

Artificial Reproduction Technologies: the child's right to know his own origins v. the donors' right to anonymity

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A story beginning in 1978



Since then:

- Gamete donation
- Surrogacy
- Delayed pregnancy using cryogenics for preserving zygotes
- Reproductive tourism

Bioethical dilemmas

These new techniques are likely to change
not only our way of reproducing
but also our view of what human reproduction is (or should be)
(Mori, 1996)

From a bioethical perspective:

- Impact on family
- The moral status of the human embryo
- Manipulation of human beings

Two main positions

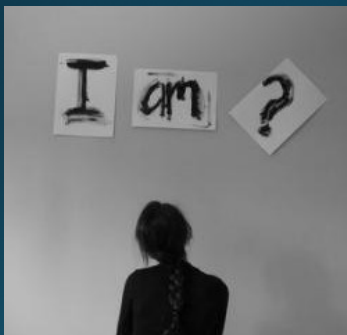
In favor of ART	Against ART
Importance of the right to make private choices free from the scrutiny of the State and the right to health, including reproductive health.	Access to ART should be only a remedy to couples' infertility and not as an alternative ways of conceiving a child available to everybody. Supremacy of the 'rights of a baby' over a supposed 'right to a baby'.

The right of babies to know their origins

- Heterologous fertilization: i.e. artificial insemination by donor (sperm or oocyte) -> half of the genetic makeup of the baby comes from a donor
- Surrogacy: implies the carrying of a pregnancy for intended parents by the surrogate mother
 - gestational surrogacy: the resulting child is genetically unrelated to the surrogate -> half of the genetic makeup of the baby may come from a donor
 - traditional surrogacy: the resulting child is genetically related to the surrogate -> half of the genetic makeup of the baby comes from a donor, who is also the gestational carrier

The right to know one's own origins

1) Right to identity



Art. 8 Convention on the Rights of the Child

- ✓The identity of an individual is the assertion of his/her existence in a society; a matter of recognition of his/her individuality and what differentiates him/her from his/her peers.
- ✓Narrative identity (biological links and other relevant circumstances of birth)

The right to know one's own origins

2) Right to know his or her parents



Convention on the Rights of the Child

Art. 7 : The child shall (...) have, as far as possible, the right to know and be cared for by his or her parents.

Art. 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.

The right to know one's own origins

3) Right to health



Universal Declaration on Human Rights, art. 25

ICECSR, art. 12

Right to health covers the access to health information, including familial medical history (heart disease, diabetes, cancer, mental health issues).

Donor's and surrogate's right to anonymity

ICCPR, Article 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation.
- 2. Everyone has the right to the protection of the law against such interference or attacks.



ECtHR case law - cases

Principles can be derived from the case law on:

➤ Establishment of paternity:

- *Mikulić v. Croatia* 2002
- *Jäggi v. Switzerland* 2006
- *Mandet v. France* 2016



➤ Identity of the birthmother in case of anonymous and secret birth:

- *Odièvre v. France* 2003
- *Godelli v. Italy* 2012



ECtHR case law – principles (1)

- Persons seeking to establish the identity of their ascendants have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. (*Mikulić*)
- An individual's interest in discovering his or her parentage does not disappear with age, quite the reverse, especially when the person shows a genuine interest trying to obtain conclusive information on the subject. (*Jaggi; Gonelli*)
- There are positive obligations bearing upon the State to support people to seek information, including facilitating them in their search.

ECtHR case law – principles (2)

➤ The balancing of all the rights at stake is necessary

✓ in *Jaggi v. Switzerland*:

- the right of third parties to the inviolability of the deceased's body
- the right to respect for the dead
- the preservation of legal certainty

✓ in *Odièvre v. France*:

- the position of the natural mother,
- the rights of other members of the natural family
- the existing family ties and the adoptive parents
- **a prominent general interest**

ECtHR case law – principles (3)

➤ Reference to the principle of the best interest of the child

...from *Mikulić v. Croatia* to *Mandet v. France*

The interests of the child is that he should know the truth about his origins, despite he does not intend to....

Towards a child 'duty' to known his origins?

Possible normative solutions for ART

1) Many legal systems allow the person conceived via donated gametes to access *identifying* information on the donor once they are mature enough.

Sweden 1984, Austria 1992, Switzerland 2001, Norway 2003, Holland 2004, the United Kingdom 2004, Finland 2006, most of Australian states; New Zealand 2004, Uruguay 2013 and Argentina 2014.

2) 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.

Iceland 1996 and many US states.

Prospective and retrospective release

Prospective regimes:

guaranteeing the right to know only for the future

or

Retrospective regimes:

application of the the right to know one's origin's retroactively?

A never ending ethical debate?

1. A real benefit for children?

- What if the right to know one's origins may bring the child more harm than benefit? Is attaching importance to genetics the best way of guaranteeing the wellbeing of families that do not share the same genetic make-up?

2. How to combine the right to know with the right not to know?

- If we consider the right to know one's origins as a right to informational self-determination it would also encompass a right *not* to know.



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