right to free development of personality, which in Germany, was already considered by the courts as more important than the anonymity of the donor,[390] since the knowledge of origins can give significant starting points for the understanding of the familial context, as well as for the development of the personality.[391]

Truth is that ARTs are relatively new, their uses have been expanding and various countries are still discussing and seeking to adapt their rules to situations that can arise from the use of these techniques, which is the case of the right of the child to know his or her origins. Therefore this chapter tried to present the subject from a legal perspective in Europe, especially Germany, in order to point out legal aspects related to the use of AHR.

---

[385] *Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen*, supra n. 09.
[386] MARTÍN, *supra n. 235, at* 28.
[387] SARMIENTO, *supra n.* 217, at 1267.
[388] AMORÓS, *supra n.* 218, at 5-6.
[389] MARGALIT, *supra n. 248*, at 90.
[390] FERREIRA, *supra n. 369*, at 86.
[391] BRÄHLER, *supra n.* 376, at 64.

4. FUNDAMENTAL RIGHTS AND ASSISTED HUMAN REPRODUCTION IN BRAZIL

This chapter aims to address the apparent inconsistency between the fundamental rights and principles enshrined in the Brazilian Constitution in the context of AHR with donor sperm.

First, the legal aspects involved in the AHR in Brazil will be discussed, together with some historical facts. Second, the anonymity of the sperm donor will be addressed, and brief allusions made to the fundamental rights and principles. Focusing on aspects regarding the knowledge of the genetic identity, related principles and rights involved in the subject will also be discussed.

4.1 ASSISTED HUMAN REPRODUCTION IN BRAZIL

Unlike most European countries and the United States, which already have specific legislation for sperm insemination and donation, and more than thirty years after the first artificial insemination in Brazil (1984[392]), discussions of this topic remain at the center of major legal debates in Brazil.[393] One of the main reasons for these discussions is the fact that in Brazil there is no specific law for the donation of sperm and for ART.[394] The subject

[392] PEREIRA, *supra n. 56*, at 59-60.
[393] BARBOSA, Camilo de Lelis Colani. *Aspectos jurídicos da doação de sêmen*. In: Seara Jurídica. Revista eletrônica de Direito. Vol.1, n. 9. Jan. Jun. 2013, p. 44-45.
[394] COITINHO, Viviane Teixeira *et al*. *Da proteção à intimidade do doador de material genético ao direito à identidade genética da criança gerada através de reprodução assistida heteróloga*. In: XI Seminário Internacional de Demandas Sociais e Políticas Públicas na Sociedade Contemporânea: 2014, p. 5-6.

has been under discussion for more than ten years in the National Congress of Brazil.[395] Since the *Conselho Federal de Medicina (CFM* - Federal Council of Medicine) issued guidelines to try to regulate the ART, the issue ended up not receiving proper attention and its discussion was not prioritized by the National Congress.

If on the one hand, there is no specific law, on the other hand the issue has been discussed under the most varied branches of the law, such as Constitutional Law, Family Law and Human Rights among other sub-areas, which bring to the discussion a range of different and specific aspects.[396]

When seeking the meaning and continuity of human existence, one may end up suppressing, ignoring, or even not considering the consequences of the use of technology in life. It is therefore up to the Law to regulate certain actions, considering all its consequences for society.[397]

Due to a lack of legal arguments, it is the responsibility of the CFM and the *Sociedade Brasileira de Bioética* (Brazilian Bioethics Society) to draw up considerations, directions and even regulations that serve as guides in cases involving AHR. In particular, one can cite Resolution 2.121/2015 of the CFM.[398]

This is the fourth Resolution on ethical norms for the use of assisted reproduction techniques.[399] The first Resolution was passed in 1992,[400], the second in 2010,[401] and the third in 2013.[402] Although it has normative force, it does not close all the gaps surrounding discussions on this issue in Brazil.

The CFM suggests that this Resolution fills gaps that Brazilian law has not yet been able to supply. However, the CFM also recognizes that this resolution is still far from being adopted in all its dimensions, since it does not deal with all the issues that may arise from

---

[395] *Id*, at 6.
[396] LUNA, Naara. *Provetas e clones: uma antropologia das novas tecnologias reprodutivas*. Rio de Janeiro: FIOCRUZ, 2007, p.182.
[397] *Id*, at 196-197.
[398] Conselho Federal de Medicina – CFM (2015). *Resolução CFM n. 2.121/2001.* Published in the Federal Law Gazette (D.O.U.) Section I, page 117, on Sep 24th, 2015.
[399] *Id.*
[400] Conselho Federal de Medicina – CFM (1992). *Resolução CFM n. 1.358/1992.* Published in the Federal Law Gazette (D.O.U.) Section I, p. 1653, on Nov. 19th, 1992.
[401] Conselho Federal de Medicina – CFM (2010). *Resolução CFM n. 1.957/2010.* Published in the Federal Law Gazette (D.O.U.) Section I, p. 79, on Jan. 06th, 2011.
[402] Conselho Federal de Medicina – CFM (2013). *Resolução CFM n. 2.013/2013.* Published in the Federal Law Gazette (D.O.U.) Section I, p.119, on May. 09th, 2013.

the use of AHR with donor sperm, such as the right of children to know their origins.[403] In addition, there is a lack of ethical consensus on the paradigms and scope of the techniques used and the impacts that these techniques can cause. This is why a series of criteria that aim to cause "the smallest possible impact" and damages (hereditary diseases, sibling marriage, eugenics, among others) are observed in dealing with donation.[404]

In general aspects, Resolution 2.121/2015 highlights the health of women and the defense of reproductive rights for all individuals, where the following aspects are considered:[405]

- The maximum age for AHR procedures is 50 years old;

- For eggs, gametes and sperm donations the maximum age is 35 years for women and 50 years for men;

- The voluntary donation of gametes is allowed, as is egg sharing;

- The donation will never be profitable or commercial;

- The use of ART for same-sex couples is allowed;

- Decisions about the disposal of the cryopreserved embryos are up to the will of the patients. They may be donated to other patients, donated for stem cell research, or discarded after five years.[406]

As can be seen, the Resolution 2.121/2015 restricts itself to considering aspects of donation, insemination, and reproduction. However, it does not discuss issues concerning the unborn child.

Prior to Resolution 2.121/2015, the other resolutions already included some points to be followed in the sperm donation process, such as ensuring that the donor does not have any diseases that could affect the health of the fetus; and stating the donation must be spontaneous and free, i.e., without financial motivations.[407]

Barbosa suggests that even with Resolutions that point to issues that should be considered in AHR, the use of such techniques has legal effects on society and the people

---

[403] COITINHO, *supra n. 394*, at 8.
[404] SALEM, Tania. *O princípio do Anonimato da inseminação artificial com doador (IAD); Das tensões entre a natureza e a cultura.* In: Physis- Revista de Saúde Coletiva. Vol. 5 . N. 1. 1995, p. 38.
[405] Conselho Federal de Medicina – CFM (2015), *supra n*. 398.
[406] *Id*.
[407] Conselho Federal de Medicina – CFM (1992), *supra n. 400.*

involved, including the conflict between the right of children to know their origin and the anonymity of the donor. These effects, Barbosa argues, should be discussed by lawmakers in Brazil as soon as possible.[408]

4.2 RIGHT OF CHILDREN TO KNOW THEIR ORIGIN AND DONOR ANONIMITY

Among many other discussions that the topic of AHR raises, the anonymity of the donor is one of the most controversial issues.[409] The rule in Brazil is that the donor cannot know the identity of the recipient couple, nor the couple that of the donor. This implies that all possible bonds and relationships between donors and the children should be avoided. [410] However, as noted in the previous chapter, some countries have already decided to delimit or exclude this anonymity in an attempt to guarantee individuals conceived by AHR with donor sperm the possibility of knowing their biological origins.

In Brazil, although there is a preference for the donor's anonymity on the part of the CFM[411] that ultimately leads to the issue being discussed in courts, there are legal aspects that end up stifling this attempt. For example, there is an understanding on the part of the Brazilian judiciary that the donation of sperm is a contractual relationship, since on one side there is the sperm donor and on the other side a sperm bank, or a couple, or a woman that will buy the sperm.[412] The word “contract” is used to designate a bilateral legal transaction that generates obligations. This also means that lay people may assume there is no contract if the agreement is not written and signed. But the contract can be made written or orally. It is not the written form that creates it, but the encounter of wills,

---

[408] BARBOSA, *supra n. 393,* at 47.
[409] SALEM, *supra n. 404*, at 41.
[410] *Id*, at. 41.
[411] IV – DONATION OF GAMETES OR EMBRYOS (…) 2 – The donors should not know the identity of the receptors and vice-versa. 4 – The identity of the donors of the gametes and embryos, as well as of the receptors, will mandatorily remain secret. In special situations, the information on donors, at medical discretion, may be provided exclusively to doctors, safeguarding the civil identity of the donor. Free translation from *Resolução CFM n. 2.121/2001.* Conselho Federal de Medicina – CFM (2015), *supra n*. 398. – Original text: “*IV - DOAÇÃO DE GAMETAS OU EMBRIÕES: (…)2 - Os doadores não devem conhecer a identidade dos receptores e vice-versa. 4 Será mantido, obrigatoriamente, o sigilo sobre a identidade dos doadores de gametas e embriões, bem como dos receptores. Em situações especiais, as informações sobre doadores, por motivação médica, podem ser fornecidas exclusivamente para médicos, resguardando-se a identidade* civil do doador”.
[412] BARBOSA, *supra n. 393*, at 47-48.

issued in the purpose of creating, regulating or extinguishing a relationship. It is, therefore, an encounter of wills with the aim of producing legal effects.[413]

Tepedino *et al* write about the social function of contracts, and understand that regardless of whether it is written, the will of two parties and their respective relations, provides a contract that in most cases will affect the lives of other people, interfering, and thus producing legal effects beyond the contractual limits established.[414]

In this sense, a contract is the agreement between two or more wills, in accordance with the legal order, intended to establish a regulation of interests between the parties, with the scope of acquiring, modifying or extinguishing legal relationships.[415] Regarding the contract that arises from a relation of sperm donation, which will directly affect a particular life – the life of the unborn child – some authors affirm that the donor's anonymity must be questioned. Although the autonomy of the will of the parties involves the power of contracting parties to freely stipulate their interests within the limits of the law so that they have legal effects[416], one must remember that the sperm donation contract will also have effects on the life of a third party who has not yet been born. In this case on the life of the child that will be conceived because of it, and for this reason, the contract should not be used to guarantee the donor's anonymity. Coitinho understands that it is necessary to break the barriers of the individualist picture of the contract, based on the autonomy of the will of individual parties, encouraging concern for the legal consequences in society.[417]

According to Venosa,[418] in addition to the requirements of Article 104 of the Brazilian Civil Code,[419] when talking about contractual relations, or more specifically about sperm donations contracts, some specific requirements must be adopted:

---

[413] GOMES, Orlando. *Contratos*. Rio de Janeiro: ed. Forense, 26 ed., 2008, p. 9-10

[414] TEPEDINO, Gustavo *et al*. *Código Civil interpretado conforme a Constitutição da República*. Rio de Janeiro: Renovar, 2006, p. 11.

[415] DINIZ, Maria Helena. *Curso de Direito Civil brasileiro*. São Paulo: Saraiva, 2008. v. 3, p. 8

[416] *Id*, at 21.

[417] COITINHO, *supra n. 394*, at 10.

[418] VENOSA, Silvio de Salvo. *Direito Civil - Direito Civil da Família*. São Paulo: Ed. Atlas Vol. V, 17 ed, 2016, p. 385.

[419] Art. 104 (…): (i) the parties must be legally capable of contracting; (ii) the object of the dispute or controversy must be lawful, feasible, determined or determinable, and (iii) the agreement must be made/drafted in a prescribed form, where it is required, or in any other form not forbidden by law. Free translation from *Lei n. 10.406 de 1 de outubro de 2002. Código Civil (Civil Code)*, *supra n*. 445. Original

- Donations should not be profitable;

- They should be based on knowledge by both parties;

- Donation contracts should be regulated by article 538 and following of the Brazilian Civil Code;

- Donations should be independent of another contract.

Venosa implies that there is no clear statement about the donor's anonymity.[420] But other authors, for example Leite, defend the anonymity of the donation by the fact that the donation of gametes does not generate any parental consequences for donors regarding the child.[421] By donating his sperm, the donor does not thereby express an intention to become a father. The donation to the sperm bank without even knowing to what end it will be used cannot lead to paternity. There is the lack of procreative will in this act.[422]

Nowadays in Brazil, due to the development and organization of both the family and parental bonds, legislation began to accept the possibility that individuals may have two fathers, or two mothers, who are recognized as biological and social-affective parents. The recognition of these cases is even reflected in the documents of the individuals who will have in their birth certificates, and later on their identity cards, the existence of more than one father or mother.[423]

For Brazilian law the expression “socio-affective” concerns affective relationships, with emphasis on feelings of love, responsibility and duty of care. It understands that affection would be the primary requirement for the definition of the contemporary family.[424] For this reason, Brazilian courts are using a broader interpretation of the concept of family, understanding that both blood and affective bonds shape it.[425]

---

text: *“Art. 104 (…): (i) agente capaz; (ii) objeto lícito, possível, determinado ou determinável; (iii)- forma prescrita ou não defesa em lei”.*

[420] VENOSA*, supra n. 418*, at. 385-386.

[421] LEITE, *supra n.* 04, at 23

[422] *Id*, at. 23-24.

[423] Conselho Nacional de Justiça – CNJ (2017). *Provimento n. 63*. Published in the Federal Law Gazette (D.O.U.) on Nov. 14th, 2017.

[424] SÁ, Maria de Fátima Freire de *et al*. *Filiação e Biotecnologia*. Belo Horizonte: Mandamentos, 2005, p. 68.

[425] FARIAS, Cristiano Chaves de. *Temas atuais de direito e processo de família***.** Rio de Janeiro: Lumen Juris**,** 2004, p. 285.

Based on the socio-affective argument, and without denying the importance of biologization, Barbosa argues that in the case of sperm donation it must be accepted that the individual born from this insemination will have two parents, or mothers, the biological and the socio-affective.[426] In this case, the contractual relationship will start from the natural recognition of the parties. It may even be plurilateral, since the consequences of the contract may also represent variations, especially after the child is born or if he or she has any genetic peculiarities, such as diseases.[427]

However, the above argument is not the preponderant one. Currently, the sperm donation contract in Brazil has a unilateral aspect (at least initially), since its obligations involve only one of the parties, the one who receives the donation. The beneficiary of this donation will have sole legal responsibility for the life being conceived.[428]

It should be taken into consideration that there is a distinction between the parties in the sperm donation agreement that should be considered. On one side there is someone who benefits from the donation and is presumed to want responsibility for the unborn. On the other side there is the sperm donor, possessor of the genetic material, who is not willing to take responsibility for the life that will be generated.[429]

Finally, there is the consent of the couple, especially on the part of the husband, to accept and take responsibility for the life that will be conceived.[430] The relations between the couple receiving the sperm and the medical center are regulated by a contractual instrument, which in Brazil is called a sperm receiving agreement (*contrato de recepção de sêmen*). In the same way, there is also the sperm donation agreement signed between donor - third party - and medical center.[431]

Since in Brazil there is no regulation for the donation of genetic materials, some legislators have chosen to treat sperm donation as a donation agreement.[432] Thus it was important to clarify some issues regarding contracts. However, it should be considered that, unlike other genetic materials, whose purpose is to maintain life, in the case of AHR

---

[426] BARBOSA, *supra n. 393*, at 48.
[427] *Id*, at 49.
[428] *Id*, at 49-50.
[429] *Id*, at 50.
[430] *Id*, at 51.
[431] *Id*, at 51.
[432] MIRANDA, Maria Bernadete. *Teoria Geral do Contrato*. In: Revista Virtual Direito Brasil, v. 2, n. 2, 2008.

life is being produced, made possible through this genetic material. Life, that should have its personal rights preserved regardless of the wishes of the biological parents.

The concern about the donor's anonymity and contractual relationship still raises discussions within the legal system, thanks to the lack of specific legislation on the subject. Controversial issues include the responsibilities of fatherhood, the right of genetic recognition, the donor's search for financial benefits, among others.[433]

By safeguarding the anonymity of the donor, even if protected by medical privacy, one is in fact denying another right: the right of the child to know his or her origins, which is directly linked to the genetic biology of the parents. In Brazil, this right is recognized by the *Estatuto da Criança e do Adolescente* (Child and Adolescent Statute).[434] In any case, the use of medically assisted procreation techniques must comply with the fundamental legal principles regarding family protection, kinship, and the rights of the unborn child, as well as the inviolable rights of the individual.[435]

Another issue pointed out by some authors and which should be considered with some caution is that if the donor is responsible for the reproduction of several individuals, this creates the risk of a consanguineous marriage between offspring who do not know that they are genetic siblings. What Dinis[436] and Fachin[437] suggest in this case is the limitation of sperm donation in such a way as to avoid relationships between blood relatives. Thus Savin[438] defends non-anonymous donations because he understands that children need access to the biological data of the donor in order to find out about possible impediments to marriage.

---

[433] FACHIN, Luiz Edson. *Da paternidade: relação biológica e afetiva.* Belo Horizonte: Ed. Del Rey, 1996, p. 37-38

[434] Article 48 of the Statute of the Child and Adolescent states that: "The adoptee has the right to know his biological origin, as well as to obtain unrestricted access to the process in which the measure was applied and its eventual incidents, after completing 18 (eighteen) years old". Free translation from *Lei 8.069 de 13 de julho de 1990. Estatuto da Criança e do Adolescente.* Published in the Federal Law Gazette (D.O.U.) n. 135, on July 16th, 1990.

[435] GAMA, Guilherme Calmon Nogueira da. *Filiação e reprodução assistida: introdução ao tema sob a perspectiva do direito comparado*. In: Revista do Tribunais RT, São Paulom V. 89, n. 776, June 2000, p. 68-69.

[436] DINIS, Joaquim José de Souza. *Filiação Resultante da Fecundação Artificial Humana*, In: TEIXEIRA, Sálvio Figueiredo. Direito de Família e do Menor. Belo Horizonte: ed. Del Rey, 2 ed., 1992, p. 43-51.

[437] *Id*, at 183.

[438] SAVIN, Gláucia. *Crítica aos Conceitos de Maternidade e Paternidade diante das Novas Técnicas de Reprodução Artificial.* In: Revista dos Tribunais, n. 659, São Paulo, 1990, p. 239.

Regarding the Federal Constitution, the donor's anonymity is justified by the principle of privacy through Article 5, X, which says that:

> "Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:….
> X – the privacy, private life, honour, and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured".[439][440]

Scholars who support anonymity hold that such an act would respect the donor's privacy. The donor's right to anonymity would also be important for the protection of the child conceived by ART, since the anonymity of the donor helps to guarantee the autonomy and the normal development of the family founded with the aid of ART. [441]

Thiesen *et al* argue that the anonymity of the donor of the genetic material must be respected, but not absolutely, in order to enable the investigation of biological origins for the purpose of prevention of hereditary diseases but not for the purpose of inheritance, or with the aim of dissolving established family bonds.[442]

There is no doubt that ART are a means of enabling procreation and are responsible not only for ensuring the continuity of the species but also for helping many couples to achieve the dream of having a child. Nevertheless, extensive studies have been made of the stresses and psychological problems caused by the processes.[443]

---

[439] Constituição da República Federativa do Brasil de 1988 [Constitution], translated in Constitution of the Federative Republic of Brazil [Federal Constitution]: Constitutional Text of October 5th, 1988, with the Alterations Introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994. Translated by István Vajda, Vanira Tavares de Souza, and Patrícia de Queiroz Carvalho Zimbres. 3rd ed. Brasília: Documentation and Information Center, Chamber of Deputies. Publishing Coordination: Chamber of Deputies, 2010. (All quotes in the text refer to this translation unless it is indicated otherwise.)

[440] Article 5 - All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
(…)
X – the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.

[441] ZANATTA, Andréa Mignoni *et al*. *Inseminação Artificial: doação anônima de sêmen e a possibilidade jurídica de quebra de sigilo*. In: Revista Perspectiva, Erechim. v. 34, n.126, jun 2010, p. 104.

[442] THIESEN, Adriane Berlesi *et al*. *O direito de saber a nossa história: identidade genética e dignidade humana na concepção da bioconstituição*. In: Revista Direitos Fundamentais e Democracia, Curitiba, Vol. 7, n. 7, jan/jun 2010, p. 63.

[443] SEGER-JACOB, Liliana. *Stress e ansiedade em casais submetidos à reprodução assistida*. (Doctoral thesis) Instituto de Psicologia da Universidade IPUSP, São Paulo, 2000, p. 07.

According to Seger-Jacob, problems that may be related to the process of insemination may become the grounds for future lawsuits.[444]

It is understood that in the AHR with donor sperm, when there is the concordance of the couple, the filiation will be given consensually. However, there is a discussion in Brazilian law about the husband's obligation to recognize the child paternally, because according to Article 1597, V of the Civil Code, the child born by AID is presumed to have been conceived in the constancy of the marriage, provided that husband's prior authorization has been obtained.[445]

According to Camargo, the issue of paternity in cases where AHR with donor sperm is carried out with the consent of the husband is clarified by Article 1597, V combined with Article 1601 of the Civil Code. As just mentioned, Article 1597 says that the child born by AID is presumed to have been conceived in the constancy of the marriage, provided that it has been previously authorized by the husband, while Article 1601 states that only the husband has the right to contest the paternity of the children born from his wife. Thus, the donor cannot claim paternity and the husband cannot contest it, since he authorized the procedure.[446]

However, there are still issues that remain unsolved. The law expressly states that the paternity of the one who consented to the procedure is presumed. Turning this around, if the husband does not authorize the treatment with donor sperm, he will not automatically be considered the father of the child generated by this procedure, but may recognize and register the child later.[447] It is noted, therefore, that what would initially seem easy to understand has a high potential to end in lawsuits, because, as Seger-Jacob says, the process of AHR by itself is already a challenge, and capable of causing numerous discussions.[448]

Luna points out another problem that can lead to lawsuits: the dissimilarity of the children born from AHR treatments to the parents. In her view, concerns about the use of

---

[444] *Id*, at 07.
[445] *Lei n. 10.406 de 1 de outubro de 2002. Código Civil (Civil Code)*. Published in the Federal Law Gazette (D.O.U.) Section I, page 1, on Jan. 11th, 2003.
[446] CAMARGO, Lucas Couceiro Ferreira de. Responsabilidade Civil do doador de material genético na inseminação artificial heteróloga. (Doctoral thesis) Tese apresentada à Universidade Metodista de Piracicaba. 2008, p. 64.
[447] *Id*, at 64.
[448] SEGER-JACOB, *supra n. 443*, at 07-08.

ART are related to the formation of kinship. She thinks that the use of sperm from third parties would introduce unknown or unfamiliar characteristics into the family, and that this would make it difficult for the family to bond with the child.[449]

Madaleno rebuts these concerns, saying that a couple who decides on an AHR treatment with donor sperm is aware of the risks assumed and cannot use AHR as an excuse for not fulfilling legal responsibilities. He says that a son is a son from birth and not by the work or grace of a judge, and that the obligations inherent to paternity must be fulfilled.[450] It is possible to verify, then, that a contractual responsibility exists in the process of insemination, subjectively producing responsibility for the child, especially in relation to those who were the recipients of the donation.[451]

However, contractual relations are limited to contracting parties, i.e. donor, sperm bank, and patients. The child who is the fruit of these relationships does not participate in these legal transactions, since at the moment when they are discussed he or she does not even exist, even in embryonic form. It would therefore be absurd to imagine any kind of contractual relationship between the donor and the child conceived by ART.[452] Nevertheless, the individuals born from a sperm donation contract, and consequently from AHR treatments, must have their rights preserved.

In this sense, Camargo still points out that contemporary Brazilian society is facing many transformations and, as a result, new conflicts arise at every moment. In order to fulfill its role of organizing social life, legislation must be also able to fulfill its essential function: the application of the law to the specific case. This discussion has social relevance since it intends to study critically how the use of ART interferes in the lives of those involved, especially in the lives of the children conceived from these procedures. It further studies what legal implications may arise from these relationships, seeking to harmonize the right to assisted reproduction and the rights of children born from artificial techniques.[453]

---

[449] LUNA, *supra n. 396*, at 198.
[450] MADALENO, Rolf. *Repensando o Direito de Família*. Porto Alegre: Livraria do Advogado, 2007, p. 150-151.
[451] GONÇALVES, Carlos Roberto. Responsabilidade Civil. São Paulo: Saraiva, 2003, p.23.
[452] CAMARGO, *supra n. 446*, at 87.
[453] *Id*, at 87

This chapter tries to understand the legal aspects of sperm insemination and donation in the Brazilian context. For the time being, the Resolutions of the Federal Medical Council (CFM) have been regulating the use of ART in Brazil and acting as a guide for decision-making in cases involving AHR. Within this understanding, it is also necessary to understand related rights and principles in the Brazilian context.

4.2.1 Human dignity

Fundamental rights are those that, regardless of their formal designation, confer subjective rights to individuals, having regard to the principle of human dignity,[454] since their intention is to ensure their holders a dignified existence according to the dictates of social justice.[455] Flávia Piovesan says that human dignity and fundamental rights give support to the entire Brazilian legal system.[456] The Brazilian Federal Constitution of 1988 determines in its Article 5, § 2 that "the rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or international treaties to which the Federative Republic of Brazil is a party."[457] Thus it enables the inclusion of other rights that come with the evolution of social relations.

Human dignity is part of the context of the democratic state of law. In the Brazilian context, it is placed at the highest level in the concerns of the legal system, as reflected in court decisions. The principle was enshrined in the federal constitution and proclaimed among its fundamental principles, attributing to it the supreme value of the foundation of

---

[454] Legal systems are composed of several principles and each constitution has a set of principles that govern its use or applicability. For the purposes of this research the term "principle" is being used with a broadly accepted minimal understanding: "principles are legal norms laying down essential elements of a legal order". (BOGDANDY, Armin von. *Constitutional principles for Europe*. In: RIEDEL, Eibe *et al*. Recent trend in German and European constitutional law. Berlin, Springer, 2006, p. 01-02).

[455] HOLTHE, Leo Van. *Direito Constitucional***.** 5 ed. Salvador: Podium, 2009, p. 343-344.

[456] PIOVESAN, Flávia. Temas de direitos humanos. 10 ed. São Paulo: Saraiva, 2017, p. 35.

[457] Constituição da Repúbica Federativa do Brasil*, supra n. 439.* Original text: *"§ 2º Os direitos e garantias expressos nesta Constituição não excluem outros decorrentes do regime e dos princípios por ela adotados, ou dos tratados internacionais em que a República Federativa do Brasil seja parte".*

the democratic juridical order.[458] Therefore, in a society where human dignity is embedded in its Constitution, as in Brazil, any legal discussion must respect fundamental rights.[459]

According to Peter Häberle, democracy represents the organizational and political guarantee of the dignity of the human person and pluralism of views.[460] In this way, the individual, through the political participation, assures his or her condition as a subject in the decision-making process about his or her own destiny and that of the community where he or she belongs.[461] The protection of dignity, inserted as the foundation of the democratic state itself, is a prerequisite for the social participation of the individual in the destiny of that state and, therefore, condition of citizenship. Dignity should be protected regardless of age, sex, origin, color, social status, ability to understand, and so on.[462]

With the 1988 Constitution[463] and its Article 1, III,[464] Brazil began to treat the human person as the center of legal relations.[465] It brought the human person into prominence, asserting that human dignity represents one of the foundations of the Federative Republic of Brazil.[466] Thus, to adopt human dignity as a basic value of the democratic state is to recognize the human being as the center and the end of the rights. This principle is the highest value and, constitutionally speaking, an absolute value. It represents an irremovable barrier, as it ensures the dignity of the person, which is the absolute supreme

---

458 MORAIS, Maria Celina Bodin de. *O conceito de dignidade humana: substrato axiológico e conteúdo normativo*. In: SARLET, Ingo Wolfgang. Constituição, direitos fundamentais e direito privado. Porto Alegre: Livraria do Advogado, 2003, p. 115.

459 SARLET, Ingo Wolfgang (2005). *A Eficácia dos Direitos Fundamentais*. 5 ed. Porto Alegre: Livraria do Advogado, 2005, p. 97.

460 HÄBERLE, Peter (2007). *A dignidade humana e a democracia pluralista*. In: Ingo Wolfgang (org.). Direitos fundamentais, informática e comunicação. Porto Alegre: Livraria do Advogado, 2007.

461 SARLET, Ingo Wolfgang *et al*. Curso de direito constitucional. 7 ed. São Paulo: Saraiva, 2018.

462 AWAD, Fahd. *O princípio constitucional da dignidade da pessoa humana*. In: Justiça do Direito, vol. 20, n. 1, Passo Fundo, p. 114.

463 Since its independence, Brazil had 7 constitutions: 1824, 1891, 1934, 1937, 1946, 1967 and 1988.

464 Article 1, III: "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (…) III – the dignity of the human person". Constituição da Repúbica Federativa do Brasil*, supra n. 439*. Original text: "*Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: (...) III - a dignidade da pessoa humana".*

465 LUNA, *supra n. 396*, at 224.

466 VAZ, Wanderson Lago *et al*. *Dignidade da Pessoa Humana*. In: Revista Jurídica Cesumar, v. 7, n. 1, jan./jun. 2007, p.188.

value protected by the Federal Constitution.[467] "The creators of the 1988 Constitution, in addition to having made a fundamental decision regarding the meaning, purpose and justification of the exercise of state power and the State itself, categorically recognized that it is the State that exists in regard to human person, and not the contrary, since the human being is the primary purpose and not the means of state activity".[468]

Since the dignity of the human person acquired the status of constitutional norm, with the entry into force of the Brazilian Federal Constitution of 1988, it acts as a limit to the activity of public authorities and, is seen as a quality that belongs to all human beings which they cannot renounce. Also, human dignity requires the state to configure its actions in such a way that it preserves dignity and promotes conditions needed to its effectiveness.[469]

Another important issue regarding human dignity is the fact that the Brazilian Constitution of 1988, when referring to itself as the foundation of the Federative Republic of Brazil, relates its founding principles to the human condition of each individual. But notwithstanding the individual character of dignity, it is not possible to deny that human dignity has inescapable community and social dimensions, precisely because all human beings are free and equal in dignity.[470]

In this way, human dignity is an intrinsic and distinctive quality recognized in each human being that deserves the same respect and consideration on the part of the state and the wider society, implying, in this sense, a complex of fundamental rights and duties that protect every person against degrading and inhuman acts.[471] In this perspective, human dignity is to be understood as an inclusive concept, in the sense that its acceptance does not mean privileging the human species above other species, but accepting that the recognition of human dignity results in obligations towards other beings and in corresponding minimum and similar duties of protection.[472]

---

[467] AWAD, *supra n.* 462, at 113.
[468] SARLET, Ingo Wolfgang (2015). *Dignidade (da pessoa) humana e direitos fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado, 10. ed, 2015, p. 103.
[469] *Id*, at 70.
[470] *Id*, at 70.
[471] *Id*, at 142-143.
[472] *Id*, at 43.

Dignity as an intrinsic quality of the human person is unavoidable and inalienable, constituting an element that inheres in human beings as such and cannot be detached from them. As an indispensable quality of the human condition itself it must be recognized, respected, promoted and protected, and it cannot be withdrawn, since it exists in all human beings as something inherent to them.[473] It can also be said that due to its importance, the principle of human dignity, is a legal norm of full effectiveness, that is, self-applicable, not requiring infra-constitutional norms to regulate it.[474]

Where there is no respect for life, for the physical and also moral integrity of the human being, where the minimum conditions for a dignified existence are not present, where there is no limitation of power and where freedom, autonomy of will, and equality in rights and dignity are not minimally guaranteed, there will be no recognition of the constitutional principle of human dignity.[475]

In a legal context, the protection of the dignity of the human person and the rights of the personality attain great importance nowadays, notably due to technological and scientific advances which intensified the potential risks and damages to which individuals may be subject in their daily lives.[476] The main impacts of the biotechnological revolution on current law are mainly the following: the sense of procreation, the foundations of filiation, family structures, and the specificity and intangibility of human beings.[477]

According to Fachin,[478] who as current Minister of the Federal Supreme Court (*Supremo Tribunal Federal* – STF) has considerable influence on a possible regulation of AHR, and donation of sperm in Brazil, the only limitations to freedom in family planning are human dignity and responsible parenthood, which implies that the right to AHR can only be considered in the context of the solidaristic and humanistic context of family law. Thus, he understands that the purely personal wishes of people who seek the help of ART – such as choosing the sex of the child, having twins, or choosing the child's physical type – cannot authorize its use.[479].

---

[473] *Id*, at 143.
[474] AWAD, *supra n.* 462, at 115.
[475] SARLET (2015), *supra n*. 468, at 143.
[476] ALVES, Cleber Francisco. *O princípio constitucional da dignidade da pessoa humana*. Rio de Janeiro: Renovar, 2001. p. 118.
[477] SAUWEN, Regina Fiuza *et al*. *O Direito "in vitro*". Rio de Janeiro. Lumen Juris, 1997, p. 35.
[478] FACHIN, *supra n. 433*, at 167.
[479] GAMA, *supra n. 435*, at 72.

The dignity of the human person must always be respected, since the human being is an end in itself, and therefore cannot be used as an instrument of personal achievements.[480] José Cabral Pereira Fagundes Júnior *et al* state that advances in science cannot go beyond the limits imposed by human dignity, even under the justification of providing a better life.[481] Therefore, the use of AHR techniques with eugenic purposes and for choosing the sex of the child would be prohibited by the principle of human dignity, since the purpose would no longer be just procreation.[482] In addition to not being the purpose of AHR, eugenics could lead to racial discrimination, which violates the dignity of the human person. This means that AHR techniques should be used with respect to human dignity.[483]

Although the Federal Constitution of 1988 guaranteed freedom and autonomy as a right, it made it clear that responsibility should be an active part of this right: that is, the right to freedom may not be asserted without respect for the welfare of the community. It is not permissible for a person thinking only of benefits to himself, to cause harm to others.[484] This raises questions about the issues that stand in the way of responsibility and autonomy in relation to the being created from a will. The result of the donation, the child, will be an active participant in a contract, reached directly by the decision of two or more people, and that child should have his or her dignity preserved.

But the donor's anonymity may directly the principle of human dignity. Regarding this issue Baracho recalls that human dignity is an intrinsic value, recognized in every human being by virtue of their ethical autonomy, and having as basis a general obligation of respect that is translated into a number of related duties and rights.[485] Building his conception from the rational nature of the human being, Kant points out that the autonomy of the will, understood as the ability to determine oneself and to act in accordance with

---

[480] Kant's view also influenced the concept of human dignity in Brazil.
See chapter 3.1

[481] FAGUNDES JÚNIOR, José Cabral *et al*. *Limites da ciência e o respeito à dignidade humana*. In:SANTOS, Maria Celeste Cordeiro Leite (org.). Biodireito: ciência da vida, os novos desafios. São Paulo: Revista dos Tribunais, 2001, p. 268.

[482] ALBUQUERQUE, Roberto Chacon de. *Por uma ética para a engenharia genética*. In: Revista de Direitos Difuso, São Paulo, jun. 2001. v. 12, p. 1640.

[483] *Id*, at 1641.

[484] PIOVESAN, *supra n.* 456, at 20.

[485] BARACHO, José Alfredo de Oliveira. *A identidade genética do ser humano*. In: PIOVESAN, Flávia *et al*. Coleção Doutrinas essenciais de direitos humanos. São Paulo: Revista dos Tribunais, 2011, p.109.

the representation of certain laws, is an attribute only found in rational beings, being the foundation of the dignity of human nature.[486]

As stated before, human dignity is one of the most important principles in the Brazilian legal system; it is considered a structuring or fundamental principle. It affects the entire legal system, since it is among the fundamental principles of the national legal system. Thus, there is no denying that the rights to life, and indeed the right to know one's genetic origins, have a direct relation to human dignity.[487]

4.2.2 Reproductive and sexual rights

The insertion of reproductive and sexual rights into the Brazilian legal system through the Federal Constitution of 1988 allows them to be treated as fundamental rights. The recognition of these rights in Brazil is another instrument for enforcing the right to procreation.[488]

In view of the existing confusion about the conceptual difference between human rights and fundamental rights, it is emphasized that although the terms are commonly used as synonyms, the common explanation for the distinction is that the term "fundamental rights" applies to those human rights acknowledged and affirmed in the constitutional law of a certain state, whereas the expression "human rights" refers to documents of international law, since it refers to legal positions that are recognized to all human beings, regardless of their relation to a particular state.[489]

Human rights can also be seen as setting limits on the actions of states regarding individuals. They are universal, inviolable, non-transferable, un-renounceable, and interdependent. Everyone has these rights regardless of their sex, ethnicity, color, religion, etc.[490] Thus, they refer to a moral and legal status recognized in all human beings that requires all countries to act in a way that promotes and protects human rights.[491]

---

[486] *Id*, at 109.
[487] AWAD, *supra n.* 462, at 116.
[488] BARBOZA, Heloisa Helena (2003). *Princípios do Biodireito*. In: BARBOZA *et al*. Novos Temas de Biodireito e Bioética. Rio de Janeiro: Renovar, 2003, p. 51.
[489] SARLET (2005), supra n. 459, at 35-36.
[490] LIMA, George Marmelstein. *Curso de Direitos Fundamentais*. São Paulo: Atlas, 2009, p. 28.
[491] SARLET (2005), supra n. 459, at 35-36.

One should therefore not confuse human rights with fundamental rights, since the latter will be inscribed in the constitution of a particular country and is related to the guarantees that a certain country gives the individuals living within its borders. It means that each country will define its own fundamental rights. They are inalienable, cannot be the object of transaction or exchange, and can be considered as the fundamental pillars of a society.[492]

Thus, the main difference between human and fundamental rights is territorial: since human rights are universal, while fundamental rights are granted within a specific society and its legal system. Besides that, fundamental rights are the ones enshrined in the constitution of a country and because of this the human rights have a broader context than that of the fundamental rights. But this does not mean that all human rights have been recognized as fundamental rights by a country.[493]

The right to procreation based on reproductive rights, which also involves reproductive technologies, should involve a parental project resulting from a conscious, free and responsible action of the couple or the woman who will conceive a baby with the help of AHR techniques. This implies the birth of a third person, who must also have his or her rights preserved.

The Brazilian Federal Constitution has provisions that can be used to regulate the effects of access to new reproductive technologies in society and their juridical repercussions. Thus, the rationale for defending access to reproductive technologies should be sought in sexual and reproductive rights. These were integrated into the Brazilian legal system by the Federal Constitution, which recognizes and guarantees the right to family planning.[494]

Article 226, paragraph 7 of the Brazilian Federal Constitution states that:

> "Article 226. The family, which is the foundation of society, shall enjoy special protection from the State…Paragraph 7. Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, it being within the competence of the State to provide educational and scientific

[492] DIMOULIS, Dimitri *et al*. *Teoria Geral dos Direitos Fundamentais*. São Paulo: RT, 2007, p. 53.
[493] *Id*, at 53.
[494] BRAUNER, Maria Cláudia (2003). *Direito, Sexualidade e Reprodução Humana*. Rio de Janeiro: Renovar, 2003, p. 15.

> resources for the exercise of this right, any coercion by official or private agencies being forbidden".[495]

However, the constitutional justification of reproductive rights is not isolated in this article. In an interpretation of constitutional rules to deal with those rights, one can invoke the principle of human dignity (Article 1 CF/88), the objective of promoting the well-being of all without discrimination, (Article 3 CF/88), right to equality, inviolability of privacy and private life (Article 5), among other constitutional rights, such as the right to health, protection of pregnant women, etc.[496]

The recognition of reproductive rights by the Federal Constitution guarantees to all the right to plan their family by deciding on the number of children and the most suitable moment for their birth. This right comprises actions relating to contraception and conception, which involve treatment for overcoming infertility through reproductive technologies.[497] Thus family planning implies the idea of birth regulation, contraception, sterilization, and all other means that act directly on the reproductive functions of men and women, especially on their health.[498]

From another perspective, in addition to contraceptive methods, AHR techniques should also be considered as a possibility for the planning of the reproductive life, since by helping in procreation, they also allow the achievement of the parental project.[499] The Ministry of Health also recognizes that family planning assistance should include access to information and all scientifically acceptable methods and techniques for conception and contraception that do not endanger anyone's life and health, according to the Family Planning Law (Law 9263/1996).[500]

In addition to assisting in the process of reproduction, ART helps to reduce the transmission of infectious or genetic diseases, guaranteeing the health both of the individuals who seek to become parents and of the child they hope to conceive. But reproductive technologies are also sought in cases where there is no verification of

---

[495] Constituição da Repúbica Federativa do Brasil*, supra n. 439*.
[496] BRAUNER (2003), *supra n. 494*, at 13.
[497] *Id*, at 13.
[498] *Id*, at 15.
[499] BRAUNER, Maria Cláudia Crespo *et al*. *Reflexões éticas e jurídicas sobre as técnicas de reprodução humana assistida*. In: Revista Trabalho e Meio Ambiente. v. 2, n. 2/3, Caxias do Sul: Educs, 2004, p. 127.
[500] Ministério da Saúde (2005). *Direitos Sexuais e Direitos Reprodutivos: uma prioridade do governo*. Brasília, 2005.

infertility, that is, as a resource for single people or same-sex couples who pursue the dream of having a child. It should be also pointed out that in Brazil there are no legal impediments for single people and same-sex couples to use AHR techniques.[501]

As mentioned before, the question must be carefully analyzed in the light of Article 226, paragraph 7 of the Federal Constitution, which deals with family planning, based on the principles of human dignity, responsible parenthood and the right to equality. In this sense Sá *et al* understand that if procreation is a subjective right of each person, its related legal duty, imputed to the state, is to ensure the right of access to any technique of assisted reproduction to couples, men or women who so desire, or who cannot conceive a child by natural means. Therefore, the AHR techniques must be seen as a responsible instrument for generating new lives.[502]

4.2.3 Privacy

In Brazil's legal system, privacy is a constitutional right guaranteed in Article 5, X of the Federal Constitution, and supported by the right to inviolability of privacy, private life, honor and the image of the person.[503] Privacy is regarded as an inherent right of the person, which means that a person does not have to conquer the right in order to possess it, nor can it be overridden because someone does not recognize it. It is a characteristic of the human being. This right, which in the Brazilian Federal Constitution has characteristics of fundamental right (article 5, X), has its basis in the right to respect for the freedom of the person, which is the basis of all kinds of coexistence and human relations.[504] Thus, as the right to anonymity is considered a fundamental right in Brazilian law, it is also understood that data confidentiality is part of the privacy of the person, in view of the relationship between the laboratory that collects the genetic material and the donor.[505]

---

[501] CORRÊA, Marilena Villela. *Novas tecnologias reprodutivas: limites da biologia ou biologia sem limites?* Rio de Janeiro: Eduaerj, 2001, p. 109.
[502] SÁ, *supra n. 424*, at 58.
[503] *Constituição da Repúbica Federativa do Brasil, supra 439 and 440.*
[504] HAMMERSCHMIDT, Denise *et al*. *Direito à intimidade genética: um contributo ao estudo dos direitos da personalidade*. In: Revista Jurídica Cesumar, v. 6, n. 1, 2006, p. 433.
[505] *Id*, at 433

According to the right to privacy and the principle of autonomy, the donor of the genetic material would have the right to decide on the use of his medical data and especially his genetic data, which implies the right to access them, control their existence and truthfulness, and authorize their disclosure.[506]

The CFM in Brazil, by the resolution 2.121/2015, understands that anonymity is the rule, seeking to safeguard not only the privacy of the donor, but also the beneficiaries of the AHR procedures with donor sperm, who will for all intents and purposes be the legitimate parents of the child.[507]

Hammerschmidt states that there are authors who understand that donor anonymity aims to protect not only the donor's privacy but also the children conceived by AHR, facilitating their bonding and living with the family and preventing donors from interfering with their education and development.[508] They also argue that this is an attempt to prevent the wider community from becoming aware of the facts, which might affect the partner who does not have his genetic identity linked to the child.[509]

The chief object of preserving privacy is to protect the donor who performed the act either for altruistic or financial reasons, but who had no intention of assuming either the paternity of the child conceived with the use of his sperm or the resulting social and legal consequences.[510]

On this line of reasoning, and based mainly on the issue of privacy, the anonymity of the donor would have to be respected as a fundamental right. But in fact, this runs in opposition to discussions that defend the right of children to know their origins.

4.2.4 Personal identity and genetic identity

Personal identity is the set of attributes and characteristics that make it possible to individualize the person in the society. Detached from the passage of time, this basic identity is placed in the past from the moment of conception, where the individual's roots

---

[506] *Id*, at 434.
[507] Conselho Federal de Medicina – CFM (2015), *supra n*. 398.
[508] HAMMERSCHMIDT, *supra n. 504*, at 434.
[509] *Id*, at 434.
[510] BARACHO, *supra n. 485*, at 109.

and history are found.[511] From this starting point on, identities become more fluid, being created over time: this is the dynamic aspect of identity.[512] Yet there is also a static aspect. When we are facing a person we are faced with an image and a name: this is how a subject is identified at first. But a person's ideological or cultural heritage is constituted by his or her thoughts, opinions, beliefs and behaviors.[513] It draws on all the characteristics and attributes that define the person. Thus, one can say that the right to identity presupposes a person's right to compose his or her own biography.[514]

Personality rights in the Brazilian legal system are those that are necessary for the development of the dignity of the person, in the physical, psychological and moral aspects of the human being.[515] They are naturally granted to everyone, by the simple fact of being alive, or for the sole fact of being. In addition, they are insusceptible to economic evaluation, although their injury may lead to damages; the collectivity has a duty to respect them; its holder cannot dispose of them, being, therefore, non-renounceable and inalienable.[516]

Gustavo Tepedino suggests that the fundamental logic of personality rights is the protection of human dignity, considering that article 1, III[517] of the Brazilian Federal Constitution presents itself as a general clause of protection of the human person, in order to protect the human being in all the necessary ways, even making it possible to guarantee and protect the right to personal identity.[518] Thus, the right to personal identity in the Brazilian legal system would be in the category of personality rights, as it is an essential right related to the human person.[519]

---

[511] HALL, Stuart. *A identidade cultural nas pós modernidade*. 14. ed. Rio de Janeiro: DP&A, 2006, p. 7.
[512] *Id,* at 13.
[513] *Id*, at 13.
[514] SESSAREGO, Carlos Fernández. *Derecho a la identidad personal.* Buenos Aires: Astrea, 1992, p. 234.
[515] TEPEDINO, Gustavo. *A Tutela da Personalidade no Ordenamento Civil-Constitucional Brasileiro*. In: Temas de Direito Civil, 3. ed. Rio de Janeiro: Renovar, 2004, p. 33.
[516] *Id*, at 33-34.
[517] Article 1: "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on…III – the dignity of the human person". Constituição da Repúbica Federativa do Brasil*, supra n. 439.* Original text: "*Art. 1º A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos: (...) III - a dignidade da pessoa humana".*
[518] TEPEDINO, Gustavo. *Crise de fontes normativas e técnica legislativa na parte geral do Código Civil de 2002*. In: TEPEDINO, Gustavo (org.), A parte geral do Novo Código Civil, 2 ed., Rio de Janeiro: Renovar, 2003, p. XXI.
[519] *Id*, at XXI.

The Brazilian Civil Code has a chapter that deals with certain personality rights (Articles 11 to 21).[520] Although it did not expressly address the right to identity, it can be understood that the Civil Code of 2002 sought to provide greater protection to the human person and greater effectiveness to the constitutional provision. It stresses rights to physical integrity, to name, honor, image and privacy.[521] One can say that the insertion of Articles dealing with personality rights in the Civil Code of 2002 is insufficient to protect what is intended, that is, the human person and its existential interests, since the needs of the individuals change over time, with technological advances, with the historical moment, etc. A strict normative provision is not compatible with changing situations, and, therefore, the perspective of a Civil Law guided by constitutional values is essential, in order to enable the full protection of the human person.[522]

The right to identity deserves legal protection because it is fundamental for the essence of the person. As mentioned before, personal Identity can be defined as the relationship between the individual and other members of society; a social framework built throughout life, through reciprocal relations that embrace genetic elements of the human person as an unrepeatable, original and unique being, in constant construction within the scope of interpersonal relations. In addition, it comprises a relative dimension, which includes the idea of relationships with other people.[523] Thus, one can understand that the construction of identity is a confluence of the natural, juridical, social and biological aspects that all help to form the fundamental rights of individuals:[524]

> "… the term 'identity' is part of the theoretical vocabulary of almost all sciences, from logic and mathematics to the so-called human sciences - personal identity, cultural identity and national identity - which is why the questions that the study of identity poses cannot be answered within the exclusive scope of a single science. Thus, the understanding of the right to identity is only viable through an extended and interdisciplinary perspective".[525]

---

[520] *Lei n. 10.406 de 1 de outubro de 2002. Código Civil (Civil Code)*, *supra n.* 445.
[521] TEPEDINO, Gustavo. *Direitos Humanos e Relações Jurídicas Privadas*. In: Temas de Direito Civil, Rio de Janeiro: Renovar, 2004, p. 62.
[522] TEPEDINO, Gustavo. *O Novo Código Civil: duro golpe na recente experiência constitucional brasileira.* Editorial da Revista Trimestral de Direito Civil, n. 7. Rio de Janeiro: Padma, jul.-set. 2001, p. IV.
[523] THIESEN, *supra n*. 280, p. 33-35.
[524] KONDER, Carlos Nelson de Paula. *The range of the right to personal identity in Brazilian civil law*. In: Pensar, vol. 23, n. 1, Fortaleza, 2018, p. 4.
[525] *Id*, at 4.

According to Petterle, genetic identity corresponds to the genome of each individual human being.[526] The relation between genetic identity and personal identity is important because identity is associated with the idea of integrity, which is something intangible, that is, it cannot be touched. Also, genetic identity is a fundamental substrate of personal identity, which, is the expression of the human dignity.[527] Thus the desire of individuals to know their genetic origin is not a mere whim, but the recognition of a personal right, manifested through the search for the construction of their identity and recognition as human beings, wherein they seek the basis of their existential continuity.[528]

Lôbo argues that every person has the fundamental right to know their biological origin so that, by identifying their genetic tendencies, they can adopt preventive measures for the preservation of their health and, *a fortiori*, their life.[529]

According to the above allusions, a person has the right to seek his or her origins, including genetic origins. But, for Lôbo, in the case of someone conceived by an anonymous AHR treatment the individual should have access to his or her genetic identity without having the right to investigate his or her paternity, because there is no need to investigate paternity in order to guarantee the protection of the right to personal identity.[530] The object of the protection of the right to genetic origin is to ensure the right to personal identity, since the data of current science point to the need of each individual to know the health history of their close biological relatives.[531] Also, the right to know one's genetic identity cannot generate a financial obligation for the donor of the genetic material, since it is not related to a paternity investigation.[532]

Although the fundamental right to genetic identity is not explicitly enshrined in the Federal Constitution, its recognition and protection can be deduced, at least implicitly,

---

[526] PETTERLE, Selma Rodrigues. *O direito fundamental à identidade genética na Constituição Brasileira*. Porto Alegre: Livraria do Advogado, 2007. p. 26
[527] BARACHO, *supra n. 485*, at 109-110.
[528] GAGLIANO, Pablo Stolze *et al*. *Novo curso de Direito Civil: parte geral*. São Paulo: Saraiva, 8 ed. 2006, p. 646.
[529] LÔBO (2004), *supra n. 20*, at 54.
[530] *Id*, at 54.
[531] *Id*, at 54.
[532] PAIANO, Daniela Braga *et al*. *O direito de acesso à identidade genética em frente ao direito ao anonimato do doador de material genético: uma colisão de direitos fundamentais.* In: Revista de Direitos e Garantias Fundamentais, Vitória, n. 10, jul./dez. 2011, p. 150.

from the constitutional system, notably from the right to life, right to personal identity and the human dignity.[533]

The right to know one's genetic identity can therefore be seen as a fundamental right, since it is based on the principle of human dignity. This is because fundamental rights are directly linked to the principle of human dignity, so that rights not expressly written in the constitution can be considered fundamental if they are based on this principle. In this way, the right to genetic identity would be a fundamental right that emerged with modern society and with the technological advances.[534]

While discussions of the right to identity are advancing, the fact is that currently the individuals conceived by AHR treatments with donor sperm continue without the certainty of being able to know their origins. Thus, it is necessary to observe that the right to identity is an active part of the composition of human rights, and may also have as a presumption the protection of the principle of human dignity, since an individual without personality and without identity can be hurt in his or her dignity.[535]

According to Gama, to deprive someone of the knowledge of his or her origins is also to deny the dignity of a person conceived with the help of ART and donor sperm, since every individual has the right to know who their biological parents are, even if this does not generate any relation of kinship or rights and duties between them.[536]

4.5 FINAL REMARKS

This chapter explained legal aspects of AHR and sperm donation in Brazil. The controversy about the anonymity of the donor and the right of the child to know his or her origins is still a topic that causes divergence in the discussions about AHR in Brazil.

There is no specific law that regulates ART in Brazil, and for this reason the Regulations of the Federal Medical Council have been serving as a guide for decision-making in cases about AHR. It was demonstrated that in the Brazilian context,

---

[533] PETTERLE, *supra n. 526*, at 89.
[534] PAIANO, *supra n. 532*, at 153.
[535] GAGLIANO, *supra n. 528*, at 646.
[536] ZANATTA, *supra n. 441*, at 104.

fundamental rights and constitutional principles also help to justify the access to reproductive technologies and give arguments and support in the discussion between the anonymity of the donor and the right of the child to know the origins.

The CFM in its last Regulation adopted the anonymity of the donor[537] in an attempt to safeguard the privacy of donor,[538] since privacy is a constitutional right guaranteed by Article 5, X of the Federal Constitution.[539] However, this rule has ultimately led to the issue being discussed in courts, because by guaranteeing the anonymity of the donor the right of the child to know his or her origins is being denied.

The current situation in Brazil is that individuals conceived by AID continue without the certainty of being able to know their origins. Although this right is not explicitly enshrined in the Brazilian Constitution, its recognition can be deduced, at least implicitly, from the constitutional system, especially from the rights to life, personal identity and human dignity, as well as from sexual and reproductive rights.[540]

Human dignity has a prominent place in the Brazilian legal system and is placed at the highest level, since it is enshrined in the Federal Constitution and proclaimed among the fundamental principles.[541] By adopting the human dignity as a basic value of the democratic State, Brazil began to treat the human person as the center of legal relations[542] and recognized the human being as the center and the end of rights.[543] The 1988 Constitution and its Article 1, III[544] brought the human person into prominence, providing that human dignity represents one of the foundations of the Federative Republic of Brazil.[545] Therefore, preventing someone from knowing his or her origins can mean denying the dignity of a person conceived by AID, since every individual has the right to know who their biological parents are, even if this does not generate any relation of kinship or rights and duties between them.[546]

---

[537] Conselho Federal de Medicina – CFM (2015), *supra n*. 398
[538] *Id.*
[539] *Constituição da Repúbica Federativa do Brasil, supra n. 439 and 440.*
[540] PETTERLE, *supra n. 526*, at 89.
[541] MORAIS, *supra n*. 458, at 115.
[542] LUNA, *supra n. 396*, at 224.
[543] AWAD, *supra n.* 462, at 113.
[544] Constituição da Repúbica Federativa do Brasil*, supra n. 439* and *464*.
[545] VAZ, *supra n. 466*, at 188.
[546] ZANATTA, *supra n. 441*, at 104.

Scholars who defend the right to know one's origins agree that an individual may have the right to seek his or her origins without having the right to investigate his or her paternity, since this right cannot generate a financial obligation for the sperm donor.[547] One of the reasons to protect the right to know origins is to ensure the right to personal identity, since the data of current science point to the need of individuals to know the health history of their close biological relatives.[548] Also, the right to identity deserves legal protection because it is fundamental for the essence of the person. Therefore, the will of an individual to know his or her origin cannot be considered a mere whim, but a search to help in the construction of personal identity.[549]

Transformations in society have resulted in the appearance of new conflicts and discussions. Because of this, laws must be adapted to the situations that arise and to the needs of the society. In this way, it was also demonstrated in this chapter that the use of ART must comply with the fundamental legal principles regarding family protection, kinship, and the rights of the unborn child, as well as the inviolable rights of the individual.[550]

Although beneficial, the use of ART interferes in the lives of those involved, especially in the lives of children conceived with the help of these techniques. Because of this, the problems that may arise from these relationships deserve attention.[551] For this reason, the next chapter, after examining laws and cases in Germany and Brazil, will present arguments for the need of specific legislation about AHR and sperm donation in Brazil.

---

[547] PAIANO, *supra n. 532*, at 150.
[548] *Id*, at 54.
[549] GAGLIANO, *supra n. 528*, at 646.
[550] GAMA, *supra n. 435*, at 68-69.
[551] CAMARGO, *supra n. 446*, at 87.

5. ANALYSIS OF THE JUDICIAL CONTEXT IN CASES INVOLVING ASSISTED HUMAN REPRODUCTIVE TREATMENTS WITH DONOR SPERM IN GERMANY AND BRAZIL

Throughout this study, the conflicts of rights that may emerge from the use of ART with third party genetic material were discussed. Chapter 3 discussed the theme in the European context, emphasizing the German case. Chapter 4 presented the subject in the Brazilian context.

This chapter will start by presenting cases involving AHR with donated sperm in Germany and Brazil, focusing on the analysis of arguments used by the judges in their decisions. Then, in view of the lack of specific legislation for the topic in Brazil, grounds for the elaboration of specific legislation will be presented.

5.1 CONFLICT OF INTERESTS IN CASES OF ASSISTED HUMAN REPRODUCTIVE TREATMENTS WITH DONOR SPERM IN GERMANY

The relevant framework for the German law on AHR with donor sperm issues relates to various provisions of the German Basic Law. As stated in chapter 3, rights such as privacy and the right to know one's origins, among others, are involved in reproductive matters. Besides this, laws, cases, and regulations of the German Medical Association (*Bundesärztekammer*) help to define the situation of the AHR in Germany.

Cases concerning the right to know one's genetic origins are not a new

phenomenon. In 1988[552] the BVerfG ruled for the first time that children have the right to know about their origins. In this case, based on Articles 6 (5)[553] and 2 (1)[554] of the Basic Law, the court decided in favor of the child, who was conceived in an extramarital affair, and gave him the right to know his lineage.

About a year later the BVerfG grounded the right to know about one's origins on Articles 2 (1), 1(1)[555] and 6 (1) of the Basic Law.[556] According to this decision, it violated the general right of personality that, according to the old version of §§1593 and 1598 BGB, a child could only clarify his or her ancestry judicially if the parents' marriage ended up in divorce or repeal, was declared void or, if the spouses have lived separately for at least three years and were not expected to restore the conjugal partnership.[557]

As justification, the court stated that the right to free development of the personality and the guarantee of human dignity ensure each individual an autonomous area of private life in which they can develop and maintain their individuality. On this view, the understanding and development of individuality are closely connected with the knowledge of the constitutive factors. These include, among others, ancestry, since it determines not only the genetic endowment of the individual but also shapes his personality.[558]

Irrespective of this, it also assumes a key position in the individual's consciousness for finding individuality and self-understanding. The court also understood that as an attribute of individualization, ancestry belongs to the personality, and the knowledge of the origins offers the individual, independent of the extent of scientific results, important starting points for the understanding and unfolding of his own individuality.[559]

---

[552] BVerFG, 18.01.1988 - 1 BvR 1589/87.
[553] Article 6 - Marriage and the family; children born outside of marriage – (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.
[554] Article 2 - Personal Freedoms - (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
[555] Article 1 - Human dignity – Human rights – Legally binding force of basic rights - (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
[556] BVerFG, 31.01.1989 - 1 BvL 17/87.
[557] *Id.*
[558] *Id.*
[559] *Id.*

The personality right therefore also includes the knowledge of one's own origin. However, there can be cases in which ancestry will remain unknowable, so that the development of personality must take place without this knowledge.[560]

In Germany, the law for the protection of embryos is called *Embryonenschutzgesetz* (EschG).[561] Since it was passed in 1990, after five years of deliberation about its text, it has regulated and imposed limits on the AHR. The EschG has been in force since its inception and has been only modified and supplemented to regulate new technologies, which include PGD and human embryonic stem cell (hESC).[562] Since it was designed as a criminal law, it gives crucial importance to the principle of certainty,[563] which means that according to Article 103, II of the GG, "an act may be punished only if it was defined by a law as a criminal offence before the act was committed."[564] There is also the Stem Cell Act (Stammzellgesetz - StZG), which ensures the protection of embryos in connection with the importation and utilization of hESC.[565]

It is important to point out that an embryo may be created outside the uterus by *in vitro* fertilization or by a somatic cell nuclear transfer, so-called cloning. On the first technique, the sperm and the egg are incubated together in a test tube, where the latter is fertilized. Afterward, the embryo is implanted in the uterus in hopes of a pregnancy. In the case of the somatic cell nuclear transfer process, a cell nucleus from an adult donor cell is introduced into an enucleated egg cell, and the embryos created are supposed to be used for research purposes.[566] Paragraph 8 of the EschG defines an embryo as "a fertilized egg cell with the capacity to develop from the moment of the fusion of the

---

[560] *Id.*
[561] *Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz–ESchG),* December 13th 1990, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 69 from December 19Th 1990, p. 2746.
[562] PARFENCHYK *et al*. *Human dignity in a comparative perspective: embryo protection regimes in Italy and Germany*. In: Law, Innovation and Technology, Vol. 9, Issue 1, 2017, p. 47-48.
[563] BENÖHR-LAQUEUR, Susanne. *Fighting in the legal grey area: an analysis of the German Federal Court of Justice in case preimplantation genetic diagnosis.* In: Poiesis & Praxis. International Journal of Ethics of Science and Technology Assessment. Vol. 8. Issue 3-8, 2011, p. 6-7.
[564] *Grundgesetz für die Bundesrepublik Deutschland*, *supra n. 170*.
[565] *Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stammzellgesetz - StZG)*, June 28th 2002, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 42 from June 29th 2002, p. 2277.
[566] PETERSEN, Niels. *The Legal Status of the Human Embryo in vitro: General Human Rights Instruments.* In: Heidelberg Journal of International Law (HJIL), Vol. 65, n. 2, 2005, p. 447-448.

nuclei."[567] The protection of the embryos, as stated in paragraph 8 of the EschG, includes "totipotent cells (i.e cells that can grow into all cell types) that could be derived from an embryo, because a totipotent cell has the potential to become an embryo."[568]

According to StZG, stem cells are "all human cells which have the potential to multiply by cell division if in a suitable environment and which by themselves or through their daughter cells are capable, under favourable conditions, of developing into specialised cells, but not into a human being (pluripotent stem cells)."[569] Embryonic stem cells are "all pluripotent stem cells derived from embryos which have been extracorporeally produced and have not been used to bring about pregnancy or which have been taken from a woman before the completion of nidation."[570] Embryonic stem cell lines are "all embryonic stem cells which are kept in culture or those which are subsequently stored using cryopreservation methods"[571] and an embryo is "any human totipotent cell which has the potential to divide and to develop into a human being if the necessary conditions prevail."[572]

With the growth of the use of ART the German Medical Association (*Bundesärztekammer*) also elaborated guidelines on ART and on research on human embryos.[573] They "determined the limits of culture and study of human embryos *in vitro*, and had incorporated the 'guidelines' as part of the physicians' professional law."[574] Thus

---

[567] WÜLFINGEN, Betina Bock von. *Contested change: how Germany came to allow PGD*. In: Reproductive Biomedicine & Society Online. Vol. 3, Dec. 2016, p. 62.
[568] PARFENCHYK *et al, supra n.* 562, at 63-64.
[569] Free translation from §3 n. 1 *Stammzellgesetz - StZG* – Original text: sind Stammzellen alle menschlichen Zellen, die die Fähigkeit besitzen, in entsprechender Umgebung sich selbst durch Zellteilung zu vermehren, und die sich selbst oder deren Tochterzellen sich unter geeigneten Bedingungen zu Zellen unterschiedlicher Spezialisierung, jedoch nicht zu einem Individuum zu entwickeln vermögen (pluripotente Stammzellen).
[570]Free translation from §3 n. 2 *Stammzellgesetz - StZG* – Original text: sind embryonale Stammzellen alle aus Embryonen, die extrakorporal erzeugt und nicht zur Herbeiführung einer Schwangerschaft verwendet worden sind oder einer Frau vor Abschluss ihrer Einnistung in der Gebärmutter entnommen wurden, gewonnenen pluripotenten Stammzellen.
[571] Free translation from §3 n. 3 *Stammzellgesetz - StZG* – Original text: sind embryonale Stammzell-Linien alle embryonalen Stammzellen, die in Kultur gehalten werden oder im Anschluss daran kryokonserviert gelagert werden.
[572] Free translation from §3 n. 4 *Stammzellgesetz - StZG* – Original text: ist Embryo bereits jede menschliche totipotente Zelle, die sich bei Vorliegen der dafür erforderlichen weiteren Voraussetzungen zu teilen und zu einem Individuum zu entwickeln vermag.
[573] Bundesärztekammer. *Assistierte Reproduktion. Richtlinie komplett neu*. In: Deutsches Ärzteblatt, Jg. 115, Heft 22, June, 1st, 2018.
[574] SCHREIBER, Hans-Ludwig. *The legal situation regarding assisted reproduction in Germany*. In: Reproductive BioMedicine Online. Vol 6. No 1, Oct. 2002, p. 9.

they constitute various regulations on the actual course of the treatment. All patients need to be reported to the *Bundesärztekammer,* and medical qualifications and authorizations must be proven. However, the German *Bundesärztekammer* guidelines are not statutory law. “The prevailing opinion is that they constitute professional standards of necessary medical diligence. Any violation of these guidelines therefore must be considered as negligent medical treatment.”[575]

The guideline from 2018 established new and uniform rules for physicians and patients. It was adapted to the “*Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen (Samenspenderregistergesetz* – SaRegG)”. Detailed provisions on criteria of donor selection and information of the donors are essential parts of the guideline.[576]

To prevent “the manipulation of human life at its initial stages and to thereby protect constitutional principles of human dignity, the Government included in the list of the forbidden procedures a rather wide range of techniques.”[577] Basically, the EschG establishes sanctions for the misuse of methods in AHR, like the choice of gender, the manipulation of human germlines, the cloning of human beings, and the production of chimeras and hybrids.[578] The first and second paragraphs of the EschG were the most important in all debates concerning ART, because the first prohibits “the fertilization of an egg cell with any aim other than to transfer it to a woman’s womb, whilst the second forbids any use of an embryo other than to preserve it.”[579]

> “Artificial insemination and embryo transfer are permitted on condition that the treatment is performed by approved and authorized doctors. It is prohibited to fertilize more than three oocytes within one menstrual cycle. However, there is no limit on the number of oocytes which are inseminated in one cycle and are cryopreserved in the pronuclear stage. Only three oocytes may be subjected to complete fertilization, and transferred within a specific cycle (para. 1 par. 1 no. 3 ss. EschG). Above all, the provision confining treatment to a maximum of three oocytes per cycle will be in dispute. On the one hand, divergent paternity is allowed, whereas on the other hand the splitting of biological and social maternity will be strictly forbidden”. [580]

---

[575] *Id,* at 10.
[576] Bundesärztekammer, *supra n.* 573.
[577] PARFENCHYK *et al, supra n. 562,* at 63.
[578] SCHREIBER, *supra n.* 574, at 8.
[579] WÜLFINGEN, *supra n. 567*, at 62.
[580] SCHREIBER, *supra n.* 574, at 10.

Even though there are no legal restrictions on artificial insemination, the insemination made with the semen of a man after his death is not allowed (para. 4 I no. 3 ESchG). Matthias Krüger suggests that a post-mortem-fertilization could affect the basic right to family according to Article 6 *GG*, because "with the husband's death one of the persons entitled to the basic right has already died."[581] Another reason for the prohibition of post-mortem fertilization is that during his lifetime the man can revoke his permission to use his semen at any time without giving any reasons.[582]

The use of surrogate mothers is also prohibited (para. 1 I no. 7 ESchG):

> "According to para. 13a *Adoptionsvermittlungsgesetz*, that is the law concerning adoptions, a surrogate mother is defined as a woman who, on grounds of a contractual agreement, gives consent to her natural or artificial insemination or who agrees to have an embryo transferred in order to abandon the child after birth to a third person".[583]

The cryopreservation of sperm is permitted. This means that sperm may be frozen and used in future inseminations. But the *Bundesärztekammer* guidelines limit "cryopreservation to the pronucleus state, while the conservation of embryos, on the other hand, is only permitted under exceptional circumstances (para. 9 no. 3 EschG), e.g. in case embryo transfer is not possible within the actual cycle on medical grounds."[584]

However, one must take into consideration that the EschG protects not only the dignity of the embryos, but also the dignity of women, because it considers it is a crime to insert an embryo into a woman against her will, since this would violate her autonomy. There is also the possibility that the woman does not want to have the embryos implanted or cannot have them implanted, for example in case of illness. In such cases, the EschG allows embryos to be cryopreserved or destroyed.[585]

Although PGD is allowed in order to prevent genetically transmitted diseases - if done before embryo's intrauterine transfer - the use of embryos for research is

---

[581] KRÜGER, Matthias. *The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights.* In: Revue internationale de droit pénal, vol. 82, n. 1, 2011, p. 49.
[582] *Id*, at 53.
[583] SCHREIBER, *supra n.* 574, at 9.
[584] *Id*, at 10-11.
[585] PARFENCHYK *et al, supra n. 562*, at 63.

prohibited.[586] Thus PGD is particularly attractive for couples who know that they carry a genetic defect they do not want to pass on to their children.[587]

Bettina Bock von Wülfingen states that until not so many years ago German laws protecting the human embryo were among the strictest internationally. "The German situation has been called 'unique and contradictory', as the relatively liberal German position on the termination of pregnancy seems to contrast with the strict protection of the embryo in vitro."[588] On July 7th, 2011 the German parliament voted to allow PGD in Germany. Before this, majorities had been against PGD. With this decision, Germany became one of the last remaining European countries to allow PGD. However, one must take into consideration that this ruling permits PGD only in specific cases of severe illnesses that are genetically detectable in the embryo.[589]

In the beginning the EschG did not clearly forbid research on hESC, since hESC are pluripotent and not totipotent cells and, therefore, they are not embryos. German researchers were allowed to perform research on imported hESC without violating the general prohibition against embryo destruction. However, for some people this would still violate the spirit of the EschG, because it involved the destruction of embryos abroad. This led to an intense debate in Germany about the legality of performing research in hESC and how the EschG could be amended to accommodate new research possibilities.[590]

In January 2002, three motions (*Anträge*) on hESC research were discussed in Parliament. After debating the three motions, the members of Parliament voted to approve the third motion, which allowed only the use of imported hESC, but with a number of restrictions.[591] This is the foundation of the Stem Cell Act (Stammzellgesetz - StZG):

> "This motion acknowledged that, on the one hand, hESC were not embryos and therefore their use was not in violation of the EschG and of the principle of human dignity. Therefore, the constitutional principle of freedom of research did not affect any constitutionally protected rights and principles. On the other hand, hESC

---

[586] BUSARDO, Francesco Paolo *et al*. *The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members*. In: BioMed Research International, vol. 2014, July 2014.
[587] PETERSEN, *supra n. 566*, at 464.
[588] WÜLFINGEN, *supra n. 567*, at 61.
[589] *Id*, at 61.
[590] PARFENCHYK *et al, supra n. 562*, at 66.
[591] *Id*, at 23.

> research was ethically and constitutionally problematic because the derivation of hESC involved the destruction of embryos and therefore led to their instrumentalisation and destruction. Specifically, by approving the import of hESC, the law would violate the Basic Law if it would create a demand for new hESC and hence would lead to the destruction of embryos. To tackle this issue, its promoters suggested to allow the import of hESC created before the discussions of the motions in Parliament. To be fully consistent with the ethics enshrined in the EschG, they further limited hESC research to those that were derived from embryos created to induce pregnancy and not for research".[592]

Since the motion allowed importing hESC lines if they were created from supernumerary embryos before the cut-off date, January 1, 2002 was set as a cut-off date. This date was chosen in order to make sure that Germany would not stimulate the destruction of embryos for research purposes. But in 2008, six years after passing the StZG, Parliament amended it by choosing May 2007 as new cut-off date for the use of embryos.[593] Further, the StZG also stipulated that:

> "… to import hESC, scientists should first prove that the research could only be performed with hESC and not, for example, with animal stem cells. Lastly, the law contained a provision that obliged German researchers to submit proposals for hESC research to the Central Ethics Commission on Stem Cells for approval, before being allowed to actually import stem cells. This mechanism was intended to act as an additional safeguard against excesses or misuses".[594]

It was also in 2007 that the *Gewebegesetz*[595] (Tissue Act) entered into force in Germany. The *Gewebegesetz* is considered a *Mantelgesetz* (mantle act), because "its contents are incorporated into, and amend, existing legislation upon enactment rather than representing stand-alone legislation."[596] This law transposes Directive 2004/23/EC of the European Parliament and of the Council of the European Union of 2004, which sets "standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells."[597] The acts amended by the *Gewebegesetz* are: *Transplantationsgesetz* (Transplantation Act), *Arzneinmittelgesetz* (Medicines Act), *Transfusionsgesetz* (Transfusion Act), *Apothekenbetriebsordnung* (operating regulations for pharmacies), *Betriebsverordnung*

---

[592] *Id*, at 24.
[593] *Id*, at 24-25.
[594] *Id*, at 24.
[595] *Gesetz über Qualität und Sicherheit von menschlichen Geweben und Zellen (Gewebegesetz)*, *supra n.* 246.
[596] HOPPE, Nils. *Bioequity – Property and the Human Body*. New York: Routledge, 2009, p. 92.
[597] *Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004.*

für Artzeinmittelgroßhandelsbetriebe (operating regulations for wholesale medicines merchants), *Infektionsschutzgesetz* (Infection Prevention Act), *Strafgesetzbuch* (Criminal Code) and *Sozialgesetzbuch* (Social Security Act).[598]

In fact, the implementation of the EC directives is mandatory in European countries and makes Community law binding in the EU Member States.

> "Due to the special features of this directive, the national legislators may stipulate stricter provisions, thus exceeding the minimum requirements specified in this EC directive. In Germany, the requirements set forth in the EC Tissues and Cells Directive have been implemented with - in the national legal framework, especially by virtue of the Medicinal Products Act, the Transplantation Act and the Transfusion Act".[599]

It is on the *Transplantationgesetz*, one of the acts amended by the *Gewebegesetz*, that one can find rules regarding sperm donation, especially regarding data protection. It states that the information about sperm donation must be kept for at least thirty years, and that sperm and bone marrow donations are not included in the anonymity regulations of this law.[600][601]

The first selected case relating to the implications of the right to know one's genetic origins in the context of AHR with donor sperm was decided in 2013 by the Court of Appeal (*Oberlandesgericht*, OLG) of Hamm.[602] This judgement of the OLG Hamm deals with an issue that has become of greater relevance during the last years: the right to information about one's genetic origin.

The plaintiff is a woman born in 1991 and the defendant a German center of reproductive medicine. As the plaintiff was conceived by AID, i.e with an anonyme sperm donation, she wanted to pursue her right to information and know who her biological father was. She requested information about her genetic origin and access to the respective documents from the defendant clinic, but they denied access in view of the agreement

---

[598] HOPPE, *supra n*. 596, at 92.
[599] AUER, Friedger von. *Das Gewebegesetz – Hintergründe und Konsequenzen*. In: Transfusion Medicine and Hemotherapy, vol. 35, n. 6, 2008, p. 407.
[600] § 14 and 15 of the *Transplantationsgesetz* (Transplantation Act).
[601] *Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben / Transplantationsgesetz – TPG)*, Nov. 5th 1997, published in the Federal Law Gazette (BGBl – Bundesgesetzblatt) Teil I, Nr. 84 from Nov, 11th. 1997, p. 2631.
[602] OLG Hamm, 06.02.2013 - I-14 U 7/12.

made between them, her mother and the donor. The *Landgericht* of Essen dismissed the action, but the plaintiff appealed, and the OLG of Hamm allowed the appeal.[603]

Firstly, the OLG of Hamm decided that the plaintiff's right to know her genetic origin derives from the contract made between the mother and the reproductive center, which is a contract with protective effect to the benefit of a third party (*Vertrag zugunsten Dritter*). They understood that if the agreement about anonymity and the ban on disclosure of information were valid, the contract signed in 1990 would be a contract at the expense of a third party, in this case the plaintiff. Hence, due to the protective effect, the Court concluded that there was a direct contractual relationship between the reproductive clinic and the plaintiff herself.[604]

Furthermore, the Court agreed with the plaintiff that a child engendered through artificial insemination is included in the protective effect of the contract, even if she was not yet born.[605] It is therefore justified to interpret the contract in the sense that the IVF center also had to fulfill contractual obligations towards the plaintiff, and that the contract works in her favor. For example, the IVF center was required to check the health of sperm donors before accepting a donation, in order that a healthy child could be conceived. This is done not only in the interest of the future parents, but also in the interest of the child to be born with the help of ART.[606] In this way, the Court understood that this does not conflict with the fact that the plaintiff was not yet conceived, because even a child who is not born can be granted rights through a contract in favor of third parties.[607]

Contracts for the benefit of a third party are regulated by §328 of the BGB.[608] They do not require acceptance by the third-party beneficiary, and "what this person acquires is a direct claim and not a claim presumed to be assigned by the stipulator."[609] The third party is not a party to the contract itself, but will benefit from the contract made between two other parties:

---

[603] *Id.*
[604] *Id.*
[605] *Id.*
[606] *Id.*
[607] *Id.*
[608] *Bürgerliches Gesetzbuch* (BGB). All references in English to the German Civil Code (*Bürgerliches Gesetzbuch* (BGB)) are taken from https:// www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf, unless indicated otherwise.
[609] HALLEBEEK, Jan. *Contracts for a third-party beneficiary: A brief sketch from the Corpus iuris to present-day civil law*. In: Fundamina. 2008; Vol. 13, n. 2. p. 32.

> "The contract may expressly provide for performance in favor of a third party as well as give the third party the right to demand such performance. However, it is not necessary expressly to provide in the contract that a third party has the right to its performance. It can be inferred from the circumstances, especially from the purpose of the contract; whether the third party acquired the right to demand performance; whether this right is to accrue immediately or only under certain conditions; and whether the contracting parties reserved the right to take away or modify the third party's right to demand performance. The third party may reject the right he acquired under the contract by declaration to the promisor".[610]

The Court also took into consideration that the plaintiff´s right to information derives from her general personal rights protected by articles 2 § 1 and 1 § 1 of the German Basic Law. These constitutional rights have an indirect effect on the German Civil Law, because they have to be followed in the interpretation of the norms. In this respect, the Court followed previous decisions of the *Bundesverfassungsgericht,* such as the judgement BvL 17/87, NJW 1989, and stated that the basic rights of the plaintiff, the defendant and the genetic father must be balanced.[611] On the one hand, there are personal rights such as the right to the free development of the personality and human dignity, which give the plaintiff the right to know her genetic father, i.e. her ancestry. On the other hand, there are the personal rights of the sperm donor, who generally has no interest in the outcome of the donation, fearing to be confronted with financial claims. Moreover, the center and its employees would have rights too, but on this side, only financial interests prevail. Thus in the end, the balancing of interests turned out in favor of the plaintiff, since the court understood that in this context the interest of the child conceived by AID has higher value than the interests of the donor and the defendant doctor in keeping the donor data confidential.[612]

Generally, the court ruled that when balancing the interest of the child born by AID to know her ancestry, the donor's interest in keeping his anonymity and the interest of the doctor who performed the AID in keeping the records confidential, the interests of the donor-conceived child are of greater and decisive weight. This means that the interests of a child conceived with donated sperm in getting information about its genetic origins has precedence over the rights of the sperm donor and the doctor to keep such

---

[610] PIECK, Manfred. *A Study of the Significant Aspects of German Contract Law*. In: Annual Survey of International & Comparative Law: Vol. 3: Iss. 1, Article 7, 1996, p. 132.
[611] OLG Hamm, 06.02.2013 - I-14 U 7/12.
[612] *Id.*

information confidential. This implies an obligation for the doctor to provide information about the donor to the child. The knowledge about constitutive factors such as ancestry are also considered important for the free development of the child's personality.[613]

In 2015 the BGH decided that children born by AHR treatments with donor sperm have the right to request the identity of their biological father at any time.[614] Their parents can be their representatives, and pursue on their behalf the right to know the identity of the donor. In this specific case, the two plaintiffs aged 12 and 17 (born in 1997 and 2002 respectively) requested information on the identity of the sperm donors from the clinic where the procedures were performed. Although the clinic had all the records about the treatment and the donor, they refused to give it to the plaintiffs, because their legal parents had waived the sister's right to know the identity of the donor in the contract made between them.[615]

The decision was mainly guided by the same principles used by OLG Hamm in its decision Az. I-14 U 7/12, as previously explained. However, the BGH understood that there is no minimum age to request donor's information, if the parents are able to prove that the child has requested the information. Thus the Court decided that children of all ages have the right to know the identity of their donors and that the right of the donor to remain anonymous will generally be trumped by the right of children to know their biological fathers.[616]

The argument that children seeking information about their donor should have a minimum age of 16 years was dismissed, as the judges saw no foundation in existing laws to support this age requirement. The judges also stated that it has to be assumed that a child of any age can have the desire to know his or her biological father, not only after a child turns 16.[617]

The Court ruled that the right of the child to know his or her ancestry derives from Articles 2(1), 1(1) of the *Grundgesetz* and that the claim to the desired information arises

---

[613] *Id.*
[614] BGH, 28.01.2015 - XII ZR 201,13.
[615] *Id.*
[616] *Id.*
[617] *Id.*

from the principles of good faith (*Treu und Glauben* - § 242 BGB[618]), since the contract signed by the parents and the clinic constituted a third-party beneficiary contract for the benefit of the child. This means that this contract is also the basis of the right of the child to know the donor's identity, since a child conceived by AID would be included in the protective effect of the contract, even though he or she was not yet born.[619]

For the court, the principle of good faith and the right of the child to know his or her origins can be connected, because it is in good faith to grant the beneficiary a right to information if the legal relationships between the parties of the contract entail that the beneficiary, who is dependent on the information to enforce his or her rights, shows that the extent of his or her right is uncertain, and the obligated party is able to easily provide the information necessary to eliminate this uncertainty.[620] The child has to prove that he or she is dependent on the information in a way that can justify a claim in good faith. Also, the contract signed by the parents and the clinic would connect all the people involved in the case, even though the plaintiffs are included in the contract as third parties, and it would demonstrate good faith to provide information to the plaintiffs.[621]

However, the inclusion of the third parties in the contractual protection obligations based on §242 of the BGH does not justify direct claims for damage, which means that the plaintiffs cannot use the information about the identity of the sperm donor to claim damages from him.[622]

The court concluded that when balancing the fundamental rights of the child and the donor, the right of the child to know his or her heritage generally carries greater weight than the donor's right to anonymity. Also, the right of the child is more important than the right of the doctor to not disclose information about his patients.[623]

---

[618] §242 - "An obliger has a duty to perform according to the requirements of good faith, taking customary practice into consideration." Translation from §242 *Bürgerliches Gesetzbuch – BGB*. Original text: "*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern".*
[619] BGH, 28.01.2015 - XII ZR 201,13.
[620] *Id.*
[621] *Id.*
[622] *Id.*
[623] *Id.*

Furthermore, regarding this case, the BGH decided that if the sperm of two different donors was used to inseminate a woman, her children necessarily have right to get information about both possible biological fathers.[624]

In 2016, a Hannover court gave a 21-year-old woman the right to know the identity of the sperm donor who donated his sperm to her mother. As a consequence, the defendant, a reproductive clinic, was ordered to give the plaintiff the documents concerning the name and other data about the sperm donor.[625]

The court's justification was that the right of the plaintiff to be informed about the identity of the sperm donor is based on the principle of good faith (§242 BGB), as it was ruled in 2015 by the BGH[626] in the case mentioned above. For the court, the principle of good faith gives the plaintiff the right to be informed about the identity of the sperm donor, since there would be a relationship between the plaintiff and the defendant, which is derived from the contract of artificial insemination. The fact that the contract was between the clinic and the plaintiff's parents plays no role in this context, since it would be a contract with protective effect to the benefit of a third party.[627] Also, they pointed out that the BGH had already decided that the right to information concerning the identity of the donor has a direct connection to the personal rights of the donor-conceived child.[628]

The Hannover court also argued that it is reasonable for the reproductive clinic to give information about the identity of the donor, and that the professional freedom of the reproductive clinic is not an argument for refusing to give the information; nor is the claim that there would be fewer donors if the anonymity of donors is not preserved. For the court, the right of the plaintiff to get information about the identity of her genetic father, i.e. the donor, is more relevant than the donor's anonymity. This is also derived from Articles 1 (1) and 2 (1) of the German Basic Law.[629]

In May 2017 the Federal Parliament adopted the "*Gesetz zur Errichtung eines Samenspenderregisters und zur Regelung der Auskunftserteilung über den Spender nach heterologer Verwendung von Samen* (*Samenspenderregistergesetz* – SaRegG)",

---

[624] *Id.*
[625] AG Hannover, 17.10.2016 – 432 C 7640/15.
[626] BGH, 28.01.2015 - XII ZR 201,13.
[627] AG Hannover, 17.10.2016 – 432 C 7640/15.
[628] BGH, 28.01.2015 - XII ZR 201,13.
[629] AG Hannover, 17.10.2016 – 432 C 7640/15.

which gives children conceived through sperm donation the right to request information about the identity of the sperm donor once they turn 16 years old.[630]

It is important to highlight that the SaRegG excludes the possibility of using the donor's information in court to declare the sperm donor the legal father of the child. It therefore prevents the assertion of custody, child support, or inheritance claims.[631]

One of the major innovations of the SaRegG is that it created a central register of sperm donors at the German Institute for Medical Documentation and Information (*Deutsches Institut für Medizinische Dokumentation und Information* - DIMDI). The register contains the first and last name of the sperm donor, his birthday and birthplace, nationality, and address, as well as the same data of the women receiving the sperm. The data must be saved in the register for 110 years. The consent of the sperm donor and of the woman receiving the sperm to have their data stored in the central register and provided to a future child is an essential prerequisite for the treatment of AHR. After the birth of the child, the clinic where the procedure took place must report the pregnancy to the DIMDI. The 110-year period takes into account the general life expectancy of a person; that time frame is also consistent with the duration that data needs to be stored in other laws, for example, the birth register and marriage register. However, sperm that has already been collected before the act entered into force may only be used for an AHR treatment if the sperm donor has been subsequently provided with the necessary information and has been informed that he can object to the use of his sperm.[632]

Any person who is 16 years old or older who suspects that he or she has been conceived through an AHR treatment with donor sperm has the right to seek relevant information from the DIMDI. People younger than 16 years old can only pursue this right through their legal guardians.[633] The registry at DIMDI makes it easier for any person conceived with the use of donor sperm to find information about their donors. It can be seen as a major step forward on the regulation of AHR with donor sperm.

---

[630] *Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen*, *supra* n. 09.
[631] *Id.*
[632] *Id.*
[633] *Id.*

5.2 CONFLICT OF INTERESTS IN CASES OF ASSISTED HUMAN REPRODUCTIVE TREATMENTS WITH DONOR SPERM IN BRAZIL

As explained in the previous chapter, there is no specific legislation on AHR in Brazil. Even though Law 11.105 (also known as Biosafety Law)[634] was instituted in 2005, it is the CFM Resolution (2.121/2015) that serves as a guide for decision-making in cases involving AHR. In the view of CFM, their Resolution fills the gaps that Brazilian law has not yet been able to supply.

In general,

> "This law 'regulates sections II, IV and V of §1 of Art. 225 of the Federal Constitution, establishes safety standards and inspections mechanisms for activities involving Genetically Modified Organisms – GMOs and their derivatives, creates the National Council on Biosafety – CNBS, restructures the National Technical Commission on Biosafety – CTNBio, provides for a National Policy Biosafety – PNB, repeals Law N. 8.974 of January 5, 1995, and Provisional Measure N. 2191-0 of August 23, 2001 and the Arts. 5, 6, 7, 8, 9, 10 and 16 of Law N. 10.814 of December 15, 2003, and other measures".[635]

In addition to creating general rules on biotechnology research, Law 11.105 regulated constitutional principles and established safety standards and mechanisms for monitoring activities involving genetically modified organisms.[636] As stated in Article 1, this law

> "… establishes the security standards and inspection mechanisms for the building, cultivation, production, handling, transport, transfer, import, export, storage, research, commercialization, consumption, release into the environment and disposal of genetically modified organisms – GMOs and their derivatives, based on the guiding principles of the promotion of scientific advances in the areas of biosecurity and biotechnology, protection of human, animal and plant life

---

[634] *Lei 11.105 de 24 de março de 2005 – Lei de Biosegurança (Biosafety Law).* Published in the Federal Law Gazette (D.O.U.) Section I, page 1, on March 28th, 2005.

[635] Free translation from *Lei 11.105 de 24 de março de 2005 – Lei de Biosegurança (Biosafety Law)* – Original text: "*Regulamenta os incisos II, IV e V do § 1º do art. 225 da Constituição Federal, estabelece normas de segurança e mecanismos de fiscalização de atividades que envolvam organismos geneticamente modificados – OGM e seus derivados, cria o Conselho Nacional de Biossegurança – CNBS, reestrutura a Comissão Técnica Nacional de Biossegurança – CTNBio, dispõe sobre a Política Nacional de Biossegurança – PNB, revoga a Lei nº 8.974, de 5 de janeiro de 1995, e a Medida Provisória nº 2.191-9, de 23 de agosto de 2001, e os arts. 5º, 6º, 7º, 8º, 9º, 10 e 16 da Lei nº 10.814, de 15 de dezembro de 2003, e dá outras providências*".

[636] *Lei 11.105 de 24 de março de 2005 – Lei de Biosegurança (Biosafety Law)*, *supra n.* 634.

> and health, and observance of the precautionary principle for the protection of the environment".[637]

The guidelines used to draft the Brazilian Biosafety Law were the recognition of scientific advances in the areas of biosafety and biotechnology; the protection of life, human health, and the health of animals and plants; as well as the observance of the precautionary principle for the protection of the environment.[638] Additionally, a national technical commission (CTNBio) was created, which became responsible for all regulation of the biotechnology sector.[639]

Law 11.105/2005 was originally created to regulate research and trade of genetically modified organisms but, in the end, it also included an article establishing rules for the use of human embryos in stem cell research.[640] Article 5 allows, for purposes of research and therapy, "the deployment of hESC harvested from non-viable *in vitro* embryos, or from frozen embryos stored in *in vitro* fertilization (IVF) clinics for more than 3 years. In all cases, consent by the genitors was required, and research projects were to be submitted to the respective institutions' ethics committees."[641]

> "The Biosafety Bill's original draft was completed by the Executive Branch in October 2003, during President Lula's first year in office. The events that had initially pushed for a new regulatory framework for biosafety had little to do with embryo research: the Bill was intended as a remedy for years of judicial deadlock concerning the legitimacy of the first commercial release license granted for a transgenic organism in Brazil, Monsanto's Roundup Ready soybean. A swift and definite solution was badly needed: the transgenic soy was already being illegally smuggled from Argentina into Brazil, since at least 1998, and was rapidly spreading".[642]

It is seen that, even though there is a law in Brazil that deals with biotechnology, Brazilian law is still far from answering the questions arising from AHR with donor sperm. Technological progress in the area of AHR is inevitable. For this reason, in order to avoid abuses and to put limits on practices that might endanger the genetic heritage and harm

---

[637] *Id.*
[638] SOARES, Eduardo. *Brazil*. In: Restrictions on Genetically Modified Organisms. International Protocols. The Law Library of Congress, Global Legal Research Center, 2014, p. 17.
[639] *Id*, at 17-18.
[640] CESARINO, Letícia *et al*. *The embryo research debate in Brazil: From the National Congress to the Federal Supreme Court.* In: Social Studies of Science. Vol. 41, n. 2, 2010, p. 228.
[641] *Id,* at 228.
[642] *Id*, at 229.

human dignity, it is necessary to adapt legislation to the advancements of science and biotechnology.

Cases concerning AHR with donor sperm in Brazil involve requests for recognition of paternity, identity of the donor, and desires to know the genetic origins. But these cases are difficult to access, since most of them proceed under the heading “secret,” being accessible only to the lawyers and people involved in the case. It is possible only to access the main decisions of these cases, and the names of the people involved are not disclosed. The three cases discussed here were selected in order to present the Brazilian context, focusing on the analysis of the arguments used by the judges in their decisions.

In case n. 70052132370 from the Court of Justice of Rio Grande do Sul, two women filed a paternity suit recognition requesting that their daughter to be born had on her birth certificate their names and their surnames. The two women are a couple and have performed AHR treatment with the help of donor sperm to conceive their daughter. Though the eggs of one of the women was used, the sperm came from an anonymous donor.[643]

In his decision, the judge argued that in order to preserve the right of the child to have access to her genetic origins, the laboratory where the insemination was done and the sperm donor should be included in the lawsuit. The applicants lodged an appeal to the Court of Justice saying that the donor and the laboratory should not be part of the case. They argued that it is unnecessary to include the donor, since the right to have access to genetic information is a personal right that can only be requested by the child (not by a third party), if she wishes and only when she reaches the minimum age. They also argued that the donor's civil identity should be kept confidential, according to CFM's resolution, and that any inclusion of the donor in the lawsuit would expose the donor's civil identity.[644]

The Court of Justice modified the decision of the previous judge by ruling that the individual who chooses to donate their eggs or sperm anonymously does so because they have no personal intention of conceiving the child that will eventually be born with

---

[643] 8ª Câmara Cível do Tribunal de Justiça do Estado do Rio Grande do Sul. *Agravo de Instrumento n. 70052132370*, April 4th, 2013.
[644] *Id*.

their gametes, and it does not interest them to know who this child is or where she or he is, or even if it exists. The anonymous donation of sperm would be an altruistic act of those who wish to help infertile people to conceive a child and fulfill their dream of bearing a child. In this way, the anonymous donor does not want to be identified, and does not want any responsibilities regarding the child.[645]

Therefore, the court decided that it was not necessary to include the laboratory and the donor in the lawsuit, and that the confidentiality of the donor should be maintained. Regarding the birth certificate of the child, the request was granted to include the names of her two mothers and her grandparents in it so that the child could carry the name of the family who conceived and raises her.[646]

It should be noted that information from anonymous donors is kept by the clinics that perform the treatments, under absolute confidentiality and for a minimum of twenty years, in order to enable access to such information for medical purposes.[647]

Regarding the birth registration of children conceived with donor sperm, in 2016 Provision n. 52 of the *Conselho Nacional de Justiça* (National Justice Council - CNJ) introduced an innovation by allowing children born with the help of donor sperm (whether the parents are a heterosexual or a same-sex couple) to have in their birth certificates the names of the parents who will raise them, without the need of a court order for it.[648]

Furthermore, Provision n. 52 of CNJ states that the knowledge of biological origins will not lead to the recognition of the kinship relationship and its legal effects between the donor and the person conceived with this sperm.[649] This provision clarifies that in the case of AHR with donor sperm, the donor is only a means to enable the birth of the individual, having no connection with the other people involved. In this way, at birth the child is already recognized in the birth certificate as the son or the daughter of the people who will raise him or her, even if this child has no biological bonds with one of them.

Therefore, Brazil adheres to the argument of “socio-affective filiation” (*filiação socioafetiva*), in which the relationship of filiation is based not just on blood but on the

---

[645] *Id*.
[646] *Id.*
[647] Agência Nacional de Vigilância Sanitária – ANVISA (2011), *supra n*. 15.
[648] Conselho Nacional de Justiça – CNJ (2016). *Provimento CNJ n. 52/2016.* Published in the Federal Law Gazette (D.O.U.) on March 14th, 2016.
[649] *Id.*

daily care given to the individual. The family institution is identified primarily by affective bonds and not only by genetic bonds.[650]

As difficult as it may be to define the legal institution of the family, when trying to define it one must take into account the fact that it is constantly changing all the time. Due to the fact that the family constitutes itself as one of the pillars of society, it is possible to observe that the new concepts of society and family directly affect the concept of filiation. And from the perspective of Brazilian law and bonds established spontaneously, older models of family marked by patriarchalism and the bonds of kinship gave way to one based on bonds of affection.[651]

The Brazilian Federal Constitution not only equalized biological and affective filiation but also, above all, made it clear that the relationship between parents and children should not be one of control or possession, but one of love, affection and respect. "While the biological family navigates on the blood vessels, the affective family transcends the seas of blood, connecting with the ideal of responsible fatherhood and motherhood, … building the family by the umbilical cord of love, affection, devotion, heart and emotion."[652]

Rodrigo da Cunha Pereira understands that the assignment of a legal value to affection expands the axiological scope of the law and authorizes us to talk about the ethics of affection as one of the supports and pillars of family law.[653]

When recognizing affective filiation as prevalent, some of the legal doubts that arise from the use of donor sperm are resolved, but, on the other hand, the emphasis on affective filiation complicates matters in cases where the individual is not recognized by his or her biological father, even if there was a relationship with the mother. This question, however, is not the focus of this study, but only mentioned to note other issues that may also need the legislator's attention.

---

[650] GIORGI, Maiara. *Disrespect to human dignity: dialogues between law, literature and culture*. In: Revista Redes – UNILASALLE, Vol. 5, n. 2, 2017, p. 146.
[651] *Id*, at 146-147.
[652] WELTER, Belmiro Pedro. *Igualdade entre as filiações biológica e socioafetiva*. São Paulo: Revista dos Tribunais, 2003, p. 13
[653] PEREIRA, Rodrigo da Cunha. *Princípios fundamentais norteadores do direito de família*. 2 ed. São Paulo: Saraiva, 2012, p. 30.

As already mentioned, the right to know one's genetic origin is recognized as a fundamental right in Brazil.[654] Thus, even if socio-affective filiation is recognized in a child's birth certificate, in the case of people conceived with donor sperm, the right to know genetic origins still remains valid. The right to genetic origin, therefore, is a fundamental and unquestionable right, but it is limited to the individual's interest in wanting to know it.[655]

In the second case 0386226-72.2008.8.26.0577 from the Court of Justice of São Paulo, a couple went to a fertility clinic because the woman was infertile. The technique used was the AIH with donated eggs. The husband, in this case also the donor, gave the necessary consents to recognize his paternity. However, the couple's first attempt did not result in pregnancy, and the husband then asked for the exclusion of his genetic material from the clinic.[656]

Before the second attempt, the couple got divorced, but the woman kept trying to get pregnant. The second attempt was made with sperm from a donor, and was successful. The child's birth certificate had the names of the mother and her ex-husband, with the authorizations that he had signed for the AIH, that is, with his genetic material.[657]

Since the child was born due to treatment made with donor sperm, the former husband filled a lawsuit requesting the exclusion of his name from the child's birth certificate. He further alleged that the procedure was made without his consent, as he had signed authorization terms for AIH only. A DNA test was made, and it was verified that the child had neither the genes of the mother nor those of her ex-husband, since for the insemination the woman had to use both eggs and sperm from donors.[658]

The São Paulo court ruled in favor of the plaintiff to authorize the exclusion of his name from the birth certificate of the child, once it was verified that the child had no genetic connection with him, and he had authorized only AIH.

---

[654] LÔBO, Paulo Luiz Neto (2007). *Direito ao estado de filiação e direito à origem genética.* In: Instituições de Direito Civil, vol. V, 11 ed., Forense, 2007, p. 203.
[655] ISHIDA, Valter Kenji. *Estatuto da Criança e do Adolescente: doutrina e jurisprudência*. 10 ed. São Paulo: Atlas, 2009, p. 49.
[656] 9ª Câmara de Direito Privado do Tribunal de Justiça do Estado de São Paulo. *Apelação n.* 0386226-72.2008.8.26.0577, Aug. 23rd, 2016.
[657] *Id.*
[658] *Id.*

It is noted that this result was only possible because the mother went to the clinic to continue the treatment when the couple was no longer together, thus accepting the anonymous donation of both eggs and the sperm without the consent of her ex-husband. Thus, it would not be possible to apply the hypothesis of presumption of paternity stated in Article 1597, V, of the Brazilian Civil Code.[659] In any case, it should be pointed out that this legal provision requires prior authorization of the husband when sperm from a donor will be used. It was also observed that the man only signed a document authorizing AIH, that is, the use of his genetic material, not having consented to the use of genetic material from third parties.

In this sense, the understanding of the Court of Justice of São Paulo was that if there was participation of the husband or ex-husband in consenting to the treatment with donor sperm, the presumption of paternity would be recognized. It is also not a case of socio-affective filiation, since even before the child was born, the couple was already separated and the man did not even have contact with the child, not having affective bonds with him or her. Also, the child can decide in the future whether he or she wants to know his or her origins.

Although the third case n. 1.042.172 – SP (2017/0005550-2)[660] does not deal with the donation of sperm, but rather with donation of eggs, it was selected because it is a decision from a superior court (*Superior Tribunal de Justiça* - STJ - Superior Court of Justice) and it brings valuable arguments to the discussion about donor anonymity.

In the present case, a woman filed a lawsuit requesting authorization to carry out an AHR treatment with the use of eggs donated by her sister, thus avoiding the prohibition of Item 2, IV, from the Resolution 2121/2015 of CFM.[661]

The STJ understood that the biggest reason for the prohibition of CFM's Resolution, safeguarding the identity of the donor and recipient, has an ethical foundation in the risks of future questioning of the biological filiation of the child, which might

---

[659] Article 1597, V of the Civil Code states that: "are presumed to be conceived in the constancy of the marriage the children: (...) born by heterologous artificial insemination, provided that there is prior permission of the husband.". Free translation from *Lei n. 10.406 de 1 de outubro de 2002. Código Civil (Civil Code)*, *supra n*. 445.

[660] Superior Tribunal de Justiça - STJ. *Agravo em Recurso Especial n.* 1.042.172 – SP (2017/0005550-2), Oct. 3rd, 2017.

[661] *Id*.

destabilize family relations and the emotional well-being of everyone involved. In addition, secrecy would also be important to ensure that donors of genetic material have no responsibility for the child to be born, but that in this specific case the consanguineous bonds between the sisters and the fact that the donor has already constituted a family would reduce the chances of a dispute over maternity. Thus, the superior court authorized the procedure with the eggs of a known donor, in this case, the sister.[662]

The court further stated that it was not disqualifying the legitimacy of the CFM resolution, but that they understand that the rule should be adapted depending on the case, given the absence of a law in Brazil that regulates the adequate use of ART.[663]

In fact, the norms related to AHR that emanate from the CFM are of a non-statutory nature, being essentially ethical norms that lack the backing of legal sanctions. And, in this respect, one can recognize the considerable difficulties faced by legislators in the future discipline of the subject, given the controversy surrounding the inviolability of the anonymity of the donors and the right of children to know their origins.[664]

The STJ also affirmed in this case that as long as there is no legal regulation for the issues of AHR, it must be recognized that it is necessary to weigh the applicability of the principle of donor anonymity by means of a judicial decision in each specific case.[665]

By analyzing the cases above, it is possible to conclude that Courts in Brazil are coming to understand that the right of children to know their origins is inherent to the individual, being part of the fundamental rights of the human person. However, this does not imply a recognition of the paternity status.

It is considered a violation of the human dignity principle to restrict the right to know the genetic origin, respecting, therefore, the psychological necessity of knowing the biological truth.[666]

The object of the protection of the right to the knowledge of genetic origin is to ensure the right of the personality, regarding the right to life, since recent scientific studies stress the importance for individuals to know the health history of their close biological

---

[662] *Id*.
[663] *Id*.
[664] *Id*.
[665] *Id*.
[666] Superior Tribunal de Justiça – STJ. *Recurso Especial n. 833.712-RS (2006/0070609-4).* June 4th, 2007.

relatives in order to take care of their own health and life. Courts are ruling that there is no need to attribute paternity to someone in order to have the right to know, for example, the biological origins of a person who was conceived with an anonymous sperm donation. In this way, there is a growing acceptance of Brazilian courts that research on paternity should not be confused with the right to know one's genetic origins.[667] That means that while individuals have the right to know their genetic origins, this knowledge does not generate paternal bonds as a consequence.

5.3 ARGUMENTS *DE LEGE FERENDA*

In the previous sections, the German and Brazilian contexts regarding AHR with donor sperm were presented, as well as some cases that deal with this issue. In the absence of specific legislation on the subject in Brazil, legal decisions have to rely on a non-statutory resolution in cases involving the use of genetic material from a donor. It should be noted that in Brazil sometimes when decisions cannot find arguments in the existing laws, judges tend to use a comparative approach and look at decisions taken in other countries, especially in the European courts, using both the decisions and the understandings likely to be used in an analogous way. An example is case number 807849/RJ from STJ.[668] The case is a paternity lawsuit and not about AHR, but when justifying her decision Minister[669] Nancy Andrighi said that the constitutional court in Germany had already decided in 1989[670] that personality rights comprise the right to the knowledge of the genetic origin.

The absence of legislation involving ART can cause some damage to families that use the AHR techniques. There are innumerable issues to be regulated and, among the existing controversies, one can mention the right of children born with the help of donor sperm to know their origins, not only genetic, but also the identity of the biological

---

[667] LÔBO (2007), *supra n. 654*, at 205-206.
[668] Superior Tribunal de Justiça – STJ. *Recurso Especial n. 807.849-RJ (2006/0003284-7).* March 24th, 2010.
[669] In Brazilian High Courts judges are called "*ministros*" (ministers).
[670] BVerFG, 31.01.1989 - 1 BvL 17/87.

father. Given the multiplicity of issues that are difficult to solve, it is also understood that it would be prudent to address issues involving ART through a specific law.

In this way, Borges says that although reproductive techniques are one of the means individuals have to exercise their right to procreation and are undoubtedly a great scientific achievement for sterility, each of its forms interferes in innumerable ways in ethical, social and religious spheres, as well as having psychological, medical, and above all, legal effects. Therefore, a law that protects and regulates AHR in Brazil is a necessary measure.[671]

The most recent law proposal regarding the regulation of ART and sperm donation is the Law Project number 1.184/2003. This proposal has seventeen[672] more Law Projects attached to it, since they all deal with issues related to AHR. Authored by senator and physician Lucio Alcantara, the Law Project 1.184/2003 was presented on June 3rd, 2003. Several Law Projects were drafted on AHR; however, this is the one that is currently under analysis in Brazil and the last discussion on it occurred on August 18th, 2015.[673] It can take a long time for a law to be approved in Brazil. Factors such as the workload of the Federal Legislative Branch (Chamber of Deputies and Senate), analysis of the project by specific commissions, number of projects to be voted on and the interest of the people involved in the legislative process may affect the approval of a Brazilian law.[674] Also, in the case of AHR with donor sperm, since the CFM has already issued guidelines to try to regulate it, the subject ends up not receiving proper attention and its discussion is not prioritized by the National Congress.

The Law Project 1.184/2003 aims to regulate the techniques of AHR in Brazil, to define norms for the accomplishment of the procedures, and to prohibit surrogacy and radical cloning experiments. Contrary to CFM guidelines, it proposes that access to information on AHR be guaranteed not only in cases of medical relevance, but also when the person conceived with the use of donor sperm manifests his or her free and informed

---

[671] BORGES, Gilza Mariane Coutinho. *A reprodução humana assistida e o biodireito*. In: Revista do Curso de Direito da Faculdade Campo Limpo Paulista, Vol. 7, 2009, p. 118.
[672] PL 120/2003, PL 4686/2004, PL2855/1997, PL 4665/2001, PL 1135/2003, PL 2061/2003, PL 4889/2005, PL 4664/2001, PL 6296/2002, PL 5624/2005, PL 3067/2008, PL 7701/2010, PL 3977/2012, PL 4892/2012, PL 115/2015, PL 7591/2017 and PL 9403/2017.
[673] Senado Federal. *Projeto de Lei 1.184 de 2003*. June 03rd, 2003.
[674] HIROI, Taeko *et al*. *Meaning of Time: Legislative Duration in the Brazilian Congress*. n. 228, Brasília: Ipea, nov. 2017.

will to have knowledge about the process that led to his or her birth, including the civil identity of the donor, and without the need of a judicial order.[675]

This project guarantees the privacy of those who participated in the process of AHR, since it says that health professionals (doctors, nurses, etc.) should prevent donors and recipients from knowing each other's identities. At the same time, however, it allows confidentiality to be broken in order to give access to all the relevant information for legal or medical reasons.[676]

It is understood that a law that regulates AHR must be based on the protection of human dignity and observe the fundamental rights of the person. This is not an easy task, since the elaboration of this law involves, on the one hand, the protection of human dignity, and on the other, the development of biotechnology and biomedicine, which give human beings control over the process of creation of life.[677] However, the regulation of certain situations will certainly bring into question problems that the law will not solve, since the creation of a law involving AHR will involve debates about the moment of the beginning of life, the existence or not of the right to have a child, and even debates about abortion. Another difficulty lies in the type of norm that must be adopted: a general law, setting broad principles, or a more specific rule.[678]

The rapid development of the ART and their consequent effects require the creation of flexible rules that can be applied to future situations generated by techniques that are not yet developed. Prohibitive and inflexible legislation on the subject would soon become obsolete. Thus, it is necessary to address the issue of regulation of reproductive technologies with the constitutional principles guaranteed by Brazil’s Federal Constitution. Principles such as human dignity must serve as a basis for drafting a law that regulates the use of reproductive technologies in the country. Also, topics such as secrecy about the identity of the donor, the child's right to know its origins, restrictions on the selection and intervention of embryos, and the child's best interests should be discussed.[679]

---

[675] *Id.*
[676] *Id.*
[677] BARBOZA (2003), *supra n.* 488, at 59.
[678] *Id*, at 59.
[679] BRAUNER *et al*, *supra n.* 499, p. 126.

In addition to the principles outlined above, discussions about the creation of a law should also include topics such as whether or not to allow the child to know the identity of his biological father; whether this situation will allow the creation of legal bonds between the donor and the child; and whether there are cases where donor anonymity should prevail.

Discussions about the anonymity of the donor involve questions about whether information about the donor is sought for purely medical purposes, or simply out of curiosity. Extreme positions either in defense of or against donor's anonymity, making no exceptions, can lead to injustice or leave donors unprotected and thus discourage sperm donation which is essential for the procedures, or it may block the search for information necessary for the development or health of the person conceived by AHR with donor sperm. Thus, the majority Brazilian authors on the subject suggest that the best solution would be to allow anonymity as a rule, while allowing it to be disregarded in exceptional cases, which would be listed in law or through judicial authorization.[680]

Rolf Madaleno defends the permissibility of relativizing the donor's anonymity by asserting that the anonymity of the donor can be removed when it conflicts with interests of greater relevance, for example, to preserve life. He understands that if on the one side the right to confidentiality is guaranteed to the donor, based on the right to privacy, on the other side, the child conceived with donated material has an equal right not to live in the shadow of doubts about who enabled him or her to be born. But Madaleno believes that any concession made in this regard must be done through a judicial procedure.[681]

But in cases where a judge needs to authorize a request to reveal the donor's identity, how should the judge decide which right will be safeguarded? It is understood that there would be no discussion of whether to authorize the disclosure of the donor's identity when anyone's life or health was involved, in view of the greatest of all rights: the life. Thus, this possibility could already be authorized by law, so that it would not be necessary to file a lawsuit. But in the case of psychic health, what would be the decision?

---

[680] TABORDA, Andressa Alves. *Reprodução assistida heteróloga: o anonimato do doador de gametas e o direito à identidade genética*. In: Revista Aporia Jurídica. Revista Jurídica do Curso de Direito da Faculdade CESCAGE. 6 ed. Vol. 1 (jul/dez-2016), p. 201-220.
[681] MADALENO, *supra n.* 450, at 138.

Would the mere fact of wanting to know one's genetic identity be seen as a right that deserves to be respected, to the point of relativizing the right to anonymity?

The right of individuals to access their own genetic information is derived from a strong personal interest, as it allows individuals to have important information (particularly about his health) to make decisions about their own lives.[682] Thus there are reasons to seek biological information not only when health and life are threatened, but also where psychological health is concerned. Access to such information can help to prevent problems that may develop in the future and affect the individual's entire life.

Discussions about the right to know one's origins pose a major challenge to law. It is important to clarify that the knowledge of biological ancestry is a real right and not a duty. In other words, no one can be obliged to know his or her biological ancestry, but all people ought to have the right to know it if they would like to. Reinaldo Pereira e Silva suggests that there are two reasons for this. Firstly, no one is obliged to refrain from doing something except by law; secondly, the knowledge of biological ancestry can be considered a fundamental right and one of the foundations of the family institution.[683]

In addition, knowledge of biological origin is of great importance both for the person's own identity and for the development of his or her personality. Therefore, a law on AHR must consider the rights of the child and protect his or her interests and well-being. Indeed, the principle of the best interest of the child must be integrated into the new law to ensure that the advancements of reproductive technologies will enable motherhood or fatherhood without prejudice to the rights of the child.[684]

Nevertheless, it is understood that this law must also rule that the disclosure of donor's identity will not attribute or guarantee patrimonial or personal rights between the donor and the person conceived with donated sperm. The right of the person conceived with donor sperm to know his or her biological origins should not impose legal obligations on the donor regarding the person born as a consequence of his donation.[685]

---

[682] DIAS, Rodrigo Bernardes. *Privacidade Genética*. São Paulo: SRS Editora, 2008, p. 163.
[683] SILVA, Reinaldo Pereira e (2003). *Biodireito: a nova fronteira dos direitos humanos*. São Paulo: LTr, 2003, p. 61.
[684] SILVA, Reinaldo Pereira e (2001). *O exame de DNA e a sua influência na investigação da paternidade biológica*. In Biodireito: Ciência da vida, os novos desafios. São Paulo: Editora Revista dos Tribunais, 2001, p. 96.
[685] FUJITA, Jorge Shiguemitsu Fujita. *Filiação*. São Paulo: Atlas, 2009, p. 76.

A law that ruled absolute secrecy over the donor's data would go against the Federal Constitution and human dignity, since it would collide with the individual's right to know his or her origins.[686] In addition, as already explained, the absolute inviolability of the data of the donor of genetic material would impede the preservation of life in cases where it is necessary to analyze the genetic origin of an individual for health reasons, including when their life is endangered. It is emphasized that life together with health are rights that are more important than the donor's privacy, when balancing the fundamental rights.[687]

A law on reproduction is needed not only to regulate the application of reproductive medical techniques but, above all, to discipline the relationships that are in one way or another linked to them, as well as to provide elements that can guide the interpretation of situations arising from this medical practice. The drafting of a law is necessary to preserve the stability of legal relations as well as family and social harmony. The future law should create a policy that reconciles public freedoms and fundamental rights with the rights of future generations, preventing discriminatory practices and commerce.[688]

The parties involved in the contractual relationship of AHR will be, on the one hand, the doctor as a specialist in human reproduction, and on the other, a person who needs the help of ART.[689] The medical professional must be qualified to apply the reproductive techniques, as well as authorized and registered for the activity with the National Registry of Germ Cells and Tissues Banks (*Cadastro Nacional de Bancos de Células e Tecidos Germinativos*), linked to the National System of Embryo Production.[690] The application of reproductive techniques will depend on informed consent and, where appropriate, consent of the couple. The documents must be filed together with all information regarding the procedure performed.

---

[686] PETTERLE, *supra n. 526*, at 90-91.
[687] *Id*, at 91.
[688] BRAUNER, Claudia (2005). *Le débat bioétique et juridique sur la reproducion médicalement asiste: un étude sur l'expérience canadienne e brésilienne.* In: Interfaces Brasil/Canadá. Revista da ABECAN - Associação Brasileira de Estudos Canadenses, n. 5, 2005, p. 183.
[689] NERY, Rosa Maria de Andrade. *Noções Preliminares de Direito Civil*. São Paulo: Editora Revista dos Tribunais, 2002, p. 120.
[690] Agência Nacional de Vigilância Sanitária – ANVISA (2008). *Resolução RDC n. 29/2008.* Published in the Federal Law Gazette (D.O.U.) n. 90, on May 13th, 2008.

The law regulating AHR should also establish rules that limit selection and intervention in embryos, with the aim of avoiding abuses arising from the manipulation of human life or selfish, sexist and racist desires. As it happens in Germany PGD is allowed to prevent genetically transmitted diseases, but not to choose certain genetic traits, such as, for example, the sex of the baby.[691]

The monitoring of compliance with the provisions established by law is an indispensable condition for ensuring that legal provisions do not become dead letters, or that they are not applied only to public institutions. Although the Brazilian national health system (*Sistema Único de Saúde* - SUS) has been offering AHR treatments since 2012,[692] they are still rarely given, and it can be said that the practice of AHR is almost exclusively developed in private centers.

Additionally, clinics should comply with the limits imposed by legislation since, for the time being, AHR centers are regulated by rules established by the doctors themselves, in this case the Federal Council of Medicine (CFM),[693] which ends up conferring them a certain freedom of action. Thus, the supervision of the procedures would be a point to be dealt with in a specific law on human reproduction.

Another ambit of protection understood as necessary in the regulation of the AHR is the administrative one. Even though there is a resolution[694] that gives the Brazilian Health Regulatory Agency (*Agência Nacional de Vigilância Sanitária* - ANVISA) the competence to control, qualify and define procedures related to AHR clinics, it is believed that better results will be achieved if the administrative control is based on a specific law.

ANVISA also created the germ cell and tissue banks (*Bancos de Células e Tecidos Germinativos* - BCTGs), which were established by Resolution n. 29/2008.[695] Subsequently, the procedures for the national registration of BCTGs and information on the production of unused (surplus) human embryos produced by *in vitro* fertilization techniques were updated by resolution n. 23/2011.[696] The great initiative of Resolution n. 29, however, was to establish the National Embryo Production System (*Sistema Nacional*

---

[691] WÜLFINGEN, *supra n. 567*, at 61.
[692] Ministério da Saúde (2012). *Portaria n. 3.149 de28.12.2012*. Brasília, 2012.
[693] Conselho Federal de Medicina – CFM (2015), *supra n*. 398.
[694] Agência Nacional de Vigilância Sanitária – ANVISA (2011), *supra n*. 15.
[695] Agência Nacional de Vigilância Sanitária – ANVISA (2008), *supra n.* 690.
[696] Agência Nacional de Vigilância Sanitária – ANVISA (2011), *supra n*. 15.

de Produção de Embriões - SisEmbrio), whose creation and maintenance are the responsibility of ANVISA. As a regulatory agency, ANVISA has the power to regulate, organize, and control entities that act in the area of AHR, as well as to punish if they do not comply with what is established in its resolutions.[697]

Thus public authorities in Brazil have taken initiatives to regulate the entire system for the production and use of human embryos, and to unify at a national level all information on the results obtained in reproductive techniques, especially on the existence and number of surplus embryos. In view of these initiatives, one might say that the outlines for an administrative protection system for AHR are already in place and only need to be effectively implemented, which should be done by means of a specific law.

It is a fact that, with the possibilities offered by ART, Brazilian law is still obsolete and without a specific law that regulates the subject and disciplines the relationships between those involved. Therefore, it is precisely in this line of thought that the present work has presented reasons to develop such a law. The protection of the legal situations involved in AHR with donor sperm must, above all, act to prevent harmful situations with the elaboration of a protective system capable of avoiding conflicts and insecurities.

5.4 FINAL REMARKS

This study's analyses of German and Brazilian laws and cases regarding AHR have helped to illustrate the main issues and discussions that arise from the use of these techniques. Germany appears to be ahead on the definition and regulation of ART, not only because of its experience with court cases on the subject, but also because a law that deals with AHR performed with sperm donation has already come into force, while in Brazil there is only a non-statutory resolution of the CFM.

The study of the current German scenario promotes reflection on the subject, and helps to strengthen arguments in favor of specific legislation about AHR and sperm donation in Brazil. As stated in this chapter, when Brazilian judges cannot find arguments for their decisions in the national laws, they tend to use a comparative approach and look

---

[697] *Id.*

at decisions taken in other countries, especially European countries, using both the decisions and understandings likely to be used in an analogous way.

Currently, the Law Project number 1.184/2003 is under analysis in Brazil, but its last discussion occurred in 2015,[698] which shows that it may take a long time for a law to be approved in Brazil. Factors such as the workload of the Federal Legislative Branch, analysis of the project by specific commissions, the number of projects to be voted on, and the interest of the people involved in the legislative process may affect the approval of a Brazilian law.[699] Also, since the CFM has already issued guidelines to try to regulate some issues involving AHR, the subject ends up not being prioritized by the National Congress and not receiving enough attention.

The lack of legislation on ART can cause some damage to the couples or women who need to use AHR to be able to conceive a baby. The quick development of ART and their consequent effects call for the regulation of the subject, especially concerning the right of the children to know their origins and the anonymity of the donor. In this sense, it is understood that future laws regulating ART must be based on the protection of human dignity and observe the fundamental rights of the person.[700] Thus, it is necessary to address the issue of the regulation of ART with the constitutional principles guaranteed by the federal constitution.

As seen in the previous chapters, the knowledge of origins has an important role in the development of a person's own identity and personality. Therefore, a law on AHR must consider and protect not only the rights of the child, but also his or her interests and well-being. In this sense, discussions on the elaboration of a law should include topics such as whether or not to allow the child to know the identity of the donor; whether this situation will allow the creation of legal bonds between them; and whether there are cases where donor anonymity should prevail.

The research conducted in this chapter showed that a law that regulates ART in Brazil is urgently needed, not only to regulate the use of AHR procedures but also to regulate the relationships that are connected to them, in order to maintain the stability of

---

[698] Senado Federal, *supra n.* 673.
[699] HIROI, *supra n*. 653.
[700] BARBOZA (2003), *supra n.488*, at 59.

legal relations as well as family and social harmony. It would also provide elements to guide the interpretation of current and future situations concerning ART.[701]

The Superior Court – STJ in Brazil already stated that given the lack of legislation on ART, Resolution 2.121/2015 from the CFM should be adapted depending on the case.[702] This statement does not question the legitimacy of the CFM Resolution, but it recognizes that a law that regulates the subject is also needed.

Since progress in the area of ART cannot easily be stopped, Brazil needs to deal with the questions of ART and regulate it in order to avoid abuses and put limits on practices that may endanger the rights of those involved.

[701] BRAUNER (2005), *supra n.688*, p. 183.
[702] Superior Tribunal de Justiça - STJ, *supra n. 660.*

6. CONCLUSION

The techniques of AHR have been evolving over time, and different problems are emerging with this evolution. The desire for children finds support through the evolution of medicine and technology, making the dream of having children realistic in cases where before it would have seemed impossible. Every advance in the area of AHR brings new hopes and expectations to all people who, for various reasons, cannot realise the dream of motherhood or parenthood through the natural process of procreation. Thus it is possible to say that the development and popularization of the ART is an answer to the demands of society for solutions to fight infertility.

Throughout human history, fertility and sterility have always been a source of concern.[703] It is believed that the Greeks started doing embryological researches already in the 5th century B.C.[704] However, it was only in the seventeenth century that male sterility was accepted, so that researchers started searching for methods and techniques to solve the problem.[705] It took a while before the first insemination with donor sperm was performed. This happened only in 1884[706] and, despite discoveries in the field of reproduction, the improvement of techniques took also some time. The 1970s were particularly significant for the evolution of AHR, because researchers started manipulating gametes and embryos, which led to the development of different types of AHR techniques

[703] LEITE, *supra n. 04*, at 302.
[704] HARRÉ, *supra n. 24*, at 32.
[705] FERNANDES, *supra n. 05*, at 35.
[706] ROSSI, *supra n. 06*, at 133.

and to the birth of the first baby conceived by *in vitro* artificial insemination.[707] Nowadays one of the most commonly used AHR techniques is artificial insemination, since it is a simpler and cheaper procedure compared to the others.[708]

Reproduction technologies are of great help to people who cannot conceive a child, and various factors may lead individuals to search for the help of ART, including single women, women in same sex relationships, women whose male partners have fertility problems or have been diagnosed with diseases that their offspring could inherit.[709] These are strong reasons for concluding that the access to ART should be guaranteed to all people, while always observing the rights and interests of those involved.

The use of donor sperm in AHR may lead to various legal problems concerning the parties involved. Most legal systems do not clearly specify whether the individual conceived with the help of donor sperm may seek to find out his or her origins, or, if the donor may have the secrecy of his anonymity broken because of a child's wish to know his or her origins. Thus, the present study compared the approaches taken in Brazil and Germany regarding the rights of the child conceived with donated sperm and the sperm donor.

The study has aimed to demonstrate the significance and relevance of the right to know one's genetic origins. It suggests that we need to reflect on both the child's right to know its origins and the donor's right to anonymity, as well as on other rights related to the subject.

First, the historical evolution of AHR, the changes that have occurred since its inception, as well as the problems that have resulted from its evolution and use were presented. It was possible to demonstrate the evolution of its concept and the progress of the different techniques of AHR. This chapter also analysed the causes and consequences of infertility and the motives that lead couples to opt for AHR procedures.

The third chapter established a conceptual framework for the investigation by undertaking a legal assessment of the subject in Europe, especially in Germany. The

---

[707] MACIONIS and PLUMMER, *supra n. 07*, at 755.
[708] COLEMAN, *supra n. 109*, at 23.
[709] RICHARDS, *supra n. 164*, at 32-33.

chapter sought to explain the child's right to know his or her origins and the donor's right to anonymity, as well as other rights that were considered relevant and related to these two rights. The right of children to know their origins is often seen as an implied right, since there are hardly any explicit rules stated in the constitutions of countries that children have this right.[710] The chapter went on to discuss other laws and rights that give indications that children cannot be denied the access to information regarding their origins.[711]

The fourth chapter discussed legal issues arising from AHR in Brazil, as well as the fundamental rights and constitutional principles that can support the access to reproductive technologies. Controversies over the anonymity of the donor and the right of children to know their origins still cause divergence in discussions about AHR in Brazil. The fact that there is still no specific law that regulates ART in Brazil means that decisions regarding AHR are guided by the rules of a non-statutory Resolution of the CFM, and with the help of fundamental rights and constitutional principles. It was seen that fundamental rights and constitutional principles can also help justify access to reproductive technologies in Brazil, and give arguments in the discussion between the anonymity of the donor and the right of the child to know his or her origins.

Finally, after looking at the German and Brazilian contexts with their peculiarities and problems, the fifth chapter presented laws and cases in Germany and Brazil. The study of the current German situation supported the study's main reflections on the issues of AHR, and gave interesting inputs to strengthen arguments for the need of a law regarding AHR in Brazil. It was seen that Germany is already ahead on the definition and regulation of AHR, not only because of its experience with court cases on the subject, but also because a law that deals with AHR done with sperm donation has already come into force. Based on these accounts of the German and Brazilian contexts, it was argued that Brazil needs specific legislation about AHR and sperm donation.

This research has shown that whether one considers the point of view of the rights of the child that will be born or those of the donor, these issues cannot be analyzed without the critical analysis of the law, in view of the consequences that the donor's anonymity

---

[710] SARMIENTO, *supra n.* 217, at 1267.
[711] AMORÓS, *supra n.* 218, at 5-6.

can have for both sides. The current situation in Brazil is that individuals conceived by AHR with donor sperm still have no guarantee that they can discover their origins, since this right is not explicitly enshrined in the Brazilian Constitution. This study has argued, however, that its recognition can be deduced, at least implicitly, from the constitutional system, especially from the rights to life, personal identity and human dignity, as well as from the sexual and reproductive rights.[712]

The importance of the theme and the absence of a specific law in Brazil make it necessary to discuss which measures have been taken on the question, since a personality right involving the protection of human dignity cannot continue without the observance of the Law, and let the matter be regulated only by non-statutory resolutions. This is why the present study presented the German context in order to support the analysis of the Brazilian scenario. In Brazil, when judges cannot find arguments in the Brazilian laws or other non-statutory regulations, they often look at decisions taken in other countries, especially in the European courts.

Although the Brazilian judiciary recognizes the legal problems related to the use of donor sperm, there is still no specific law to regulate aspects of AHR in Brazil. The only rules in force are those related to the Federal Medical Council and the Health Regulatory Agency, which deal with ethical matters and the control and definition of procedures related to AHR clinics and tissue banks. They do not offer answers to the main issues that may arise in human legal relations, especially, regarding the right of the child to know his or her origins. Some legal proposals that aim to regulating the use of AHR techniques were already presented, and currently the Law Project number 1.184/2003 is under analysis. But its last discussion occurred in 2015,[713] which shows that it may take a long time for a law to be approved in Brazil. Besides all the other factors that can delay the approval of a law, the fact that the CFM has already issued guidelines to try to regulate some issues involving AHR means that the subject is not prioritized by the National Congress and does not receive enough attention.

The arguments for the need of a law do not seek to impede scientific progress in AHR. The aim is to approve a law that defines principles that will guide the practice of

[712] PETTERLE, *supra n. 526*, at 89.
[713] Senado Federal, *supra n.* 673.

AHR in Brazil, but that will also establish rules to stop any violations of human rights. The right to know one's origins must be guaranteed for biological and moral reasons, in order to prevent diseases and avoid incestuous unions, as well as for psychosocial reasons, in order to ensure the healthy psychological development of the child. It should be emphasized that the possibility of knowing genetic origins should never imply parental or financial obligations on the donor toward the person born from his sperm donation.

The quick pace of change of ART and their consequent effects call for the regulation of the subject, especially regarding the right of the children to know their origins and the anonymity of the donor. Discussions about the elaboration of a law should include topics such as whether or not to allow the child to know the identity of the donor; if there are cases where donor anonymity should be protected; and if knowledge of origins will allow for the creation of legal bonds between the child and the donor. In other words, a law that regulates AHR needs to be based on the protection of human dignity and observe the fundamental rights of the person,[714] making it necessary to address the issue of regulation of ART with the constitutional principles guaranteed by Brazil's Federal Constitution.

The need for a law on AHR is justified not only to regulate the application of reproductive medical techniques, but also to regulate the relationships between those involved, as well as to provide elements that can guide the interpretation of current and future situations that may arise from these medical procedures. As already stated, Germany showed to be ahead on the discussions of the subject. Cases concerning the right to know one's origins are not new in the German legal context, since courts have been dealing with them since 1988. The Sperm Donor Registry Act of 2018 (SaRegG) is a major step forward on the regulation of AHR and sperm donation in Germany, and can contribute to the study of the subject in Brazil.

Finally, considering the scientific possibility of using the various forms of AHR and the frequent use of AHR techniques in Brazilian society, it is understood that there is an urgent need for a law that addresses all aspects of AHR, imposes rules based on the principle of the human dignity, and indicates the limits of the ART. But it is also understood that this law should contain flexible rules so as not to hinder the development of science,

[714] BARBOZA (2003), *supra n.488*, at 59.

and so that can be applied to the future situations generated by techniques not yet developed. The new law must be able to respond to scientific developments in the area of AHR. Thus, special norms must be recognized in order to deal with equally special facts and repercussions, such as the case of AHR.

7. BIBLIOGRAPHY

AGARWAL, Ashok *et al*. Artificial Insemination. In: FALCONE, Tommaso and HURD, William W. *Clinical reproductive medicine and sugery*. Philadelphia: Elsevier, 2007.

ALBORNOZ, Eduardo Osuna Carrillo. *Técnicas de reproducción humana asistida. Comentários a la Ley 14/2006 de 26 de mayo, sobre Técnicas de Reproducción Humana Asistida*. Pamplona: Aranzadi, 2007.

ALBUQUERQUE, Roberto Chacon de. *Por uma ética para a engenharia genética*. In: Revista de Direitos Difuso, São Paulo, jun. 2001. v. 12.

ALDROVANDI, Andréa *et al*. *A reprodução humana assistida e as relações de parentesco*. Revista Jurídica Consulex, Brasília, ano I, n. 7, 31 out. 2002.

ALLAN, Sonia. *Donor conception and the search for information: from secrecy and anonymity to openness*. New York: Routledge, 2017.

ALMELING, Rene. *Selling Genes, Selling Gender: Egg Agencies, Sperm Banks, and the Medical Market in Genetic Material*. In: American Sociological Review, 2007, vol. 72.

ALVES, Cleber Francisco. *O princípio constitucional da dignidade da pessoa humana*. Rio de Janeiro: Renovar, 2001.

AMORÓS, Esther Farnós. *Donor anonymity, or the right to know one's origins?* In: Catalan Social Sciences Review, 5, Secció de Filosofia i Ciències Socials, IEC, Barcelona, 2015.

ANDORNO, Roberto. *Human dignity and human rights as a common ground for a global bioethics*. In: HAVE, HENK A. M. J. and GORDIJN, Bert. Handbook of Global Bioethics, Dordrecht: Springer, 2014.

ARORA, Puneet. *Right to Access Reproductive Technologies – A Right or A Wrong?* In: Journal of Forensic Medicine and Legal Affair, vol. 2 (1), 2017.

ASCENSÃO, José de Oliveira. *A lei n. 32/06, Sobre Procriação MedicamenteAssistida*. In: Revista da Ordem dos Advogados, ano 67, III, Lisboa, 2007.

ATADJANOV, Rustam. *Humanness as a Protected Legal Interest of Crimes Against Humanity. Conceptual and Normative Aspects*. Berlin: Springer, 2019.

AUER, Friedger von. *Das Gewebegesetz – Hintergründe und Konsequenzen*. In: Transfusion Medicine and Hemotherapy, vol. 35, n. 6, 2008.

AWAD, Fahd. *O princípio constitucional da dignidade da pessoa humana*. In: Justiça do Direito, vol. 20, n. 1, Passo Fundo.

BARACHO, José Alfredo de Oliveira. *A identidade genética do ser humano*. In: PIOVESAN, Flávia *et al*. Coleção Doutrinas essenciais de direitos humanos. São Paulo: Revista dos Tribunais, 2011.

BARAK, Aharon. *Human dignity: the constitutional value and the constitutional right*. Cambridge: Cambridge University Press, 2015.

BARBOSA, Camilo de Lelis Colani. *Aspectos jurídicos da doação de sêmen*. In: Seara Jurídica. Revista eletrônica de Direito. Vol.1, n. 9. Jan. Jun. 2013.

BARBOZA, Heloisa Helena (1993). *A filiação em face da inseminação artificial e da fertilização "in vitro"*. Rio de Janeiro: Renovar, 1993.

BARBOZA, Heloisa Helena (2003). *Princípios do Biodireito*. In: BARBOZA *et al*. Novos Temas de Biodireito e Bioética. Rio de Janeiro: Renovar, 2003.

BARROSO, Carmen. *From reproductive to sexual rights*. In: AGGLETON *et al*. Routledge Handbook of Sexuality, Health and Rights. New York, Routledge, 2010.

BENKO, Radoslav. *The Impact of the Charter of Fundamental Rights of the European Union on the Constitutional Architecture of the European Union in the Light of Melloni case*. Pravnik. Vol. 154, Issue 8, 2015.

BENÖHR-LAQUEUR, Susanne. *Fighting in the legal grey area: an analysis of the German Federal Court of Justice in case preimplantation genetic diagnosis.* In: Poiesis & Praxis. International Journal of Ethics of Science and Technology Assessment. Vol. 8. Issue 3-8, 2011.

BERLINGUER, Giovanni. *Everyday bioethics: Reflections on Bioethical Choices in Daily Life.* Amityville: Baywood Publishing Company INC, 2003.

BERRY, Janet J. *Life after Death: Preservation of the Immortal Seed*. Reno: University of Nevada. 1997.

BHAT, Ishwara. *Idea and Methods of Legal Research*. 1st ed. Oxford: Oxford University Press, 2019.

BLAUWHOFF, Richard J. *Tracing down the historical development of the legal concept of the right to know one's origins Has 'to know or not to know' ever been the legal question?* In: Utrecht Law review. Vol. 4, Issue 2, June 2008.

BLYTH, Eric. *Discovering the 'facts of life' following anonymous donor insemination.* In: International Journal of Law, Policy and the Family, v. 26, n. 2, 2012.

BOGDANDY, Armin von. *Constitutional principles for Europe*. In: RIEDEL, Eibe *et al*. Recent trend in German and European constitutional law. Berlin, Springer, 2006.

BORGES, Gilza Mariane Coutinho. *A reprodução humana assistida e o biodireito*. In: Revista do Curso de Direito da Faculdade Campo Limpo Paulista, Vol. 7, 2009.

BRÄHLER, Christa. *Familie, Kinderwunsch, Unfruchtbarkeit: Motivationen und Behandlungsverläufe bei künstlicher Befruchtung*. Darmstadt: Westdeustche Verlage, 1990.

BRÄNNMARK, Johan. *Respect for Persons in Bioethics: Towards a Human Rights-Based Account*. In: Human Rights Review, n. 18, 2017.

BRAUNER, Maria Cláudia (2003). *Direito, Sexualidade e Reprodução Humana*. Rio de Janeiro: Renovar, 2003.

BRAUNER, Claudia (2005). *Le débat bioétique et juridique sur la reproducion médicalement asiste: un étude sur l'expérience canadienne e brésilienne.* In: Interfaces Brasil/Canadá. Revista da ABECAN - Associação Brasileira de Estudos Canadenses, n. 5, 2005.

BRAUNER, Maria Cláudia Crespo *et al*. *Reflexões éticas e jurídicas sobre as técnicas de reprodução humana assistida*. In: Revista Trabalho e Meio Ambiente. v. 2, n. 2/3, Caxias do Sul: Educs, 2004.

BRYDE, Brun-Otto. *Fundamental rights as guidelines and inspiration: German constitutionalism in international perspective.* In: Wisconsin International Law Journal. Vol 25, Issue 2, 2005.

BUCHANAN, Allen *et al. From Chance to Choice: Genetics and Justice.* Cambridge: Cambridge University Press, 2000.

BUMKE, Christian and Voßkuhle, Andreas. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University press, 2010.

BUSARDO, Francesco Paolo *et al*. *The Evolution of Legislation in the Field of Medically Assisted Reproduction and Embryo Stem Cell Research in European Union Members*. In: BioMed Research International, v. 2014, July 2014.

BYRD, Sharon Byrd and HRUSCHKA, Joachim Hruschka. *Kant's doctrine of right: A commentary*. Cambridge: Cambridge University Press, 2010.

CALLAHAN, Sidney. *The ethical challenges of the new reproductive technologies*. In: MORRISON, Eileen. Health Care Ethics: Critical Issues for the 21st Century. 2nd ed. Sudbury: Jones and Bartlett Publishers, 2009.

CAMARGO, Lucas Couceiro Ferreira de. Responsabilidade Civil do doador de material genético na inseminação artificial heteróloga. (Doctoral thesis) Tese apresentada à Universidade Metodista de Piracicaba. 2008.

CESARINO, Letícia *et al*. *The embryo research debate in Brazil: From the National Congress to the Federal Supreme Court.* In: Social Studies of Science. Vol. 41, n. 2, 2010.

COITINHO, Viviane Teixeira *et al*. *Da proteção à intimidade do doador de material genético ao direito à identidade genética da criança gerada através de reprodução assistida heteróloga*. In: XI Seminário Internacional de Demandas Sociais e Políticas Públicas na Sociedade Contemporânea: 2014.

CHEDID, Silvana*. Infertilidade*. São Paulo: Contexto, 1998.

CHURCH, Joan *et al*. *Human rights from a comparative and international perspective*. Pretoria: University of South Africa, 2007.

CLARK, Brigitte. *A balancing act? The rights of donor-conceived children to know their biological origins.* In: Georgia Journal of International and Comparative Law. Vol. 40. N. 3, 2012.

COHEN, Glenn *et al*. *Sperm donor anonymity and compensation: an experiment with American sperm donor*. In: Journal of Law and the Biosciences, Oxford University Press, n. 3, 2016.

COLEMAN, Carl H. *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*. 50 UCLA Law Review, vol. 17, 2002-2003.

COLLIER, Roger. *Disclosing the identity of sperm donors*. In: Canadian Medical Association Journal, Vol 182 (3), 2010.

CORLEY, Stephanie O. and MEHLMAN, Maxwell. *Sperm donation: legal aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A comprehensive guide. New York: Springer, 2014.

CORRÊA, Marilena Villela. *Novas tecnologias reprodutivas: limites da biologia ou biologia sem limites?* Rio de Janeiro: Eduaerj, 2001.

CÔRREA, Marilena and LOYOLA, Maria Andréa. *Reprodução e Bioética. A regulação da reprodução assistida no Brasil.* Caderno CRH/UFBA. V. 18, n. 43, 2005.

COULANGES, Fustel de. *The ancient city: a study on the religion, laws and institutions of Greece and Rome.* Kitchener-Canada: Batoche Books, 2001.

DANIELS, Cynthia R. *et al*. *Procreative compounds: popular eugenics, artificial insemination and the rise of the american sperm banking industry.* In: Journal of Social History, Vol. 38, n. 1, Fall 2004.

DANIELS, Cynthia. *Marketing masculinity: bioethics and sperm banking practices in the United States*. In: FREEMAN, Michael. Law and bioethics. Oxford: Oxford University Press; 2008.
DIAS, Rodrigo Bernardes. *Privacidade Genética*. São Paulo: SRS Editora, 2008.

DICKENS, Bernard. *The challenges of reproductive and sexual rights*. In: American Journal of Public Health, Oct. 2008, n. 98.

DIMOULIS, Dimitri *et al*. *Teoria Geral dos Direitos Fundamentais*. São Paulo: RT, 2007.

DINIS, Joaquim José de Souza. *Filiação Resultante da Fecundação Artificial Humana*, In: TEIXEIRA, Sálvio Figueiredo. Direito de Família e do Menor. Belo Horizonte: ed. Del Rey, 2 ed., 1992.

DINIZ, Maria Helena. *Curso de Direito Civil brasileiro*. São Paulo: Saraiva, 2008. v. 3.

DUBEY, Anil *et al*. *The influence of sperm morphology on preimplantation genetic diagnosis cycles outcome*. In: Fertility and Sterility. June, 2008, Vol 89, Issue 6.

DÜRIG, Günter, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus GG Art 1 Abs 1 iVm Art 19 Abs 2*, AöR, 81, 1956.

DUTTGE, Gunnar *et al*. *Heterologe Insemination*. Aktuelle Lage und Reformbedarf aus interdisziplinärer Perspektive. Universiätsverlag Göttigen, 2010.

EBERLE, Edward (1997). *Human Dignity, Privacy, and Personality in German and American Constitutional Law*. In: Utah Law Review, 1997.

EBERLE, Edward (2008). *The German idea of freedom*. In: Oregon Review of International Law. Vol. 10, n. 01, 2008.

EBERLE, Edward (2012). *Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview.* In: Liverpool Law Rev, n. 33, 2012.

ENDERS, Christoph (1997). *Die Menschenwürde in der Verfassungsordnung: Zur Dogmatik des Art 1 GG*. Tübingen, Mohr Siebeck 1997.

ENDERS, Christoph (2010). *The Right to have Rights: The concept of human dignity in German Basic Law*. Leipzig, 2010.

EPPING, Volker. *Grundrechte*. 7. ed. Berlin: Springer, 2017.

ETTINGER, Robert C. W. *The Prospect of Immortality*. Detroit: Ria University Press, 2005.

FACHIN, Luiz Edson. *Da paternidade: relação biológica e afetiva.* Belo Horizonte: Ed. Del Rey, 1996.

FAGUNDES JÚNIOR, José Cabral *et al*. *Limites da ciência e o respeito à dignidade humana*. In: SANTOS, Maria Celeste Cordeiro Leite (org.). Biodireito: ciência da vida, os novos desafios. São Paulo: Revista dos Tribunais, 2001.

FARIAS, Cristiano Chaves de. *Temas atuais de direito e processo de família***.** Rio de Janeiro: Lumen Juris**,** 2004.

FELDSCHUH, Joseph *et al. Successful sperm storage for 28*. In: Fertility and Sterility Vol. 84, N. 4, October 2005.

FEHRING, Richard J. *Under the Microscope: A Brief History of Natural Family Planning*. In: Natural Family Planning Current Medical Research, vol. 25, n. 3 and 4, 2016, p. 14.

FERNANDES, Silvia da Cunha. *As Técnicas de Reprodução Humana Assistida e a Necessidade de sua Regulamentação Jurídica.* Rio de Janeiro: Renovar, 2005.

FERREIRA, Nuno. *Fundamental rigths and private law in Europe. The case of tort law and children*. London: Routledge, 2011.

FLETCHER, Joseph F. *Morals and Medicine: the moral problems of the patient's right to know the truth, contraception, artificial insemination, sterilization, euthanasia*. Princeton University Press, 1979.

FREEDMAN, L. P and ISAACS, S.L. Human Rights and Reproductive Choice. In: Studies in Family Planning, v. 24, n. 2, 1993.

FUJITA, Jorge Shiguemitsu Fujita. *Filiação*. São Paulo: Atlas, 2009.

GAGLIANO, Pablo Stolze *et al*. *Novo curso de Direito Civil: parte geral*. São Paulo: Saraiva, 8 ed. 2006.

GAMA, Guilherme Calmon Nogueira da. *Filiação e reprodução assistida: introdução ao tema sob a perspectiva do direito comparado*. In: Revista do Tribunais RT, São Paulom V. 89, n. 776, June 2000.

GIORGI, Maiara. *Disrespect to human dignity: dialogues between law, literature and culture*. In: Revista Redes – UNILASALLE, Vol. 5, n. 2, 2017.

GODOY, José Joaquín Ugarte. *El Derecho de la Vida- el derecho a la vida: Bioética y Derecho*. Santiago: Editorial Jurídica de Chile, 2006.

GOMES, Orlando. *Contratos*. Rio de Janeiro: ed. Forense, 26 ed., 2008.

GONÇALVES, Carlos Roberto. Responsabilidade Civil. São Paulo: Saraiva, 2003.

GONG, Dan *et al. An overview on ethical issues about sperm donation.* In: Asian Journal of Andrology, Vol 11 (6), nov. 2009.

GRUSKIN, Sofia (2000). *The Conceptual and Pratical Implications of Reproductive and Sexual Rights: How Far Have We Come?* In: Health and Human Rights, vol. 4, n. 2, 2000.

GRUSKIN, Sofia (2008). *Reproductive and Sexual Rights: Do Words Matter?* In: American Journal of Public Health. Vol. 98, n. 10, Oct. 2008.

HÄBERLE, Peter (2006). *Role and impact of constitutional courts in a comparative perspective*. In: STÖBENER, Patricia *et al*. ECLN Conference Berlin 2005: the future of the European judicial system in a comparative perspective. Bade-Baden: Nomos Verlag, 2006.

HÄBERLE, Peter (2007). *A dignidade humana e a democracia pluralista*. In: Ingo Wolfgang (org.). Direitos fundamentais, informática e comunicação. Porto Alegre: Livraria do Advogado, 2007.

HÄBERLE, Peter (2018). *Human Dignity as foundation of the Constitutional State and the political community*. Translated by Katrin von Gierke. In: KOTZUR, Markus (ed). Peter Häberle on constitutional theory. Constitution as Culture and the Open Society of Constitutional interpreters. Nomos, 2018.

HALL, Stuart. *A identidade cultural nas pós modernidade*. 14. ed. Rio de Janeiro: DP&A, 2006.

HALLEBEEK, Jan. *Contracts for a third-party beneficiary: A brief sketch from the Corpus iuris to present-day civil law*. In: Fundamina. 2008 ; Vol. 13, n. 2.

HAMMERSCHMIDT, Denise *et al*. *Direito à intimidade genética: um contributo ao estudo dos direitos da personalidade*. In: Revista Jurídica Cesumar, v. 6, n. 1, 2006.

HARRÉ, Rom. *Great Scientific Experiments: Twenty experiments that changed our view of the world.* Mineola, New York: Dover Publications, Inc, 2002.

HIROI, Taeko *et al*. *Meaning of time: legislative duration in the brazilian congress*. n. 228, Brasília: Ipea, nov. 2017.

HODGSON, Douglas. *The international legal protection of the child's right to a legal identity and the problem of statelessness*. In: International Journal of Law and the Family, Vol. 7, 1993.

HOLTHE, Leo Van. *Direito Constitucional***.** 5 ed. Salvador: Podium, 2009.

HOPPE, Nils. *Bioequity – Property and the human body*. New York: Routledge, 2009.

HUI, Edwin. *A savior child conceived by PGD/HLA: medical and ethical aspects*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011.

INHORN, Marcia. *Right to assisted reproductive technology: Overcoming infertility in low-resource countries*. In: International Journal of Gynecology and Obstetrics, n. 106, 2009.

ISHIDA, Valter Kenji. *Estatuto da Criança e do Adolescente: doutrina e jurisprudência*. 10 ed. São Paulo: Atlas, 2009.

JAISHANKAR, K. *et al. Manusmriti: A Critique of the Criminal Justice Tenets in the Ancient Hindu Code*- In: *ERCES Online Q. Rev.* n. 3, 2004.

JANKOWIAK, Tim. *Immanuel Kant*. In: Encyclopedia of Philosophy, ISSN 2161-0002, available at http://www.iep.utm.edu/kantview/.

JOHNS, Rebecca. *Abolishing Anonymity: A Rights-Based Approach to Evaluating Anonymous Sperm Donations.* In: 20 UCLA Women's Law Journal, 2013.

KANT, Imannuel. *Grounding for the metaphysics of morals*. 3. ed. Indianapolis, Cambridge: Hackett Publishing Company, 1993.

KLEIN, Laura and WAPLER, Friederike. *Reproduktive Gesundheit und Rechte*. In: Aus Politik und Zeitgeschichte. Zeitschrift der Bundeszentrale für politishe Bildung (bpb), n. 20/2019.

KLONOFF-COHEN, Hillary, CHU, Elaine, *et al. A prospective study of stress among women undergoing in vitro fertilization or gamete intrafallopian transfer*. In: Fertility and Sterility*,* Vol. 76, No. 4, October 2001.

KONDER, Carlos Nelson de Paula. *The range of the right to personal identity in brazilian civil law*. In: Pensar, v. 23, n. 1, Fortaleza, 2018.

KRÜGER, Matthias. *The prohibition of post-mortem-fertilization, legal situation in Germany and European Convention on human rights.* In: Revue internationale de droit pénal, vol. 82, n. 1, 2011.

KULIEV, Anver. *Preimplantatiopn genetic diganosis in assisted reproduction: medical, ethical, and legal aspects*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011.

KURTZ-COSTES, Beth. *Families as educational settings*. In: International Encyclopedia of the Social & Behavioral Sciences. 2nd ed. Philadephia: Elsevier, 2015.

LAMB, Michael and LERNER, Richard. *Handbook of child psychology and developmental science*. Vol 3, 7th ed. Hoboken: John Wiley & Sons Inc, 2015.

LEITE, Eduardo de Oliveira. *Procriações artificiais e o direito (aspectos médicos, religiosos, psicológicos, éticos e jurídicos).* São Paulo: Revista dos Tribunais, 1995.

LEMBCKE, Oliver. *Human Dignity – a Constituent and Constitutional Principle. Some Perspectives of a German Discourse*. Archiv für Rechts - und Sozialphilosophie (ARSP), Beiheft 137, 2013.

LENK, Christian *et al*. *Biobanks and tissue research*. Vol. 8. New York:Springer, 2011.

LIMA, George Marmelstein. *Curso de Direitos Fundamentais*. São Paulo: Atlas, 2009.

LÔBO. Paulo Luiz Neto (2004). *Direito ao estado de filiação e direito à origem genética: uma distinção necessária*. In: Revista CEJ, Brasília, Issue 27, out./dez. 2004.

LÔBO, Paulo Luiz Neto (2007). *Direito ao estado de filiação e direito à origem genética.* In: Instituições de Direito Civil, vol. V, 11 ed., Forense, 2007.

LOGATTO, Anthony F. *Artificial Insemination: I - Legal Aspects*. In: The Catholic Lawyer: Vol. 1: No. 3, Article 2, July 1955.

LOPES, Joaquim Roberto Costa. *Tratado de Ginecologia: 63***.** Aspectos Éticos da Inseminação Artificial. Rio de Janeiro: Revinter, 2000, vol. 1.

LUNA, Naara. *Provetas e clones: uma antropologia das novas tecnologias reprodutivas*. Rio de Janeiro: FIOCRUZ, 2007.

MACHADO, Maria Helena (2008). *Reprodução Humana Assistida: Aspectos Éticos e Jurídicos*. Curitiba: Juruá, 2008.

MACHADO, Maria Helena (2011). *Reprodução Humana Assistida: Aspectos Éticos e Jurídicos.* Curitiba: Editora Juruá, 2011.

MACIONIS, John J. and PLUMMER, Ken. *Sociology. A Global Introduction*. 4. ed. England: Pearson Education Limited, 2008.

MADALENO, Rolf. *Repensando o Direito de Família*. Porto Alegre: Livraria do Advogado, 2007.

MAK, Chantal*. Fundamental rights in European contract law. A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherland, Italy and England.* Kluwer Law International: Rotterdam, 2007.

MARGALIT, Yehezkel. *Artificial Insemination from Donor (AID)-From Status to Contract and Back Again.* In: Boston University Journal of Science & Technology Law, n. 69, 2015.

MARSHAL, Jill (2009). *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights*. Leiden: Martinus Nijhoff Publishers, 2009.

MARSHAL, Jill (2014). *Human Rights Law and Personal Identity*. New York: Routledge, 2014.

MARTÍN, Imaculada de Melo. *The ethics of anonymous gamete donation: Is there a right to know one's origins?* In: Hastings Center Report 44, n. 2, 2014.

MATTAR, Laura Davis. *Legal recognition of sexual rights - a comparative analysis with reproductive rights*. In: Sur, Revista Internacional de Direitos Humanos. vol.5, no.8, São Paulo, June 2008.

McCOMBS *et al*. *Right to Identity*. In: University of California, Berkeley School of Law, Law Clinic reports, Nov. 2007.

MIRANDA, Maria Bernadete. *Teoria Geral do Contrato*. In: Revista Virtual Direito Brasil, v. 2, n. 2, 2008.

MONTEIRO, A. Reis. *Ethics of Human Rights*. Springer, 2014.

MORAIS, Maria Celina Bodin de. *O conceito de dignidade humana: substrato axiológico e conteúdo normativo*. In: SARLET, Ingo Wolfgang. Constituição, direitos fundamentais e direito privado. Porto Alegre: Livraria do Advogado, 2003.

NERY, Rosa Maria de Andrade. *Noções Preliminares de Direito Civil*. São Paulo: Editora Revista dos Tribunais, 2002.

NERY JUNIOR, Nelson *et al*. *Código Civil Comentado*. 5th ed. São Paulo: Editora Revista dos Tribunais, 2007.

NOWICKA, Wanda. *Sexual and reproductive rights and the human rights agenda: controversial and contested*. In: Sexual and Reproductive Health Matters, Vol. 10, n. 38, 2011.

OLIVEIRA, Simone Born de. *Da bioética ao direito: Manipulação Genética e Dignidade Humana*. Curitiba: Juruá, 2002.

OLIVELLE, Patrick. *Manu's Code of Law. A critical edition and translation of the Manava-Dharmasastra*. New York: Oxford University Press, 2005.

OLMOS, Paulo Eduardo. *Quando a cegonha não vem: os recursos da medicina moderna para vencer a infertilidade*. São Paulo: Carrenho Editorial. 2003.

OMBELET, Willem and VAN ROBAYS, Johan. *History of human artificial insemination*. In: Facts, Views and Visons in OBGYN. Belgium; Universa Pressa, 2010.

PARFENCHYK *et al*. *Human dignity in a comparative perspective: embryo protection regimes in Italy and Germany*. In: Law, Innovation and Technology, Vol. 9, Issue 1, 2017.

PEERS, Steve *et al*. *The EU Charter of fundamental rights: a commentary*. Bloomsbury Publishing, 2014.

PEREIRA, Dirceu Henrique Mendes. *A história da reprodução humana no Brasil*. Fêmina, vol. 39, n. 2, 2001.

PEREIRA, Rodrigo da Cunha. *Princípios fundamentais norteadores do direito de família*. 2 ed. São Paulo: Saraiva, 2012.

PÉREZ, Alfredo. *General Overview of Natural Family Planning.* Vol. 54, n. 3/4, 1998.

PESSINI, Leo and BARCHIFONTAINE, Christian de Paul de. *Problemas Atuais de Bioética*. São Paulo: Edições Loyola. 2005.

PETERSEN, Niels. *The Legal Status of the Human Embryo in vitro: General Human Rights Instruments.* In: Heidelberg Journal of International Law (HJIL), Vol. 65, n. 2, 2005.

PETTERLE, Selma Rodrigues. *O direito fundamental à identidade genética na Constituição Brasileira*. Porto Alegre: Livraria do Advogado, 2007.

PETOK, William D. *Sperm donation: psychological aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A comprehensive guide. New York: Springer, 2014.

PIECK, Manfred. *A Study of the Significant Aspects of German Contract Law*. In: Annual Survey of International & Comparative Law: Vol. 3: Iss. 1, Article 7, 1996.

PIOVESAN, Flávia. Temas de direitos humanos. 10 ed. São Paulo: Saraiva, 2017.

POTTER, Nelson. *Maxims in Kant's Moral Philosophy.* In: *Philosophia,* Bar-Ilan University, July 1994.

PUNAB, M. *et al*. *Causes of male infertility: a 9-year prospective monocenter study on 1737 patients with reduced total sperm counts.* In: Human Reproduction, Vol. 32, n. 1, Oxford: 2017.

RACHELS, James. *The elements of moral philosophy*. 7. ed. New York: McGraw-Hill, 2012.

RICHARDS, Martin. *The development of governance and regulation of donor conception in the UK*. In: GOLOMBOK *et al*. Regulating Reproductive Donation, Cambridge University Press, 2016.

ROCHA, Renata da. *O Direito à Vida e a Pesquisa com Células-Tronco*. Rio de Janeiro: Elsevier, 2008.

ROSSI, Brooke V. *Donor Insemination.* In: GOLDFARB, James M. Third-Party Reproduction. A comprehensive guide. New York: Springer, 2014.

ROUVROY *et al*. *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*. In: GUTWIRTH , SERGE *et al*. Reinventing data protection? Netherlands: Springer, 2008.

RUCKDESCHEL, Kerstin *et al*. *Unequal Neighbours? A French-German comparison of family size intentions*. In: Comparative Population Studies, Vol. 43, Wiesbaden, 2018.

SÁ, Maria de Fátima Freire de *et al*. *Filiação e Biotecnologia*. Belo Horizonte: Mandamentos, 2005.

SALEM, Tania. *O princípio do Anonimato da inseminação artificial com doador (IAD); Das tensões entre a natureza e a cultura.* In: Physis- Revista de Saúde Coletiva. Vol. 5 . N. 1. 1995.

SARLET, Ingo Wolfgang (2005). *A Eficácia dos Direitos Fundamentais*. 5 ed. Porto Alegre: Livraria do Advogado, 2005, p. 35-36.

SARLET, Ingo Wolfgang (2015). *Dignidade (da pessoa) humana e direitos fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado, 10. ed, 2015.

SARLET, Ingo Wolfgang *et al*. Curso de direito constitucional. 7 ed. São Paulo: Saraiva, 2018.

SARMIENTO, Daniel. *Who's Afraid of the Charter; The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*. In: Common Market Law Review. Vol 50, Iss 5, 2013.

SAUWEN, Regina Fiuza *et al*. *O Direito "in vitro*". Rio de Janeiro. Lumen Juris, 1997.

SAVIN, Gláucia. *Crítica aos Conceitos de Maternidade e Paternidade diante das Novas Técnicas de Reprodução Artificial.* In: Revista dos Tribunais, n. 659, São Paulo, 1990.

SCHENKER, Joseph (2011a). *Ethical dilemmas in assisted reproductive technologies*. Berlin: De Gruyter, 2011.

SCHENKER, Joseph (2011b). *ART practice: religious views*. In: SCHENKER, Joseph. Ethical dilemmas in assisted reproductive technologies. Berlin: De Gruyter, 2011.

SCHREIBER, Hans-Ludwig. *The legal situation regarding assisted reproduction in Germany*. In: Reproductive BioMedicine Online. Vol 6. No 1, Oct. 2002.

SEASHORE, R. T. *Artificial impregnation*. Minnesota Medicine 21, 1938.

SEGER-JACOB, Liliana. *Stress e ansiedade em casais submetidos à reprodução assistida*. (Doctoral thesis) Instituto de Psicologia da Universidade IPUSP, São Paulo, 2000.

SESSAREGO, Carlos Fernández. *Derecho a la identidad personal.* Buenos Aires: Astrea, 1992.

SEVERSON, Julie R. *Sperm Donation: Ethical Aspects*. In: GOLDFARB, James M. Third-Party Reproduction. A comprehensive guide. New York: Springer, 2014.

SHARMA, R., Biedenharn, K. R., Fedor, et al. *Lifestyle factors and reproductive health: taking control of your fertility*. In: Reproductive Biology and Endocrinology*: RB&E*, 2013.

SHUAI, H-F *et al*. *Comparison of conventional in vitro fertilization and intracytoplasmic sperm injection outcomes in patients with moderate oligoasthenozoospermia*. In: Andrologia: First International Journal of Andrology, vol. 47, 2015.

SILVA, Reinaldo Pereira e (2001). *O exame de DNA e a sua influência na investigação da paternidade biológica*. In Biodireito: Ciência da vida, os novos desafios. São Paulo: Editora Revista dos Tribunais, 2001.

SILVA, Reinaldo Pereira e (2003). *Biodireito: a nova fronteira dos direitos humanos*. São Paulo: LTr, 2003.

SIMMONS, Danielle. *Genetic inequality: Human genetic engineering*. In: Nature Education, n. 1.

SOARES, Eduardo. *Brazil*. In: Restrictions on Genetically Modified Organisms. International Protocols. The Law Library of Congress, Global Legal Research Center, 2014.

SOUZA, Marise Cunha. *As Técnicas de Reprodução Assistida. A Barriga de Aluguel. A Definição da Maternidade e da Paternidade*. Bioética. In: Revista da EMERJ, v.13, n. 50, 2010.

STANHISER, Jamie *et al*. *Psychosocial Aspects of Fertility and Assisted Reproductive Technology*. In: Obstetrics and gynecology clinics of North America, vol. 45, 2018.

STEDMAN, Thomas Lathrop. *Stedman's Medical dictionary*. 22. ed. Baltimore: The Williams & Wilikins Company, 1972.

STERN, Harvey J. *Preimplantation genetic diagnosis: prenatal testing for embryos finally achieving its potential*. In: Journal of Clinical Medicine, Vol 3 (1), 2014.

STEVENSON, Angus. *Oxford Dictionary of English*. Oxford: Oxford University Press. 2010.

SÜTTERLIN, Sabine et al. *Ungewollt kinderlos Was kann die moderne Medizin gegen den Kindermangel in Deutschland tun?* Berlin-Institut für Bevölkerung und Entwicklung, 2007.

TABORDA, Andressa Alves. *Reprodução assistida heteróloga: o anonimato do doador de gametas e o direito à identidade genética*. In: Revista Aporia Jurídica. Revista Jurídica do Curso de Direito da Faculdade CESCAGE. 6 ed. Vol. 1 (jul/dez-2016).

TEPEDINO, Gustavo (2001). *O Novo Código Civil: duro golpe na recente experiência constitucional brasileira.* Editorial da Revista Trimestral de Direito Civil, n. 7. Rio de Janeiro: Padma, jul.-set. 2001.

TEPEDINO, Gustavo (2003). *Crise de fontes normativas e técnica legislativa na parte geral do Código Civil de 2002*. In: TEPEDINO, Gustavo (org.), A parte geral do Novo Código Civil, 2 ed., Rio de Janeiro: Renovar, 2003, pp .XXI.

TEPEDINO, Gustavo (2004a). *A Tutela da Personalidade no Ordenamento Civil-Constitucional Brasileiro.* In: Temas de Direito Civil, 3. ed. Rio de Janeiro: Renovar, 2004.

TEPEDINO, Gustavo (2004b). *Direitos Humanos e Relações Jurídicas Privadas*. In: Temas de Direito Civil, Rio de Janeiro: Renovar, 2004.

TEPEDINO, Gustavo *et al*. *Código Civil interpretado conforme a Constitutição da República*. Rio de Janeiro: Renovar, 2006.

THIESEN, Adriane Berlesi *et al*. *O direito de saber a nossa história: identidade genética e dignidade humana na concepção da bioconstituição*. In: Revista Direitos Fundamentais e Democracia, Curitiba, Vol. 7, n. 7, jan/jun 2010.

TRAPPE, Heike. *Assisted Reproductive Technologies in Germany: A Review of the Current Situation*. In: Kreyenfeld M. *et al* (eds). Childlessness in Europe: Contexts, Causes, and Consequences. Demographic Research Monographs (A series of the Max Planck Institute for Demographic Research). Berlin, Springer, 2017.

VALVERDE, José Luis. *2050: A changing Europe, demographic crisis and baby friend policies*. Vol. 9, Granada: IOS Press, 2007.

VAZ, Wanderson Lago *et al*. *Dignidade da Pessoa Humana*. In: Revista Jurídica Cesumar, v. 7, n. 1, jan./jun. 2007.

VENOSA, Silvio de Salvo. *Direito Civil - Direito Civil da Família*. São Paulo: Ed. Atlas Vol. V, 17 ed, 2016.

WEATHERALL, David *et al*. *Science and Technology for Disease Control: Past, Present, and Future*. In: JAMISON, Dean T. Disease Control Priorities in Developing Countries. 2nd ed. New York: Oxford University Press, 2006.

WEBER, Gregory M. And LEE, Cheng-Sheng. *Current and Future Reproductive Technologies for Fish Species*. In: LAMB, G. Cliff and DILORENZO, Nicolas. Current and Future Reproductive Technologies and World Food Production. New York: Springer, 2014.

WELTER, Belmiro Pedro. *Igualdade entre as filiações biológica e socioafetiva*. São Paulo: Revista dos Tribunais, 2003.

WIDER, Roberto. *Reprodução assistida: aspectos do biodireito e da bioética*. 1. ed. Rio de Janeiro: Lumen Juris, 2007.

WÜLFINGEN, Betina Bock von. *Contested change: how Germany came to allow PGD*. In: Reproductive Biomedicine & Society Online. Vol. 3, Dec. 2016.

WYMELENBERG, Suzanne. *Science and Babies: Private Decisions, Public Dilemmas.* Washington: National Academy Press, 1990.

ZANATTA, Andréa Mignoni *et al*. *Inseminação Artificial: doação anônima de sêmen e a possibilidade jurídica de quebra de sigilo*. In: Revista Perspectiva, Erechim. v. 34, n.126, jun 2010.

ZEGERS-HOCHSCHILD, Fernando *et al (2009)*. *The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009*. In: STEIRTEGHEM, André Van. Human Reproduction, Vol.24, No.11, Oxford: Oxford University Press, 2009.

ZEGERS-HOCHSCHILD, Fernando *et al (2020)*. *Assisted reproductive techniques in Latin America: The Latin American Registry, 2017*. In: JBRA Assisted Reproduction, v. 24, n. 3, 2020.

ZHENG, Ju-Fen *et al*. *ICSI treatment of severe male infertility can achieve prospective embryo quality compared with IVF of fertile donor sperm on sibling oocytes.* In: Asian Journal of Andrology, Vol. 17, 2015.

8. ANNEX

CASES

Brazil

Superior Tribunal de Justiça – STJ. *Recurso Especial n. 833.712-RS (2006/0070609-4).* June 4th, 2007.

Superior Tribunal de Justiça – STJ. *Recurso Especial n. 807.849-RJ (2006/0003284-7).* March 24th, 2010

8ª Câmara Cível do Tribunal de Justiça do Estado do Rio Grande do Sul. *Agravo de Instrumento n. 70052132370,* April 4th, 2013.

9ª Câmara de Direito Privado do Tribunal de Justiça do Estado de São Paulo. *Apelação n.* 0386226-72.2008.8.26.0577, Aug. 23rd, 2016.

Superior Tribunal de Justiça - STJ. *Agravo em Recurso Especial n.* 1.042.172 – SP (2017/0005550-2), Oct. 3rd, 2017.

European Court of Human Rights

Mikulic v Croatia, Application no. 53176/99, Judgment 4 September 2002.

Odièvre v. France, Application no. 42326/98, Judgment 13 February 2003.

Germany

Census Act (*Volkszählungsurteil*), BVerFG, 65, 1 - 15.12.1983.

Right to Heritage I, 79 BVerfGE 256 (1989)

Right to Heritage II, 90 BVerfGE 263 (1994).

Abortion II (Schwangerschaftsabbruch II), BVerfGE 88, 203 (252).

BVerFG, 18.01.1988 - 1 BvR 1589/87.

BVerFG, 31.01.1989 - 1 BvL 17/87.

OLG Hamm, 06.02.2013 - I-14 U 7/12.

AG Hannover, 17.10.2016 – 432 C 7640/15.

BGH, 28.01.2015 - XII ZR 201,13.

CONSTITUTIONS, LEGISLATIONS, AND ADMINISTRATIVE MATERIALS

Brazil

Constituição da República Federativa do Brasil de 1988 [Constitution], translated in Constitution of the Federative Republic of Brazil [Federal Constitution]: Constitutional Text of October 5th, 1988, with the Alterations Introduced by Constitutional Amendments No. 1/1992 through 64/2010 and by Revision Constitutional Amendments No. 1/1994 through 6/1994. Translated by István Vajda, Vanira Tavares de Souza, and Patrícia de Queiroz Carvalho Zimbres. 3rd ed. Brasília: Documentation and Information Center, Chamber of Deputies. Publishing Coordination: Chamber of Deputies, 2010. (All quotes in the text refer to this translation unless indicated otherwise.)

Lei n. 10.406 de 1 de outubro de 2002. Código Civil (Civil Code). Published in the Federal Law Gazette (D.O.U.) Section I, page 1, on Jan. 11th, 2003.

Lei 8.069 de 13 de julho de 1990. Estatuto da Criança e do Adolescente. Published in the Federal Law Gazette (D.O.U.) n. 135, on July 16th, 1990.

Lei 11.105 de 24 de março de 2005 – Lei de Biosegurança (Biosafety Law). Published in the Federal Law Gazette (D.O.U.) Section I, page 1, on March 28th, 2005.

Senado Federal. *Projeto de Lei 1.184 de 2003*. June 03rd, 2003.

Agência Nacional de Vigilância Sanitária – ANVISA (2008). *Resolução RDC n. 29/2008.* Published in the Federal Law Gazette (D.O.U.) n. 90, on May 13th, 2008.

Agência Nacional de Vigilância Sanitária – ANVISA (2011). *Resolução-RDC n. 23/2011.* Published in the Federal Law Gazette (D.O.U.) n. 102, on May 30th, 2011.

Agência Nacional de Vigilância Sanitária – ANVISA (2019). *13 Relatório do Sistema Nacional de Produção de Embriões (SisEmbrio),* 2019.

Conselho Federal de Medicina – CFM (1992). *Resolução CFM n. 1.358/1992.* Published in the Federal Law Gazette (D.O.U.) Section I, p. 1653, on Nov. 19th, 1992.

Conselho Federal de Medicina – CFM (2010). *Resolução CFM n. 1.957/2010.* Published in the Federal Law Gazette (D.O.U.) Section I, p. 79, on Jan. 06th, 2011.

Conselho Federal de Medicina – CFM (2013). *Resolução CFM n. 2.013/2013.* Published in the Federal Law Gazette (D.O.U.) Section I, p.119, on May. 09th, 2013.

Conselho Federal de Medicina – CFM (2015). *Resolução CFM n. 2.121/2001.* Published in the Federal Law Gazette (D.O.U.) Section I, page 117, on Sep 24th, 2015.

Conselho Nacional de Justiça – CNJ (2016). *Provimento CNJ n. 52/2016.* Published in the Federal Law Gazette (D.O.U.) on March 14th, 2016.

Conselho Nacional de Justiça – CNJ (2017). *Provimento n. 63*. Published in the Federal Law Gazette (D.O.U.) on Nov. 14th, 2017.

Ministério da Saúde (2005). *Direitos Sexuais e Direitos Reprodutivos: uma prioridade do governo*. Brasília, 2005.

Ministério da Saúde (2012). *Portaria n. 3.149 de28.12.2012*. Brasília, 2012.

Germany

Grundgesetz für die Bundesrepublik Deutschland (GG) [Constitution], revised version published in the Federal Law Gazette (BGBl – Bundesgesetzblatt), classification number 100-1, as last amended by Article 1 of the Act of 15 Nov 2019. Translated in Basic Law for the Federal Republic of Germany [Basic Law], by Christian Tomuschat and David P. Currie. Translation revised by Christian Tomuschat and Donald P. Kommers in cooperation with the Language Service of the German Bundestag, 2010. (All quotes in the text refer to this translation unless indicated otherwise.)

Bürgerliches Gesetzbuch (BGB) [(German) Civil Code], revised version published in the Federal Law Gazette (BGBl – Bundesgesetzblatt), as last amended by Article 1 of the Act of 12 June 2020(BGBl. I p. 1245). Translated by the Langenscheidt Translation Service. Translation, regularly updated by Neil Mussett and most recently by Samson Übersetzungen GmbH, Dr. Carmen v. Schöning. (All quotes in the text refer to this translation unless indicated otherwise.)

Strafgesetzbuch [(German) Criminal Code], revised version published in the Federal Law Gazette (BGBl – Bundesgesetzblatt), as last amended by Article 5 of the Act of 10 July 2020(BGBl. I p. 1648).

Gesetz über die Spende, Entnahme und Übertragung von Organen und Geweben / Transplantationsgesetz – TPG), Nov. 5th 1997, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 84 from Nov, 11th. 1997, p. 2631.

Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stammzellgesetz - StZG), June 28th 2002, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 42 from June 29th 2002, p. 2277.

Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen (Act to Regulate the Right to Know One's Heritage in Cases of Heterological Use of Sperm), July 17th 2017, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 48 from July 21st. 2017, p. 2513.

Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz–ESchG), December 13th 1990, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 69 from December 19Th 1990, p. 2746.

Gesetz über Qualität und Sicherheit von menschlichen Geweben und Zellen (Gewebegesetz), July 20th 2007, published in the Federal Law Gazette (BGBI – Bundesgesetzblatt) Teil I, Nr. 35 from July 27th. 2007, p. 1574.

Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten - Schwangerschaftskonfliktgesetz - SchKG), July 27th 1992, published in the Federal Law Gazette (BGB1 – Bundesgesetzblatt) Teil I, Nr. 37, p. 1398 from August 4 th 1992.

Allgemeine Gleichbehandlungsgesetz – AGG (General Act on Equal Treatment of 14th August 2006). Federal Law Gazette I, p. 1897.

Bundesärztekammer. *Assistierte Reproduktion. Richtlinie komplett neu*. In: Deutsches Ärzteblatt, Jg. 115, Heft 22, June, 1st, 2018.

Bundesärztekammer. MBO-Ä ((Muster-)Berufsordnung: Schweigepflicht). In: Deutsches Ärzteblatt, Jg. 116, Heft 05, Feb., 01st, 2019.

Deutscher Bundestag. *Dokumente: Vor 60 Jahren: Bundestag beschließt Gleichberechtigungsgesetz*, 2017.

Spain

Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida (Law 14/2006 from may 26th about assisted human reproduction techniques), published in the Federal Law Gazette (Boletín Oficial del Estado) Nr. 126 from May 27th. 2006, p. 19947-19956.

INTERNATIONAL MATERIALS

United Nations. *Universal Declaration of Human Rights*, adopted 10 December 1948.

United Nations. *International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976.

United Nations. *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, entered into force 23 March 1976.

United Nations. *Convention on the Elimination of Discrimination against Women*, adopted 18 December 1979.

United Nations. *Convention on the Rights of the Child*, adopted 20 January 1989, entered into force 2 September 1990, 1577 UNTS 3.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, adopted 25 May 2000, entered into force 12 February 2002, GA Res. A/RES/54/263.

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted 19 December 2011, entered into force 14 April 2014, A/RES/66/138.

United Nations Population Fund. *Programme of Action*, adopted at the International Conference on Population and Development, Cairo, 5-13 September, 1994.

United Nations. *Beijing Declaration and Platform for Action*, adopted at the 16th plenary meeting, Beijing, 15 September 1995.

United Nations Population Fund. *Sexual and Reproductive Health for All. Reducing poverty, advancing development and protecting human rights*. September 2010.

United Nations. *Convention on the Rights of Persons with Disabilities*, adopted 13 December 2016.

European Court of Human Rights. *European Convention on Human Rights*, adopted 4 November 1950.

Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004.