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Why should France change its legislation relating to donor anonymity? A prospective comparative study¹

In France, medically assisted reproduction is regulated by a 1994 law. Medically assisted reproduction involving the help of a third party donor is open to living heterosexual couples, whether married or not, of childbearing age. The donation is anonymous and unpaid, with the consequence that children conceived through donation have no access to their personal origins.

The establishment of their parentage follows the mimetic scenario of natural procreation, in order to conceal the truth of the donation. The child's mother is the woman who gave birth. The presumption of paternity applies where the couple is married – if not, the mother's partner must recognise the new-born baby.

Secrecy is therefore organised and guaranteed from the moment both parents give their consent to medical assistance, until legal parentage is established.

That being said, a growing number of children born through donation have been demanding to know the identity of their donors, in order to build their own personal history. Such access is nowadays permitted by the 22nd January 2002 Act for children born under X and placed for adoption. It is still not permitted for children born through medically assisted reproduction.

Many people are convinced that France should modify its legislation and remove the anonymity requirement in relation to gamete donors. But what does that mean?

It certainly doesn't mean that gametes will cease to be anonymous. Nor does it mean that the donor selection process - which allows parents to choose the donor - will be modified. The point is to know whether a child born through donation has access, if he or she wants it, to his or her donor's identity, regardless of the donation being a sperm, an oocyte or an embryo one.

¹ This article finds its roots from the work we performed for the report ordered by the Minister of Family Law in February 2014, published under the Title: *I. Théry, A.M. Leroyer; Filiation, Origine, Parentalité*, O. Jacob, 2014.

It has been suggested, in France as in many other countries, that such a right should be open to all children having reached the age of majority.

Should such proposal be retained, donors would henceforth be guaranteed that their anonymity would be preserved during a minimum of 18 years.

The social and political questions at stake, as regards the removal of anonymity, are clearly a matter of access to origins: waiving the anonymity requirement would be reserved to people born through donation, who have reached the age of majority and who want to learn more about *their* donors.

I. Comparative law regarding access to personal origins

A. Many countries already admit access to personal origins²

- Sweden was the first country in the world to change its legislation in 1984. Children conceived through sperm donation have the right to know the identity of their donors. The law entered into force on 1st March 1985 and was then amended so as to grant the same right to children born through oocyte donation, once such a donation was legalised, on 1st January 2003³.
- In Switzerland, the principle according to which “everyone shall have access to data relating to their ancestry” was added to the Federal Constitution in 1992, and amplified by the 1998 Federal Act relative to medically assisted reproduction. The law came into force on 1st January 2001⁴.
- That same year, in 1992, Austria, which does not authorise oocyte or embryo donations, allowed children to have access to identifying data related to the sperm donors to whom they were born.
- In 1995, the state of Victoria in Australia decided that identifiable information on the donor might be communicated to the child, once he or she has reached the age of majority. Since then, the question has spread throughout the country: an important Australian Senate report, published in February 2011, recommended that the removal

² G. Mathieu “La Place du Donneur d’engendrement”, in H. Fulchiron and J. Sosson (dir), *Parenté, filiation, origines*, Bruxelles, Bruylant, 2013, p.135-168.

³ K. Orfali, “Assisted Reproduction and Removal of Anonymity in Sweden: Between a Tradition of Transparency and a Novel Status of the Child”, in *Who is my Genetic Parent? Donor Anonymity and Assisted Reproduction: A Cross Cultural Perspective*, B. Feuillet, K. Orfali, Th. Callus, (dir), Bruylant, 2011, p. 247-257.

⁴ D. Manai, “Assisted Reproduction Under Swiss Law: The Truth About the Conception and the Identity of Gamete Donor”, in *Who is my Genetic Parent*, *op. cit.*, p. 259-271.

of donor anonymity be extended to all Commonwealth countries. It also recommended a package of measures in support of people and families conceived by donation, as well as donors⁵.

- In 1996, Iceland adopted a two-tier system. It approves on the one hand, anonymous gamete donations, and, on the other hand, donations from people who specifically give consent to disclosure.
- Norway, which only authorises sperm donation, voted in favour of removing donor anonymity in December 2003. The law was progressively implemented, from 2003 to 2005.
- In the Netherlands, since June 2004, and after more than 15 years of debates, donations can no longer be anonymous. Actually, when it adopted the 2002 law related to information on gamete donors, Holland eventually abandoned the two-tier system, which previously enabled donors to disclose, or not, their identity.
- In New Zealand, since 2004, gamete donors can no longer be anonymous. A special register procedure was set up in order to establish voluntary links between donors, recipients and children born by ART, so as to meet to the maximum extent possible their requests relative to donations made prior to the Act.
- In the UK, the decision to remove anonymity was taken in 2005. The law enables those who had made a donation prior to the 2005 Act to reconsider their previous decision and to lift their identity secrecy. It also enables those who had made a donation prior to 1990 – date of the first law regulating ART – to enrol in a voluntary programme in order to encourage contacts between donors and people conceived through donation, following the example of New Zealand.
- Finland, which previously applied the two-tier system, decided to remove donor anonymity in a 15th October 2006 Act: children born through donation are today entitled to know their donor's identity once they reach the age of majority.
- In Belgium, the 15th March 2007 Act established the two-tier system, allowing donors to opt for anonymous donation or identifiable donation. Embryo donation remains however anonymous⁶.

⁵ The Senate Legal and Constitutional Affairs References Committee, "Donors Conception Practices in Australia", Feb. 2011.

⁶ *G. Schamps and M.N. Derese*, "Anonymity and Assisted Reproduction Techniques in Belgian Law:

- In the case of the United States, as well as in Israel, things are more complex. Hospitals and clinics are free to propose the option of anonymous donation or identifiable donation. It is however to be noted that in those two countries, researchers report that more and more people call into question donor anonymity, not only amongst heterosexual couples but above all amongst female same-sex couples⁷.

B. Consequences of the removal of anonymity: unsubstantiated rumours about a “donation shortage”

The above-mentioned countries, which allowed access to personal origins, were very much concerned about a donation shortage but none of the available statistics has detected such a decline. In documented cases, donations have even *increased*.

1) It is true that in Sweden, the year after the law was voted, the number of sperm donors fell. However it was not just short but also exceptional. The very next year, the number of donors was restored to its previous level.

The new law has modified the profile of the donors: today, donors turn out to be older than before, and most of the time, they already have a family. The year during which the exceptional shortage occurred corresponded to the moment when the initial student-based profile dried up, while the new profile was emerging.

Parents consequently decided to inform their children of the conditions under which they were conceived.

Recently, a national Swedish survey was carried out in order to better understand how recipient parents considered this notion of secrecy in relation to their children’s conception. The results were published on 5th January 2011, on the international Journal *Human Reproduction* Internet site.

The article, written by S. Isaksson and 6 other researchers, was entitled “Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?”⁸. It offered us a clear and unambiguous answer: 90% of the interviewed recipient parents declared that they intended to

Legislation for Existing Practice in the Law of 6th July 2007”, in *Who is my Genetic Parent?*, *op. cit.*, p. 121.

⁷ Ch. Miller, “Donated Generation”, *The New Atlantis*, summer 2007, p. 27-44.

⁸ S. Isaksson *et al*, “Two Decades After Legislation on Identifiable Donors in Sweden: Are Recipient Couples Ready to be Open About Using Gamete Donation?”, *Human Reproduction*, 2011 January 5th.

inform their children of the way they had been conceived. They even added that they considered that to be a basic duty of ‘honesty’ as well as a duty to respect their children’s ‘rights’.

2) In the UK, the number of new gamete donors is published each year on the *Human Fertilisation and Embryology Authority* site.

No apparent donation shortage has been found since the Act, which allows access to origins for people born through donation, entered into force.

Year	Sperm donors
1992	375
1993	426
1994	417
1995	414
1996	419
1997	343
1998	256
1999	302
2000	323
2001	327
2002	288
2003	257
2004	239
2005	272
2006	303
2007	360
2008	405
2009	438
2010	480

(Source: HFEA. *New Donors Registration*. <http://www.hfea.gov.uk/3411.html>)

II. European law

The question of access to personal origins under French law is regularly confronted with Articles 8 and 14 of the ECHR, related to the protection of private and family life and non-discrimination.

Actually, the European Court of Human Rights has established that access to personal origins comes under the auspices of Article 8 of the Convention and considers it as a component of the right to privacy.

In 1989, in *Gaskin v. United Kingdom* (n° 10454/83), the Court held that it was in the best interest of a person to have access to his or her social assistance file, in order for him or her to know and better understand his or her childhood and formative years. The Court stressed the need to preserve the right balance between the general interest – which may require data confidentiality in order to maintain good childcare public service management – and individual interests – which grant access to personal information. The Court noted that this principle of proportionality is satisfied as soon as an independent body capable of weighing those competing interests is created.

Later on, the Court made clear in *Odièvre v. France* (n° 42326/98) that “Article 8 protects the right to identity and personal fulfilment as well as the right to establish and develop relationships with other human beings and the outside world”.

In order to reach personal fulfilment, it may be necessary to establish the details of one’s own human being identity; it may also be of extreme importance to obtain information with a view to ascertaining the truth regarding an important aspect of one’s personal identity, such as the identity of the biological parents (*Mikulić v. Croatia*, no 53176/99, §§ 54 et 64). The birth and the circumstances around it are part of the child’s (and subsequently adult) private sphere, as guaranteed under Article 8 of the Convention.

The Court also affirmed that people have a vital interest, protected by the Convention, in obtaining information which is essential to uncover the truth in relation to a significant aspect of their personal identity (*Jäggi v. Switzerland* n° 58757/00), that the right to know your ancestry is a component of privacy (*Godelli v. Italy*, n° 33783/09) and that the right to know your ancestry falls under the scope of the notion of privacy, which covers important aspects of personal identity, such as the identity of the biological parents (*Pascaud v. France*, n° 19535/08 ; *Anayo v. Germany*, n° 20578/07).

The right to access to personal origins is therefore a component of privacy under Article 8 of the Convention. However, the Court considers that the conditions

for accessing such right are to be treated in different manners, depending on whether the child was conceived through donation or was born under X⁹.

In cases of AHR using third-party donation, the European Court of Human Rights considers that each Member State has a quite wide margin of appreciation in regulating such a right, as there is no “consensus amongst Member States of the Council of Europe, regarding the relative importance of the issue at stake or the best ways to protect it, especially when it comes to moral questions or delicate ethical issues” (see this constant formula held by the Court, esp. *Evans v. UK* n° 6339/05, § 77; *X, Y et Z v. UK*, § 44; *Fretté v. France*, n° 36515/97, § 41; *Christine Goodwin v. UK*, n° 28957/95, § 85).

Thus, the European Court held that it was necessary to achieve “an appropriate solution establishing a fair balance between the need to preserve gamete donor anonymity and the legitimate heterologous right to information for children conceived through AHR” (*S. H. and others v. Austria*, April, 1st 2010 § 84). If such indent was not reiterated in the ruling of the Grand Chamber dated 3rd November 2011 (*S.H. and others v. Austria*, n° 57813/00), it nevertheless evidences that it might be difficult to achieve such fair balance while maintaining the absolute secrecy of donor anonymity.

It is in that context that the French State Council (State Council, litigation support, 13th June 2013, req. 362981)¹⁰ was asked to give its opinion on the conformity of French law ensuring strict gamete donor anonymity with regard to Articles 8 and 14 of the European Convention on Human Rights.

The French State Council came to the conclusion that the right based on the 1994 Acts was not incompatible with Article 8, guaranteeing the protection of private and family life. According to the French State Council, reconciling the various interests at stake falls within the States’ margin of appreciation. It especially noted that transmitting some data to the individuals concerned might be more detrimental than anything else, in the light of health protection, preservation of privacy and

⁹ *N. Gallus*, “La Procréation Médicalement Assistée et la Jurisprudence de la Cour Européenne des Droits de l’homme”, in *N. Gallus* (dir.), *Droit des Familles, Genre et Sexualité*, Paris, Bruxelles, LGDJ, Anthémis, p. 203 *et seq.*

¹⁰ RFDA, 2013, 1051, E. Crepey; AJDA 2013. 1246; D. 2013. 1626, obs. R. Grand; AJ fam. 2013. 405, obs. A. Dionisi-Peyrusse; S. Henneville-Vauchez, “Hard case en vue? L’anonymat du donneur de gamètes en débat au Conseil d’État”, AJDA, 12th November 2012, n° 38/2012, p. 2119; S. L. Badat, “Droit à la connaissance de ses origines (Art. 8 et 14 CEDH): Le principe de l’anonymat des donneurs de gamètes passe le cap du Conseil d’État”, in Lettre “Actualités Droits-Libertés” du CREDOF, 4th July 2013.

medical confidentiality. It invited thus the legislator to open the debate: “In this area, it is for the legislator alone, if need be, to further appreciate public interest considerations to be taken into account and the consequences to be drawn”.

III. Proposals for instituting a right to access to personal origins for people born from donations

1) Maintaining the anonymity rule for gamete and embryo donations

The anonymisation principle of gamete donors, first imposed by the CECOS¹¹ medical practice, was incorporated into positive law by the 29th July 1994 Act.

According to Article 16-8 of the French Civil Code¹²: “No information enabling the identification of either the person who donated a component or a product of his or her body, or the person who received it, shall be divulged. The donor shall not know the recipient’s identity; the recipient shall not know the donor’s identity. In case of therapeutic necessity, only the donor and recipient’s physicians shall be entitled to have access to information enabling their identification”.

It is important to understand the significance of the anonymisation principle. The donor’s identity, as well as further information on his or her health, personal and family data, is *known* to the healthcare unit being authorised to obtain and store gametes (CECOS). The medical practitioners in charge of the medically assisted procreation operations within such healthcare unit also know it (R. 1244-5 CSP)¹³. By contrast, such identity is not disclosed to the centres of medical assistance for the procreation, or to the physicians of such centres. The latter have access to some anonymised information on the donor, notably those concerning his or her medical, personal or family history (R. 1244-5 CSP), or other factors linked to the donor’s morphological characteristics, in order to be able to carry out a match with the recipient couple¹⁴.

¹¹ On the principle and its application see esp. *S. Bateman*, “Le Principe de l’anonymat du don de Sperme: Remarques Historique sur son Histoire et son Application”, *Andrologie*, 2011, 21, p.192-198.

¹² This principle is iterated in Articles L.1211-5 and L. 1244-7 of the French Public Health Code.

¹³ Article R. 1244-5 last subparagraph: “Les informations touchant à l'identité des donneurs, à l'identification des enfants nés et aux liens biologiques existant entre eux sont conservées, quel que soit le support, de manière à garantir strictement leur confidentialité. Seuls les praticiens agréés pour les activités mentionnées au premier alinéa ont accès à ces informations”.

¹⁴ See esp. *L. Brunet*, “Procréations médicalement assistées et catégories ethno - raciales: l’enjeu de la ressemblance”, in G. Canselier and S. Desmoulin-Canselier (dir.), *Les catégories ethno-raciales à l'ère des biotechnologies, Droit, sciences et médecine face à la diversité humaine*, Société de législation comparée, 2011, p.135-154.

According to Article 16-8 of the French Civil Code “In case of therapeutic necessity, only the donor and recipient’s physicians shall be entitled to have access to information enabling their identification”. A similar rule is contained in Article L. 1244-6 of the French Public Health Code, stating that: “The authorized bodies and establishments, in accordance with the provisions of Article L. 2142-1, provide health authorities with appropriate information on the donors. A physician may access non-identifying medical data in case of therapeutic necessity relative to a child born through reproductive technologies, using donated gametes”.

The 7th July 2011 Act and the 20th June 2013 Decree have broadened access to medical data: today the notion of precautionary measure is taken into account where the risk of serious genetic disorder is high and if the donor consents to disclose his or her identity. Hence, where a serious genetic disorder is diagnosed, the consequences of which are likely to put prevention measures in place, including genetic counselling, health care for a person who donated gametes - which led to the conception of one or more children – or for one member of the couple that donated an embryo, such a person may authorise the prescribing physician to refer the matter to the director of the centre of medical assistance for procreation, so as to inform the children born from such donation. The physician informs the concerned children of the above-mentioned information and invites them to genetic counselling (art. L. 1131-1-2 CSP and R. 1131-20-3 CSP, issued from Decree n° 2013-527, June 20th, 2013).

There is no reason to call into question the general principle of anonymisation of gamete or embryo donations. It is justified not only by reference to the principle of non-commercialisation of the human body (Article 8) but also by reference to medical secrecy rules.

Moreover, anonymisation protects the privacy of the donor and his or her family. It helps prevent confusions between his or her status of donor, excluding filiation, and a ‘biological’ parentage, in contradiction with the very meaning of gamete donation organised by our society.

Last but not least, it protects the privacy of the parents and their family throughout the minority of the child.

2) Allowing an adult born through donation to have access to his or her donor's identity, after having made the request of it

The French National Consultative Ethics Committee (CCNE), in an opinion dated 24th November 2005 and entitled "Access to origins, filiation anonymity and confidentiality", suggested both maintaining the principle of donor anonymity and encouraging the transmission of non-identifying data to the children that have reached the age of majority. It also added that, in cases of gamete and embryo donations, "the CNAOP mission could be extended to access to personal origins".

In France, the legislative proposal n° 3225 relative to the option of removing the gamete donor anonymity requirement, dated 28th June 2006, was introduced in the National Assembly by Valérie Pécresse. Such proposal provided that only donors who would consent to it might be authorised to disclose their identity ("two-tier" system).

The first important report in charge of reviewing bioethics laws was published in 2008, by the parliamentary office for scientific and technological options assessment (OPECST). It recognised the legitimacy of the access to origins and elaborated a list of possible solutions: access to the donor's identity (according to the British model), access to non-identifying data only (according to the Spanish model) or a two-tier system, where the donor's identity would be disclosed should the donor consent to it.

The following year, in 2009, in a report entitled "Reviewing bioethics laws", the French State Council publicly advocated for the access to certain non-identifying data for children who would reach the age of majority, as well as for the removal of the donor anonymity requirement where the donor consents to it¹⁵.

The latest effort to introduce access to personal origins in French law relates to the bioethics draft law n° 2911 tabled before the National Assembly on 20th October 2010. The draft law provided that children born through gamete or embryo donation might, when reaching the age of majority, have access to some non-identifying data. Should the donor consent to it at the time of the request, the child would access the donor's identity. A committee - which goal was to deliver access to non-identifying data and gamete donor's identity - was to be established, in a quite similar way to the CNAOP, upon the child's request.

¹⁵ Conseil d'État, La révision des lois de bioéthique, La Documentation française, 2009.

This positive move failed to prosper, as it had to face an extremely intense offensive against a potential confusion between access to origins and filiation.

The debate became thus a debate on filiation and more precisely, on the notion of “real parent”: is the “real” parent the “social” or the “biological” parent?¹⁶ Such confusion prevented this very question of personal identity from being asked, the Parliament resisted the bill and the option could not be retained¹⁷.

And yet, it is clear that access to personal origins cannot be confused with the establishment of parentage.

Moreover, it is particularly discriminatory to allow such access to adopted children and wards of the state, including those born under X, but to refuse it to people conceived through a third party donor, in the context of medically assisted reproduction.

Children who were born in such a way and who have reached the age of majority should be allowed to access their personal identities. They also should be able to have access to either the name of their donors or non-identifying data.

The access could be modelled on the one prescribed in cases of adoption or birth under X, under the CNAOP channel (national council for the access to personal origins).

This is actually what was suggested in the report that Ms Irène Théry and myself wrote in 2014, to the Minister for the Family.

3) Creation on a voluntary basis of a register for donations made prior to the new law

The Act that would establish the right to access personal origins for people born through donations, and that would be non-retroactive, as with any other laws, would apply only to donations occurring after its entry into force.

As far as previous donations are concerned, previous donors could be asked to give, on a voluntary basis, their consent to their potential identity disclosure.

4) The issue of the right to access identity for those born from the same donor

¹⁶ *I. Théry*, *Des humains comme les autres*, p.137-178.

¹⁷ *Leonetti*, Report AN, n° 3111, 26th January 2011; *Milon*, Senate Report, 338, 30th March 2011, which conversely supports the access to origins for children born through donation.

People conceived by means of assisted human reproduction through donors often seek access to information other than the ones related to the donor's identity.

Many studies have shown that the questioning of the identity of potential biological 'siblings', *i.e.* other people born from the same donor, is often more important than the one regarding the identity of the donor himself or herself.

In doing so, they express a certain concern over incest in our society. Here, incest is not only to be understood as the union of two persons legally related to each other by parentage or marriage (as provided in Articles 161 and following of the French Civil Code) but also by blood (as already stated in Article 356 of the Civil Code which, in cases of adoption, prohibits the marriage of anyone with any person from their birth family).

There is a growing awareness and knowledge of the problem, as evidenced by lengthy developments in a special report issued from the Australian Senate¹⁸. It should also be remembered that Portugal, a country that refuses access to donors' identity, allows a person conceived through donation to question the medically assisted reproduction National Council in connection with potential impediments to marriage¹⁹.

English law²⁰ is particularly interesting on that point. Since the very first law regulating medically assisted reproduction in 1990 (the *Human Fertilisation and Embryology Act*), the legislator has entrusted the *Human Fertilisation and Embryology Authority (HFEA)* with the task of keeping a Register of information recording all births conceived through medically assisted reproduction and storing information on gamete donors.

The objective was to enable an adult born from assisted reproduction procedures involving a third party donor to question the HFEA in connection with such donor's non-identifying data as well as to know, in view of a marriage, if he or she is related to the intended spouse.

¹⁸ The Senate Legal and Constitutional Affairs References Committee, "Donors conception practices in Australia", Feb. 2011.

¹⁹ *G. de Oliveira and R. Reis*, "Donor anonymity in Portugal", in B. Feuillet (dir), in *Who is my Genetic Parent?*, Donor Anonymity and Assisted reproduction: a cross cultural perspective, B. Feuillet, K. Orfali, Th. Callus (dirs), Bruylant, 2011, p. 235-245.

²⁰ Donor Conception, Ethical Aspects of Information Sharing, Nuffield Council on Bioethics, April 2013; *Th. Callus*, From total to partial anonymity: The revolution of English Law on assisted reproduction techniques, in *Who is my Genetic Parent?*, Donor Anonymity and Assisted Reproduction: a cross cultural perspective, B. Feuillet-Liger, K Orfali, Th. Callus (dirs), Bruylant, 2011, p. 175-188.

Subsequently, the law, revised in 2008, as well as the by-law adopted in 2009 by the HFEA, pursuant to its normative jurisdiction (*Opening the register policy*), conferred on children born through donation, recipients and donors new rights of access to the Register of information.

Today, people conceived through donations may, as of the age of 16, request non-identifying information on their donor and any other person born from the same donor («genetically related siblings»). They may ask whether they - *i.e.* the requesting party and the person he or she wishes to marry, establish a partnership with, or simply have an intimate physical relationship with²¹ - were conceived from the same donor. At the age of 18, they are entitled not only to know their donor's identity but also decide to record information on themselves aimed at other people born from the same donor. In this respect, a new *Sibling Contact Register* was established.

The *Sibling Contact Register* therefore complements a much older register, the *Donor Link*, governed by an association but financed by public funds, designed for people born before 1990, *i.e.* before the adoption of any medically assisted reproduction regulation, in order to facilitate contacts with donors or with people conceived from the same donor.

Following the example of other European Union Member States, further reflexion is needed in French law, in order to authorise people born through donation to access their origins, provided that they reach the age of majority and that they so request, being assisted by the current National Council for personal origins, the actions of which could be thus extended.

²¹ J. Sosson, L. Brunet, "L'engendrement à plusieurs en droit comparé, quand le droit peine à distinguer filiation, origines et parentalité" in H. Fulchiron and J. Sosson (dir), *Parenté, filiation, origines*, Bruxelles, Bruylant, 2013, p. 31-70.

