Right to know one's origin

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THE question that is currently agitating legal minds across the globe is whether an adopted child or a child whose being was brought about through sperm or gamete donation has a right to know his or her origin or biological parents on attaining maturity?

The question is now critical because some school of thought are agreeable that a child has a right to know his or her origin while the other school of thought is of the view that it is not necessary considering the dislocations or consequences such revelation may cause in the family. Yet others are in between. Which divide do you belong?

Well, lets define adoption to enable us really understand the issues to be discussed shortly.

According to Black's Law dictionary (7th ed) edited by Bryan Garner, adoption is "the statutory process of terminating a child's legal rights and duties toward the natural parents and substituting similar rights and duties toward adoptive parents." Put in another way, it is the creation of a family relationship between adopter (the adoptive mother and father) and the adopted child. It is a civil family relationship. Or better still, it is traditionally understood as acceptance of a stranger's child as one's own and as a voluntary assumption of parental obligations by an individual who usually is not the biological parent of the person adopted.

The effect of an adoption order is that the child is thenceforth treated as if he or she had been born as a child of the adopters' marriage, and not as the child of any one else.

Article 7 of the United Nations Convention on the Rights of the Child recognised or guaranteed the rights of the child to know its origin. The article provides;

"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and as far as possible the right to know or be cared for by his or her parents". (emphasis mine).

Though the traditional concept of adoption and the laws or enactment made on it are tailored such that after adoption, there is a complete severance between the old family (that is the biological parents) and the new family (that is the adoptive parents.

It has now become apparent that the uses to which adoption has increasingly been put create a certain tension between the so-called total transplant or sperm or gamete donation concept of adoption, firmly embedded in the statutory frame work of some countries, and pertinent to question whether the law should not permit, or even in some cases facilitate the retention by an adopted person of legal links with the birth family.

In England, and I would say Nigeria inclusive, the legislation was originally formulated on the assumption that there would be no contact at all. Such contact

would (it was thought) be undesirable not only in the child's interest, but in the interests both of the adopting parents (who might find themselves harassed by the birth parents) and of the birth mother who might have agreed to place her child for adoption only on the basis that she could conceal from everyone, including perhaps her husband - the fact that she had ever born a child. The legislation therefore provided - and still provides - a procedure enabling adoptive parents to conceal their identity from the birth parents.

The adoption law of Lagos State 2003 applies only to the adoption of a person under the age of 17 years who is abandoned, or whose parents and other relatives are unknown or cannot be traced after due enquiry certified by a juvenile court. In this case, it can be clearly seen that there is no contact with the biological parents of the child to be adopted.

It has for long been regarded as a good practice for a child to be brought up in the knowledge of his or her true parentage and of the circumstances leading up to the adoption, and adoptive parents are given written background information about the child and birth family in an attempt to help them bring up the child in the knowledge of the adoption from an early age. This trend, which recognises the wish of many adopted people to trace their genetic origins (and also, sometimes, the wish of the birth parents to know what has become of the child) also influenced the enactment of two important statutory provisions in England. First, on attaining the age of 18, an adopted child is now entitled to access the original birth records, which will reveal his or her original name and parentage in so far as that is recorded. (See Section 51 of the Adoption Act 1976). Secondly, an adoption contact register has been established: relatives of an adopted person who which to contact him or her can have their details recorded in the register, and information will be passed on if the adopted person has given notice indicating a wish to contact relatives. See Section 51A of the Adoption Act 1976.

As good as this provisions may seem beneficial to all concerned, the problem of birth parents suffering grave distress when traced and the adoptive parents who had made the adopted child to believe that the adoptive parents are the parents facing embarrassment has not be taken care of. The facts of R Vs. Registrar General, ex parte Smith (1991) 1 FLR 255 CA show too clearly the dangers which disclosure and openness may create. In this case, the applicant was a patient in Broadmoor Hospital who had brutally sadiscally murdered a fellow prisoner (apparently under the delusion that the victim was his adoptive mother). Disturbed and unstable, he continued to express hatred for his adoptive parents. He exercised his statutory right to seek information which would enable him to trace his birth certificate, and thereby to be in a position to trace his birth parents, whom he blamed for his problems; and the Court of Appeal accepted that, in the circumstances, it has been right to deny him the statutory right of access to his birth certificate.

Though the decision appears correct because of the particular circumstances of the applicant, but it would not be taken as an authority to deny other applicants of their right to know their origin.

The Warnock Committee in England considered that basic information about the donor should be made available to a child born as a result of AID (sperm or gamete donation) at age 18. The government sought further views of the issues of confidentiality and access to information about origin. Most respondents supported a

right for children to have some information about their genetic parents and some argued, by analogy with adoption, for a right to know the identity of genetic parents.

In Netherlands, the right to know one's origin has been taken up in the courts. In Roovers V. Valkenhorst, the question at issue was whether a person, now an adult, who had been born and brought up in an institution, (Valkenhorst) had the right to inspect files kept by the institution. Of particular interest to each applicant were records of statements made by the mother when admitted to the institution concerning the identity of the father of the child which she was then carrying. The institution's policy was only to allow the applicant to inspect the file if the mother had given her permission, or had died without expressly forbidden disclosure. The applicants, who were born in the institution, challenged the policy in legal proceedings. The trial court and the Court of Appeal (Gerechtshof's Hertogen bosh) upheld the policy. The applicant's appeal to the Supreme Court provided the court with the opportunity to declare that Dutch law guaranteed a person the right to know his origin. The court held that Maria Roovers had a right to know the identity of her father which weighed more heavily than the mother's right to privacy.

The matter did not stop there as theValkenhorst revised its policy on disclosure of files. TheValkenhorst was prepared to disclose the identity of the mothers in all circumstances.

The father's identity would be disclosed if the mother was deed and had made no objection or, if alive, she had consented. If the mother, who was living, refused to consent disclosure, Valkenhorst would "keep mum". This new policy was the subject of the second case and the Court of Appeal again upheld this new policy. On appeal to the Dutch Supreme Court, the rulings of the two lower courts were reversed and the decisions quashed. The

Supreme Court held firstly that there was a right to know one's parentage in Dutch law. It held that basic rights such as respect for private life, freedom of thought and conscience and religion and freedom of expression are all aspects of a more general underlying, freedom of personality. That this implicit freedom of personality includes, the right to know the identity of one's parents. The court acknowledged that the right is recognised in Article 7 of the United Nations Convention On The Rights Of The Child.

Secondly, the Supreme Court held that the right of personality of the child was not absolute, the right had to be weighed against other countervailing rights. In its view, the lower court had made two mistakes in weighing up the three countervailing interest which are (a) the "child's" interest in knowing his or her origins, (b) the mother's rights of piracy and a "social function" interest arising from the need for Valkenhorst to be able to ensure confidentiality to future clients. The Supreme Court held, contrary to the lower court, that the social function interest was, in the circumstances not applicable.

It must be pointed out here that Article 7 of the United Nations Convention on the Rights of the Child do not provide the right must be enforceable in all cases. It used the phrase "as far as possible ...".

Where in some cases, the court is of the view that the mother's right to privacy is weightier than the child's right to know, the right of the child should be denied e.g

where the birth of the child was as a result of rape. In such a case, the mother's right to privacy will be considered to out-weigh the child's right to know his origin. In such a case, the child will be required to prove that the mother was lying. Where a child successfully proves this or the court disbelieves the mother, the mother will be compelled to give the information.

Another interesting case on the issue is the case of Nemesis 1999 - 2 nr. 1012 decided by the Zwolle District Court in Netherlands. In this case, after the parties had devorced, a discussion arose regarding the division of matrimonial assets. The husband alleged that the wife, by informing their son that he had been born as a result of artificial insemination by donor, had behaved unreasonably. Were this to be established as unreasonable behaviour it would have unfavourable consequences for the wife regarding the sharing of responsibility for the household expenses, in accordance with Article 84 (6) of Book 1 of the Netherlands Civil Code. The court held that this was not unreasonable behaviour. On the contrary, the court further held, it was well-known that the son has a strong interest in being informed of his biological origins. The wife had acted in accordance with the child's interests and could not be said to have acted unreasonably!

In Nigeria, our courts have not yet had the opportunity of testing this issue. It is hoped that when the opportunity presents itself, our courts should not shy away from the challenges, especially when none of the local legislations protects this right.

The English and Netherlands decisions on these issues should be a strong persuasive authority especially the Supreme Court decision in the Valkenhorst case that decided that basic rights such as respect for private life, freedom of thought and conscience and religion and freedom of expression are all aspect of a more general underlying freedom of personality which includes the right to know the identity of one's parents.

Freedom of personality or right to dignity is guaranteed under the constitution of Nigeria 1999 and under the Child's Rights Act 2003.

Though the Child's Rights Act 2003 did not make any provisions specifically guarantying this right, the spirit and intent of the Act supports the child's right to know its origin. Our courts when faced with this issue should fall back on Article 7 of the United Nations Convention On The Rights Of The Child, after all Nigeria is one of the countries that have ratified the Convention.

The states that are yet to enact the Child Rights Law should take this into consideration and include the right of the child to know it origin when they eventually do so.

This right is particularly important now because of changing concept of adoption, especially the issue of total transplant and gamete or sperm donation.

I am of the strong view that a child whose birth was as a result of sperm or gamete donation should know the donor as of right so as to avoid some humiliating consequences later in life. It is of great importance that the child knows its origin especially in the Eastern part of Nigeria where the male child has a lot of roles or responsibility to shoulder. Otherwise, he will be derided by his kinsmen or age grade.

Another reason why a child should not be denied this right is the fact that the child never had a say on whether or not to come into this world. The parents or the gamete or sperm bank should be able to release the information of the child's biological parents or the details of the donor of the gamete or sperm.

Wherein then lies the dignity of a person if he or she does not know his origin? After all, nobody fell from heaven!