

Donor anonymity, or the right to know one's origins?

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Abstract

Taking into account a recent decree enacted by the Catalan government stipulating the procedure to provide information on a person's biological roots, this article examines the tension between the anonymity of the gamete donor and the child's right to know their origin. The analysis of legal systems that recognise this right for children conceived through donated gametes spurs us to further examine the hypotheses, quite widespread today, which consider traditional arguments for secrecy outdated. In this regard, the article also challenges the different treatment granted to adopted children and donor gamete children by legal systems such as Spain's. Beyond the possible conflicting rights of children, donors and parents, arguments provided by anonymity supporters, such as the moral damage resulting from disclosure or the possible link between disclosure and a decrease in the number of donors, should be also taken into account. However, these arguments require absolute empirical evidence, which is not currently conclusive. Alternatively, disclosure of the donor's identity is consistent with the needs of donor families and with a major trend in family law supporting the right to know one's genetic origin, dissociated from biological and legal parentage.

Key words: Genetics, biology, donor families, anonymity, secrecy, origins, right to know, assisted reproduction techniques, parentage

1. Introduction

On the 11th of June 2014, the plenary session of the Bioethics Committee of Catalonia (CBD) approved a proposal from a multidisciplinary working group whose mission was to draft a reflection on the draft decree stipulating the procedure to provide knowledge on a person's biological roots; this effort has given rise to Decree 169/2015 dated the 21st of July 2015, which establishes the procedure to provide information on biological origins (DOGC no. 6919 dated 23rd of July 2015). Because of issues involving competences, the decree only

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stipulates this right for adoptees, since donor anonymity is the general rule in Spain regarding people conceived with assisted reproduction techniques (ART) (article 5.5 of Law 14/2006 on Human Assisted Reproduction Techniques, dated 26 May 2006 [abbreviated LTRHA]), and the Catalan Parliament does not have authority over this matter (1st final provision of the LTRHA). In practice, this limitation confers a more restricted scope on article 30.2 of Law 14/2010 on the Rights and Opportunities of Children and Adolescents, dated 27 May 2010 (abbreviated LDOIA) than what stems from its literal reading, according to which “children and adolescents have the right to know their *genetic origin*, *biological* parents and *biological* relatives”.

In the current legislative context, the joint interpretation of the LTRHA and the Catalan Civil Code (CCC) leads us to equate genetics and biology; however, it is telling that the aforementioned art 30.2 of the LDOIA contrasts the two terms, indicating that they are not identical. Thus, for example, genetics and biology may be dissociated in surrogate pregnancy, such as in partial surrogate pregnancy, when one woman provides the egg(s) to be fertilised while another brings the pregnancy to term. Something similar might occur in heterosexual couples who use heterologous fertilisation with donated eggs, or in couples comprised of two women, in which the reception of oocytes from partner (ROPA) technique is used to impregnate one of the two with embryo(s) created from the egg(s) of the other and donated sperm. In both cases, the two women who take part in the process play a biological role, but only one of them plays a genetic role by providing the gametes. With the exception of couples with two women, in which the maternal relationship can be proven with both partners (article 235-8.1 and 235-13.1 of the CCC), in other cases the maternal relationship is governed, genetics aside, by the principle of Roman law which states that motherhood is determined by the biological fact of birth (article 235-3 of the CCC). Given that article 30.2 mentions both biology and genetics, at least hypothetically we could question whether the Catalan lawmakers' choice reflects a voluntary decision to expand the right to know one's origins to the sphere of ART.

This interpretation would be coherent with the biology-driven system that has traditionally inspired Catalan law on issues of parentage (Alegret, 2014: 618-620). For this reason, despite its limited authority, the group created within the CBD aims to reflect on the possible existence and consequences of a right to know one's origins not only in the sphere of adoption, both national and international, but also in cases of heterologous ART with donated gametes. In this article, I shall focus on the scope of the law in this latter case.

According to Spanish laws on ART, the information on the donor that the child conceived through ART may obtain is generally restricted to very basic data, and revealing the donor's identity is limited to extraordinary circumstances which entail a certain danger of the child's death or health, or when this information is needed according to criminal trial law, whenever it is absolutely indispensable (article 5.5 of the LTRHA). The main issue sparked by this law stems from its conflict with a possible right to know one's origins which, if it does exist, would render the law devoid of content. My working hypothesis assumes that the recognition of this right only for adoptees places those who were conceived through donated gametes on a lower rung. In my opinion, we cannot ignore the fact that the result of a successful ART procedure is the birth of a person with the same rights as a person conceived any other way.

At a time like now, when more and more families are based on affect and a non-biological conception of parentage, it may be surprising that there are claims for the right to know one's origins. The reason for these claims is twofold: first, this is each individual's personal choice which must be respected if they choose to exercise it once they are legally of age; and secondly, when using ART, this information is already available to third parties and is therefore accessible.

2. Recent data

According to the data published by the Department of Health of the Generalitat de Catalunya, 54.5% of the IVF-ICSI procedures carried out in 2011 were performed with donated eggs and 15.4% were performed with donated sperm (Fivcat.net, 2014: 16). However, the figures from semen banks show a rise in the number of donors in both artificial insemination procedures and in-vitro techniques (Fivcat.net, 2014: 7).

The statistics do not reflect the cases in which the person who uses ART is a single woman or a couple with two women, who necessarily require an anonymous donor. We do, however, have data on the United Kingdom, where this group already accounts for one-third of all ART recipients. In the UK, too, it is estimated that one out of every ten fresh IVF procedures uses donated gametes or embryos, and that the number of donors of both sperm and eggs has been on the rise since 2005 (HFEA 2014: 8). Of all the British couples who used heterologous IVF between 2012 and 2013, 39% did so with donated sperm, 59% with donated eggs and 3% with donated eggs and sperm or embryos (HFEA 2014: 19-20).

Among the supporters of maintaining the rule of donor anonymity, there is some concern that the abolition of this rule might trigger a decline in donations, and thus in the practice of ART, with the obvious repercussions this might have on what has been described as a "business" (Igareda, 2014: 239). Despite this, in the United Kingdom the Nuffield report reveals that the legislative change that took place there in 2004 has not stopped donors from donating (2013: 54 and forward). In October 2014, the executive director of the National Gamete Donor Bank confirmed these figures, specifically that in the ten years that have elapsed since the enactment of the new law, not only have there been more donors, but the donors are becoming younger, which has led to higher ART success rates (<http://www.hfea.gov.uk/9386.html>).

While there are few studies on the attitudes of persons conceived with donated gametes, and the studies that do exist largely focus on those who were conceived with donated sperm, it is claimed that the most commonly sought information revolves around the personal characteristics of the donor, their reasons for donating, their possible shared traits and their health history (Nuffield, 2013: 54 and forward).

Regarding the impact of this information, recent studies corroborate what previous information noted: both families that reveal the method of conception and those that do not work well until early adolescence. However, the discovery of this origin in adulthood or by third parties has significantly negative effects. Likewise, parents who tell children about their origins rarely regret this decision, while the same cannot be said of parents who do not, some of whom perceive the "secret" as a burden (Nuffield, 2013: 54 and forward).

3. Brief comparative study

In recent years, many countries have evolved from an anonymous donation system to one that is more flexible and transparent (Schwenzer, 2007: 9-11). 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 (IFFS, 2013: 74).

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. This also applies in Switzerland (with a 1998 law which has been in force since 2001), Norway (2003), Holland (with a 2002 law which has been in force since 2004), the United Kingdom (2004), Finland (2006). Outside Europe, worth noting are the laws in the Australian state of Victoria (1995), Western Australia and New Zealand (2004), New South Wales (2007), Southern Australia (2010), Uruguay (2013) and Argentina, where the new *Código civil y comercial de la nación* (Civil and Commercial Code of the Nation), approved by Law 26,994 dated the 1st of October 2014, also recognises this right. Other legal systems have chosen a double-track system, which allows the donors and the users of ART to choose between the anonymous or identifiable donation track (in favour of their adoption, given that this allows for a better balance between the rights involved; Pennings, 1997: 2839-2844). In 1996, Iceland chose this model, which is the preferred one in many US states (Cohen, 2014: 31-37).

One common denominator among all the laws that allow the donor to be identified is the dissociation between knowledge of genetic parentage and the establishment of legal parentage. This is provided for in Spanish ART law for the few exceptions to the general rule of anonymity (article 8.3 of the LTRHA), and it is generally provided for in the case of adoption (article 180.4 of the Spanish Civil Code [CC] and 235-49.2 of the CCC).

The general rule of donor anonymity is also being called into question, with a few nuances, in the numerous recent official reports, such as France's *Filiation, origines, parentalité*, written by a working group presided over by the sociologist Irène Théry. The report concludes that the Civil Registry should allow children who are legally of age to learn the way they were conceived (2014: 213, 230 and forward). However, the report suggests revealing the identity only when there is a previous request by a legally adult child and consent of the donor (320), in that it claims that anonymity is not incompatible with the right to a private and family life recognised in the European Human Rights Convention (63-64). In Australia, the general trend in favour of the possibility of knowing the gamete donor is captured in the Senate report entitled *Donor Conception Practices in Australia*, which recommends banning anonymity in donations and providing compulsory counselling, especially targeted at parents' revealing to the child the origin of their conception in order to prevent the latter from having identity issues (2011: 11 and 15). The report recommends that the child be able to access *non-identifying* information on the donor after the age of 16 and *identifying* information after the age of 18 (95), and it bases the right to

know donors on medical reasons, on getting important information on lowering the risk of relations between relatives, on establishing relationships with donors and half-siblings, and on access to a more complete notion of identity (80).

4. The right to know one's origins

Article 7 of the Convention on the Rights of the Child recognises the child's right "to know their parents... to the extent possible", as well as the member states' obligation to ensure the effectiveness of these rights according to their national laws and specific obligations stemming from international agreements on this matter. In 2002, the UN's Committee on the Rights of the Child, aware that children who were born out of wedlock in the United Kingdom or who were adopted or conceived through ART did not have the right to know the identity of their biological parents, recommended, based on article 7 in relation to the higher interest of the minor (article 3), that all the member states take all the necessary measures "to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible" (*Concluding Observations*, recommendations 31 and 32, CRC/C/15/Add.188, 8).

The European Court of Human Rights (ECtHR) has never handed down a decision on the scope of the right of persons conceived through ART to know their origins. However, it has ruled on minors under the guardianship of a public administration and adopted children (*Gaskin v. United Kingdom*, 7.7.1989; *Odièvre v. France*, 13.2.2003, and *Godelli v. Italy*, 25.9.2012), and to justify the provenance of actions and claims to non-marital paternity (*Mikulic v. Croatia*, 7.2.2002), even beyond the statutes of limitations for these actions stipulated by the national laws (*Jäggi v. Switzerland*, 13.7.2006 and *Backlund v. Finland*, 6.7.2010). Based on all of these cases, we can infer that the right to know one's origins is an essential right in the development of an individual's identity, which does not necessarily have to evolve towards a legal bond of parentage with the parent(s), and which is part of the right to private life recognised in article 8 of the European Convention on Human Rights (ECHR).

There is an increasing number of voices in favour of recognising this right within the context of ART, in that the traditional justifications of maintaining secrecy have gradually lost value (Blauwhoff, 2009: 10-11, 341 and forward; Cahn, 2009: 127). The evolution towards a system in which the identity of the donor is open is the outcome of a new focus on the rights and interests of people conceived with donated gametes, which are not viewed as symmetrical to the rights of the parents or donors (Cahn, 2014: 1111-1112; Raes, Ravelingien, Pennings, 2014; for Spain, *vid.* Garriga, 2007: 184-186, according to which the LTRHA has focused on the interests of the recipients, in contrast to the norms that regulate adoption, which revolve around the child's interests). Ultimately, it is claimed that family relationships should be governed by honesty (Garriga, 2007: 173-174, with citations of numerous studies in the field of psychology; Nuffield, 2013: 86 and forward).

If a rule in favour of abolishing anonymity is chosen, one of the most controversial issues is whether the right to know one's origin's should be applied retroactively, since if there is in fact a subjective right, one should always be able to exercise it. On this point, the reports that recommend that anonymity be

abolished believe that the right to privacy should be preserved if the donor was not informed that the person thus conceived could find out their identity when they donated the gamete (*Filiation, origines, parentalité* 2013: 222 and 233). In this sense, the claim is that abolishing anonymity non-retroactively would not affect donors' rights. The report by the Australian Senate stresses that none of the four states which have approved laws in favour of the possibility of knowing the donor (Victoria, Western Australia, Northern Territory and New South Wales) has done so retroactively (2011: 77-78 and 96). The report stresses that gamete donation often takes place through a contract between the donor and the centre, and that breaking these conditions could lead donors to file requests for monetary compensation against the centres or states. In the absence of evidence on the legal and ethical implications of abolishing anonymity retroactively, the Australian Senate expressed its approval of donors' right to maintain the anonymity that they were guaranteed when they decided to donate. However, if we claim that the child thus born has the right to know their origins, the justifications based on the non-retroactivity of the provisions that guarantee this law become devoid of content. In view of this conflict, perhaps the best way to reconcile the different interests involved would be for the legal systems to create voluntary registers that only reveal the information if both the child and the donor request it, similar to what some of the legal systems that have abolished the guarantee of anonymity have done, such as some Australian states, New Zealand and the United Kingdom.

5. Donor anonymity

Many of the authors who support maintaining donor anonymity believe that the child's right to know their origins too readily assumes that this recognition may bring the child more harm than benefit, and that it enters into conflict with the donor's right to privacy and the right to reproduction (De Melo Martín, 2014: 28-35). The field of psychology notes that it is beneficial for children to grow up feeling like they are part of a family (cited by Garriga, 2007: 173-174). It also appeals to the importance of parental autonomy when taking decisions that affect their children's wellbeing (De Melo Martín, 2014: 30; Pennings, 2014), and it questions the existence of a right to know one's origins based on the right to health (De Melo Martín, 2014: 28-35). Ultimately, those in favour of the anonymity rule object to the fact that many people who do not have this information do have a clearly delimited identity, and that attaching too much importance to genetics is not the best way of guaranteeing the wellbeing of families that do not share the same genetic make-up (De Melo Martín, 2014: 32).

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. However, in reproduction with ART, unlike in sexual reproduction, the intervention of people outside the reproductive process in order to make conception possible breaks the rule of anonymity from the outset (Farnós, 2014: 112-115). Yet in this conflict of rights, the right of the child must prevail, since even though medical information is confidential, the matter shifts once a person is born (Garriga, 2007: 179-180, 2014: 777). Regarding the argument that abolishing donor anonymity may violate the right to reproduction in that it might lower the number of donations, in addition to the

fact that there is no empirical evidence to support this claim (see section 2), a more transparent policy would only affect reproduction stemming from heterologous ART. What is more, ultimately a system in which the donor decides whether or not they want to be identified would continue to respect all the rights involved.

6. Weak points of Spanish law on assisted reproduction techniques

The possibility of learning the donor's identity (article 5.5 of the LTRHA), already exceptional in Spanish law, is even further restricted if we bear in mind that the origin of parentage cannot be recorded in the Civil Registry (article 7.2 of the LTRHA). In consequence, if the parents say nothing to the child about the origin of their conception, the child has no way of accessing this information beyond chance discovery or birth within a homosexual couple. Given the uncertainty entailed in leaving the supply of this information in the parents' hands (Golombok et al., 2002: 830-840), it is advisable to have a system in place that provides for a record of the origin of the birth. This uncertainty might be eliminated by guaranteeing that the origin of the conception is recorded in the Civil Registry, as it is in cases of adoption, where the information on the adoptee and the original parentage are under a system of restricted public access (article 21 and 22 on the Civil Registry Regulation [RRC]). Likewise, it could be recorded on the birth certificate, in line with the provisions of article 563 of the new Argentine CC, or in a national donor registry, such as the ones in Sweden and the United Kingdom. The latter may be useful for revealing the donor's identity, although it would be sufficient if the origin of the conception appeared in the Civil Registry (Garriga, 2007: 219-221).

A second aspect of Spanish law on ART that is surprising is that the right to know one's origins is guaranteed to the adoptee but not to the person conceived using these techniques. Thus, article 235-49 of the CCC allows adoptees who are legally of age to perform actions leading to the discovery of their biological parents' identity without this affecting their adoptive parentage. Ever since the law in Book II of the Catalan Civil Code was adopted, this right has been complemented by adoptive parents' obligation to inform the adopted child about the adoption (article 235-50). Even though forcible compliance with this law does not exist, nor are there legal consequences for failing to comply with it or even a means to check compliance with it, its enactment signals yet another step in the recognition of the child's right to information on their own origin. This does not affect the parents' right to personal or family privacy, since the law protects the circumstance of the adoption from public knowledge, as it is subjected to restricted public access in the Civil Registry (Garriga, 2014: 778-779). Other regional laws on the protection of minors recognise that the adoptee has the right to know their original parentage (Garriga, 2014: 766 and 778). In article 180.5 of the CC, based on the reform introduced with Law 54/2007 on International Adoption dated the 28th of December 2007, the state lawmakers limited themselves to guaranteeing adoptees the right to know "the information on their biological origins" either once they are legally of age or through their legal representatives when still minors. The scope of this precept was further fleshed out by Law 26, 2015 dated the 28th of July 2015, which changed the child and adolescent protection system (BOE no. 180 dated 29.7.2015), which introduces a new article, 180.5 CC, which states that information on the minor's

origins, especially any information related to “the identity of their parents” must be conserved for at least 50 years after the adoption effectively takes place.

We might think that in the case of adoptees the justification for accessing their origins is that there has been a more extensive bond (legal and even affective) with the biological family, while in the case of people conceived through donated gametes this bond has not existed, plus the child usually has a biological bond with one of the people who use ART. In my opinion, the objection of prior history, meant in the broad sense beyond mere biology, as a distinctive feature among adoptees and people conceived via donated gametes is not sufficient justification if we bear in mind that from the standpoint of the child’s rights it is difficult to justify why the law denies children conceived via assisted reproduction a right that it does grant to adoptees.

7. Final reflections

Despite the questionable constitutionality of article 5.5 of the LTRHA (Pantaleón, 1988: 31-36), the Constitutional Court’s ruling 116/1999 dated the 17th of June 1999 endorses its counterpart article 5.5 of the 1888 LTRA by arguing that when one uses ART the investigation guaranteed by article 39.2 of the Spanish Constitution does not have the purpose sought by the Constitution, which is the establishment of comprehensive legal bonds of reciprocal rights and obligations; that identity can be revealed in the exceptional cases provided for by law; and that the donors’ right to privacy must be guaranteed because, among other reasons, it is a necessary measure in order to continue practising ART. However, the increasing dissociation between the different spheres of parentage (Schwenzer, 2007: 11; Singer, 2007: 148), the tendency towards a society with families based more on roles than on biology, and a distancing from the image of donor-parent are all arguments that suggest that a revision of this doctrine is in order today (Puigpelat, 2012: 190-191).

One study performed in Sweden after the law that allows the donor’s identity to be accessed entered into force shows that many people conceived through donated gametes are not informed of this by their parents, such that anyone who has reason to believe that they were conceived in this way has the right to be assisted by the Social Welfare Committee in order to find the information available at the centre where the ART was performed (Singer, 2007: 148). This study reveals that ultimately the possibility that the person conceived via donated gametes can learn their origins spotlights the need for a deeper and slower social change. Laws guaranteeing these rights are worthless if attitudes do not change, in that the state has no means to obligate parents to reveal information on the origins of their children (*vid.* the reference to article 235-50 of the CCC in the previous section). However, the body of laws, such as the codes of good practices that countries like the United Kingdom developed just before the reform that abolished anonymity entered into force, play a pedagogical role in this context. Once secrecy ceases to be the rule of thumb and the laws encourage the recognition of origins, this knowledge becomes perceived as positive.

When the state hinders access to identifying and non-identifying information on the donor, it is depriving the child conceived with gametes via ART from an important aspect of their individual autonomy: the freedom to

choose what meaning they assign to the genetic components of their identity (Ravitsky 2014: 36-37).

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