

Assisted heterologous fertilization and the right of donor-conceived children to know their biological origins

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Abstract

The paper's main goal is to elaborate on the ethical issues that heterologous fertilization has raised as to the right of children thus conceived to find out about their origins. Such a quandary revolves around the following questions: Is it the right thing to inform the child as to the way he or she was conceived? If it is, does said child have a right to know his or her biological parent and genetic background too? Authors point out that there is no unanimity of judgment among experts, and it is worth weighing all reasons in favor and against acknowledging the children's right to full knowledge of their biological parents' data. Laws regulating the issue in different countries vary substantially as well. Therefore, the authors advocate for shared legislation, centered on the children's best interest. *Clin Ter 2018; 169(1):e39-43. doi: 10.7417/CT.2018.2052*

Key words: *heterologous fertilization, knowledge of one's origins, anonymity, truth, foreign legislation*

Introduction

Over the past decades, technological advancements with regards to biomedicine have been remarkable, especially pertaining to beginning and end of life issues. As a matter of fact, improved transplantation, intensive care and resuscitation techniques make it feasible to keep patients alive who would otherwise have died. Still, the most revolutionary progress has occurred in fertilization. Embryo and gamete cryopreservation techniques have gone a long way towards spreading assisted procreation procedures worldwide: the ability to store gametes and embryos, and easily carry them virtually anywhere have created great momentum for such practices. Birth in the 21st Century is defined by biological as well as social factors. Such a breakthrough has given rise to an array of ethical, medical, psychological and legal implications and has caused the juxtaposition of various rights and interests which may be mutually at odds with one another and are all involved in the procreation process: those belonging to parents, children, gamete donors, and family members.

When dealing with similar situations, the question of whether it would be suitable to regulate access to identity information and procreation procedures arises with ever-increasing regularity. There are several options available as far as procreation is concerned: secrecy, partial anonymity, and thorough knowledge of all donor-related information.

In modern-day society, women and couples often put off having children for financial or career reasons, relying on medically assisted procedures in a way that somehow defies nature itself. Despite the giant strides made by science in that field though, there are still limitations that cannot be overcome, and doctors and specialists, who also have a right to conscientious objection, (1) must abide by them, in compliance with the Code of Medical Ethics (art.44) (2-4), in order to avoid jeopardizing the patients' health; as the woman grows older, in fact, childbearing and delivery may pose unconscionable dangers and complications (5-8) regardless of the latest innovative medical procedures, both for beginning and end of life practices (e.g. transplantation techniques) (9,11). Thus, assisted reproductive technology (ART), which is invasive to various degrees, has joined, and at times replaced, natural conception. Conception, in fact, does not take place through sexual intercourse between a man and a woman anymore, but rather via in vitro fertilization (IVF). Asexual fertilization, either through fertilization or the creation of embryos, brings about the "autonomy" of the embryo itself, which is thus unbound to the woman's body: at this stage, it is a mere "product", manipulated and kept alive by means of technical procedures (12, 13). Such embryos turn back into "children" only once they have been implanted into the woman's uterus - in the case of homologous or heterologous fertilization. Multiple issues arise from the practice of heterologous fertilization, which takes place when couples have to resort to at least a third party's (i.e. a donor's) gamete. Italian Law 40 does not lay out any definition of heterologous fertilization (14 15). The most common case is the male partner's impotence, because of which a donor's sperm has to be used, but it could be done through the donation of oocytes as well, which will eventually be fertilized by the male partner's semen and ultimately implanted into the woman's womb (16).

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As for Medically Assisted Procreation (MAP) methodologies, the practice known as “surrogacy” clearly stands out. Such a procedure involves the signing of an agreement between the couple and the surrogate mother. By virtue of said agreement, the surrogate mother commits herself to carrying (and in gestational surrogacy, to fertilizing) an embryo from a sterile couple for the purpose of bringing it to term and eventually handing the newborn baby back to them (17).

Before further elaborating on the issue, it is worth noting that homologous artificial fertilization techniques mark the separation between procreation and sexuality, whereas heterologous MAP brings about the dissociation between biological and “social” parents.

By virtue of the above mentioned, new ethical issues have arisen pertaining to the right of the children born through such procedures to be acquainted of their origins. An undisputed obligation exists to allow these individuals access to gamete donors’ medical records and genetic background, given that such news may be of the utmost importance in the case of hereditary diseases (18).

It is, on the other and, far more contentious whether one’s wish to know his or her biological origins may warrant allowing those born from medically assisted procreation techniques to know the donor’s identity, or whether such data should be kept partially secret, while divulging different, less sensitive ones (a donor’s profession, hobbies, etc...). Such a quandary has been dealt with through varying pieces of legislation in different countries.

A glimpse into foreign regulations

Heterologous medically assisted procreation is regulated along national lines with a great degree of variability: some national laws only allow gamete donation while banning the donation of embryos, while both are legal in other jurisdictions. France, for instance, imposes total anonymity, except in case of clinical and therapeutic necessity, when knowing the donor’s identity is necessary in order to stave off damage to a child’s health (19). Spain, on the other hand, has opted for a middle ground solution: both those born from medically assisted procreation and legal parents may access information that do not, however, reveal donor identity (18). In Denmark, a “dual track” system has been adopted, under which donors may choose between anonymity or the recording of their personal data, thus making identification possible (18). Italian legislation imposes total anonymity for donors. Heterologous fertilization used to be banned by law 40/2004, but was eventually legalized by the Supreme Court ruling n.162/2014. Heterologous fertilization in Italy is still unregulated, although the Conference of Regions and Autonomous Provinces issued a guideline in September 2014 (20) according to which «gamete donation must be anonymous» and that «donors are not entitled to know the identity of those born from these procedures and the latter, in turn, have no right to know the donor’s identity». Any further modifications made at a later stage «must guarantee donor anonymity to those who have donated their gametes prior to the enactment of the new legislation. People who get involved in gamete donation programs must be reassured that their privacy will be respected».

In general terms, the right to know one’s biological origins has been undergoing a positive evolution, on account of scientific and technological advancements that make donor anonymity harder and harder to maintain, in spite of the privacy policies put in place by medically assisted procreation units.

Currently, Sweden, Norway, the Netherlands, Austria and Germany ban donor anonymity (19). In Germany, anonymity has been found to be unconstitutional, and not only are children entitled to be acquainted of their biological origins, but have a right to the corresponding legal status as well, if they wish so (19). In the United Kingdom, the Human Fertilisation and Embryology Act has mandated that all gamete donations not be anonymous from April 2005. Furthermore, from April 2006, anonymously donated gametes can no longer be used unless their anonymous donors are willing to have their identity disclosed. The law also acknowledges different interests, e.g. the knowledge of one’s biological siblings and other information to be provided to the donors upon demand as to the children born from their gametes, and instituted a specific registry, the “Donor Sibling Link” (21), where those interested may submit their names. If, based on the data recorded in the registry, two people born from the same gamete donor manifest their wish to know their genetic siblings their home addresses or phone and e-mail contacts will be disclosed to each other. Lastly British norms allow donors to know the outcome of their donations, that is how many children were conceived from them, their gender and year of birth. Thus, the entitlement to know one’s genetic origins has been asserted as the centerpiece of a broader right to personal identity, which is internationally upheld and enshrined in international treaties. Article 7 of the United Nations Convention on the Rights of the Child, adopted on November 20th, 1989 and ratified via law n. 176/2001, states that «the child 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» (22).

Truth versus secrecy

As mentioned above, perhaps the most challenging ethical debate centers on the right of those conceived through medically assisted procreation procedures to gain access to information about their genetic origins.

First and foremost, it is worth noting that simply ensuring the availability of such information does not necessarily mean that those conceived through gamete donation will actually access it. In fact, for them to be able to access the information, they need to be aware that their conception occurred via MAP procedures (23).

Information is then at the forefront of the whole process. Obviously, the decision of whether to inform the children of the way in which they were conceived is an extremely hard one. §In fact, while homosexual parents are bound to explain to their children that they were conceived via gamete donation, heterosexual couples may choose to conceal it. Children born through gamete donation were raised by their “social-legal” parents, and are unaware that their conception was made possible by a gamete donor, who is a total stranger to them. No record reflects the involvement of a third

party: such information and the disclosure of the “double parenthood” is ultimately the prerogative of the legal parents. In our view, however, although the choice to conceal the truth appears to be in keeping with the emotional intimacy of the family, it also appears to be hypocritical and hard to sustain at the communicative level. Several studies have been carried out on the psychological implications arising from the decision to inform one’s son or daughter of those circumstances, and they ultimately concluded that there is no right or wrong decision in absolute terms. Explaining such events to a child is undoubtedly complicated, because it entails information as to the parents’ sexuality, the difference between natural parenthood and one based on affection and voluntarism, the medical procedures performed, the absence of any parental obligation and responsibility for the biological parent, or donor.

Most couples who choose to keep their child’s biological origins secret are driven by their unwillingness to generate confusion in their child genetic and social parenthood.

In addition to that motivation, there is an urge to spare one’s partner and child the social and family discrimination which may stem from their not being considered their parents’ biological children (24-26), and which may in turn cause psychological and social distress and trauma.

The reasons behind that choice are sometimes “private”: families may want to conceal the husband’s condition of sterility and keep up the appearance of a normal pregnancy within the marriage. Research has shown that male infertility often gives rise to doubts about one’s manhood and sexual adequacy (27-29). Men may interpret having to resort to MAP procedures as a personal failure, therefore choose to keep it secret. Heterologous fertilization enables them to pretend that their children are genetically related to both parents. Behind those motives there may be a fear that the children could turn them down in their parental role. Even though the law establishes who the father is from a legal standpoint, the symbolic presence of a donor, or biological parent, cannot be underestimated (30). If the parents choose to keep the truth from their children, they have to make sure that relatives and friends act accordingly, or they are liable to make their children feel betrayed and lose their trust.

Heterologous fertilization and adoption: similarities and differences

The Italian Constitutional Court, in its ruling n.162/2014, compares heterologous fertilization with adoption and asserts that there should be equal treatment for both children conceived in vitro and those adopted. With ruling n. 278/2013 on adoption, the Supreme Court had urged lawmakers to eliminate the ban on access to information for those mothers who had declared at the moment of birth their unwillingness to be identified and to enact new specific norms aimed at ensuring that they have not reversed their position and to uphold their right to anonymity if that were their will.

The Court would apply the same principle to heterologous fertilization and medically assisted procreation: by virtue of those standards, neither donor anonymity nor the right of children to know the truth, i.e. the identity of their biological parents, the donors. Conventional wisdom

justifiably considers heterologous fertilization and adoption substantially different concepts.

The basis for an adoption is that a child be abandoned, or taken away from his or her biological parents, often through distressing legal proceedings that uproot the child from his or her family setting. Adoption is warranted only when all else fails to leave a child with his or her natural family. Hence, children have gone through family dynamics of their own before being abandoned.

Adoption is therefore essentially meant to serve in the forsaken children’s best interest, because it is instrumental in finding for them a new family, thus preventing them from growing up in orphanages.

Children born via heterologous fertilization procedures, on the other hand, have no prior family history, because the gamete donor is merely a biological parent, who have obviously never had any relationship with them.

Therefore, heterologous fertilization does not provide a new family to children who have been abandoned, but rather enables sterile couples to become parents (31). Ultimately, heterologous fertilization, unlike adoption, does not offer a family to abandoned children, but makes it possible for a newborn child to be born from a biological parent who abandons him or her before they are born. It is fair to say then that heterologous fertilization entails a child’s birth and abandonment at the same time: in so doing, it deprives children of a fundamental right for every child: the right to know their parents and to be brought up within their family settings (law n. 189 from 1983) and exposes them to possible psychological and existential distress and complications (32). Moreover, in the case of artificial insemination, at least either parent is genetically related to the child, which is not the case with adoption (33).

For all the above mentioned reasons, heterologous MAP upholds the rights of biological and social parents, but fails to acknowledge the right of children to know their genetic origins. The Italian National Bioethics Committee (34, 35), citing the principle of equality, «does not view as legitimate, from an ethical and legal standpoint, to prevent those born through MAP from seeking information as to their biological origins». By the same token, the adoption of abandoned supernumerary embryos could be considered viable too, when parents cannot or will not have them implanted. In that case, the adoption of cryopreserved may be deemed an act of solidarity, creates no discrepancy between adoptive parents and prevents embryo destruction. It appears to be a viable solution in light of law 40/2004 provisions as well, which uphold the right of those conceived, among which certainly the right to be born. Thus, it is far preferable for embryos to be implanted and carried to term, even under adoption rules (having the embryo been created from gametes other than the couple’s who undergoes the MAP treatment) rather than have them stored indefinitely (36).

Gamete donors: anonymity versus knowledge

The doctrine at the root of the principle of full truth states that children born via heterologous fertilization procedures are entitled to know not only the circumstances of their conception, but all information available, even that pertai-

ning to the donor's identity, in order to try and establish a relationship with him (37, 38). The psychological and social consequences that a child would suffer should he or she were to find out about brothers or sisters who live in different families and in different places should not be underestimated. The violation of such a right may entail complex identity-related issues, psychological imbalances described as 'genealogical bewilderment' (39). Consequently, children may sustain an objective damage if prevented from accessing that information. To buttress this point, conventional doctrine often cites the connection that exists between parenthood and responsibility: that is the act that brings about childbirth and the ensuing responsibility. International jurisprudence bestows upon the parents the duty to support, raise and educate their children, even if born out of wedlock. Therefore, in order to determine a responsibility, it is enough to naturally procreate, and not the willingness or unwillingness to embrace parenthood. Heterologous fertilization, on the other hand, already constitutes an abandonment of the principle of parental responsibility, since it imposes on the child a family status that is different from the one that he or she would be entitled to.

Doctrine in favor of anonymity, conversely, is inspired by the need to protect a donor's private and family life, in particular when he already has children and solid family ties. Undoubtedly, the revelation of a child born from a donation possibly happened long before and under different family conditions may well give rise to traumatic repercussions on the donor and his family.

Anonymity, moreover, certainly incentivizes gamete donation. (40). If anonymity were no longer guaranteed, many potential donors would probably backtrack on their purpose lest they be tracked down by their "children" long after.

Such a theory is borne out by data from countries where anonymity has been repealed: the number of donors has decreased in those countries, whereas it has increased in countries who still enforce it (26). Nonetheless, research has shown that gamete donation can be fostered and enhanced through adequate recruitment strategies and campaigns that appeal to potential donors' altruistic motivations.

Conclusions

The issue of whether or not children should be entitled to know their biological origins lends itself to various ethical, moral, social and legal considerations, according to which party should be viewed as more worthy of safeguards: the children, thus allowing them to find out about their origins, or the donors, their privacy and right to anonymity and to keep their identity from ever being disclosed. Solutions need to be devised by legislative choices that, due to the sensitive issues at stake, should be thoroughly assessed and widely shared. Within the discourse about medically assisted procreation procedures, it is also necessary to place greater emphasis on the rights of newborn children. In fact, their best interest often turns out to be neglected, because of a tendency to disproportionately look after the parents' instead.

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