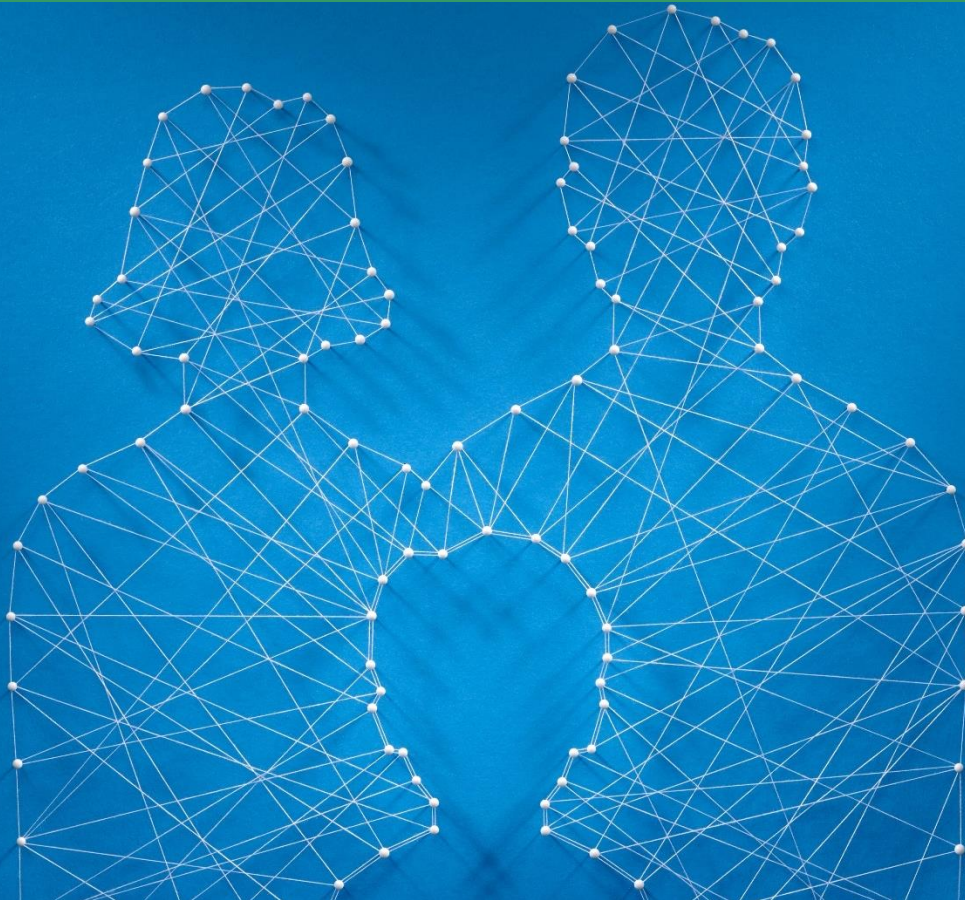


# ACCESS OF PERSONS CONCEIVED BY GAMETE DONATION TO INFORMATION ON THEIR ORIGINS



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**Comparative study  
prepared by  
Jean-René Binet**



# **COMPARATIVE STUDY ON ACCESS OF PERSONS CONCEIVED BY GAMETE DONATION TO INFORMATION ON THEIR ORIGINS**

**prepared by Jean-René Binet  
Professor, Faculty of Law,  
University of Rennes, France  
under the supervision of the  
European Committee on Legal Co-operation (CDCJ)**

Council of Europe

French edition:

*Accès aux origines des personnes conçues par don de gamètes*

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All other correspondence concerning this document should be addressed to the Division for Legal Co-operation, Directorate General Human Rights and Rule of Law, [DGI-CDCJ@coe.int](mailto:DGI-CDCJ@coe.int).

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## Executive summary

The purpose of this report is to present the results of an analysis of the existing literature, the case law of the European Court of Human Rights, the relevant case law of the member States' constitutional courts and their national legislation on the right of persons conceived by gamete donation or born through embryo reception to know their origins. In addition to the donor's identity, it also considers national arrangements insofar as they allow access to non-identifying information such as the donor's age, appearance or employment status, as well as information on his or her state of health.

The first section of the report sets out the context of the study in the light of the Council of Europe's questions on the feasibility and advisability of preparing a draft recommendation or other non-binding instrument on the right of persons conceived by gamete donation to access information on their origins. In order to define the scope of the study, it points out its main focus, namely exogenous medically assisted reproduction and origins. It goes on to specify its objective, which is to produce a sufficiently precise overview of existing law in order to be able to reach possible conclusions on the appropriateness of drawing up recommendations on the recognition of a right of donor-conceived persons to know their origins. Lastly, it describes the methodology employed for the study and the main sources studied.

The second section identifies the issues raised by the recognition of a right of children born from gamete donation or embryo reception to know their origins. This part accordingly first explores the relationships and differences between the notions of parentage and origin. Although these two notions overlap most of the time, there are cases in which they do not coincide. These cases, which constitute the focal point of the question of one's access to information on his or her origins, are adoption and recourse to exogenous medically assisted reproduction. This section therefore makes it possible to understand how the arrangements for adoption and anonymous childbirth make up the conceptual framework for establishing the right to knowledge of one's origins in the case of exogenous medically assisted reproduction.

The third section analyses the arguments for or against establishing the right of children born from gamete donation to access information on their origins. There are two types of arguments in favour. Firstly, while the various national laws began by disregarding their situation, some children who have become adults have claimed their right to know their origins. Secondly, technical progress in both genetics and information technology now makes it unrealistic to guarantee the secrecy of a person's origins. Arguments against establishing that right are the parents' right to secrecy, the possible risk of destabilising the legal family, the donor's right to anonymity and, lastly, the risk that gamete donations will dry up. None of these arguments is decisive in itself but an analysis of all of them and putting them into perspective leads one to conclude that nuanced solutions are needed as far as access to information on origins is concerned.

The fourth section sets out the legal framework for the recognition of this right, including aspects of international law, an overview and analysis of the case law of the European Court of Human Rights and of the relevant case law of the constitutional courts of the member States, and, lastly, a comparative overview and analysis of the legislation of the member States in this area. This section identifies the rules and principles that may underpin the assertion of the existence of a right at international level to know one's origins and examines trends and existing gaps.

The right to know one's parents enshrined in the United Nations Convention on the Rights of the Child or the principle of the primacy of the best interests of the child enshrined in the same instrument thus show how the issue of access to information about one's origins can be addressed by concepts of international law. The Hague Convention on Intercountry Adoption

also affirms the existence of a right to know one's origins but only in the case of adoption, as does the European Convention on the Adoption of Children. Last but not least, Article 8 of the European Convention on Human Rights and the case law of the European Court of Human Rights reveal the possibility of enshrining this right in a Council of Europe instrument. In the light of these aspects, an examination of the arrangements in national law reveals, apart from the differences in approaches, a very clear trend towards recognising the right to know one's personal origins. This developing consensus therefore suggests that a recommendation on this important issue should be drawn up.

The report's conclusions include proposals for drafting a possible future legal instrument. Such an instrument would necessarily have to strike a fair balance between the rights involved, whether they be those of the child, the legal parents, the donors or society as a whole.



# I. Introduction

## 1. Context

1. In its reply to the Parliamentary Assembly concerning its [Recommendation 2156 \(2019\)](#) on “Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children”, the Committee of Ministers invited the European Committee on Legal Cooperation (CDCJ), in consultation with the Committee on Bioethics (DH-BIO), the European Committee on Organ Transplantation (CD-P-TO) and the Ad hoc Committee for the Rights of the Child (CAHENF), to consider, in its future activities the feasibility and desirability of preparing a draft recommendation or other non-binding instrument to assist member States in protecting the rights of donor-conceived persons to know their origins, whilst ensuring a balance with the interests and rights of other parties involved in sperm and oocyte donation, and of the interests of society and obligations of the State.<sup>1</sup> In this connection, the CDCJ decided to undertake the drafting of a comparative study on the rights of donor-conceived persons to know their origins in order to examine the feasibility of a legal instrument on the rights of these persons to know their origins, with the assistance of Jean-René Binet, Professor of Law, specialist in family law, medical law and bioethics law.

## 2. Methodology and scope of the study

2. The issue studied in this analysis should be clearly defined. The only matter under consideration is the right of persons conceived by gamete donation to know their origins.
3. A person is conceived by gamete donation when his or her legal parents have had access, mostly for reasons of infertility, to exogenous or heterologous medically assisted reproduction, that is to say involving a third party. They may have had recourse to sperm or oocyte donation and may also have agreed to the transfer of an embryo conceived by another couple.
4. For donor-conceived persons, knowledge of their origins means access to the identity of the sperm donor, the oocyte donor or the biological parents of the embryo from which they were born. If they are unable to access information on the identity of these persons, donor-conceived persons may also wish to access non-identifying information such as age, profession or certain medical details.
5. The aim of this study is to produce a sufficiently precise overview of existing laws in order to be able to reach possible conclusions on whether it is relevant to draw up recommendations on the recognition of a right for donor-conceived persons to know their origins.
6. The methodology adopted is based on an analysis of existing laws both at the level of the Council of Europe and in the legislation of its member States. The information on this legislation is based in particular on a questionnaire that was drawn up in the context of this study and contributions received from 26 member States. It is also based on existing instruments of other international bodies, on the case law of the European Court of Human Rights and on that of constitutional courts, as far as this has been ascertained.

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<sup>1</sup> [CM/AS\(2019\)Rec2156-final](#) “Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children”, Parliamentary Assembly Recommendation 2156 (2019) (Reply adopted by the Committee of Ministers on 9 October 2019 at the 1356th meeting of the Ministers’ Deputies).

7. In addition to national or international texts, the study is based on several publications, the main ones being:
- Committee on Bioethics (DH-BIO), *Replies by the member States to the questionnaire on access to medically assisted procreation (MAP), on the right to know about their origin for children born after MAP and on surrogacy*, updated 14 June 2021;
  - National Consultative Committee on Ethics for the Life and Health Sciences (Comité consultatif national d'éthique pour les sciences de la vie et de la santé (CCNE - France), Opinion No. 90, *Accès aux origines, anonymat et secret de la filiation*, 24 November 2005;
  - European Union Agency for Fundamental Rights and Council of Europe, European Court of Human Rights, [Handbook on European law relating to the rights of the child](#), June 2015;
  - Parliamentary Assembly of the Council of Europe (PACE), Document 14835 (2019), [Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children](#), by P. De Sutter, rapporteur;
  - Association PMAnonyme, *Comment ça se passe à l'étranger ?*, <https://pmanonyme.asso.fr/le-principe-danonymat-a-letranger/> (updated May 2019);
  - Child Identity Protection, *Child's right to identity in assisted reproductive technology*, symposium/webinar, 13-14 September 2021.



## II. Questions raised by the recognition of a child born from gamete donation or embryo reception to know his or her origins

8. The word “origin” comes from the Latin *originem*, which itself derives from the verb *oriri*, which means to be born. Accordingly, at first sight access to information on origins means obtaining knowledge of the conditions of birth. By extension, however, access to information on origins is less about birth itself than about parentage in its purely biological sense rather than the fact that it denotes a legal relationship. Considering origins therefore consists in determining, in the case of a child, who the man and woman from whom his or her life stems are. That is the purpose of genealogy, which touches on genetics, which is commonly understood as the science that studies the laws of heredity and the medium of hereditary transmission, i.e., the gene. Both disciplines derive from the Greek verb *gennân*, meaning to generate or give birth.
9. In most cases, these two dimensions of parentage coexist, as the child is legally related to the man and woman who are his or her biological parents. In these cases, the question of access to information on origins does not arise. The situation is very different when the biological and legal dimensions do not coincide.

### 1. Overlap of the biological and legal dimensions of parentage

10. For a child, access to information on origins thus consists in finding out the identity of those who are his or her biological father and mother. The reason why it is important to distinguish one from the other is that the respective roles are different although both are necessary for the procreation of children. This difference in their biological role in reproduction leads to a difference in the legal provisions applicable to the designation of the mother on the one hand and the father on the other.

#### 1.1 Maternal origin and parentage

11. As regards the mother, pregnancy and childbirth, which are matters of public record, enable her to be identified. The person who bears and gives birth to the child is in fact designated as its mother by application of the adage *Mater semper certa est*: the mother is always certain. Childbirth – a de facto situation – enables the bond of parentage to be established, so the woman who gave birth to the child is referred to as his or her mother.

#### 1.2 Paternal origin and parentage

12. The overlap of the biological and legal dimensions of paternity is more difficult to establish or guarantee owing to the very different role played by men in the procreation of children. The absence of a public dimension to the man’s involvement – unlike gestation and childbirth – leads to the establishment of parentage being based on probability. Accordingly, the rule *pater is est quem nuptiae demonstrant*, which makes it possible to designate the mother’s husband as the child’s father, does indeed reflect a probability mechanism. It is indeed likely that the mother’s husband is the child’s father because the spouses are bound by a duty of faithfulness to one another. In the absence of marriage, parentage is established by acknowledgement, which is an admission of paternity, again reflecting the likelihood of the bond. Lastly, if none of these means has led to the establishment of paternal parentage, the public acceptance of this status will do so. As it enables the paternity of the person who takes care of the child and is considered by the latter and by society as the child’s father to be established, the possession of that status is still based on probability. Lastly, in the absence of parentage established on the basis of probability, the possibility recognised by all legal systems of having parentage

established by the courts using biological evidence, i.e., a genetic test, will enable information on the child's origin to be accessed in order to establish parentage.

## 2. Absence of overlap of the biological and legal dimensions of parentage

13. The biological and legal dimensions of parentage generally do not coincide in cases of adoption. Exogenous medically assisted reproduction techniques provide new solutions, so it is in these cases that the question of access to information on origins arises.

### 2.1 Adoption

14. Historically, the first cases in which biological and maternal parentage did not coincide were in the adoption process, which mainly involved children abandoned at birth or sent to institutions for adoption. In such cases, the parent-child relationship established by the adoption judgment does not correspond to the biological facts.
15. The child's access to information on his or her origins then presupposes revealing the parents' identity. In most cases, the only name is that of the woman who gave birth but disclosing it is sometimes frustrated by her wish to remain anonymous. In many legal systems, a procedure for giving birth in secret (often referred to as an "anonymous birth") enables the woman to maintain her anonymity. As will be seen below, it is on these issues that the European Court of Human Rights has been led to affirm the existence of a right to know one's personal origins<sup>2</sup>, which constitutes the conceptual framework for the right of access to those origins for children born as a result of exogenous medically assisted reproduction.

### 2.2 Medically assisted reproduction

16. Medically assisted reproduction techniques, developed since the 1970s, can be distinguished according to whether they are carried out with the involvement of the couple themselves or a third party.
17. When they are carried out with the involvement of the couple themselves (in this case we speak of intra-marital or endogenous techniques), medically assisted reproduction practices do not separate the biological and legal dimensions of parentage. The child is in fact biologically the offspring of those whom the law designates as his or her father and mother.
18. Moreover, most of the time the establishment of this parentage is based on the general legal mechanisms of natural parentage: maternal parentage resulting from childbirth; paternal parentage established by marriage, recognition or public acceptance of status or by the courts. These techniques are employed in the vast majority of medically assisted reproduction practices. Indeed, it is estimated that they account for between 90 and 95 % of the 8 million births resulting from medically assisted reproduction.

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<sup>2</sup> *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III; *Godelli v. Italy*, no. 33783/09, 25 September 2012.

19. Matters are radically different in the case of techniques involving a third party, which are known as exogenous techniques. Whether it is a question of artificial insemination with a donor's sperm, in vitro fertilisation of an oocyte from a donor for subsequent implantation of the embryo into the woman's uterus or the reception of an embryo conceived by another couple, these techniques necessarily result in parentage that does not correspond to the biological reality. In such cases, the question of access to information on the child's origins arises, whether it is a matter of finding out the identity of the sperm donor, the oocyte donor or the couple who consented to the reception of their embryo.
20. Lastly, this separation of the legal and biological dimensions of parentage is also encountered in the case of recourse to surrogate motherhood. This expression covers a variety of practices that have in common the fact that a woman bears a child on behalf of another person or other persons: a heterosexual or homosexual couple or an unmarried individual. The child may be conceived in vitro from the couple's own gametes or from a donor's sperm and oocyte. The surrogate mother may also bear the child conceived after the insemination of her own oocytes with the man's sperm. In all cases, the intention is to hand the child carried by the woman over to the clients once born. Whether prohibited, as in most member States, or allowed, the situation created by the use of surrogate motherhood considerably blurs the relationship between conception, gestation, maternal parentage and paternal parentage. In this area, although the question of access to information on origins arises, this is not the problem commonly raised before the European Court of Human Rights, which has been asked to rule on the possibility of establishing the child's relationship to the commissioning mother when her national law prohibits these practices.<sup>3</sup>

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<sup>3</sup> See for example: *Menesson v. France*, no. 65192/11, ECHR 2014 (extracts); *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.

### III. Arguments concerning access to information on origins

21. This chapter examines the arguments in favour of and against the establishment of a child's right of access to information on origins before providing an analysis.

#### 1. Arguments in favour of establishing a right of access to information on origins

22. Initially brushed aside by most of the systems that have accepted the use of gamete donation, which is generally based on anonymous donation, the question of a right of persons born by gamete donation to know about their origins has gradually made its way onto the list of national legislators' concerns due to a combination of two factors: the existence of demands made by children born from gamete donation and the development of gene databases.

##### 1.1. Demands of children conceived by gamete donation

23. Many legal systems base the use of a third-party donor on the principle of anonymity. This anonymity was initially based on a comparison with other cases involving the donation of elements or products of the human body. Whether blood or organs are donated, the donor's anonymity and the fact that no charge is made are considered key ethical principles in most legal systems. By analogy, the use of a gamete donor has therefore been based on the same principle of anonymous provision without payment. Rightly or wrongly, anonymity has also been seen as a good way to encourage gamete donation. Whatever the virtues or advantages, this way of thinking has totally overshadowed consideration of the interests of children conceived by gamete donation. Over time, these children have become adults and some have embarked on a search for their origins.

24. Clearly not all donor children are searching for their origins.<sup>4</sup> However, while it is not possible to determine their proportion precisely among the tens of thousands of individuals conceived by donation, some children said they suffer from a lack of information on their origins. Their proportion does seem to be significant if the figures in the 2019 Council of Europe Parliamentary Assembly report are to be believed. This states:

“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. 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. 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.”

Source: PACE, Document 14835 (2019), *Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*, by P. De Sutter, rapporteur, especially § 16.

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<sup>4</sup> For a necessarily incomplete overview, see Blyth E., “Discovering the ‘facts of life’ following anonymous donor insemination”, *International Journal of Law, Policy and the Family*, vol. 26, no 2, 2012, pp. 143-161; See also Delaisi de Parseval G., “Comment entendre les demandes de levée du secret des origines ?”, *Esprit*, May 2009; Théry I., “Anonymat des dons d'engendrement : le grand malentendu du débat français”, *Andrologie*, vol. 20, no. 1, 2010, p. 110.

25. To make their voices heard, these children have set up associations campaigning for the recognition of the right to know their origins.<sup>5</sup> Some have also taken legal action to obtain from a court what the law has failed to offer them,<sup>6</sup> and several applications are currently pending before the European Court of Human Rights. As evidence of its importance, one of these applications led the Court to ask the state concerned whether there had been a violation of the applicant's right to respect for her private and family life within the meaning of Article 8 of the European Convention on Human Rights (hereinafter "ECHR") and whether there had been discrimination in breach of Article 8 in conjunction with Article 14. Above all, it asked for details to be provided of the discussions underway concerning the anonymity of gamete donors in the context of the current reform of its legislation.<sup>7</sup>
26. For the most part, the motivation of children demanding access to information about their origins is bound up with issues of identity and personal development. These individuals feel the need to know where they come from in order to find out who they are. For them, donor anonymity is an obstacle to their identity construction. As far as fundamental rights are concerned, this aspect of the issue is the most important because it concerns the place of the conceived person in society and the way in which the state guarantees the conditions for his or her personal development. This identity-related dimension of the issue of access to information on origins also makes it possible to understand the key difference between gamete donation and blood or organ donation. Since it is not a question of saving but of creating a life, it seems legitimate that the person given that life, i.e., the donor-conceived individual, should be given the fundamental right to know where he or she comes from.
27. In addition, their demand is also based on medical or health considerations. As the origin of or predisposition to many diseases is genetic, a lack of knowledge of their biological past places these individuals in a state of uncertainty and fear of developing disorders. Without necessarily requiring knowledge of the donor's identity, these considerations should result in their having unconditional access to the donor's medical information.
28. Lastly, when identity considerations are combined with medical aspects, donor-conceived individuals' lack of knowledge of their origins may frustrate or complicate their plans to have children. They may be afraid of the transmission of a possible genetic disease present in their unknown parent or fear that the person with whom they wish to have a child is, without their knowledge, a brother or sister from the same donor. Although this risk of inbreeding is reduced due to the legal limit on the number of children that can be conceived from the same donor, it cannot be ignored. Accordingly, 29 member States have provisions to reduce this risk, either by means of a register recording the identity of all children born from the same donor or, more often, by limiting the number of children that can be born from the same donor.

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<sup>5</sup> Association Procréation médicalement anonyme ([www.pmanonyme.asso.fr/temoignages.php](http://www.pmanonyme.asso.fr/temoignages.php)); Donorkinderen (<https://www.donorkinderen.com/getuigenissen>); Enfants de donneurs (<https://pmanonyme.asso.fr/category/temoignages/temoignages-de-personnes-concues-par-don/>).

<sup>6</sup> Montreuil Administrative Court, 14 June 2012: *JCP G* 2012, act 802, observations by J.-R. Binet; *RTDciv* 2012, p. 520, observation by J. Hauser; *D* 2012, observations by A. Mirkovic – Conseil d'État, opinion, 13 June 2013, No. 362981: *Dr famille* 2013, 112, note by J.-R. Binet; *D* 2014, p. 1176, observations by F. Granet-Lambrechts – Versailles Administrative Court of Appeal, 2 July 2013, No. 12VE02857: *JurisData* No. 2013-019143.– Conseil d'État, joint session of the 10th and 9th subsections, No. 372121, 12 November 2015, on which J.-R. Binet, "Insémination avec tiers donneur et droit à la connaissance des origines : l'enfant impensé du droit de la bioéthique", *Dr. Famille* 2016, study 1 – Conseil d'État, joint session of the 10th and 9th subsections, 27 December 2017, No. 396571: *JurisData* No. 2017-026464; *Recueil Lebon, Dr. Famille*, communication 64, note by H. Fulchiron and reference 3, J.-R. Binet; *RJPF* 2018-3/8, note by S. Cacioppo.

<sup>7</sup> European Court of Human Rights, Fifth Section, Application No. 21424/16, *Audrey Gauvin-Fournis v. France*, communicated on 5 June 2018.

## 1.2. Development of gene databases

29. The second factor, which is at least as effective as the first, is the development of gene databases which, for about a hundred euros, make it possible to obtain a genetic sequence and run a search for a genetic match with the millions of genetic profiles in the database. By enabling the secrecy established to be circumvented in an apparently simple and inexpensive way, the development of these databases makes it technically impossible to maintain anonymity.

The story of a child born from gamete donation in France illustrates very well the ease of access now provided by these databases.<sup>8</sup> Having realised when he was 18 that he would never be able to access information on the donor's identity, the man concerned campaigned for several years to change the law.<sup>9</sup> In order to circumvent the rule of strict anonymity imposed by French law<sup>10</sup>, he ordered a DNA test on the website 23andMe.

Three weeks later, the results of the test were displayed on the website's interface, which suggested that his DNA be compared with that of all the other users of the site. He then discovered the profile of a woman living in London with whom he shared 6 % of his DNA. He contacted her that evening and obtained the first and last names of the family member who turned out to be the gamete donor the next day. Thanks to the use of these databases, a child born from gamete donation can thus access the donor's identity for 100 euros in less than a month. In such a situation, how is it possible to maintain a secrecy rule that is virtually impossible to guarantee?

## 2. Arguments against establishing a right to information on origins

30. There are a number of arguments against establishing the right of a child conceived by gamete donation to know about his or her origins and these need to be analysed and put into perspective.
31. The obstacles to revealing the donor's identity are:
- the parents' right to secrecy,
  - the possible risk of destabilising the legal family,
  - the donor's right to anonymity, and
  - the risk of gamete donations drying up.

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<sup>8</sup> Arthur Kermalvezen delivered "His experience of knowing from childhood that he was donor conceived" at a seminar on "Child's right to identity in assisted reproductive technology" held in Geneva on 13 and 14 September 2021.

<sup>9</sup> Kermalvezen A., *Né de spermatozoïde inconnu*, Les presses de la renaissance, 2008.

<sup>10</sup> Solution applicable until the entry into force of the provisions of Act No. 2021-1017 of 2 August 2021.



## 2.1 Parents' right to secrecy

32. From the parents' point of view, access to information on personal origins, if demanded by the child, is incompatible with their desire to keep it secret. For them, however, this is a matter of respect for their private life, based on Article 8 of the ECHR. It is certainly conceivable that these persons wish to keep the arrangements for their child's conception private. The confidentiality of the procedure carried out is then guaranteed by the general rules of medical secrecy.
33. It is sometimes reinforced by technical choices linked to the morphological matching between the donor and one of the couple. This matching is carried out in 20 member States. The legitimacy of the request for access to information on origins made by the donor-conceived child is then counterbalanced by the parents' desire to keep the method of conception secret. Taking this desire into account means that in almost all states that permit gamete donation there is no obligation to reveal to the child that he or she was conceived in this way.

## 2.2 Possible risk of destabilising the legal family

34. The access of children conceived by gamete donation to information on their origins may entail a risk of destabilising the family formed between the child and his or her legal parents. The information given on the sperm donor's identity could in fact lead the child to meet or even form a relationship with the donor. This could go as far as expressing a desire to disavow his or her parentage in order to claim parentage with the donor. That is why, with the exception of Finland,<sup>11</sup> no legal system enshrining access to information on the child's origins draws any inferences in terms of establishing parentage.
35. All these possibilities would obviously be contrary to the well understood objective of ensuring the stability of the bond of parentage and guaranteeing the peace of families. The family that must then be taken into consideration is more than just the organised relationship between the child and their parents. Revealing the secret will inevitably have consequences for the siblings. If a child is born from a donor, his or her brothers and sisters will naturally ask about their own conception. What will be the impact if there are several donors or even only a single donor on the robustness of the relationship between the children and each other on the one hand and the children and their parents on the other? Apart from the siblings, the revelation of the donor's existence and identity could also affect the relationship between the child and his or her grandparents. How will the father's parents react when they learn that their grandchild is not biologically related to them? Is there not a risk that the grandparents will have a preference, albeit not explicitly, for other grandchildren, namely those of their own "blood"?

## 2.3 Donor's right to anonymity

36. Establishing the right to access information on their origins for persons born from gamete donation could seriously conflict with any guarantee given to the donor to preserve his or her anonymity. If the donor has agreed to the collection of his or her gametes because of the anonymity rule, it is obviously a significant matter to call this rule into question, as this could mean disregarding a contractual commitment between the donor and the state. Without definitively prohibiting the reconsideration of donor anonymity, this is a persuasive argument for any change in the law in this area only being valid for the future. Accordingly, in a state that has based recourse to donors on a strict anonymity principle the change would lead to a distinction between the situation of children conceived before the entry

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<sup>11</sup> See the description of the Finnish legislation in paragraph 101.



into force of the new provisions and those conceived afterwards. The latter would have the right to access information on their origins, but the former would not. However, this arrangement, which ensures respect for the commitment to secrecy made to donors at the time of their donation, brings about a difference in the treatment of children according to the date of their conception, which is not without raising concern.

37. Lastly, for donors, it is essential that the disclosure of their identity or other information on them does not entail any legal consequences, such as the possibility for the child to demand that his or her parentage with the donor be established or to call for the donor to be held liable for any harmful consequences resulting from the conditions of his or her conception, be it the genetic transmission of a disability or disease or the existential suffering caused by the problems of identity building.

#### 2.4 Risks of gamete donations drying up

38. Establishing such a right may also have implications for gamete donation because donors may not come forward in sufficient numbers if there is no guarantee of their anonymity. This risk is commonly mentioned in debates on reconsidering the question of anonymity. For example, while France has amended its legislation in this area with the Act of 2 August 2021, a study indicates that the fact that the donor's identity may be revealed to the child at the age of majority accounts for a drop in donations in the case of more than a third (35 %) of the men aged 18 to 45 surveyed.<sup>12</sup> However, it seems that the fear that gamete donations will dry up is exaggerated and does not hold up to scrutiny. This is reflected in the 2019 report of the Parliamentary Assembly of the Council of Europe.

“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. In the United Kingdom since 2005, when the law changed, donations have steadily increased. 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.”

Source: PACE, Document 14835 (2019), *Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children*, by P. De Sutter, rapporteur, especially § 19).

39. The fall in donor numbers could have two consequences.
40. The first and most obvious one would be an automatic increase in the time required to obtain the desired procedure. Such a consequence would be detrimental to the interests of all those wishing to access medically assisted reproduction using a donor.

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<sup>12</sup> *ViaVoice* study carried out in September 2021 for the Biomedicine Agency (Agence de la biomedicine), cited by A. Leclair in “PMA: une campagne pour recruter des donneurs de gamètes”, *Le Figaro*, 20 October 2021.

41. The second, a side-effect, would be reconsidering the fact that gamete donation is without remuneration.
42. The no-remuneration principle is affirmed by the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164, also known as the Oviedo Convention).
43. Article 21 of this convention states: “The human body and its parts shall not, as such, give rise to financial gain”.
44. However, this principle is not recognised or applied in all member States, even those that have ratified the Oviedo Convention. Of the member States, 12 provide for the donor to be compensated. This is the case in the United Kingdom, which has not ratified the Oviedo Convention and where oocyte donors are compensated £750 per cycle and sperm donors £35 per clinic visit. It is also the case in Spain which has ratified the Oviedo Convention in 1999 and which allows “donors” to be compensated €900 per oocyte,<sup>13</sup> which enables sufficient donors to be found to meet the very large number of requests within a reasonable timeframe. Although the Spanish situation seems to fuel the important phenomenon of reproductive tourism it could be explained because of a large number of ART centres and services. Moreover, it should be taken into account that Spanish legislation allows some reproductive techniques or even gamete donation itself, while in other countries this is not permitted.

### 3. Analysis of opposing arguments and putting them into perspective

45. The many serious arguments put forward in support of or against establishing a right for donor-conceived children to access information on their origins oblige us to reject any simplistic statement on the subject out of hand. All the interests involved seem to have genuine legitimacy, so it seems perfectly legitimate for children to want to know their origins as a necessary element of their personal identity construction or to consider their own procreative choices better. It seems just as legitimate for parents to claim their right to secrecy concerning the child’s conception for the sake of respecting their privacy and with regard to any suffering endured when recourse to gamete donation is the outcome of a long and painful process of medically assisted reproduction. The protection of the legal family against any risk of destabilisation resulting from the sudden disclosure of the third party’s identity may also be a good reason to prefer to maintain secrecy. Lastly, even if it seems to be of minor importance, the interest of society, linked to the availability of a sufficient number of gametes to satisfy a significant number of requests, cannot be overlooked.
46. The complexity of these points of view should therefore ensure that an instrument of international scope adopts balanced solutions.

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<sup>13</sup> M. de Taillac, “L’Espagne, eldorado de la PMA pour les Françaises” (“Spain, MAP Eldorado for Frenchwomen”), *Le Figaro*, 20 September 2021: (translation) “Unlike France, the country allows donors to be paid (the official term is ‘compensate’). The average amount is 900 euros, the organisation says, ‘a comparable amount’ to what is paid elsewhere in Europe. In Anne-Lyse’s case, the Mallorca clinic found a donor within a month and a half. ‘The protocol is difficult and receiving hormones is not without its risks’, she says. As long as we don’t want to pay for them, women won’t want to donate their oocytes’.”

47. These solutions could accordingly acknowledge the coexistence within the same legal system of several models of recourse to gamete donation from which the beneficiaries of the donation or the donors could choose: a model based on assumed and guaranteed anonymity; a model based on transparency accepted by the parents and the donor and enabling the child to access information on his or her origins. There could also be an arrangement based on the existence of a principle of secrecy, while keeping open the possibility of voluntary access to the donor's identity at the request of the child or his or her parents (or both). For the same reasons of adopting balanced solutions, it would not seem appropriate to support or maintain a system based on a total ban on access to information on origins or, by contrast, on absolute transparency.

## IV. Legal framework of the right of donor-conceived persons to know their origins

48. This chapter will consider in turn the various elements of international law, comparative law and examples of relevant case law.

### 1. Aspects of international law

49. Several international binding legal instruments contain provisions that may provide a basis for the establishment of a right to know one's origins.

#### 1.1. United Nations Convention on the Rights of the Child

50. The United Nations Convention on the Rights of the Child (CRC) of 20 November 1989 contains two sets of provisions relevant in connection with access to information on one's origins: the right to know one's parents and the preservation of the child's identity and the principle of the primacy of the best interests of the child.

##### 1.1.1 *The right to know one's parents and the preservation of the child's identity*

51. Article 7 of United Nations Convention on the Rights of the Child provides that a child "shall have [...] as far as possible, the right to know and be cared for by his or her parents". The reference to "parents" may be understood in a sufficiently broad sense to include those who, without being legally related to the child, are his or her progenitors.

52. Two member States made reservations or declarations in respect of Article 7 at the time of the ratification of the CRC. The Government of Luxembourg considers that Article 7 is no bar to the legal procedure for anonymous childbirth which is considered to be in the interests of the child, as provided for in Article 3 of the Convention. Secondly, according to the United Kingdom's interpretation, the term "parents" referred to in the Convention applies only to those persons who in domestic law are considered to be the child's parents, including cases where the child is considered by law to have only one parent, for example when the child has been adopted by a single person, or in certain special cases where the child has been conceived by the woman who gives birth to him or her by means other than sexual intercourse and where that woman is considered to be the sole parent.

53. Article 8 of this Convention enshrines the child's right to preserve his or her identity, including his or her family relations, without unlawful interference. This right entails the obligation for states to grant the child sufficient protection to ensure that his or her identity is re-established as quickly as possible. However, it should be noted that these provisions only concern the child, i.e., the individual who has not reached the age of majority, and that that identity, as recognised by law, mainly involves the child's nationality, name and family relations.

##### 1.1.2 *The best interests of the child*

54. The best interests of the child, as set out in Article 3(1) of the Convention on the Rights of the Child, is also an important basis for the right of a child born from gamete donation to know his or her origins. This provision states that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".<sup>14</sup>

55. Although the best interests of the child are not explicitly mentioned among the rights guaranteed by the ECHR, the European Court of Human Rights has, through its case law, reviewed compliance with this right.
56. Since the *Tyrer v. United Kingdom* judgment<sup>15</sup>, it has held that the ECHR is a "living instrument" to be interpreted in the light of "present-day conditions". The dynamic interpretation that results from this view, which has frequently been reaffirmed since that judgment,<sup>16</sup> leads the Court in particular to adopt a comparative approach in order to seek common denominators in the law of the States Parties to the Convention, the so-called "consensus of states". It also leads it to take account of other international instruments.
57. It is therefore as a result of this dynamic interpretation that the Court has been able, since 1996, to include the notion of the child's best interests in its decisions concerning him or her.<sup>17</sup> Several recent decisions illustrate how this notion of the CRC has been incorporated into the Court's case law.
58. In the *Maumousseau and Washington v. France* judgment<sup>18</sup>, which was delivered in a case involving the international abduction of a child, the Court affirmed that the child's best interests have been paramount in child protection issues since the adoption of the New York Convention, which led it to make Article 3(1) of that instrument a relevant source of the right to respect for family life guaranteed by Article 8 of the ECHR. Subsequently, in its *Popov v. France* judgment<sup>19</sup> it included the child's best interests among the component elements of Article 8<sup>20</sup> and criticised the state for placing in administrative detention foreigners with children who had been refused refugee status. Lastly, in the *Neulinger and Shuruk v. Switzerland* judgment of 6 July 2010<sup>21</sup>, which was also delivered in a case involving the international abduction of a child, it noted that "there is currently a broad consensus – including in international law – in support of the idea that (...) the best interests (of children) must be paramount". This consensus is particularly easy to establish in the case of the States Parties to the Convention, as they have all ratified the New York Convention.

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<sup>14</sup> Convention on the Rights of the Child, adopted on 20 November 1989. See also the Declaration adopted by the UN General Assembly on 20 November 1959, Resolution 1387 (XIV).

<sup>15</sup> *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A no. 26.

<sup>16</sup> See for example: *Dudgeon v. the United Kingdom*, 22 October 1981, § 60, Series A no. 45, and, more recently, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I.

<sup>17</sup> See in particular *Johansen v. Norway*, 7 August 1996, *Reports of Judgments and Decisions* 1996-III. JCP G 1997, I, 4000, No. 53, observations by F. Sudre: "measures to remove the mother's parental rights and her right to visit her daughter, 'totally' depriving the applicant of a family life with the child, should only be applied in exceptional circumstances and 'could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests". (§ 78).

<sup>18</sup> *Maumousseau and Washington v. France*, no. 39388/05, 6 December 2007, *Actualité Juridique famille*, 2008, p. 83, note by A. Boiché.

<sup>19</sup> *Popov v. France*, nos. 39472/07 and 39474/07, 19 January 2012.

<sup>20</sup> Dumortier T., "L'intérêt de l'enfant : les ambivalences d'une notion 'protectrice'", *Revue des droits de l'homme* n° 3, 2013, especially no. 14.

<sup>21</sup> *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010; *JurisData* No. 2010-030729, JCP G 2011, p. 94, observations by F. Sudre.

59. The European Court of Human Rights has therefore made the best interests of the child a general criterion to be applied in all decisions concerning children.
60. A study of its case law in family matters reveals that this criterion is applied in a wide range of disputes concerning child custody and parental access rights,<sup>22</sup> parentage or access to information on personal origins,<sup>23</sup> the placement of children in care,<sup>24</sup> adoption<sup>25</sup> or child abduction.<sup>26</sup>
61. In those decisions, the child's best interests are seen as the criterion against which national courts must make decisions concerning children. Accordingly, any national decision found to have been made without reference to those best interests<sup>27</sup> or with reference to another criterion<sup>28</sup> will result in a decision against the state. For example, in its *Schneider v. Germany* judgment<sup>29</sup>, the Court found against the state for refusing to allow the putative biological father to see the child without taking the child's best interests into account.
62. **The criterion can then serve to arbitrate between conflicting claims regarding the child.** This is the case in matters of parental separation when it comes to deciding on the exercise or enjoyment of custody or access rights. Since the child is at the centre of a conflict between parents who have competing rights concerning him or her, taking account of the child's interests enables the authorities of the States Parties to resolve the dispute. The check carried out by the Court therefore results in the endorsement of decisions when it finds that they were motivated by the interests of the child.<sup>30</sup> On the other hand, it rules against decisions not motivated by this criterion.<sup>31</sup>
63. In other cases, the child's best interests principle not applied in order to arbitrate between the demands of third parties but rather to limit the rights claimed by a third party. This is mainly how this reference is used in litigation concerning establishing or contesting parentage, as well as in adoption cases.

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<sup>22</sup> See for example: *Diamante and Pilliccioni v. San Marino*, no. 32250/08, § 170, 27 September 2011; *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 71, ECHR 2001-V (extracts); *Görgülü v. Germany*, no. 74969/01, § 43, 26 February 2004; *W. v. the United Kingdom*, 8 July 1987, Series A no. 121; *P.V. v. Spain*, no. 35159/09, 30 November 2010; *M.K. v. Greece*, no. 51312/16, 1 February 2018; *Schneider v. Germany*, no. 17080/07, 15 September 2011.

<sup>23</sup> See for example: *Odièvre v. France* [GC], no. 42326/98, § 29, ECHR 2003-III; *Mikulić v. Croatia*, no. 53176/99, § 64, ECHR 2002-I; *Chavdarov v. Bulgaria*, no. 3465/03, 21 December 2010; *Godelli v. Italy*, no. 33783/09, 25 September 2012; *Menesson v. France*, no. 65192/11, ECHR 2014 (extracts); *Labassee v. France*, no. 65941/11, 26 June 2014.

<sup>24</sup> See for example: *Johansen v. Norway*, 7 August 1996, § 64, *Reports of Judgments and Decisions* 1996-III; *Kutzner v. Germany*, no. 46544/99, § 67, ECHR 2002-I; *Gnahoré v. France*, no. 40031/98, ECHR 2000-IX; *Levin v. Sweden*, no. 35141/06, 15 March 2012; *B.B. and F.B. v. Germany*, nos. 18734/09 and 9424/11, 14 March 2013.

<sup>25</sup> See for example: *K. and T. v. Finland* [GC], no. 25702/94, ECHR 2001-VII; *Ageyevy v. Russia*, no. 7075/10, 18 April 2013; *Aune v. Norway*, no. 52502/07, 28 October 2010; *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, ECHR 2004-V (extracts).

<sup>26</sup> *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010, *op. cit.*; *X v. Latvia* [GC], no. 27853/09, ECHR 2013.

<sup>27</sup> *Sabou and Pircalab v. Romania*, no. 46572/99, 28 September 2004, concerning the automatic and definitive forfeiture of parental rights following a criminal conviction.

<sup>28</sup> *Zaunegger v. Germany*, no. 22028/04, 3 December 2009, *RTDciv* 2010, p. 773, observations by J. Hauser.

<sup>29</sup> ECtHR, 15 September 2011, Application No.17080/07, *Schneider v. Germany*, *op. cit.*.

<sup>30</sup> *Malinin v. Russia*, no. 70135/14, 12 December 2017, *JurisData* No. 2017-029136.

<sup>31</sup> *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016, *Dr. famille* 2016, citation alert 27.

64. For example, in its *Mikulić v. Croatia* judgment of 4 September 2002<sup>32</sup>, the Court held that the child's best interests in obtaining the information necessary to uncover the truth about his or her origins (an important aspect of his or her personal identity) must outweigh the right of the father being sought to refuse the DNA tests requested. In this case, the best interests of the child seeking to determine his or her parentage must prevail over the right of the father.
65. The same solution was adopted with regard to a deceased father in the *Jäggi v. Switzerland* judgment<sup>33</sup> and then in the *Pascaud v. France* judgment<sup>34</sup>.
66. **In these different cases, the Court favoured a concrete approach to the child's best interests.** For example, the above-mentioned case of *Schneider v. Germany* concerned a man who had had an intimate relationship with a married woman during the legal period of conception and appeared to be able to establish with certainty that he was the biological father of the child she was raising with her husband, who was the child's legal father by virtue of the presumption of paternity. Without denying the possibility that this man was the child's father, the couple refused to undergo any genetic test in the interests of maintaining their family relationship. The man then demanded to be allowed to see the child and receive regular news about him. The courts rejected his application on the grounds that "even if he were the biological father of the child, he did not belong to the category of persons – for example the legitimate father or any person who has developed a social and family relationship with the child – who can claim access to the child under the relevant provisions of the Civil Code". In this case, it is interesting to note the way in which the Court proceeded to find a violation of Article 8 of the ECHR. The German Government argued that giving an existing legal family precedence over biological fathers' rights guaranteed stability.
67. However, the Court stated that it was "not convinced that the best interest of children living with their legal father but having a different biological father could be truly determined by a general legal assumption". Accordingly, it is not possible to adopt an abstract approach. The Court emphasised this point by stating that "(c)onsideration of what lies in the best interest of the child concerned was of paramount importance in every case of this kind and, in view of the great variety of family situations possibly concerned, a fair balancing of the rights of all persons involved necessitated an examination of the particular circumstances of each case".

## 1.2 The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption

68. Although it deals only with international adoption, Article 30 of the **Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption** also contains relevant provisions on access to information on origins. This instrument imposes on the competent authorities of the Contracting States the obligation to ensure that they preserve the information they hold on the child's origins, in particular the identity of the child's mother and father, as well as data on the child's medical history and his or her family. These authorities should then ensure that the child or his or her representative has

<sup>32</sup> *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I, *RTDciv* 2002. 795, observations by J. Hauser.

<sup>33</sup> *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X, *RTDciv* 2006, p. 727, observations by J.-P. Marguénaud; *LPA* 16 June 2009, 14, note by J. Flauss-Diem; *Médecine et droit*, vol. 2007, No. 85, p. 109, note by D. Berthiau.

<sup>34</sup> *Pascaud v. France*, no. 19535/08, 16 June 2011, *RTDciv* 2011, 526, observations by J. Hauser; *D.* 2012, 1433, observations by F. Granet-Lambrechts; Adde Vial G., "Expertise génétique post mortem et vie privée", *Revue des droits et libertés fondamentaux* 2011, chronique n 16.



access to this information, under appropriate guidance, to the extent permitted by the law of their state.

### 1.3 Council of Europe Conventions

69. According to Article 8 of the ECHR, everyone has the right to respect for their private and family life, their home and their correspondence.
70. According to the case law of the European Court of Human Rights in respect of Article 8 of the ECHR, the right to private life must be understood broadly, including the right to personal development and the right to know about family relationships.
71. The Court defines private life very broadly, as it also comprises “the right to establish and develop relationships with other human beings”.<sup>35</sup> It is not surprising, therefore, that it has gradually brought all the elements that contribute to personal identity under the protection of Article 8. The individual’s name comes under this protection because, even if it is a means of personal identification “a person’s name none the less concerns his or her private and family life”.<sup>36</sup> This has also applied as far as sexual identity is concerned since the cases relating to transsexualism syndrome, in which the Court held that the refusal to allow the mention of a transsexual woman’s gender and first name to be changed placed her “in a situation which, taken as a whole, is not compatible with the respect due to her private life”.<sup>37</sup>
72. Accordingly, the right to know one’s origins, like everything that contributes to the construction of one’s legal identity, should fall under the protection of private life based on Article 8 of the ECHR.
73. Article 22(3) of the **European Convention on the Adoption of Children (Revised)**<sup>38</sup> also establishes the adopted child’s right to know his or her origins.
74. According to this convention’s provisions, while States Parties may grant parents of origin the legal right not to disclose their identity, this possibility is only open to them to the extent that it does not amount to an absolute veto. Taking into account the circumstances and the respective interests involved, the competent authority should be able to determine whether to override the right of the parents of origin and decide to disclose identifying information. Lastly, in the case of a full adoption, the adopted child must at least be able to obtain a document attesting the place and date of his or her birth.
75. Furthermore, there may be scope examining the question of “access to origins” under Article 17 of the **European Social Charter**, which provides for the right of children and young persons to social, legal and economic protection. Although the European Committee of Social Rights (CCS) did not have yet the opportunity to examine the issue of children born from gamete donation, its case law does contain some elements that might be relevant. In the Conclusions published in 2003 with respect to France, the Committee previously stated that it considered that the right of a child to know his origins was not adequately protected in certain situations in France; including where the mother of a child has requested that her identity should be kept secret during the birth and declaration of the birth (“accouchement sous X”). The case law may easily be transposable from one issue to another.

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<sup>35</sup> *Niemietz v. Germany*, 16 December 1992, Series A no. 251-B.

<sup>36</sup> *Burghartz v. Switzerland*, 22 February 1994, Series A no. 280-B.

<sup>37</sup> *B. v. France*, 25 March 1992, Series A no. 232-C.

<sup>38</sup> Council of Europe, *European Convention on the Adoption of Children (Revised)*, CETS No. 202, 2008.

## 2. Case law regarding access to information in origins

### 2.1. Case law of the European Court of Human Rights

76. There is so far no European Court of Human Rights case law on the specific issue of access to information on origins in the case of gamete donation or embryo reception.
77. However, decisions on related issues contain solutions from which conclusions may be drawn by analogy. The most relevant are those concerning secret childbirth, but other older judgments are also worth considering.

#### 2.1.1. Various legal cases

78. The first decision providing an adequate solution in terms of access to information on origins is the *Gaskin v. the United Kingdom* judgment.<sup>39</sup> The case did not concern a question of access to information on biological origins but only the conditions for raising a child. The applicant was a man who suffered from serious psychological problems that he attributed to the treatment he had received from the foster family in which he had been placed by the Social Services Department, of which he was a ward. He therefore wanted to know the identity of this family. In its decision (§ 49), the Court stated that individuals “have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development”. Despite this affirmation of the vital importance of the interest acknowledged, the Court did not establish in this judgment an absolute right to know one’s origins.
79. The judgments delivered on legal proceedings to establish parentage also contain elements that could usefully be transposed to the question of access to origins. For example, in the *Mikulić v. Croatia* judgment of 4 September 2002,<sup>40</sup> the Court held that the child’s vital interest in obtaining the information essential to discover the truth about his or her origins, an important element of his or her personal identity, must prevail over the right of the father being sought to refuse the DNA tests requested. It is not simply a question of origins in the biological sense but of establishing paternity. However, it could be deduced that what applies to the dual legal and biological nature of the parent-child relationship must apply even more so when only its biological dimension is involved. In this case, the best interests of the child seeking to establish her parentage must take precedence over the father’s right to keep his secret. The same solution was later adopted in the *Ebru and Tayfun Engin Çolak v. Turkey* judgment<sup>41</sup> with regard to a father who had refused to submit to a DNA test and then in the case of a deceased father in the *Jäggi v. Switzerland* judgment of 13 July 2006<sup>42</sup> and the *Pascaud v. France* judgment<sup>43</sup>.

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<sup>39</sup> *Gaskin v. the United Kingdom*, 7 July 1989, Series A no. 160.

<sup>40</sup> *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I, RTDciv 2002. 795, observations by J. Hauser.

<sup>41</sup> *Ebru and Tayfun Engin Çolak v. Turkey*, no. 60176/00, 30 May 2006.

<sup>42</sup> *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X, RTDciv 2006, p. 727, observations by J.-P. Marguénaud; LPA 16 June 2009, 14, note by J. Flauss-Diem; *Médecine et droit*, vol. 2007, No. 85, p. 109, note by D. Berthiau.

<sup>43</sup> *Pascaud v. France*, no. 19535/08, 16 June 2011, RTDciv 2011.526, observations by J. Hauser; D. 2012, 1433, observations by F. Granet-Lambrechts; Adde Vial G., “Expertise génétique post mortem et vie privée”, *Revue des droits et libertés fondamentaux* 2011, chronique n° 16.

80. Lastly, the Court's case law on surrogate motherhood shows the importance of the biological link in the situation concerned. This importance led the Court to issue a judgment against France for its refusal to establish paternity even though the biological truth was not contested.<sup>44</sup> By the same token, when there is no biological link between the child and those who commissioned his or her conception through a surrogate mother, the state does not violate Article 8 of the ECHR by taking the child away and placing him or her in care.<sup>45</sup>

### 2.1.2. Cases concerning secret childbirth

81. The case law on secret childbirth is clearly the most relevant insofar as it deals exactly with access to information on origins. Only the circumstances of the separation between the child's origin and parentage differ, as it is not a question there of medically assisted reproduction. Apart from this difference, the issues are basically similar.

82. The first decision in this regard was the *Odièvre v. France* judgment of 13 February 2003.<sup>46</sup> In that case, the applicant, born to a woman who wished to keep her admission and delivery secret, complained that it had been made impossible for her to find out the identity of her mother owing to the right to protection of private life under Article 8 of the ECHR. In order to reach its decision, the Court had to balance the particular interest of the child – the applicant who wished to know her origins – against the general interest of the unborn child. It counted among the interests involved the safeguarding of the mother's health, the respect for family life owed to the adoptive parents, the right to life of the child itself, the fact that French law, by allowing anonymous childbirth, pursued the aim of protecting both the life and health of the woman and of the child by avoiding clandestine abortions or abandonment. It concluded that the infringement of the right to know one's origins was not disproportionate to the legitimate aims pursued by the law (including the child's best interests). In that case, a general and abstract conception of a child's interests, combined with other interests (those of the woman) prevailed over the particular interests of the applicant child. This decision is particularly enlightening for the question of access to information on origins because the Court employed a method of reconciling the child's interests with other interests, leading it not to rule against the state as long as it has a mechanism for allowing the child, even if conditionally, to access information on his or her origins. It is generally acknowledged that the above-mentioned *Ebru*<sup>47</sup> and *Jäggi*<sup>48</sup> judgments are a further development of the *Odièvre* judgment.

83. It is interesting in this connection to note that in a similar case the European Court of Human Rights gave judgment against another state precisely because it did not provide any mechanism enabling a child born anonymously to access information on her origin. In that case, *Godelli v. Italy*,<sup>49</sup> the Court reaffirmed the importance of the right to know one's origins and the need for reconciliation but found that, unlike France in the *Odièvre* case, the Italian State had exceeded the margin of appreciation available to it. On the grounds

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<sup>44</sup> *Menesson v. France*, no. 65192/11, ECHR 2014 (extracts); *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.

<sup>45</sup> *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 24 January 2017 (non-violation of Article 8).

<sup>46</sup> *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III, JCP 2003. II. 10049, note by A. Gouttenoire-Cornut; *ibid.*, I. 120, study by P. Malaurie; *Dr. fam.* 2003, No. 58, note by P. Murat, chronique 14, note by H. Gaumont-Prat; *RTDciv* 2003. 276, observations by J. Hauser and p 375, observations by J.-P. Marguénaud.

<sup>47</sup> *Ebru and Tayfun Engin Çolak v. Turkey*, no. 60176/00, 30 May 2006.

<sup>48</sup> *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X.

<sup>49</sup> *Godelli v. Italy*, no. 33783/09, 25 September 2012, D. 2013, 798, observations by M. Douchy-Oudot, D. 2012, 1436, observations by F. Granet-Lambrechts, *RTDciv* 2013, 104, observations by J. Hauser.

that the child had no possibility of obtaining non-identifying information and that the mother could not lift her anonymity, Italian law absolutely and definitively refused access to any information whatsoever.

84. *Mutatis mutandis*, the solution resulting from the European Court's case law on anonymous childbirth could perfectly well be chosen in the cases already before it that involve access to information on the origins of children conceived by gamete donation.<sup>50</sup>

## 2.2. Case law of the Constitutional Courts

85. In a decision of 24 April 2018<sup>51</sup>, the Constitutional Court of **Portugal** declared anonymous gamete donation unconstitutional.
86. **In France**, the Constitutional Council has not given a ruling on access to information on the origins of donor-conceived persons but has done so on the question of anonymous childbirth.<sup>52</sup> In its decision of 16 May 2012, it stated that "by allowing the mother to oppose the disclosure of her identity even after her death, the contested provisions are intended to ensure proper respect, for health protection purposes, for the mother's expressed wish to preserve the secrecy of her admission and identity during childbirth while at the same time providing, as far as possible and by appropriate means, for the child's access to knowledge concerning his or her personal origins. It is not for the Constitutional Council to substitute its assessment for that of the legislature on the balance thus defined between the interests of the birth mother and those of the child. The contested provisions have not removed the legal guarantees from the constitutional requirements to protect health and have not undermined respect for private life and the right to lead a normal family life". On the other hand, the Constitutional Council has specifically given judgment on two occasions on the question of access to information of their origins of children conceived by gamete donation.<sup>53</sup> It has for example held that there is no contradiction between the anonymity rule and the rights guaranteed under Article 8: "By prohibiting (...) the disclosure of information on a gamete donor's personal data, the legislature has established a fair balance between the interests involved. Consequently, this prohibition is not incompatible with the provisions of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms." It also rejected the complaint about discrimination based on Article 14 taken in conjunction with Article 8: "while Article 14 prohibits, in the enjoyment of the rights and freedoms recognised by the Convention, the different treatment of persons in comparable situations, unless there is objective and reasonable justification, the child conceived by gamete donation is not in an analogous, and therefore comparable, situation to either the children of the gamete donor or those of the recipient couple. Consequently, there is no discrimination, within the meaning of these provisions, against the child conceived by gamete donation as far as access to such data is concerned."

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<sup>50</sup> See above.

<sup>51</sup> Portuguese Constitutional Court, decision No. 225/2018, 24 April 2018.

<sup>52</sup> Conseil constitutionnel, decision 2012-248 QPC, 16 May 2012, *JO* 17 May 2012, p. 9154.

<sup>53</sup> Conseil d'État, joint session of the 10th and 9th subsections, No. 372121, 12 November 2015, on which J.-R. Binet, "Insémination avec tiers donneur et droit à la connaissance des origines : l'enfant impensé du droit de la bioéthique" (Insemination with a third-party donor and right to know one's origins: the child left out of account in bioethics law), *Dr. famille* 2016, study 1 – Conseil d'État, joint session of the 10th and 9th chambers, No. 396571, 28 December 2017, *Dr. famille*, 2018, Reference 3.

### 3. Elements of comparative law and analysis

87. The Council of Europe's Committee on Bioethics (DH-BIO) sent a questionnaire to the member States on medically assisted reproduction and on the right of a child born as a result of medically assisted reproduction or surrogate motherhood to know his or her origins. This document, updated on 14 June 2021, is the initial source of the comparative law study presented here. It has been supplemented by the answers given by 26 member States to a questionnaire drawn up by the CDCJ.<sup>54</sup> The sections below consider the national rules established with regard to access to the donor's identity, access to non-identifying information, as well as the identified main national legislative trends and the prospects for filling the gaps identified.

#### 3.1. National approaches on accessing the donor's identity

88. Most states that permit gamete donation allow access to information on origins. A few do not allow such access or have a dual system.

##### 3.1.1. States that allow donor-conceived children to access information on their origins

89. Of the states that responded to the DH-BIO questionnaire, 37 stated that they allowed sperm donation, 32 that they also allowed oocyte donation and 25 that they also allowed embryo reception.

90. Of the 26 states that replied to the CDCJ questionnaire, only **Türkiye** does not permit sperm donation, nor, incidentally, oocyte donation or embryo reception. On the other hand, of the 25 states that allow sperm donation two (**Germany and Switzerland**) prohibit oocyte donation and embryo reception and two (**Austria and Norway**<sup>55</sup>) only prohibit embryo reception.

91. A majority (15) of the 25 states that allow donor assisted reproduction recognise the right of the person conceived through the three techniques (sperm donation, oocyte donation and embryo reception) to access information on his or her origins. Of these 15 states, one (Spain) only permits access on strict medical grounds. Ten states prohibit this access for persons conceived through sperm donation, oocyte donation or embryo reception (**Belgium, Czech Republic, Greece, Latvia, Montenegro, North Macedonia, Poland, Serbia, Slovenia, Ukraine**). Of these 10 states, 4 state that they might develop a right of access to information on origins (**Belgium, Germany, Greece, Ukraine**) and one (**Czech Republic**) states that it has made two unsuccessful attempts in this direction. Depending on whether the state only allows the use of sperm donation or whether it also permits oocyte donation or embryo reception, access to information on origins applies to the donor or the couple who have consented to the reception of their embryos.

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<sup>54</sup> The following 26 states replied to the questionnaire (document CDCJ(2021)23): Austria, Belgium, Croatia, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Serbia, Slovenia, Spain, Sweden, Switzerland, Türkiye, Ukraine, United Kingdom.

<sup>55</sup> The Norwegian Act No. 100 of 12 May 2005 on the application of biotechnology in human medicine (the Biotechnology Act) only provides for an exception to this ban in the case of female couples. An embryo conceived by the fertilisation of a woman's oocyte with a donor's sperm may be implanted into the other woman's uterus.



92. The paragraphs below examine at what age the person can request the disclosure of the donor's identity, who can make that request and whether the donor must consent or whether their death has an impact.

### 3.1.1.1 Age from which the application can be made

93. In most cases, information on origins can only be accessed from the age of majority of the donor-conceived child, sometimes a little earlier.

#### In most cases a child can access the donor's identity at the age of majority

94. Of the 26 states that replied to the CDCJ questionnaire, 15 allow access to information on a person's origins. Thirteen impose an age requirement (**Austria, Croatia, Finland, France, Germany, Ireland, Lithuania, Malta, Norway, Sweden, Switzerland, United Kingdom**). **Denmark** has a dual regime, with access to information on origins only possible if the donor has consented. Of these 13 States, 9 require the person to have reached the age of 18 (**Croatia, Denmark, Finland, France, Ireland, Lithuania, Malta, Switzerland, United Kingdom**). The fifteenth country that allows access to information on a person's origins, **Spain**, imposes conditions relating to medical necessity, regardless of the age of the child.
95. **Switzerland** legislated quite early in this regard: since 1992, the Federal Constitution has provided that "every person shall have access to data relating to their ancestry". A 1998<sup>56</sup> law governs the recording, preservation and communication of information concerning only sperm donors, as oocyte donation is prohibited. From the age of 18, persons conceived from a sperm donation have the absolute right to access the information on the donor's identity and physical appearance. Persons under the age of 18 must demonstrate a legitimate interest in order to get access to it.
96. The most recent legislation in **France** is the Act of 2 August 2021<sup>57</sup> Children conceived after the entry into force of this Act can access information on their origins when they reach the age of majority. Children conceived before then can ask for the donor's identity to be communicated to a commission that will approach the donor. If the donor consents, his or her identity will be passed on to the child.
97. In **Lithuania**, a child over 18 years of age can have the donor's identity communicated only if the donor consents.
98. A donor-conceived person can also request access to information on his or her origins from the age of 18 in **Croatia** and **Ireland**. In **Ireland**, the Children and Family Relationships Act of April 2015, which allows this access, also provides a mechanism whereby that donor-conceived persons can be informed that additional information is held in relation to their identity on the National Donor Conceived Person Register. This will arise where the donor-conceived person has reached 18 and is requesting a copy of his or her birth certificate. Once given this information, the child who has come of age can request the donor's identity from the Department of Health, which keeps that register. Access is not automatic, however, as the donor may invoke the risks to him or her and/or the child if the identity is revealed. Before the age of 18, the child's parents may request the disclosure of non-identifying information. A government Bill (Health (Assisted Human Reproduction) Bill 2022) has been published and is currently under consideration by the Houses of the Oireachtas (Irish parliament) which proposes to lower the age at which a

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<sup>56</sup> Articles 24 to 27 of the Federal Act on Medically Assisted Reproduction (Reproductive Medicine Act, RMA) of 18 December 1998 (RS 810.11, in force since 2001).

<sup>57</sup> Act No. 2021-1017, 2 August 2021, JO 3 August 2021, text no. 1.

person can receive this information to 16. The Bill proposes to also remove a donor's ability to raise concerns as regards the release of identifying information to the donor-conceived person.

99. This has also been the case in **the United Kingdom** since 1 April 2005, when the Act governing this access came into force. The Act provides that the Human Fertilisation and Embryology Authority (HFEA) is responsible for maintaining the register containing information on donors. Donor-conceived persons can access non-identifying information from the age of 16 and the donor's identity from the age of 18. In addition, from the age of 18 anyone may contact the HFEA to find out whether they are the result of exogenous fertilisation. Access to the donor's identity is possible from the age of 18. From the age of 16, persons who know they are donor-conceived can access non-identifying information.
100. **Malta** has quite a similar system. Gamete donation has been permitted since the introduction of a 2018 Act, which also introduced the right of a person conceived in this way to access the donor's identity. The Embryo Protection Authority keeps a register of conceptions by medically assisted reproduction and must store the information for 110 years. Access to identity is possible for all children not only from the age of 18 but also beforehand if the authority agrees, but only for health reasons.
101. Lastly, the **Finnish system** is also worth describing, as it contains a novel feature. Since the introduction of an Act of 22 December 2006, which came into force on 1 September 2007, persons conceived by gamete donation or from embryo reception have been able to access information on their origins from the age of 18.<sup>58</sup> In this system, there is no possibility to receive confirmation of more than two legal parents. It is possible for the single recipient to use a known donor who can register an agreement to assume paternity of the child. The information is kept in a national register of gamete and embryo donations maintained by the National Welfare and Health Supervisory Authority (VALVIRA). The acknowledgment of the child is only possible when the woman is already pregnant.

In some states, a child can access the donor's identity before the age of majority

102. Some states allow donor-conceived persons to access information on their origins before the age of majority by setting a lower age. Of the states that replied to the CDCJ questionnaire, five allow access from the age of 16 (**Germany, the Netherlands, Sweden**) or even earlier (**Austria, Norway**). Lastly, as mentioned previously, **Ireland** is considering lowering its age threshold from 18 to 16.
103. The age threshold is set at 16 in **Germany**. As in **Switzerland**, oocyte donation is prohibited. A 2017 Act permitted this access to the donor's identity by providing for a person conceived by sperm donation to request it from the age of 16. The request must be made to the Central Register of sperm donors and female recipients, which is required to keep data for 110 years, as in **Malta**. Before the child reaches his or her 16th birthday, the legal representatives (usually the legal parents) may request and obtain the donor's identity on behalf of the child.

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<sup>58</sup> Act on assisted fertility treatments, 1237/2006, 22 December 2006.



104. This is also the case in **the Netherlands**. Before 2004, donors could choose whether to be anonymous. Since the passing of an Act on 20 June 2002 and its entry into force in 2004, donor-conceived children have been able to access non-identifying information from the age of 12 and the donor's identity from the age of 16.<sup>59</sup> Before the age of 12, parents may be given non-identifying information. This information is kept in a register required to be held by clinics and containing data on gamete donors and women who have recourse to them. The law limits to 12 the number of children who may be conceived from the same donor's gametes.
105. The **Swedish system** is slightly different. The country is at the forefront with regard to access to information on origins, the law permitting this access having been passed as early as 1984. According to this law, all persons conceived by sperm donation from March 1985 onwards can access the donor's identity when they have reached "sufficient maturity", which is interpreted as meaning 16 years of age. The information is kept by the clinic in a specific register. The arrangement has been extended to persons born through oocyte donation from 2003.
106. The system in force in **Norway** has recently changed. Until 1 January 2021, access to information on origins, enshrined in an Act of 5 December 2003<sup>60</sup> and benefiting persons conceived by sperm donation after 2005, could only be exercised by the child from the age of 18. Since 1 January 2021, it has been possible to request this from the age of 15. The application must be made to the National Donor Identity Register. Parents cannot be given any information. The 2003 Act made no provision for children conceived before 2005.
107. Lastly, in **Austria**, since the passing of an Act on 14 May 1992,<sup>61</sup> a donor-conceived person has had the right to access the gamete donor's identity from the age of 14. The information is kept by the clinic, which the child can contact directly. The right is exercised personally by the child and his or her parents cannot access this information except in very limited circumstances. The donor is required to give the healthcare facility or practitioner all information about himself or herself and agree to this being provided on request to the child conceived with his or her gametes. This consent can be withdrawn by the donor at any time, which then prohibits any use of his or her gametes.

### 3.1.1.2 Holder of the right to access the donor's identity

108. Of all the member States that replied to the DH-BIO questionnaire, twenty indicated they allow the child to make an application for access to information on his or her origins.
109. Of these 20 states, only 9 also allow the child's parents to obtain this information, mostly subject to restrictive conditions. In 19, this right may be exercised by a court or by doctors.
110. As mentioned earlier, of the 26 states that replied to the CDCJ questionnaire, 15 allow access to information on origins. Of these 15 states, 7 grant this right only to the donor-conceived person (**Denmark, France, Lithuania, Norway, Sweden, Switzerland, United Kingdom**). **Austria** also provides for access to parents in the best interests of the child and grants courts the right of access. **Croatia** provides for access by the courts as well as by a doctor or the parents, who must then be authorised by the National Commission for Medically Assisted Reproduction (NCMAR) and only for a reason relating

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<sup>59</sup> Act containing rules relating to the use of gametes and embryos, 20 June 2002.

<sup>60</sup> Act No. 100 of 5 December 2003 on the application of biotechnology in human medicine.

<sup>61</sup> Act of 14 May 1992, which entered into force on 1 July 1992, published in the Federal Gazette (Bundesgesetzblatt, BGBl), No. 275/1992.

to the child's health or wellbeing. In **Germany**, legal representatives of the child can apply for such access on behalf of the child before the child's 16th birthday. In **Malta**, parental access depends on the existence of exceptional circumstances. The **Finnish system**, as mentioned previously, is novel in that access is possible also for the mother, but only if she has obtained a sperm donation from a donor who has agreed to the establishment of his paternity.

### 3.1.1.3 Donor's consent and impact of death

111. In **Austria**, the donor must agree to the disclosure of their identity at the time of the donation. This is also the case in **Croatia, France, Switzerland and the United Kingdom**.

112. In **Germany**, there is a distinction between standard information about identity (names, birth date, address) and additional data (e.g., reasons for donation). Whereas the first set is necessary to become a registered donor (if registered donor, only with identity data stored), the second set is subject to an additional approval by the donor to be stored and disclosed. Even related to additional data, the donor cannot prevent disclosure of stored data or even select whom to give information. The donor can only withdraw the approval relating to additional data, consequently this set of information has to be deleted and not disclosed. Standard information cannot be deleted once the sperm has been used.

113. In **the Netherlands**, the donor must consent at the time of donation and at the time the child makes the request. However, in the latter case, the donor's refusal will not constitute a veto. Depending on the interests at stake, the donor's identity can be disclosed despite his or her objection.

114. In **Lithuania**, the donor must agree to the disclosure of his or her identity when the child conceived from their donation requests it.

115. However, the donor's consent to the disclosure of his or her identity is not required in **Finland, Norway and Sweden**.

116. It is possible to disclose the donor's identity after his or her death in **Austria, Denmark, Finland, France, Germany, Ireland, Lithuania, the Netherlands, Sweden and Switzerland**.

117. In **the United Kingdom**, the impact of the donor's death differs according to the child's date of birth. If the child was born before 1 April 2005, the donor's identity will not be passed on to the child if the donor dies. If the child was born on or after that date, the donor's death does not affect the communication of his or her identity.

### 3.1.2 States that do not recognise the right to origins

118. Of the 26 states that replied to the CDCJ questionnaire, 9 states that allow recourse to sperm or oocyte donation or embryo reception do not permit access to information on origins: **Czech Republic, Greece, Latvia, Montenegro, North Macedonia, Poland, Serbia, Slovenia and Ukraine**. As mentioned previously, however, **Spain** allows access to origins in very exceptional circumstances.<sup>62</sup> This was also the case in **France** until the legal framework was amended by the Act of 2 August 2021.<sup>63</sup> It should be noted that the

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<sup>62</sup> Act 14/2006 of 26 May 2006 on human assisted reproduction techniques, State Gazette (Boletín Oficial del Estado), A-2006-9292.

<sup>63</sup> Act No. 2021-1017, 2 August 2021, JO 3 August 2021, text no. 1.

new French provisions provide for the need for an implementing decree to come into force. Until its publication, the right of access to information on origins will therefore not yet be recognised for persons conceived by gamete donation.

119. In the **Czech Republic**, this right of access is, however, granted to the courts.

### 3.1.3 States with dual systems

120. Five states allow both possibilities to coexist (**Belgium, Denmark, Hungary, Iceland, Russian Federation**). In these countries, donation is either anonymous or not at the donor's option. Consequently, the conceived child can access information on his or her origins if the donor did not wish to be anonymous but will never be able to do so if that is not the case.

121. In **Denmark**, the law enabling the use of medically assisted reproduction techniques is Act No. 460/1997, which came into force on 1 October 1997 and has since been amended several times. For example, since an amendment passed in 2012, parents have been able to choose a donor who is permanently anonymous, one who is anonymous at the time of donation but agrees that his or her identity may be revealed later to the children conceived by his or her donation or a donor who is known at the time of donation. Since a recent amendment came into force, only the child has had the right to request access to the donor's identity, and only if the legal parents had access to a non-anonymous donor.

122. **Iceland** has a different system of options. Since the adoption of the Act of 1 June 1996, the donor has had a choice at the time of donation.<sup>64</sup> He or she either asks to remain anonymous or does not. In the latter case, the persons born by his or her donation will be able to access his or her identity from the age of 18.

123. **Belgium** does not recognize access to the origins of a child conceived by an anonymous donation. However, non-anonymous donation resulting from an *agreement between the donor and the recipient(s)* is authorised by the law of 6 July 2007 relating to medically assisted procreation and the destination of supernumerary embryos and gametes (article 57). Even if this does not expressly offer a specific guarantee of information for the child in the case of a non-anonymous donation, the possibility exists.

## 3.2. National rules on accessing non-identifying information

124. Of the 26 states that replied to the CDCJ questionnaire, those that provide for a right of access to the donor's identity often also allow the disclosure of non-identifying information. However, some states that do not provide that right of access to the donor's identity allow the disclosure of non-identifying information. Lastly, some states do not allow access to non-identifying data.

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<sup>64</sup> Artificial Fertilisation Act No. 55/1996, 1 June 1996.

### *3.2.1. States that provide for the right of access to non-identifying information in addition to the donor's identity*

125. Of the states that replied to the CDCJ questionnaire, eight say they enshrine the right of access to non-identifying information in addition to the donor's identity: **Denmark, Finland, France, Ireland, Malta, the Netherlands, Switzerland and the United Kingdom.**
126. In some states this information is provided prior to conception, in order to inform the choice of donor. This is the case in **Denmark and Malta**, where the physical characteristics are communicated to the candidates for medically assisted reproduction to enable them to choose. This information is also available to the child. This is also the case in **Finland**, but the information is only given to the doctor responsible for choosing the donor.
127. In **Ireland**, a donor-conceived child who has reached the age of 18, or his or her parents before that age, may be provided with non-identifying information on the donor, in addition to information on the number of children born from that donor, as well as information on their gender and year of birth. The Health (Assisted Human Reproduction) Bill 2022, currently under consideration, proposes to reduce the age at which donor-conceived children can receive the above information to 16. The Bill also provides that medical information may be given to a doctor to prevent an imminent and serious risk to the child's health or to enable the child to receive informed health advice regarding the existence of a genetic disease.
128. In **Switzerland**, an adult who meets the requirements has an absolute right to access non-identifying data<sup>65</sup>. A child must demonstrate having a legitimate interest for such access. In such cases, access to all data is possible, that is not only the results of the medical examinations but also the date of the sperm donation and the date of the insemination or embryo transfer.
129. In **France**, the law enshrines a right of access to non-identifying information by the donor-conceived person, who may exercise this right after coming of age. The nature of the information to be communicated must be specified by decree.
130. In **the Netherlands**, a child over the age of 12, his or her parents before that age or the family doctor can obtain any information about the donor's physical, social or medical characteristics.
131. In **the United Kingdom**, a child can access non-identifying information from the age of 16. His or her parents can also apply to the HFEA. The UK Human Fertilisation and Embryology Act 1990, as amended in 2008, sets out precisely what information can be provided depending on the child's year of birth.
132. If the child was born between 1 August 1991 and 31 March 2005, the following information can be provided: physical description of the donor (height, weight, eye and hair colour), year and country of birth, ethnicity, whether the donor had children at the time of the gamete donation, any other information the donor wished to pass on (occupation, religion, interests and a short description).

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<sup>65</sup> Basic data include the training, the profession, information on physical aspects (corpulence, height, hair color, eye color, skin color, special characteristics). Upon donor's request, other data can be recorded, such as photos of the donor.

133. If the child was born after 1 April 2005, he or she can obtain the following information: physical description of the donor, if made available (height, weight, eye and hair colour), year and country of birth, ethnicity, whether he or she had children at the time of gamete donation and, if so, how many and what gender, marital status, medical history, a message the donor may have written for him or her, any other information the donor wished to pass on, and the number, year of birth and gender of children conceived from the same donor.

### *3.2.2. States that provide for the right of access to non-identifying information without allowing access to the donor's identity*

134. Of the states that replied to the questionnaire, nine said they enshrined a right of access to identifying data without, however, allowing access to the donor's identity: **Belgium, Czech Republic, Greece, Latvia, Poland, Serbia, Slovenia, Spain and Ukraine.**

135. In **Greece**, there is no right to access information on origins but the child and his or her legal representatives may access the donor's non-identifying data. This access is limited to medical information and is subject to medical necessity. This rule has also been adopted in **Serbia** and **Spain**, as well as in **Slovenia**, but in the latter case only when the child is aged 15 or over.

136. In **Belgium**, information relating to gamete donors (medical information relating to the gamete donor which may be of importance for the healthy development of the unborn child; physical characteristics of the gamete donor) may be communicated by the fertilization centre:

- *to the recipient or the recipient couple who requests it when making a choice;*
- *insofar as the health of the person who has been conceived by the insemination of gametes so requires, to his referring doctor and that of the recipient or the recipient couple.*

137. The information is therefore communicated for medical reasons or to make a choice. But, whatever the case, the child has no right of access to information.

138. In **Poland**, information about the donor may be disclosed to the child from the age of 18 or to his or her legal representatives. This information includes the health status of the donor as well as the year and place of his or her birth.

139. In the **Czech Republic**, a couple seeking gamete donation are informed about the donor's age, occupation and state of health at the time of donation. This is also the case in **Latvia**. In **Ukraine**, such a couple is only given phenotypic information, but this is also done before the procedure is carried out.

### *3.2.3. States that refuse to allow access to non-identifying information*

140. Eight states refuse to allow any access to non-identifying information: **Austria, Croatia, Germany, Lithuania, Montenegro, North Macedonia, Norway and Sweden.**

141. In **Lithuania**, however, a court may allow the disclosure of non-identifying information about the donor or the donor-conceived child if the request is based on medical or other valid grounds.

### 3.3. Trend and outlook

142. There is a clear trend in national legislation to establish a right to access information on origins. Some of the shortcomings noted above open up prospects for an international legal instrument.

#### 3.3.1. Established trend towards a right of access to information on origins

143. A study of the arrangements in force in the Council of Europe member States shows that their legislation in this area is evolving. The developments observed show that the trend is to allow access to information on origins.

144. This is the case when states choose to abolish anonymity, as has happened with the reforms in **the Netherlands, the United Kingdom and Sweden**. In **Portugal**, the law was changed given that the rule of strict anonymity was declared unconstitutional. A 2006 Act allowed recourse to gamete donation and gave children the right to access non-identifying information but not the donor's identity. However, in a decision of 24 April 2018<sup>66</sup> the Portuguese Constitutional Court ruled that the anonymity of gamete donation was unconstitutional. As a result, a transitional Act was passed in 2019 providing for anonymity to be maintained for donations made before the 2018 decision and for gametes already donated before then to be used for another three years, while complying with the rule of anonymity. For children conceived later, access to the donor's identity was coupled with an obligation of confidentiality: they must not reveal the donor's identity to a third party. Moreover, where anonymity still applies, attempts to abolish it have been made (twice in the **Czech Republic**) or discussions on abandoning it are underway (**Belgium, Greece and Ukraine**).

145. This is still the case when states enable a system based on anonymity to coexist with one based from the beginning on knowledge of the donor's identity. For example, in **Denmark**, which has established this dual regime,<sup>67</sup> the law required strict and irreversible donor anonymity before 2012.

146. This also applies when the anonymity rule is retained as a matter of principle but is combined with the establishment of a right to know the donor's identity. This is the case in **France** since the reform carried out by Act No. 2021-1017 of 2 August 2021 on bioethics which abandoned the rule of absolute secrecy that had prevailed in this area since the promulgation of the first bioethics laws on 29 July 1994.

147. Lastly, this applies also when the coexistence of a regime of anonymity and a regime of access to information on origins is abandoned. As mentioned previously, in **the Netherlands**, before 2004, donors could choose to remain anonymous, but this is no longer an option since the entry into force of the 2002 Act in 2004. All donor-conceived children can now access non-identifying information from the age of 12 and information on the donor's identity from the age of 16.

#### 3.3.2. International overview reveals gaps that would need to be filled

148. As mentioned previously, nowadays, most states enable access to information on the donor-conceived child's origins. However, while the law provides choices for children conceived within a legal framework, the situation may differ in states for the many children born under a contractual arrangement, which is sometimes called "friendly assisted

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<sup>66</sup> Portuguese Constitutional Court, decision No. 225/2018, 24 April 2018.

<sup>67</sup> See above.



reproduction” or simply private donation. The lack of organisation and preservation of donor information risks rendering any search for the origin of persons conceived in this way futile. This type of practice then joins, at least partly, the situation of children to whom the identity of the father will remain unknown and can find, in the legislation concerning contentious establishment of filiation, the necessary key answers to be provided. Nevertheless, in view of the resulting irreversible infringement of the right of donor-conceived persons to know the truth about their biological ancestry, such practices should be vigorously opposed, and legislation should provide for legal avenues enabling children born via private donations to identify their biological origins.

149. Sometimes national law does not provide any solution for children conceived before the entry into force of the belatedly adopted provisions, a situation that therefore leaves unanswered the request for access to information on origins made by the very many children that were born as a result of exogenous reproduction before a right valid only for those conceived afterwards was enshrined in law. This inequality of rights between children according to their date of conception cannot be fully justified by the sole desire to respect the commitment made to donors to keep their identity secret. Insofar as the information exists and has been preserved, either in a national or a local register, without it necessarily being appropriate to move towards a compulsory lifting of anonymity, it would be sensible to provide, at the very least, for a system allowing the donor to be questioned when the donor-conceived person wishes to access information on his or her origins. This would enable the donor to reconsider their position in the light of the child's interests and thus constitute a satisfactory response to the need to strike a balance between the various interests at stake.



## V. Conclusions and preliminary aspects to be considered for a possible future legal instrument

150. The analysis of the arguments and solutions enshrined in the legislation of the member States shows that the question of access to information on origins tends to pit the rights of one party (the biological mother, the biological father, the mother's spouse, the adoptive parents, the gamete donors) against those of the other (the child). Based on principles and provisions of equal rank, it should only be possible for the law to take these interests duly into account by applying the technique of conciliation, which means striking a fair balance. It is indeed possible to identify as many arguments in favour of recognising the right to know one's origins (importance of truth and transparency, need to identify one's genealogy for self-development, medical interest or interest associated with a plan to start a family, etc.) as well as arguments against it (risk of destabilising the legal family by the sudden disclosure of the third party donor's identity, commitment made to the donor to guarantee their anonymity, risk that the donor, the child or the legal parents will wish to call into question the bond of parentage, etc.).
151. However, the analysis carried out also quite clearly reveals the emergence of a consensus on the right to know one's origins. What seemed to be a marginal solution in the early days of exogenous medically assisted reproduction has gradually become a valid principle in most member States, supported by the development of the Court's case law linking the child's best interests and the right to know one's origins to the right to personal development based on the protection of privacy enshrined in Article 8 of the ECHR. This consensus could therefore legitimately lead the Council of Europe to recommend that member States establish a mechanism for donor-conceived persons to access information on their origins. Such a mechanism should, however, take all interests into account and not be made an absolute requirement.
152. In this respect, it would first of all be appropriate to take into consideration the wishes that the gamete donor may have had at the time of the donation. In cases where donation was conditional on strict anonymity, it would nevertheless be possible to ask them to agree to the communication of their identity when the child requests it.
153. Secondly, in view of the possible risks of destabilising the legal family, it does not seem right in cases of recourse to gamete donation to compel the state to take the place of the parents to inform the child of the circumstances of his or her conception. On the other hand, it would be appropriate to ensure that when consent is given before exogenous medical assistance is performed it is made clear how important it is for a child's personal development to know about his or her origins.
154. In accordance with the most frequently encountered solution, the child should be allowed to access the donor's identity from the age of majority. However, earlier access would provide the child with an answer to the questions of identity that he or she often asks in adolescence.
155. Furthermore, while the legal framework provides solutions for children born by donation, there is none for those born under contractual arrangements. However, even if this situation does not arise everywhere, it seems that, in many cases, information is kept by the practitioners who assisted in their conception. In such cases, in addition to the possibility offered by law for the judicial establishment of the paternity, it would be appropriate to allow persons conceived through such practices to go to court to obtain information about their origins. However, in order not to increase the risk of it being physically impossible to access information on origins, it would be advisable to vigorously

prohibit any practice that does not guarantee the preservation and accessibility of donor-information.

156. Lastly, even though it seems that access to health data is generally permitted in the member States, it should be clearly pointed out that, even in states that do not provide for access to information on origins, the donor-conceived person should always be able to access any non-identifying information on the donor when this is relevant for his or her health or in order to inform his or her choices with regard to having children, taking however into account the need to ensure a fair balance regarding access to such information for all children, whether born through medically assisted procreation or naturally conceived.

## VI. Glossary

**Donor anonymity:** the principle whereby the identity of the person who has consented to the donation of an element (organ) or product (blood, gametes) of their body is and remains unknown to the person who receives it. This principle is enshrined in law in many states. When it applies, it means that a child conceived by gamete donation cannot know the donor's identity and therefore cannot access information on his or her origins.

**Morphological matching:** a medically assisted reproduction practice in which a gamete donor is sought who resembles the person intended to become the legal parent of the child conceived by gamete donation. In the case of sperm donation, the donor will resemble the legal father. This practice is associated with the desire not to have recourse to a specific medically assisted reproduction technique.

**Exogenous medically assisted reproduction:** a medically assisted reproduction technique using a third party. This may involve recourse to gamete donation, i.e. the donation of sperm or oocyte, that is to say the sex cells produced by the man and the woman respectively. In addition to gamete donation, the reception of an embryo conceived by another couple is also a form of exogenous reproduction.

**Embryo:** a term that usually refers to the first stage of the development of a human being from the fusion of the nuclei of a sperm and an oocyte until the 12th week, when the embryo becomes a foetus. However, some authors use the term "zygote" or "pre-embryo" for the first 14 days of development. In order to be implanted in the context of in-vitro fertilisation or embryo reception, the embryo must be no more than 7 days' old.

**Civil status:** all elements contributing to the identification of a person such as their surname, first name, gender and nationality.

**Legal family:** a term referring to the legally established family in the case of gamete donation or adoption, as opposed to the family of origin, which refers to the legally established family in the case of gamete donation or adoption as opposed to the family of origin, the biological family or the blood family.

**In-vitro fertilisation:** a medically assisted reproduction technique consisting of the fusion of the nuclei of a spermatozoon and an oocyte outside the uterus. Fertilisation is said to be intra-marital when the gametes used come from the man and woman who are to become the child's legal parents. It can also be exogenous in the case of gamete donation (sperm or oocyte) or double gamete donation (sperm and oocyte).

**Parentage:** legal link between the child and his or her father (paternal parentage) and mother (maternal parentage). This link is based on biological truth or likelihood (carnal parentage) or on personal will (adoptive parentage, parentage in the case of recourse to exogenous medically assisted reproduction).

**Gametes:** sex cells produced by the man (spermatozoa) and the woman (oocytes).

**Surrogacy:** the practice of a woman carrying a child for another person: a heterosexual or homosexual couple or a single person. The child may be conceived in vitro from the couple's own gametes or from a donor sperm and oocyte. The surrogate mother may also carry the child conceived after insemination with the man's sperm. In all cases, the child carried by the woman is intended to be given to those who commissioned the procedure.

**The human body is not for sale:** the principle that the human body, its parts and products cannot be the basis for any property rights. Where it exists, this principle entails a ban on remuneration for donations of elements and products of the human body.

**Best interests of the child:** principle, affirmed by Article 3(1) of the United Nations Convention on the Rights of the Child, of 20 November 1989, according to which in all judicial or legal matters affecting the child, his or her best interests shall be a primary consideration.

**Origins:** term designating the biological link between a person and the man and woman from whom he or she originates. Origin coincides with parentage in the vast majority of cases but does not coincide whenever the child is biologically descended from a person other than the one designated by law as his or her father or mother.

**Genetic testing:** a technique to identify the part of an individual's genome that has been passed on by another person who can then be designated as the biological father or mother.