The ‘double track’ policy for donor anonymity

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Although there is no evidence that any one policy is the best solution, clinics as well as legislators tend to impose one position about donor anonymity on all participants. The most evident alternative policy is to let the parties decide for themselves. Donors may choose between anonymity or identification and recipients can opt for an anonymous or identifiable donor. This ‘double track’ policy for anonymity represents the best attempt to balance the rights of donors, recipients and donor offspring. The procedure reflects the plurality of visions and the absence of an independent standard to decide which one is best.

Key words: anonymity/donor/ethics/policy/sperm donation

Introduction

For some years now, the anonymity of the gamete donor has been the topic of a lively debate. The discussion made an end to the supremacy and self-evidence of the anonymity rule. The change of practice in adoption has led to a greater tendency for openness in the context of gamete donation. However, the balance has tipped the other way. Whereas previously anonymity was guaranteed by law, some countries now oblige all donors to be identifiable. Again it is assumed that there is one correct position which should be imposed on all participants. Already in Austria, Germany, Sweden, Switzerland and Victoria in Australia, the child has the legal right to know its origins. In the USA, Spain and in the latest proposal of law in the Netherlands (Hubben, 1996), the anonymity can be abolished if the vital interests of the child are at stake (as decided by the court).

At present, the whole issue of anonymity is reduced to the question of either the best interests of the donor child or the right of the child to know its genetic parents. Both questions attribute an overwhelming importance to the well being of the donor offspring. The other aspects of the anonymity topic, however, should also be recognized. The choice between anonymity and identification expresses the importance a person accords to family relationships and actual parenting on the one hand and the genetic link on the other (Haimes, 1992). It reflects the role attributed to the donor by the recipients and by the donor himself. It indicates to what extent families (those of the recipients as well as the family of the donor) should be protected against external intrusion. Those who argue for the legal imposition of either anonymity or identification presuppose that a single way of organizing the family will and should work for everybody. This is a short-sighted and false idea. Donor insemination is a practice in which a couple (or woman) is looking for someone to help them (or her) to build a family. There is nothing in this situation that indicates the role to be assigned to the helper. Most couples try to restrict the donor contribution to a minimum, others do not mind if the helper shares something more. The same spectrum of opinion can be found among donors.

The ‘double track’ policy

The policy is simple: a donor has the choice to enter the programme as an anonymous or as an identifiable donor and recipients can choose between an identifiable or an anonymous donor. The details (at what age the child can be told the name of the donor, who the child should contact, etc.) may be adapted to the national legislation and can be used to emphasize specific points. The model is currently used in most oocyte donation programmes where it was initially introduced because of the difficulty of attracting oocyte donors (Baetens et al., 1995). The choice, however, is between a known and an anonymous donor and not between an identifiable (but unknown at the moment of the donation) and an anonymous donor (Braverman and Corson, 1995). Some sperm banks in the USA and, more recently, the University Hospital of Leiden (The Netherlands), have established a ‘double track’ system for anonymity of semen donors (De Bruyn et al., 1996).

The model takes the relativity of the different perspectives as a starting point. It is built on the admission that no position is inherently better than the others and that consequently the parties involved should be able to decide under which conditions they want to participate. If we conceptualize the anonymity issue as the participants’ expression of the kind of relationship they want in the future, we can distinguish two positions: (i) there is no good or bad way for the different parties to relate. Donor and recipient should make binding contracts or promissory arrangements and, as long as they both agree, whatever they decide is right. For adherents of this view, the choice could also be presented as a question of preference rather than of moral rightness. The only moral value involved is a person’s right to organize his life in the way he sees fit; (ii) the genetic link imposes some minimal requirements on the relationship between the recipient and the donor and between the donor and the child. By offering the genetic material the donor has a minimal responsibility toward the donor offspring. The willingness to be identified and to have contact with the child(ren) is part of that responsibility (Baran and Pannor, 1989).
A general model applicable to other aspects of the donation?

The anonymity issue is structured as a reciprocal ‘double track’: both parties have to make a choice on the same issue (e.g. anonymous versus identifiable). The second party chooses the group in which the first party has placed himself. For something to become a reciprocal option, both parties should think of the aspect as crucial for the donation. They should consider the choice made by the other party as important for their relationship.

The model could be applied to other dimensions of the donation. Donors could be asked whether they want to be contacted by the donor offspring. At the Pacific Reproductive Services, a sperm bank in the USA, the donors not only agreed to be identifiable but they also consented to meet the donor child at least once (Sherrid, 1996). Donors might, as is the case in some oocyte programmes, be offered the choice between becoming a known (identified at the moment of donation) or unknown donor. On the other hand, donors might claim the right to decide whether their semen will be used for single and lesbian women (Pennings, 1995). Recipients could be asked to give non-identifying information about themselves to the donor (Purdie et al., 1994). If one party expresses a strong wish for a certain type of person as the other party, one can introduce the ‘double track’ policy. The procedure which is adopted in the end will always be the result of a negotiation process among the different parties involved. Although there will rarely exist a perfect balance between the different positions, some kind of dynamic equilibrium will be obtained.

The position of the clinic or sperm bank

The position accorded to the fertility centre or sperm bank differs considerably. For some, the clinic is no more than an intermediary between gamete provider and patient, for others it carries a considerable responsibility for the way the transfer of gametes and the medically assisted procreation takes place. The general decision-making power of a clinic is largely determined by the national legislation concerning assisted procreation. In countries where no legal regulation exists, like Belgium, the medical staff still has a considerable say in the procedure, even when it concerns fully non-medical aspects. Anonymity is one such non-medical aspect and it is unclear what places the physician in a better position than the other participants to decide this issue. The absence of a law concerning the right to know one’s ancestry does not imply that the participants are given the freedom to choose. Whether this is the case largely depends on the prevalent position of the community and of the major medical societies on the issue. In Belgium, clinics solely rely on anonymous sperm donors and they guarantee the anonymity. In New Zealand, with its general tendency towards openness, sperm banks only accept semen donors who are willing to be identified (Adair and Purdie, 1996). Even if the clinic favours one position, the uncertainty about what is the right solution is too great to justify a coercive framework.

In countries where there is a law, the legislation should be such that the introduction of a ‘double track’ model by the clinic is possible. In general, the law should contain no rules which would contradict the basic points of the agreement. For instance, since 15 April 1994, the High Court in the Netherlands has recognized the right of each child to know its ancestors. This law could cross the model because the anonymity of the donor can no longer be guaranteed by the clinic (Broekhuijsen-Molenaar, 1996). Such a stipulation undermines the validity of the choice. Moreover, the basic legal conditions for identification, like the legal guarantee that the donor has no parental and financial rights and responsibilities to the child, should also be enacted. Without these preparatory rules, the choice for either party would not constitute a real choice.

The dual system is a short-cut for repeated negotiations between donors and recipients. The clinic can structure the transfer by providing a limited number of choice options for the basic issues. By bringing donors as well as recipients into compatible categories, they can easily be matched. The introduction of a restricted number of options is practically feasible and does not (over)burden the clinic. Parties who want to negotiate some special or extraordinary arrangement should look for their own partner (donor or recipient) before approaching the clinic.

Clinics and legislators must abandon attempts at regulating those aspects of the procedure on which no consensus exists concerning the best policy. The role of the organizers should be restricted as much as possible to counselling the participants on the known or presumed aspects of their choices in order to enable them to make a fully informed decision. Recipients who, for instance, want to use a family member as a donor should be allowed to do so unless there is reasonable evidence to anticipate that the use of family donors leads to serious problems in the newly created family. The clinic should check the free consent of the participants and should counsel the parties on the different aspects of known donation but it should not forbid or exclude such a choice. This position implies a morality of consent in all domains in which no consensus exists. Neither the legislator nor the clinic should impose their view on all participants. The procedure should reflect the plurality of visions and the absence of an independent standard to decide which one is best.

Objections to the ‘double track’ approach

Discrimination

According to the Royal Commission on New Reproductive Technologies (1993) in Canada, the introduction of a dual system would treat some children as unequal and would discriminate against them. There would be a class of children who may have named information on their genetic father and a class who may not. If the child has a basic right to know its ancestry, then the system would deny some children the application of their right (Broekhuijsen-Molenaar, 1996). This is of course correct. However, if the equality of the children is the first consideration of the authorities, they should not give the option of secrecy. The parents are given the right ultimately to decide whether or not to tell the child of the mode of conception. Society recognizes the right of parents to introduce distinctions between children and tolerates the
inequality by accepting that the name of the social father is mentioned on the birth certificate. There is now a class of children who know their mode of conception and another class who do not. Just as parents are given the right to decide whether or not to tell, they have in the proposed system the right to choose the donor pool from which they will be served. This argument normally presupposes that the needs of all children are the same. The discrimination is unjust because all children would equally benefit from knowing their genetic father. However, since some children (i.e. those whose parents keep the secret) will not even know that a donor was involved, they cannot want to know his name. Some countries, like the UK, installed a system by which every child can consult a national central register independently from its parents to find out whether he or she is the result of assisted conception (Cooke, 1993). A similar system is under consideration in the Netherlands. However, in practice this presupposes knowledge (or doubt) by the child of its mode of conception. Why would someone check on something which he or she has no reason to doubt?

**The need of the donor child**

This ‘double track’ system offers no solution to the problem of the children who wish to know the identity of their genetic parents (De Wert, 1990). The donors (and the parents) still have the possibility to keep the information from the child. For those who are convinced that the need of the child should always take precedence over the privacy of the donor and the parents, the solution will remain unacceptable.

**Division of the donor pool**

The introduction of different categories automatically subdivides the already limited donor pool. The smaller the number of donors, the more difficult to find a donor who matches the husband or partner. This is equally true when donors are given the right to designate the groups of recipients or when recipients can indicate which groups of donors they want to use (Pennings, 1995).

**Counselling**

Purdie et al. (1994) have already pointed out that there is a problem in counselling the donors about the choice they have to make. An informed choice should at least take into account the possible or likely consequences of the different options. Donors will want to know whether they will be contacted by their progeny, what the implications will be for their family, the chance that there will be problems etc. There is currently no information on how well the system works. The Sperm Bank of California has an identity release policy but since this programme only started in 1982 and since identity will be released solely to children who have reached the age of 18 years, the first data will only be available in 2000 at the earliest. The opinions on the reactions of the offspring towards the donor seem to be based on speculation, intuition and partially on comparisons with the adoption situation. People who are opposed to the right to anonymity of the donor argue that it is psychologically unlikely that the donor child will either intrude on the donor’s family or invade the donor’s personal life by seeking contact (Bogdan, 1986; Meerum Terwogt, 1992). On the other hand, the existence of a major group like Donors’ Offspring seems to point in another direction. Even if they are not looking for a new father or for emotional support from the donor, the offspring of the donor is interested in hoped-for relationships with unknown siblings (Turner, 1993). If, as is the case in Sweden, half of the semen donors have kept their donations secret from their partner and from their own children, contact by donor offspring may cause considerable distress (Daniels et al., 1996). In order to be able to predict with reasonable certainty the possible effects of identification, aspects of the donation such as the importance attributed by the community to the genetic link, and the degree of secrecy by the donor toward others, should be taken into consideration. However, at present the conclusion that the risks for the donor are negligible is largely speculation and needs to be corroborated by empirical data.

**Time gap**

The last problem is the time gap between the moment of decision (and donation) and the moment that the child may be told. The system assumes that the donor at the time of the donation can anticipate how he will feel about identification approximately 18 years later. This objection can be raised against all long-term decisions we take in our lives (marriage, having children, career choice, etc.). Moreover, donors similarly make long-term decisions by entering into the present system without being able to anticipate their future reaction. An anonymous donor who, after having children of his own, wants to be known, generally cannot alter this situation. It has been suggested in New Zealand that clinics recontact previous donors in order to ask them whether they want to be identified and available for contact, an option not offered at the time they donated (Daniels, 1996). This fact clearly illustrates that the issue of anonymity cannot be evaluated independently from the general social view on the matter. Given the general tendency to favour openness, the possibility of change is not symmetrical: no donor who indicated his wish to be contactable has been approached to offer him the option to become anonymous. In general, such a change should never be forced (Engelhardt and Wildes, 1991). To keep the trust of all parties, it is extremely important that the original agreement should be respected unless all parties voluntarily agree to the proposed alterations.

In addition, donors who regret the donation itself cannot change their minds. Just as the uncertainty about the future and about one’s future emotions is no reason to prohibit marriage, it is no reason to object to sperm donation. In general, the change of opinion will be due to changes in the life conditions of the donor. The possibility that the donor changes his mind can be greatly reduced by requesting that the conditions which may cause the conversion are fulfilled at the moment of the donation: donors should be married or in a stable relationship and they should have a child of their own.

It is indeed unrealistic to believe that the donor’s feelings and beliefs about his role will remain the same. However, the validity of the decision does not depend on his wishes and opinions at the moment of disclosure. The decision of the
donor should be taken as a declaration of intent. It is like a promise: you cannot go back on your promise because you think, at the moment the promise must be honoured, that the promise was ill-considered. By stating that he does not object to identification, the donor creates expectations in others (namely the expectation that when the child reaches the age of maturity, it will be given the name of the donor). The parents have acted on the assumption that the donor will keep his promise. The wrong done by a donor who withdraws his consent lies in the fact that, if he had not said that he was willing to be identified, the couple could have chosen another donor who would truly have agreed to be identified (Scanlon, 1990). Since the recipients made their choice on the basis of the decision by the donor and since their decision is equally irrevocable, the donor should not be given the right to withdraw his permission. If the donor has to reconfirm his original permission, the parents and the donor offspring are being offered a pseudo right (De Wert, 1990). Revocation of consent should not be allowed to prevent the original choice becoming meaningless (Royal Commission on New Reproductive Technologies, 1993).

The National Bioethics Consultative Committee (NBCC) in Australia considered a different ‘double track’ system which would avoid the time gap problem of consent. The first track would be donors who would be identifiable while the second track would be donors who would be identified if they consent to the release of their name at the moment that the information is sought by the child (Bennett, 1993). The Committee, however, did not consider the other half of the agreement, namely the fact that the recipients make their choice on the basis of the preceding decision of the donor.

The argument of the unpredictability due to the time gap requests too high a standard for the decision made by the donor (i.e. no uncertainty about his future reactions is allowed) and borders on paternalism. If one presupposes that the donor is able to make a free and informed decision about the donation itself, his maturity and discretion should also enable him to make the anonymity versus identification choice.

The advantages of the system

Information gathering
The system enables us to assemble much-needed information concerning the effects of both options. As long as anonymity is legally imposed, there is no way to gather information on the effects of identification. The model can also be presented as a transitional measure which can be abolished once we know enough about the consequences. The options will be offered until it is demonstrated that, for instance, one arrangement violates the rights of some party. If it can be shown beyond doubt that anonymity of the biological parent causes severe identity problems in the donor child, anonymity should be abandoned as an option. The rationale underlying the temporary nature of the system is evidently that the matter can be decided on the basis of new information and research. However, some objections are not based on the empirical consequences but may be founded on the view of one party on what constitutes appropriate reproduction. Moreover, in the case of anonymity and identification, there will probably never be information which shows clearly and beyond doubt that a certain option harms one of the participants. Is the fact that some children feel a desperate urge to know from whom they are descended sufficient to oblige all donors to be identifiable? Is the child’s need for information about the genetic parent culturally induced and if so, should we do something about that? The controversy does not seem amenable to a clear-cut resolution. Nevertheless, even on a transitional basis, the model may be useful.

Self-regulation
The model is self-regulating in the sense that both parties have the opportunity to reach an agreement by adapting their positions to the choices made by others. Purdie et al. (1994) decided to let donors as well as recipients choose between anonymity and identification. After a few years, they had to reject donors who wished to remain anonymous because all recipients opted for an identifiable donor. However, this only followed because the number of donors who were prepared to release their name met the demand. When the supply drops, some recipients may be obliged to accept a less than ideal donor. If, on the other hand, the recipients insist, some donors will lose their reticence and be prepared to release the information. Without any form of coercion or external force, the practice is directed in such a way that no person can say that his rights are infringed. The power balance is guaranteed by the simple fact that every party can veto any proposal of any other party. They may do this by finding their own solution (they travel abroad or they start looking for their own donor) or by refusing to participate under these conditions. The model thus seems to prevent the possible exploitation of one party by another.

Co-ordination with the position of the parents on secrecy
Secrecy about the method of conception is the lock through which one has to pass to get to the anonymity issue. Those who promote the abolition of anonymity should logically also be in favour of greater openness concerning the use of donor material itself. However, there is no consensus on the influence of the anonymity (or identifiability) of the donor on the attitude of the parents toward secrecy. The decision to take a known or anonymous donor can be seen within the context of the larger decision to keep the secret of the manner of conception from the child (Braverman and Corson, 1995). Two points arise regarding identity. Firstly, the abolition of anonymity would drive more parents to keep the secret (Leenen, 1993; De Wert, 1990). The threat the donor constitutes for the completeness and naturalness of their family is greater the more concrete and personal he becomes. By releasing the name, the child might choose to contact the donor (Bogdan, 1986). Anonymity offers the parents the security that the donor will never intrude into their families and this would support them if they wish to be open about the method of conception (Royal Commission on New Reproductive Technologies, 1993; Thévoz, 1996). Secondly, parents would not tell their child at present because they are not in a position to give any further information about the donor. A limited amount of information
might do more harm than good (Cusine, 1988). The parents want to protect the child from frustration since the child will not be able to locate the donor even if it is informed about his existence (Lasker and Borg, 1989). The latter is confirmed in the research by Cook et al. (1995).

Since no country legally obliges the parents to inform the child on the method of its conception (Knoppers, 1993), the end result of the anonymity rule will always be mediated and restricted by its effect on the attitude of the parents. The rule would be self-defeating if offering the child the possibility of identifying the donor would lead to a much stricter secrecy by the parents concerning the use of donor material (Knoppers, 1993; Royal Commission on New Reproductive Technologies, 1993). Most probably the social parents will reason according to the conception which corresponds best with their personal view on the role of the donor. The procedure should be organized in such a way that the parents do not have to take a position which constitutes an additional barrier for them to tell the child about the manner of conception.

The welfare of the family as a unit

A right is typically accorded to an individual. Talking of the right of the child to know its origins focuses on the need of the child as if this need can be met without touching the interests of the other people involved. Given the position of the child, it is more realistic to consider the welfare of the child as intrinsically connected to the welfare of the other family members, and in particular of the parents. The isolation of the welfare of the child from the welfare of the family as a whole might prove counter-productive and self-defeating (Cook et al., 1995; Knoppers, 1993). Especially in the absence of objective proof of the harmfulness of the lack of information to the child, a flexible system which allows parents to choose what they think is best for themselves and for the child and to act in accordance with what they consider to be right, might turn out the most beneficial for all (Shenfield and Steele, 1997).

A more carefully thought-out choice

The sheer fact that a choice is offered obliges the recipients and the donors to think about the issue. If counselling is effective, the freedom of choice will sharpen the deliberation process and thus will lead to a more thorough reflection than when the matter has been decided beforehand. Both parties are forced to consider their motivations and to think explicitly about the kind of relationship they want with respectively the donor and with the parents and the offspring. This results in a choice better fitted to the personal and family situation and more suited to the motivations of the participants (Weil et al., 1994).

Recognition of moral pluralism

An important reason for defending the ‘double track’ system is a moral one. There is no consensus (and probably never will be) on what constitutes appropriate reproduction. It is impossible to decide objectively which rights and obligations should be attached to the genetic link. The role attributed to the donor cannot be defended independently from a specific moral background. Without a particular content-full moral vision, there is no way to discover the right policy (Engelhardt and Wildes, 1991). The ‘double track’ procedure might be the best practical solution to respect the moral convictions of everyone. It supports a morality reached by consensual agreement, in which the consent of the parties determines whether a position is acceptable. An enormous variety of arrangements can be worked out, ranging from total anonymity to a large responsibility of the donor in the upbringing of the child. The application of the autonomy principle is restricted by the harm principle: if it can be shown that some agreement harms one of the parties or infringes the rights of a participant, it should be rejected as invalid. However, others should not be able to forbid or refuse a certain agreement between free and autonomous persons on the basis of unsupported fears. In the light of the disagreement about the best policy, the legislator should abstain from regulation, especially in so intimate and personal an area as reproduction (Kremer and Leenen, 1991; Leenen, 1993).

Conclusion

The ‘double track’ policy for anonymity represents the best attempt to balance the rights of donors, recipients and donor offspring. It offers the social parents the freedom to choose the degree to which they want the donor involved in their new family. It also enables donors to define their commitment. Moreover, it also expresses the idea that there is no unique and universal optimal solution.

References

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*Received on June 18, 1997; accepted on September 25, 1997*