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

### Committee Opinion<sup>1</sup>

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Pierre-Alain FRIDEZ, Switzerland, Socialists, Democrats and Greens Group

### A. Conclusions of the committee

1. The Committee on Legal Affairs and Human Rights congratulates the rapporteur of the Committee on Social Affairs, Health and Sustainable Development, Ms Petra De Sutter (Belgium, SOC), for her comprehensive report and, on the whole, endorses the draft recommendation which has been proposed.

2. Sperm and oocyte donation is a topical and controversial issue. In the absence of common European standards, the various national legal frameworks regulate this issue in very different ways or sometimes not at all. It is also an area in which technological and scientific progress is being made at an ever-increasing pace. Without going into detail on the differences between national laws, the committee nevertheless wishes to support the rapporteur's proposal to abolish, as far as possible, the anonymity of gamete donors, in view of the right of persons conceived by medically assisted procreation (MAP) to know their origins, a right which is recognised as an integral part of the right to private life guaranteed under Article 8 of the European Convention on Human Rights (ETS No. 5, "the Convention"). In addition, the committee shares the rapporteur's view that maintaining anonymity has become almost impossible given the progress made in genetic technologies.

3. However, the committee wishes to propose a number of amendments in order to further strengthen the draft recommendation with regard to the terminology used and certain legal aspects.

### B. Proposed amendments

#### *Amendment A (to the draft recommendation)*

In paragraph 2, first sentence, after the word "including" add "the interpretation given to".

#### *Amendment B (to the draft recommendation)*

In paragraph 2, second sentence, after the words "This right", add ", which is an integral part of the right to respect for private life,".

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1. Reference to committee: [Doc.14419](#), Reference 4349 of 22 January 2018. Reporting committee: Committee on Social Affairs, Health and Sustainable Development. See [Doc. 14835](#). Opinion approved by the committee on 4 March 2019.



*Amendment C (to the draft recommendation)*

At the beginning of paragraph 5, insert the following text: “The Parliamentary Assembly notes that the legislation and practices of Council of Europe member States in the field of medically assisted procreation vary significantly. Nonetheless,”.

*Amendment D (to the draft recommendation)*

At the beginning of paragraph 7.1, insert the words “as far as possible”.

**C. Explanatory memorandum by Mr Pierre-Alain Fridez, rapporteur for opinion**

1. I cannot but congratulate Ms De Sutter on her report, which addresses the very controversial issue of the anonymity of sperm and oocyte donors. As the rapporteur points out,<sup>2</sup> donor anonymity is no longer guaranteed in practice, given the advances in genetic technologies, and individuals wishing to discover their ascendants have no difficulty in accessing their genetic data. These issues must therefore be regulated in order to avoid any possible abuses in the development of these technologies, and that is why I fully support the conclusions contained in Ms De Sutter’s report.

2. Nevertheless, I would like to propose some amendments to the draft recommendation in order to add some terminological clarifications and to highlight the diversity of national legislation in the field of medically assisted procreation (MAP). In particular, I would like to point out that, as demonstrated by the replies provided by the majority of Council of Europe member States to the questionnaire drawn up by the Council of Europe’s Bioethics Committee (DH-BIO) on access to MAP, on the right to know about their origin for children born after MAP and on surrogacy, published in January 2017,<sup>3</sup> there are significant differences in Council of Europe member States with regard to the regulations and practices in the field of MAP and access to this procedure.<sup>4</sup> Some countries (for example Azerbaijan, the Czech Republic, Malta, Poland, Serbia and the Slovak Republic) do not even have a law specifically dealing with the subject. Among those States that replied to the questionnaire, 20 or so reported that MAP was reserved solely for heterosexual couples. Other specific criteria for access to MAP also varied from country to country. While sperm donation is authorised in most member States, some countries prohibit the donation of oocytes. In addition, some States (for example France) prohibit double gamete donation. With regard to the anonymity of gamete donations, 19 countries replied that it was possible to learn the identity of the donor, while 14 replied that it was not always possible. There is therefore no European consensus on this issue.

3. The European Court of Human Rights (“the Court”) has on a number of occasions had the opportunity to rule on MAP-related issues, but its case law in this area is still quite limited.<sup>5</sup> In its *S.H. and Others v. Austria* judgment, the Court concluded that there was no European consensus on recourse to external gametes.<sup>6</sup> In this case, the applicants, two Austrian couples, wished to use *in vitro* fertilisation (IVF) with sperm donation for the first applicant and oocyte donation for the second, whereas Austrian law prohibited sperm donation for IVF treatment and prohibited oocyte donation in general. The Grand Chamber, which overturned the Chamber’s judgment, noted that there was a “clear trend in the legislation of the Council of Europe member States towards allowing gamete donation for the purpose of *in vitro* fertilisation, which reflects an emerging European consensus”. However, that consensus reflected “a stage of development within a particularly dynamic field of law” rather than “long-standing principles established in the law of the member States”; accordingly, the Court held that this did not decisively narrow the margin of appreciation of the State<sup>7</sup> and found that there had been no violation of Article 8 of the Convention. The issue of access to MAP for female couples was recently referred to the Court in a case against France, but it did not rule on the merits, as the application was found inadmissible for non-exhaustion of domestic remedies.<sup>8</sup>

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2. See paragraph 17 of her report.

3. [DH-BIO/INF\(2016\)4](#).

4. With regard to member States of the European Union, see also: [www.touteurope.eu/actualite/pma-quels-droits-en-europe.html](http://www.touteurope.eu/actualite/pma-quels-droits-en-europe.html) (French only).

5. In this context, see the *Dickson v. United Kingdom* judgment, Application No. 44362/04, judgment of 4 December 2007 (Grand Chamber). In this case, the Court held that there had been a violation of Article 8 of the Convention, as the applicant, serving a long prison sentence, had been refused access to artificial insemination which would have enabled him to have a child with his spouse.

6. *S.H. and Others v. Austria*, Application No. 57813/00, judgment of 3 November 2011 (Grand Chamber).

7. *Ibid.*, paragraph 96.

8. *Charron and Merle-Montet v. France*, Application No. 22612/15, decision of 8 February 2018.

4. It should be noted that the Court is currently examining two cases against France concerning the authorities' refusal to provide information on the origins of the conception of the applicants born as a result of artificial insemination from donated sperm. The applicants complain under Article 8 (right to respect for private life) and Article 14 (prohibition of discrimination) of the Convention insofar as they have been denied information on the identity of the donor.<sup>9</sup> The outcome of these applications will undoubtedly be decisive for assessing the issue in question or for the possible drawing up of European rules in this field.

5. It should be noted that for more than 15 years, under Article 8 of the Convention, the Court has ruled in favour of a right to know one's origins, including the identity of one's ascendants, in particular in cases concerning the challenging or recognition of paternity,<sup>10</sup> although it has always sought to ascertain whether "a fair balance has been struck between the competing interests" of the case.<sup>11</sup> In the *Odièvre v. France* judgment concerning anonymous childbirth, the Court emphasised that birth, and in particular the circumstances under which a child is born, forms part of a child's, and subsequently the adult's, private life.<sup>12</sup> However, it did not find in favour of the applicant, considering that the latter had been given access to non-identifying information about her mother and her biological family (non-violation of Article 8 of the Convention). In the *Godelli v. Italy* case, concerning the secrecy of birth and the impossibility for the applicant, abandoned by her mother, to obtain non-identifying information about her natural family, the Court found a violation of Article 8 of the Convention. However, it did not come to the same conclusion in the *Mandet v. France* case, in which the applicants (the mother, her husband and the child) complained that the French courts had annulled recognition of paternity at the request of the child's biological father. The Court held that the best interests of the child, who continued to live with the Mandet family, were first and foremost to know his origins.<sup>13</sup>

6. In subsequent judgments on surrogacy, the Court has also examined the question of the identity of children born as a result of such practice. In the *Menesson v. France* and *Labassée v. France* cases, which concerned the French authorities' refusal to enter in the civil register children born to American surrogate mothers and French biological fathers (the applicants), the Court criticised this practice as violating these children's right to an identity. In the Court's view, by obstructing both the recognition and the establishment in domestic law of their parent-child relationship with their biological father, France had failed to respect these children's right to private life (violations of Article 8 of the Convention).<sup>14</sup> It is also interesting to note that in a more recent case, *Paradiso and Campanelli v. Italy*, concerning the placement in care by the Italian social services of a nine-month-old child born in Russia following gestational surrogacy arranged by the applicant couple, the Grand Chamber annulled the Chamber's judgment and found in favour of the Italian authorities. It held that, given the absence of a biological link between the child and the applicants (unlike the applicants in the *Menesson v. France* and *Labassée v. France* cases) and the short duration of their relationship, the decision of the Italian authorities was not disproportionate and did not give rise to a violation of Article 8 of the Convention.<sup>15</sup>

7. It can therefore be seen that the Court attaches paramount importance to the biological link between parents and children. The right to know one's biological origins and to have them recognised is considered by the Court as an integral part of the right to respect for private life. It would therefore appear that lifting the anonymity of gamete donors would not run counter to the requirements deriving from the case law of the Court with regard to Article 8 of the Convention.

8. It should also be borne in mind that Article 7.1 of the United Nations Convention on the Rights of the Child (UNCRC) stipulates that children have the right to know their parents "as far as possible". In addition, "States Parties undertake to respect the right of the child to preserve his or her identity, ... name and family relations, as recognised by law, without unlawful interference" (Article 8.1 of the UNCRC).

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9. *Gauvin-Fournis v. France*, Application No. 21424/16, and *Silliau v. France*, Application No. 45728/17, notified to the French Government on 5 June 2018.

10. See *Phinikaridou v. Greece*, Application No. 23890/02, judgment of 20 December 2007, paragraphs 45-46; *Mikulić v. Croatia*, Application No. 53176/99, judgment of 7 February 2002, paragraphs 53-54, or *Krušković v. Croatia*, Application No. 46185/08, judgment of 21 June 2011, paragraph 41. See also the Registry of the Court's research report on [Bioethics and the case-law of the Court](#), 2016, pp. 98-112.

11. *Jäggi v. Switzerland*, Application No. 58757/00, judgment of 3 July 2003, paragraph 38. This case concerned the authorities' refusal to analyse the DNA of the alleged biological father (deceased); the Court found that there had been a violation of Article 8 of the Convention and of Article 14 taken in conjunction with Article 8.

12. *Odièvre v. France*, Application No. 42326/98, judgment of 13 February 2003 (Grand Chamber), paragraph 29.

13. *Mandet v. France*, Application No. 30955/12, judgment of 14 January 2016, paragraphs 56-57.

14. *Menesson v. France* and *Labassée v. France*, Applications Nos. 65192/11 and 65941/11, judgments of 26 June 2014, see paragraphs 100-101 and 79-80 respectively.

15. *Paradiso and Campanelli*, Application No. 25358/12, judgment of 27 January 2017 (Grand Chamber).

9. Furthermore, in a study published by the Council of Europe's Bioethics Committee in November 2017, researchers at the University of Leiden (Netherlands) made the point that gamete donation was not regulated either by the Convention on Human Rights and Biomedicine (ETS No. 164, "Oviedo Convention") or by the Additional Protocol on Transplantation of Organs and Tissues of Human Origin (ETS No. 186). In their view, this was an issue that required greater attention, as the right to an identity was protected by the UNCRC and Article 8 of the European Convention on Human Rights. In view of advances in reproductive technologies, MAP should be more closely regulated by States. It would be helpful to provide States with recommendations and good practices on legal and other measures to ensure that children can receive viable information about their origin and the circumstances of their birth.<sup>16</sup> The report by Ms De Sutter is therefore in line with this approach.

### **1. Amendment A**

#### *Explanatory note*

The purpose of this amendment is to highlight the fact that it is the interpretation given to the United Nations Convention on the Rights of the Child that has evolved and not the Convention itself (see in this respect the explanations contained in Ms De Sutter's report in paragraph 7, see footnote 7). This clarification is all the more advisable as paragraph 2 of the draft recommendation refers to the case law of the Court (which has indeed evolved in order to respond to new challenges in the field of bioethics), but not to the European Convention on Human Rights.

### **2. Amendment B**

#### *Explanatory note*

The purpose of the amendment is to highlight the fact that the right to recognition of one's origins is an integral part of the right to respect for private life (see in particular the case law of the Court relating to Article 8 of the Convention, paragraphs 5-6 above).

### **3. Amendment C**

#### *Explanatory note*

The purpose of this amendment is to emphasise that, with regard to gamete donation, legislation and practices vary from one State to another (see paragraph 2 above). Accordingly, the Assembly should take these differences into account before making specific recommendations.

### **4. Amendment D**

#### *Explanatory note*

The aim of this amendment is to slightly soften the categorical wording of the first sentence of this subparagraph, particularly in view of the scope of Article 7.1 of the UNCRC, which stipulates that the child has the right to know his or her parents "as far as possible". In addition, the right to private life, to which the right to know one's origins is linked, is not an absolute right and may be restricted under certain conditions (see Article 8.2 of the Convention). Lastly, it is also necessary to take into account the disparities that exist between each country's national legislation and the latter's specific characteristics.

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16. [From Law to Practice: Towards a roadmap to strengthen children's rights in the era of biomedicine](#), p. 35.