

How to kill gamete donation: retrospective legislation and donor anonymity

Guido Pennings*

Department of Philosophy and Moral Science, Bioethics Institute Ghent (BIG), Ghent University, Blandijnberg 2, Gent B-9000, Belgium.

*Correspondence address. Tel: +32-16-620-767; Fax: +32-16-620-767; E-mail: guido.pennings@ugent.be

ABSTRACT: Victoria (Australia) is considering retrospective legislation on the abolition of gamete donor anonymity. Retrospective legislation evokes many negative emotions mainly because it is considered unfair. It also makes it impossible for citizens to organize their life with reasonable certainty of the consequences. Introduction of this law for donor anonymity is defended by the right of the child to know its genetic origins. Against this law, people appeal to the right to privacy and confidentiality of the donor. This paper analyses the arguments for and against a retrospective law on donor anonymity by looking at the conditions that should be respected when two principles (the donor's right to privacy and the child's right to genetic information) have to be balanced. It is concluded that the justification for introducing retrospective law is lacking: the conditions are not fulfilled. Moreover, retroactive laws in the context of gamete donation may jeopardize the whole practice by destroying the trust of candidate donors and recipients in the government.

Key words: donor anonymity / ethics / gamete donation / justice / retrospective legislation

Introduction

In 2011, the Senate Legal and Constitutional Affairs References Committee of Australia issued a report on the practice of donor conception in Australia. In that report, the Committee introduced the question of whether information on the donor should be provided to children born before the law that required donor identifiability. About a year later, the Law Reform Committee (LRC) of Victoria, which advises the Parliament on new legislation, recommended that the law should be retrospective. The Victorian Government has 6 months from March 28 to respond to the Committee's report. If this recommendation becomes law, gamete donors in the past, who donated in the understanding that they would remain anonymous, will become identifiable. The legislation in Victoria has maintained complete donor anonymity for donors before 1988. For donors who donated between 1988 and 1997, the identity can only be released to the offspring if the donor consents. Donors after 1998 have to provide identifying information to their donor offspring.

Many people consider the proposed retrospective abolition of donor anonymity as an unacceptable violation of the donor's rights. In this paper, we will analyse and evaluate the arguments for and against retrospective legislation on gamete donation.

Retrospective legislation

Generally speaking, there is a widespread antipathy against retrospectivity in law (Sampford, 2006). The reason for this attitude is that

retrospectivity violates the rule of law, i.e. the conditions that have to be respected by lawmakers in order for law to guide conduct in a democratic society (Murphy, 2005). When lawmakers fall short of the rule of law, for instance by introducing retroactive legislation or by contradicting themselves, citizens feel resentment, based on a sense of fairness and justice (Woozley, 1968). Perhaps the most fundamental reason why retroactive legislation is viewed suspiciously stems from the principle that 'a person should be able to plan his conduct with reasonable certainty of the legal consequences' (Hochman, 1960). As a consequence, one needs a strong justification to introduce a retrospective law.

What reasons can be given to introduce retrospective legislation? Retrospective legislation may:

- (i) rectify a slowly grown discrimination or inconsistency. The different steps of the Victorian law on donor anonymity indirectly lead to different rights for the donor children born at different times.
- (ii) demonstrate the growing conviction that things done in the past are unacceptable. Lawmakers in countries that have abolished donor anonymity may come to believe that the steps taken in previous legislation can no longer be justified. In other words, too many rights were accorded to the gamete donor in the past compared with the rights of the donor offspring.

Why is retrospective legislation about donor anonymity morally wrong? Several reasons can be given. Retrospective legislation is:

- (i) unfair; the government comes back on a previous agreement, unilaterally. This decision can be seen as abuse of power.

- (ii) ungrateful; donors donate to help others and they do so within a context in which there is a balance between costs and benefits. Instead of being grateful for their help, the government now significantly increases the costs to a point where it can be expected that the majority of the donors would not have donated if they had known. In a way, they have been cheated into donating.
- (iii) inconsistent; donors are counselled so as to enable them to make a well-informed decision. When they have done so, the conditions on which the decision was made are changed. The retrospective changes inherently deny the donor's autonomy, because he (or she) has not given informed consent within the amended situation.
- (iv) disrespectful; closely related to the previous reason, it can be argued that retrospective changes imply that the donor is used solely as a means to serve someone else's interests. The only way the donor can be respected is by requiring prior consent to the release of the information.

Solving conflicts between principles

There is no obvious reason why all retrospective legislation would be wrong. Whether or not such law is justified depends on the balancing of the principles involved. The two main principles for our discussion are the right of the donor to privacy and the right of the child to know his or her genetic origin. The parties who believe that retrospective legislation is acceptable argue that the donor's right to privacy and confidentiality is overridden by the child's right to know its genetic origin (Allan, 2011; Law Reform Committee, 2012). They are convinced that not being able to know one's genetic origin causes great harm to the child.

When two conflicting principles have to be balanced, six conditions should be respected: '(i) better reasons can be offered to act on the overriding norm than on the infringed norm; (ii) the moral objective justifying the infringement must have a realistic prospect of achievement; (iii) the infringement is necessary in that no morally preferable alternative actions can be substituted; (iv) the infringement selected must be the least possible infringement, commensurate with achieving the primary goal of the action; (v) the agent must seek to minimize any negative effects of the infringement, and (vi) the agent must act impartially in regard to all affected parties.' (Beauchamp and Childress, 2001).

Let us consider these conditions consecutively.

There must be better reasons for the overriding rule

Obviously, both sides believe that they have better reasons. Reasons should refer to morally relevant aspects of the situation, and it is clear that both sides can refer to harm and to violation of rights. When we look at harm, the evidence about the harm to the child when no identifying information is available is weak (Broderick and Walker, 2004). It mostly amounts to anecdotal evidence from donor-conceived offspring. The evidence pointing to 'no (major) problems' is much stronger and based on scientific research. This also explains why the majority of the countries maintain donor anonymity. The data are reassuring for the welfare of the children for both secrecy and anonymity. Firstly, the studies up to date indicate that children who do not know about their donor conception are doing as well as non-donor

conceived children (Golombok *et al.*, 2006; Murray *et al.*, 2006). Secondly, children who are informed about their donor conception early in life are curious about their donor but do not suffer from any major problems from not knowing their donor (Vanfraussen *et al.*, 2001). The wish to know more about the donor in children who were informed about their donor conception neither has an effect on the child's well-being nor on the quality of the parent-child relationship (Vanfraussen *et al.*, 2003). Much more can be said about the different elements of the 'need' of the child to genetic information, but the overall conclusion is that the strong justification needed to break the rule against retrospective law is lacking.

The evidence on the harm to the donor in a strict sense is also weak. It is not known at present how much harm will be caused to donors and their families by such legislation. Presumably, many of these older donors have not told anyone about their donations. When their social environment is informed, highly problematic situations may be caused. Whether this harm will outweigh the harm to the child is undecided. Still, harm comes in many forms. When fewer donors present themselves because they no longer trust the government, the infertile couples will have to wait longer or will have to look for treatment abroad, where identifiability is frequently not offered. This balancing of harms and benefits tends to become a highly complex discussion and we need the other elements to break this tie.

When we look at rights rather than harm, Allan argues that the right to privacy of the donor is outweighed by the manifest injustice against the children (Allan, 2011). As I pointed out above, there is no manifest injustice against the children. The argument largely depends on the comparison one makes. Defenders of the right of the child mostly refer to adoption. This is a revealing view, since it leads to the conclusion that gamete donors are like people who give up their child for adoption and have the same obligations as birth parents. However, several analogies can be made, leading to different conclusions. One might, for instance, refer to the millions of children conceived by 'natural' donation, i.e. after adultery or unfaithfulness of the mother. Moreover, if we accept, for the sake of argument, that there is an injustice against the child, the solution would not be to commit an equally manifest injustice against the donor. The donor, in good faith and backed by society, performed an act to help people to have a child and now may suffer serious consequences for it. This message about the protection through the rules of the moment can be illustrated by the statement of the Human Fertilization and Embryology Authority (HFEA) regarding the rights and duties of the donor: 'If you donate through an HFEA-licensed clinic, you will not be legally responsible for any child born as a result of your donation.' (<http://www.hfea.gov.uk/egg-and-sperm-donors.html>). This statement is clearly inspired by the growing tendency to look for donors outside the official circuit. The HFEA is warning the potential 'grey' donors about the dangers of leaving the regulated practice. Indirectly, the HFEA gives the message that they are safe and that their rights and duties are fixed within the law. Retrospective amendments of legislation, even when outside the UK, unsettle all that.

The moral objective must have a realistic prospect of achievement

The moral objective of the compulsory retrospective donor identifiability is to enable every donor child to obtain the name of his or her

donor. However, this goal is clearly not achievable. The most important barrier for this goal is the secrecy by the parents: children who do not know that they are donor-conceived cannot ask for the name of their donor (Janssens *et al.*, 2011). It could also be argued that the objective is that every child who asks for the name of the donor should receive the name. This would very severely limit the number of children who would benefit, since most of the children conceived at the time will not be aware of their donor conception. Moreover, this goal is problematic because it accepts discrimination and one goal emphasized in the report of the LRC is non-discrimination among children born at different time periods. The LRC does not argue that all children should be contacted to tell them about their donor conception, regardless of what the parents think about this. By not doing so, it allows discrimination, not between those before the new law on donor identifiability and those conceived afterwards, but between those children who were told and those who were not. To their credit, the LRC does try to force the parents to tell by giving donors the right to request identifying information about their donor offspring. This is interesting in itself, since this means that the donor children might be informed about their conception in the worst possible circumstances: when they are over 18 years old and by a state agency.

Retrospectively lifting donor anonymity must be necessary

Several alternatives have been presented as morally preferable. The Fertility Society of Australia, for instance, has recommended in reaction to the report that 'donors be contacted in an extremely sensitive, confidential and respectful manner and asked their wishes in relation to this'. This solution would respect the donor's autonomy. Moreover, if he consents to the release of identifying information, he will be better prepared, will be more likely to accept contact if requested (thus preventing harm to the donor offspring) and will be able to inform his partner and/or children in a way he/she considers appropriate. Obviously, this means that one should accept refusal but especially in those cases the revelation of his donation may cause irreparable damage to his family. A second solution would be to provide non-identifying information considered useful by the child. However, the absolutism about the right to know one's genetic origin seems to block the consideration of this solution. If non-identifying information would satisfy the curiosity that the donor children have about their donor, there would be no need to breach the donor's privacy. Empirical research should establish which information would be most useful for the children.

The retrospective law must be the least infringement possible of the donor's right to privacy and confidentiality

The LRC (2011) seems to believe that the negative effects to the donor and his family can be minimized by giving the donors the option of lodging a contact veto. This balance, euphemistically speaking, is skewed. This concession to the donor is so small that it cannot qualify as a compromise. Moreover, it should not be made easy for the donor to obtain a contact veto since, in the mind of the LRC, it has 'the effect of constraining people's ability to freely associate with certain other people' (p. 80). This formulation reveals the assumption

that the donors should have long-term relationships with their donor offspring. Identifiability means much more than just revealing the name of the donor. The LRC believes that donors should build friendships and other relationships with the offspring and they even seem to regret the fact that the state cannot compel people to do so (p. 63). But they would make it difficult for the donor to refuse such contact. Therefore, the contact veto has to be renewed every 5 years and the donor should lodge a separate contact veto for every donor child who requests information (which may be up to 30 or more). As a final concession to the donor, they grant that if the child plans to make unwanted contact, he can always apply for a personal safety intervention order against the child (p. 81). Imagine being a donor: would you feel reassured?

The government must make sure that the negative effects are minimized

The LRC seems to believe that counselling will do much good. How would counselling prevent that the partner of the donor feels betrayed by his/her partner's donation? Moreover, the trust they put in counselling seems to be selective since if it would indeed work that well, why not solve the children's problems through counselling? The most evident way to minimize the negative effects is by inserting a step which requires the donor's consent. If, as they point out, many donors have either changed their minds, have always had no desire to be anonymous or have come to realize that donor children need this information, why not trust them and give them the possibility to consent? If all these arguments were true, then donors would already have come forward and registered with the voluntary registers that were installed years ago.

A second important point regards the feelings of the social parents. They too may feel betrayed when they were told at the time of treatment that their children could not make contact with their donor. They might have made a different decision about telling or not telling about the donor conception if they had known about the new situation. Moreover, for single women and lesbian couples, the legal status of the donor may be unclear and a demanding donor may threaten the family unit (Cameron *et al.*, 2010).

The government must act impartially

Impartiality demands that the interests of every person should be considered in the same way. The balancing of the LRC is window dressing, since the result is known in advance. Throughout the LRC report, it is emphasized that the interests and rights of the donor children are paramount and should override the interests and rights of all other people involved. This position has no theoretical foundation. On the contrary, it violates some basic ethical rules like equality and impartiality. The 'interests of the child are paramount' is moral demagoguery appealing to the general intuitive weakness of people for children. It is clear that the rights and interests of vulnerable groups should be protected, but that does not mean that their rights should take automatic precedence.

Trust

Apart from the violation of the original contract, the main effect of retrospective legislation is the loss of trust. Uncertainty and distrust

are lethal for a practice that may have far-reaching implications for a person's private life. Once one rule is changed retrospectively, what should stop the legislator from coming back on other points? In a few years time, the legislator may decide that it is impermissible to transfer parental rights and duties (Weinberg, 2008). That would mean that the donor might also be forced to take up parental obligations for the donor children. If it is judged to be in the best interests of the child, the donor might be obliged to provide child support for the child and eventually to adopt the child. Some already argue that a child has a right to be raised by his or her genetic parents (Somerville, 2010). The same arguments as those used now to justify retrospective legislation regarding donor anonymity could be used to impose parental rights and duties on the donor. Given the extended time period during which retrospectivity may have an impact (the whole life span of the donor) and given the increasing tendency to attribute an extremely high value to genetic links, a donor should be willing to accept the worst case scenario. Unless a donor is willing to become the parent of the child, he or she should not donate.

Some people may believe that this is a far-fetched argument. However, I would advise reading the report of the LRC. I will give just one example of how they look at gamete donation. At a certain point, they present a discussion on the donor's access to information and state the following: 'For example, the Committee hears from Mr. Ian Smith, a pre-1988 donor, who is the biological father of nine children, seven of whom were donor-conceived'. It is extremely rare to find a similar description of a donor's family in other documents. On reading the report and many of the documents produced by the defenders of the child's right to know, the idea that gamete donors may one day become legally responsible is not far-fetched. It may even be closer than one thinks.

This report of the LRC is a collection of anecdotal evidence from self-selected donor-conceived people who present their wishes and whose wishes are directly transformed into needs to be fulfilled. It shows where attaching absolute value to genetic relationships in gamete donation leads us. Numerous counselling sessions are suggested for the donors, the donor siblings, the non-donor-conceived children of the donor, the partners and family of the donors, the recipients, the family of the recipients, the donor-conceived children, and all that, over a long time period. Intricate stepwise procedures are developed to provide information and to support people in every step. It makes one wonder where the counsellors will come from to do all this work and who is going to pay for this organization. It also demonstrates the dynamics of this movement. The members of parliament in Victoria, Australia, are no longer talking about identifiability: they talk about long-term contact, large family networks, implicit and explicit obligations to form relationships etc. Finally, the report expresses a totally different culture. For decades now, the Australian and New Zealand culture has emphasized the importance of genetic relationships for psychological well-being (identity) and social networks. In doing this, they culturally induced and reinforced the wish to know one's genetic origin and thus indirectly caused the problems that are seen now. There is little doubt that, in a society that tells a person that she cannot know who she is if she does not know her genetic parents, she has a high(er) risk of developing psycho-social problems if she cannot find her genetic parents. This opens a familiar debate: should we do something about the desire (i.e. make sure that people do not need to know their genetic origin to form an identity)

or should we do something to increase the chance of fulfilling the desire? Given the context of past gamete donation, it seems far more logical to do something about the need for genetic information.

Hidden agenda

A strategy of some people who oppose a certain practice is to shift focus when their original arguments do not convince the others. They then focus on a different aspect of the practice that carries greater consensus. Some opponents of embryo research moved from the status of the embryo, not very successful since highly contentious, to the argument of exploitation of women in oocyte donation (Mertes and Pennings, 2010). For certain types of embryo research, such as somatic cell nuclear transfer, one has to create embryos. To create embryos, one needs oocytes. By blocking the availability of oocytes for research, they indirectly prevent therapeutic cloning. A similar strategy seems to underlie the present discussion on donor anonymity. Some people are opposed to gamete donation because it contradicts their normative conception of the family. This argument is not very successful, since it conflicts with the increasing acceptance of pluralism in family forms. Instead of pursuing the old line, they shift strategy by emphasizing the importance of genetics for the identity of the child. Children's rights can always count on much sympathy. Even if this does not lead to a prohibition on gamete donation, it will surely make things more difficult. An additional effect is that it renders family building hard especially for same-sex couples, another violation of these opponents' beliefs of what families should look like. Like the feminist argument against oocyte donation is meant to block embryo research, the child's right to know his or her genetic origin argument serves to discredit gamete donation. For this movement, the goal is reached when the child is raised by his or her genetic parents and when social parents become foster parents. Moreover, a retrospective change of law is one of the most damaging steps imaginable for the practice of gamete donation. Why would any donor from now on trust the clinic or the government? Destroying this trust will make it much harder to recruit donors.

Conclusion

Retrospectivity in the law needs a strong justification. This justification is lacking as far as legislation on donor anonymity is concerned. Moreover, retrospectivity in matters of gamete donation jeopardizes the whole practice. By granting a child an absolute right to know his or her genetic origins, thereby ignoring the rights and interests of the other parties, very little benefit will be obtained and a lot of damage will be caused.

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