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Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children²

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Introductory memorandum

1. Introduction

1. Assisted reproduction using donor sperm has been in place for several decades. In Council of Europe member states there are different types of legislation on human gamete donation, i.e. sperm and oocyte donation for treatment using assisted reproductive technologies (ART).

2. Traditionally, most states have restricted the right of a person born as a result of artificial insemination by donor sperm (AID) to know their origins. This restriction may be due to legislation, but also to the absence of a system for gathering information on the identities of donors. In the same way as similar legal proceedings on adoption, in cases concerning assisted procreation using human gametes a conflict between the child's right to information and the adult's right to anonymity has typically been resolved in favour of the adult.

3. The persistent nature of this tendency is apparent from a relatively recent decision by the French *Conseil d'État*,³ which rejected an application by a person conceived through gamete donation to obtain more information on their genitor in the interests of protecting the "life of the child's legal family" and the "donor's private life." Indeed, in France, the principles of "free" and "anonymous" donation are enshrined in law, along the same lines as for blood donation, notwithstanding the donor's consent.⁴

4. The anonymity of gamete donors was introduced in the law of many states to ensure that donations would remain altruistic and voluntary, and also to guarantee respect for the donor's private life and the interests of the legal family of the donor-conceived person. It would seem, however, that these grounds for the principle of donor anonymity are now, to some extent, obsolete. The principle of the anonymity of human gamete donors is today called into question by the increasing number of challenges thereto, by changes in society and in certain European legal instruments and by the evolution of genetic technology.

¹ Introductory memorandum declassified by the Committee on Social Affairs, Health and Sustainable Development at its meeting on 28 June 2018 in Strasbourg.

² New title proposed by the Rapporteur subject to approval by the Committee.

³ *Conseil d'État*, 12 November 2015, No. 372121, "Ms B...".

⁴ Law No. 94-654 of 29 July 1994 on the donation and use of elements and products of the human body, on medically-assisted reproduction and on prenatal diagnosis.

2. The international legal framework: gradual recognition of the right to know one's origins

5. The anonymity of human gamete donors is no longer a principle unanimously adhered to at European level. Internationally, a tendency towards recognition of a donor-conceived person's right to know their origins has been emerging for a number of decades. In 1984, Sweden was the first country to waive the principle of the anonymity of gamete donations.⁵ The Swedish example was then followed by several other countries such as Germany, Switzerland, the Netherlands and the United Kingdom. Recently, Portugal's Constitutional Court held that anonymous gamete donations were unconstitutional, thereby changing the legal situation regarding donations in Portugal and conferring force of law on the right of access to one's genetic origins.⁶ There is therefore a growing tendency to give priority to the rights of donor-conceived persons to know their origins and to favour waiving the anonymity of gamete donors.

6. Several international instruments reflect this development. Firstly, Article 7.1 of the United Nations Convention on the Rights of the Child (CRC) of 20 November 1989 provides for a child's right to know his or her parents "as far as possible".⁷ Article 8 of the CRC also establishes the right of the child to preserve his or her identity, including family relations, without unlawful interference. It goes on to provide that states shall grant appropriate assistance and protection with a view to speedy re-establishment of the child's identity. However, it should be noted that the CRC applies solely to "children".⁸ Its scope does not extend to adults conceived through gamete donation who wish to know their genetic origins.

7. The Council of Europe's European Convention on Human Rights (ECHR) may be useful in this respect, in that it applies to all persons, whether a minor or an adult. Since the early 2000s the Strasbourg-based European Court of Human Rights has given a constructive interpretation to Article 8 of the Convention which provides for a person's right to respect for private life. It has, for example, held that Article 8 protects "the right to an identity and to personal development", which includes the right to access information that would make it possible to trace "some of [one's] roots".⁹ It has also held that Article 8 implies the right of a person to know their origins and the circumstances of their birth¹⁰ and a right to have access to certainty of paternal filiation.¹¹ The Court thus places emphasis on the vital interest of the child, even as an adult, to obtain information essential to discovering the truth about an important aspect of their personal life, which includes the identity of their genitor. However, as reflected in the Court's judgments, the right to know one's origins is not absolute and must always be balanced against the interests of the other parties concerned. What is striking is that this balancing often tends to favour the genitor's right to privacy, and therefore, donor anonymity.¹² In addition, none of the Court's decisions so far have specifically concerned the right of a person conceived by means of gamete donation to have access to information on the donor, although an application is currently pending against France on this subject. It is therefore not possible for the moment to establish with certainty whether or not the Court is in favour of waiving donor anonymity.

8. In view of what can be perceived as the limited scope of international instruments guaranteeing the right to know one's origins and of the remaining disparities between national laws, which are likely to increase recourse to cross-border medically assisted procreation, the Assembly can draw attention to the existing

⁵ Law No. 1140 of 20 December 1984 on artificial insemination

⁶ Decision of the Constitutional Court (Portugal), 24 April 2018, No. 225/2018

⁷ Article 7 has been interpreted by the Committee on the Rights of the Child as including the right of children born through assisted reproduction technologies involving a third party to have access to information about their biological family in accordance with the legal and regulatory framework of the country concerned. See the Concluding Observations of the Committee on the Rights of the Child concerning the report by Ireland, 1 March 2016 (CRC/C/IRL/CO/3-4, paragraphs 33-34.)

⁸ Within the meaning of Article 1 of the Convention on the Rights of the Child (CRC), a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier.

⁹ Judgment of the European Court of Human Rights of 25 September 2012, No. 33783/09, *Godelli v. Italy*

¹⁰ Judgment of the European Court of Human Rights of 13 February 2003, No. 42326/98, *Odièvre v. France*

¹¹ Judgment of the European Court of Human Rights of 13 July 2006, No. 58757/00, *Jäggi v. Switzerland*

¹² In the above-mentioned *Odièvre v. France* judgment, which concerned an application by a person whose mother had opted to give birth anonymously, requesting access to information on their biological family, the Court, after having established the principle of the right to access information, held nonetheless that the French legislation which provides for the right to give birth anonymously did not violate Article 8 of the ECHR in that it tends to strike a balance and ensure sufficient proportion between the competing interests.

inadequacies and make recommendations regarding the steps that might be considered by Council of Europe member states.

3. The issues: the various problems posed by anonymous donation of gametes

9. The anonymity of gamete donors raises a number of issues, which lead to the question of whether it should be maintained in the legislation of member states.

10. Firstly, the principle of anonymity of gamete donors raises a public health issue, since it means that the donor-conceived person cannot be informed of their genitor's medical history. Moreover, it increases the risk of consanguinity, as some donors who have made several donations may end up with several children, without the latter being able to know whether they are related when they wish to enter into a relationship with each other. Despite the fact that some states limit the number of donations that can be made by a single donor, the "serial donors" phenomenon is exacerbated by the recurring lack of a system for exchanging information between clinics performing artificial insemination by donor within a state (for example, in Belgium), and also by the phenomenon of cross-border donations.

11. Secondly, the principle of anonymity raises the fundamental ethical issue of the position of the donor-conceived person. Although the quest to find out about their identity by persons born as a result of anonymous gamete donation differs from that of adopted persons and may apparently seem "of lesser importance", it is nonetheless just as legitimate, as transpires from the claims of the many associations such as *Procréation Médicalement Anonyme*. The principle of anonymity of gamete donors is often modelled on the anonymous nature of organ donations, but it has different implications. Organ donations save lives whereas gamete donations create lives. The donation of gametes will therefore determine certain physical characteristics of the donor-conceived person. Access to the donor's identity is accordingly a fundamental aspect of the child's identity building.

12. An American study carried out in 2017 noted that in a sample of young American adults conceived through a sperm donation programme with the identity of the donor being accessible, 40% asked for access to the identity of the donor.¹³ Another American study conducted in 2010 showed that 65% of donor-conceived persons considered that the donor constituted half of themselves, that 70% of them wondered what the family of their donor was like and 69% wondered if the donor's family would like to get to know them.¹⁴ It can therefore reasonably be assumed that at least one out of two donor-conceived persons is seeking to know their origins, hence the importance for these persons of having access to certain information about their genitors.

13. Finally, the principle of anonymity is becoming obsolete due to the evolution of genetic technology, making it possible for a person to have access to their genetic data and therefore to find their genitor. "Recreational" genetic tests are becoming increasingly common world-wide and access to testing, whether via internet or when travelling abroad, is now very easy.¹⁵ Donor anonymity is, de facto, no longer guaranteed today. It would therefore appear more appropriate to prevent potential excesses arising from developments in these technologies by waiving the anonymity of gamete donors and by managing the manner in which this information is communicated to the donor-conceived person, instead of allowing anonymity to remain in place although it has now become out-dated.

¹³ Scheib, J. (2017, 02). Who requests their sperm donor's identity? The first ten years of information releases to adults with open-identity donors. *Fertil Steril*. Available on : [https://www.fertstert.org/article/S0015-0282\(16\)62946-1/fulltext](https://www.fertstert.org/article/S0015-0282(16)62946-1/fulltext)

¹⁴ Karen Clark, Norval Glenn and Elizabeth Marquardt, (2010, 01). My Daddy's Name is Donor: A Pathbreaking New Study of Young Adults Conceived Through Sperm Donation. Available on: <http://www.americanvalues.org/search/item.php?id=25>

¹⁵ In the United States, many donor-conceived persons have already identified their donor thanks to associations such as the Donor Sibling Registry, which has, alone, already helped more than 15 000 persons conceived by means of sperm donation find their donors or half-brothers and sisters (<https://donorsiblingregistry.com/>)

4. The need to waive anonymity in order to better protect donor-conceived persons

14. It should first be said that the aim is not to abolish the anonymity requirement completely, but simply to waive it so that the parents cannot know the identity of the donor at the moment of insemination and vice versa, but the donor-conceived person can later have access to certain information. It is therefore more accurate to talk in terms of access to information rather than abolition of the principle of the anonymity of gamete donation. However, there would seem to be certain practical, as well as ethical, obstacles to such a waiver of the anonymity requirement.

15. The argument systematically put forward by the clinics which carry out artificial inseminations with donor sperm is that the number of donors will decrease in the event of a waiver of anonymity. However, this argument is not backed by statistics. No decrease in donations has been noted in the countries which have granted the right to have access to one's origins. In Sweden, for example, the 1984 law providing for the right of donor-conceived persons to have access to their genetic origins resulted in a decrease in the number of donors in the first year only, but this trend has now reversed.¹⁶ In the United Kingdom since 2005, when the law changed, donations have steadily increased.¹⁷ The different studies carried out have shown a substantial change in the donor profile, as they are generally older and have had time to think about their decision, but not a reduction in their number.

16. Lastly, an ethical obstacle is often cited by those opposed to recognition of the right of donor-conceived persons to have access to information on their genitors: the risk of eroding the family unit comprising the legal parents and the donor-conceived person in favour of the donor, the biological parent, and therefore of "reducing" filiation to biological parenthood. However, it is generally recognised that donor-conceived persons wishing to know their genetic origins already have parents and are not in pursuit of an emotional bond or looking for a family, but are instead searching for a part of their history. Therefore, in view of changes in society and in attitudes with regard to the plurality of family types which can be noted today, it would seem easy to imagine a form of peaceful coexistence of the truth about a person's origins and their legal filiation, without the latter being under threat, as they clearly have different functions and prerogatives.

17. Furthermore, in the countries where the right of access to one's origins has been recognised, waiving anonymity has had no legal consequences for filiation, as it is already established between the donor-conceived person and the legal parent. The donor is thus protected from any request to determine parentage or an inheritance or parenting claim. The state and its bodies will have an essential role to play in this development, both with a view to eliminating the legal risks for filiation through legislation as well as to identify the donors and those who receive gamete donations in order to improve the transparency of AID techniques.

18. The distinguishing features of the Council of Europe, namely its mandate encompassing the promotion of human rights, democracy and the rule of law, and its role of promoting good practice among the member states, place the Organisation in an ideal position to address the risks and challenges related to the anonymity of gamete donations. It is thus for the Council of Europe to make recommendations to states in order to improve the protection of the rights of all the parties concerned, i.e., the parents, the donors and the children, while focusing on the rights of the donor-conceived person, who is in the most vulnerable position and for whom the stakes appear to be higher.

¹⁶ Daniels, K. et Lalos, O. (1995) The Swedish Insemination Act and the availability of donors. *Hum. Reprod.* , 7, 1871–4.

¹⁷ Human Fertilisation and Embryology Authority, (2014, 10). Egg and sperm donation in the UK: 2012-2013. *HFEA Archive*. Available on <://hfearchive.uksouth.cloudapp.azure.com/www.hfea.gov.uk/9370.html>

5. Work programme envisaged

Date	Action
<i>Committee meeting, June 2018 part-session, Strasbourg</i>	Consideration of an introductory memorandum
<i>Committee meeting, 17-18 September 2018, Lisbon</i>	Hearing with the participation of experts
<i>Committee meeting, 4 December 2018, Paris</i>	Consideration of a preliminary draft report
<i>Committee meeting, January 2019 part-session, Strasbourg</i>	Consideration of a draft report and adoption of a draft resolution and/ or a draft recommendation

The formal deadline for the adoption of this report in Committee is 22 January 2020; the date of debate in the Assembly is yet to be decided.