EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF GAUVIN-FOURNIS AND SILLIAU v. FRANCE

(Applications nos. 21424/16 and 45728/17)

JUDGMENT

Art 8 • Positive obligations • Private life • Refusal by national authorities to allow individuals conceived using donor-assisted reproduction to access information about their donor, owing to rule of anonymous gamete donation • Wide margin of appreciation afforded concerning means of ensuring effective respect for applicants' private life, but reduced because essential aspect of their private life was in issue • Right to access information about one's origins protected by Convention • Rights and interests at stake weighed up by legislature following constructive, in-depth debate on whether to remove donor anonymity • No clear European consensus on access to information about one's origins but recent trend towards removing donor anonymity • Fair balance between competing interests at stake struck by State in refusing requests to access donors' non-identifying medical information, on ground of medical confidentiality (with exceptions for doctors) • Legislature's decision to make access to information about origins by individuals born before entry into force (1 September 2022) of new legislation (enabling access to information about donors who at time of donation consented to its collection and storage) subject to donor consent in order to respect situations pre-dating that legislation • Margin of appreciation not overstepped

STRASBOURG

7 September 2023

FINAL

19/02/2024

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Gauvin-Fournis and Silliau v. France,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Georges Ravarani, *President*,
Carlo Ranzoni,
Mārtiņš Mits,
Stéphanie Mourou-Vikström,
María Elósegui,
Mykola Gnatovskyy, *judges*,
Catherine Brouard-Gallet, ad hoc *judge*,
and Victor Soloveytchik, *Section Registrar*,

Having regard to:

the applications (nos. 21424/16 and 45728/17) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Ms Audrey Gauvin-Fournis and Mr Clément Silliau ("the applicants"), on 15 April 2016 and 23 June 2017 respectively;

the decision to give notice to the French Government ("the Government") of the complaints under Article 8 of the Convention, taken alone and together with Article 14, and to declare the remainder of the applications inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicants;

the comments submitted by the European Centre for Law and Justice (ECLJ) and Alliance Defending Freedom (ADF) International, which were granted leave to intervene by the President of the Section;

Considering that Mattias Guyomar, the judge elected in respect of France, was unable to sit in the case (Rule 28 of the Rules of Court) and the President of the Chamber thus decided to appoint Catherine Brouard-Gallet to sit as an *ad hoc* judge (Rule 29 § 1 (b));

Having deliberated in private on 27 June 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged impossibility for the applicants, who were conceived using donor-assisted reproduction, to access information about their respective donors. They complained of a violation of Article 8 of the Convention, in so far as it enshrined the right to access information about one's origins, and of discrimination in breach of Article 14.

THE FACTS

2. The first applicant, Audrey Gauvin-Fournis, was born in 1980 and lives in Levallois-Perret. She was represented by Mr B. Favreau, a lawyer

practising in Bordeaux. The second applicant, Clément Silliau, was born in 1989 and lives in Beaune-la-Rolande. He was represented by Mr C. Pettiti, a lawyer practising in Paris.

3. The Government were represented by their Agent, Mr F. Alabrune, Director of Legal Affairs at the Ministry of European and Foreign Affairs.

I. APPLICATION No. 21424/16

4. The first applicant was conceived through artificial insemination by donor sperm, an assisted reproductive technology (ART) procedure that consists in injecting sperm directly into the uterus of a woman – in the present case the applicant's birth and biological mother. In 2009, when the applicant was 29, her parents told her how she had been conceived.

5. On 22 February 2010 the applicant requested that the Bondy Centre for Egg and Sperm Research and Preservation (*Centre d'études et de conservation des œufs et du sperme* – "the CECOS") provide her with information about the donor of the gametes used in her conception. Specifically, she asked for his identity and for non-identifying information such as his age, his occupational status, a physical description, the reasons for his donation, the number of people conceived using his gametes, and details of his medical history. In particular, she wished to know whether her brother, who had been born in 1977, had been conceived using the same donor.

6. Following a tacit refusal to grant that request, the applicant applied to the Commission for Access to Administrative Documents (*Commission d'accès aux documents administratifs* – "the CADA"). On 27 July 2010 it issued an opinion advising against the requested disclosure of information, except in so far as it concerned the applicant's parents' medical files documenting the steps they had taken to obtain the ART procedure. Citing the principle of anonymous gamete donation (see paragraphs 29-34 below), the CADA gave the following reasons for its opinion:

> "... [T]he need to protect family life within the child's legal family, which could be destabilised by the identification of the donor.
>
> ... [T]he psychological and family-related interests of the donor, whose voluntary act is generally intended solely to provide assistance to couples unable to have children, and who in most cases does not want his or her identity to be disclosed. It should be noted in this regard that, under Article 311-19 of the Civil Code, '... no legal parent-child relationship may be established between the donor and the donor-conceived child'.
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> ... [P]ublic-interest considerations relating to the consequences of removing anonymity. As can be seen from the experience of States that have removed gamete-donor anonymity, such a reform may have the effect, firstly, of reducing the supply and demand of gametes to varying degrees and, secondly and most importantly, of dissuading parents from telling their child how he or she was conceived. CECOS practice shows, however, that it is preferable from a psychological point of view to inform the child of this fact as soon as he or she is capable of understanding."

7. With regard to the applicant's argument that there was an increased risk of incest and consanguinity, the CADA stated that the risk was not above average and was actually probably lower than in certain areas characterised by low geographical mobility among residents. It also said that the legislature would have taken that factor into consideration. As to non-identifying information about the donor, the CADA pointed out that only medical information could be disclosed, and even then only to doctors (see paragraphs 29 and 34 below). The CADA then concluded that it was for the legislature alone to decide whether or not to make non-identifying information about the donor accessible. This was not, however, before it informed the applicant that several reports and studies had found in favour of lifting the ban on disclosing non-identifying information, and that France's position made it an outlier among the Council of Europe's member States. Many had removed anonymity either without restrictions (Sweden, the United Kingdom, Germany, Switzerland, Austria, Norway and Finland) or subject to donor consent (Belgium and Iceland), while others had authorised the disclosure of non-identifying information (the Netherlands and Spain).

8. On 21 September 2010 the applicant applied to the Montreuil Administrative Court to have the CECOS's tacit decision set aside. She also requested that the Administrative Court order the Paris regional health authority, *Assistance publique – Hôpitaux de Paris* ("AP-HP"), which was acting in support of the respondent in the proceedings, to provide her with the requested information and to pay her the sum of 100,000 euros (EUR) in damages. The applicant submitted, in particular, that her inability to access the information in question prevented her from having full enjoyment of her right to an identity, in breach of Articles 8 and 14 of the Convention.

9. On 31 August 2011 Dr B., a hospital psychiatrist, issued a medical certificate at the applicant's request, attesting to the severe identity crisis she had been suffering since learning about her unknown origins.

10. On 14 June 2012 the Administrative Court dismissed the applicant's requests in the following terms:

> "... [T]he information in the file of a gamete donor for ART purposes constitutes confidential information protected by law within the meaning of section 6 of the Law of 11 July 1978, which in particular guarantees that the donor's anonymity will be protected from anyone requesting access to it, notably any individual who was conceived from his or her donated gametes ...
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> [The applicant] is not one of the persons and authorities to which the law strictly reserves access to certain information concerning gamete donors. It follows that the [CECOS] was able, without committing a mistake of law, to refuse to disclose to her (i) non-identifying information about the donor who enabled her conception and (ii) information about any biological connections with her brother, who had been conceived in the same way ...
>
> ... [T]he provisions of Article 8 of [the Convention], the purpose of which is to ensure a fair balance between the public interest and the requirements of the protection of private life, including in relationships between individuals, afford the legislature a wide

> margin of appreciation in the field of [ART] in particular, in terms both of choosing the means by which to implement such a policy and of assessing whether their consequences are justified, in the public interest, by the need to achieve the aims pursued by the law. The rule of gamete-donor anonymity, which notably serves the aim of respect for family life within the legal family of the child conceived from the donated gametes, and the aim of protection of the donor's private life, does not in itself entail any interference with the private life of the individual thus conceived ...
>
> Moreover, the provisions of Article L. 1244-6 of the Public Health Code, which restrict access to non-identifying medical information in the donor's file solely to a doctor in the event of a therapeutic necessity concerning the donor-conceived child, notably serve the purposes of protecting health, preserving private life and safeguarding medical confidentiality. This difference in treatment between the doctor and any other person, which falls within the margin of appreciation that Articles 8 and 14 of [the Convention] afford solely to the national legislature, is not incompatible with those provisions. The provisions of section 6 (II) of the Law of 17 July 1978, which restrict access to documents whose disclosure would breach medical confidentiality solely to the individual concerned, and which serve, in particular, the aims of preserving private life and safeguarding medical confidentiality, do not constitute discrimination prohibited by [the above-cited Articles 8 and 14] either. ..."

11. The applicant appealed against the decision.

12. In his opinion on that case, the public rapporteur emphasised that the legislation made no provisions for children conceived by gamete donation, even in the event of a therapeutic necessity, and that such a "vacuum" was difficult to reconcile with Article 8 of the Convention and the Court's case-law.

13. In a judgment of 2 July 2013 the Versailles Administrative Court of Appeal upheld the Administrative Court's judgment using the same terms, specifying that the ban on accessing the information in question applied to all donations of body parts or products (see paragraph 38 below).

14. The applicant appealed on points of law against that judgment. In her submissions she relied on the Court's case-law to complain of a system of absolute anonymity and to argue that the right to know one's origins could be restricted only where there were overriding interests. She asserted that the disclosure of non-identifying information, medical or otherwise, would do no harm to the donor, who would remain anonymous. As to the other interests at stake, she submitted that those of donors were not necessarily immutable and absolute, since some donors wished to make their identity known, and that French law wrongly presumed to know the opinion of donors and their families. She disputed the argument that the removal of donor anonymity might reduce the number of donations, citing the United Kingdom as an example to the contrary. She also challenged the need for absolute anonymity in the interest of the recipient couple and family life, particularly where, as in her case, the conditions of conception had been revealed, and given that her parents and brother were in favour of the removal of anonymity. Lastly, she complained of discrimination on the grounds of her birth, in breach of Article 14 of the Convention.

15. In his opinion on that case, the public rapporteur stated that the interests that were likely to be weighed in the balance against the vital interest of knowing one's parentage did not appear to be very compelling from the standpoint of the Convention. He nevertheless concluded that the appeal should be dismissed because the Court had taken no position on the issue of gamete-donor anonymity.

16. On 12 November 2015 the *Conseil d'État* dismissed the appeal in a decision along the same lines as a previous opinion delivered on 13 June 2013 in another case (see paragraph 35 below). The relevant parts read:

> "5. First, in defining access to non-identifying information in Articles L. 1244-6 and L. 1131-1-2 of the Public Health Code, the legislature was seeking to protect the health of donor-conceived individuals while ensuring respect for the rights and freedoms of others. In this regard, the provisions of Article L. 1244-6, according to which a doctor may access non-identifying medical information in the event of a therapeutic necessity, must be understood as not preventing such information from being obtained for preventive purposes, in particular in the case of a couple formed by two donor-conceived individuals. While such information is available only to a doctor and not to the individual concerned, the reconciliation of the interests at stake thus performed and the difference in treatment between the doctor and any other person falls within the margin of appreciation afforded to the national legislature under the aforementioned provisions of Article 8 of the Convention, particularly given the disadvantages that disclosing such information to the individuals concerned would have with regard to the aims of protecting health and preserving private life and medical confidentiality.
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> 6. As regards identifying information, the rule of anonymity serves the aim of protecting the private life of donors and their families. While this rule, which applies to all donations of body parts or products, prevents certain requests for information from being granted, it does not in itself entail any interference with the private and family life of the donor-conceived individual, especially since it is for the parents alone to decide whether or not to reveal the truth about his or her conception. In refusing any change to the rule of anonymity when enacting the Law of 7 July 2011, the legislature based its decision on several public-interest considerations, including the need to preserve family harmony along with the major risk of undermining the social and emotional nature of parent-child relationships, the risk of a substantial decrease in gamete donations, and the risk of calling into question the ethics of all donations of body parts or products.
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> 7. In thus prohibiting the disclosure of a gamete donor's personal information, except in the circumstances indicated in paragraph 5, the legislature struck a fair balance between the interests at stake. Accordingly, this ban is not incompatible with the provisions of Article 8 of the Convention.
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> 8. Second, while, in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment – without an objective and reasonable justification – of individuals in relevantly similar situations, a child conceived by gamete donation is not in an analogous and thus relevantly similar situation either to the children of the gamete donor or to the children of the recipient couple. In consequence, no discrimination, within the meaning of those provisions, is suffered by the donor-conceived child in terms of access to such information."

17. In her submissions to the Court the applicant stated that in September 2017 she and nine other people conceived in France by gamete donation,

including her brother and her husband, had decided to take recreational DNA tests marketed by the US company 23andme. The results showed that four of the ten people tested, including her and her brother, were conceived using the same donor. She specified that her husband had been able to identify and locate his donor, who had expressed his joy in having found him and had informed him of his medical history.

18. On 3 August 2021 Law no. 2021-1017 of 2 August 2021 on bioethics ("the Law of 2021") was published in the Official Gazette of the French Republic. Section 5 of that Law introduces a system whereby donor-conceived individuals can obtain information once they have reached the age of majority. It also enables individuals born under the former system to request access to their donor's non-identifying information and identity (see paragraphs 50-54 below). The system entered into force on 1 September 2022.

19. On 21 November 2022 the applicant informed the Court that on 7 October 2022 she had applied to the newly established Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology (*Commission d'accès des personnes nées d'une assistance médicale à la procréation aux données des tiers donneurs* – "the CAPADD") to obtain access to information about her origins (see paragraph 54 below). On 28 March 2023 the CAPADD replied that it was unable to grant her request because the information gathered had revealed that the donor had passed away, and that it could not, "without [his] express, personal consent" and "as legislation currently [stood]", disclose his identifying and non-identifying information to her. It did not specify whether the donor had passed away before or after she had lodged her application.

II. APPLICATION No. 45728/17

20. The second applicant was conceived through artificial insemination by donor sperm, an ART procedure that consists in injecting sperm directly into the uterus of a woman – in the present case the applicant's birth and biological mother. In 2006, when the applicant was 17, his parents told him how he had been conceived.

21. In a letter of 18 March 2010, which remained unanswered, the applicant asked the CECOS to provide him with information about the background to his conception. In particular, he wished to obtain the donor's identity, medical history and other, non-identifying information such as his motives, his family situation and a physical description.

22. Following that tacit refusal, the applicant applied to the CADA. On 22 December 2010 it stated that his request had become devoid of purpose because the donor's file could not be found.

23. On 16 September 2011 the applicant applied to the Paris Administrative Court using arguments similar to those of the first applicant in application no. 21424/16 (see paragraph 8 above).

24. On 10 November 2011 AP-HP informed the applicant that his donor's file had been recovered but that under French law no information could be disclosed.

25. On 6 December 2013 the Administrative Court dismissed the applicant's requests for the same reasons given by the Montreuil Administrative Court in its judgment of 14 June 2012 (see paragraph 10 above).

26. In a judgment of 22 January 2016 the Versailles Administrative Court of Appeal upheld the Administrative Court's judgment using the same terms. It further stated that the psychological issues relied on by the applicant to obtain medical information did not amount to therapeutic necessities within the meaning of the law.

27. The applicant appealed on points of law, alleging a violation of Articles 8 and 14 of the Convention.

28. In a decision of 23 December 2016 the *Conseil d'État* declared his appeal inadmissible.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Provisions of the Civil Code, Criminal Code and Public Health Code applicable at the material time and case-law

1. Civil Code

29. Article 16-8 of the Civil Code provided:

> "No information may be disclosed that would enable the identification either of the donor of a body part or product, or of the recipient thereof. The donor may not know the identity of the recipient, nor the recipient that of the donor.
>
> In the event of a therapeutic necessity, only the doctors of the donor and of the recipient may have access to information that would allow their identification."

30. Article 16-9 read:

> "The provisions of the present Chapter are a matter of public policy."

31. Article 311-19 provided:

> "In cases of donor-assisted reproduction, no legal parent-child relationship may be established between the donor and the donor-conceived child.
>
> No action for damages may be brought against the donor."

32. Article 311-20 read:

"Married or cohabiting couples who, in order to conceive, have recourse to medical assistance involving a third-party donor shall give their prior consent, in a manner that ensures confidentiality, before the judge or notary, who shall inform them of the implications of this act as regards the legal parent-child relationship.

Consent to assisted reproduction shall preclude any action to establish or to dispute the legal parent-child relationship, unless it is argued that the child was not conceived using assisted reproduction or that the consent has been rendered ineffectual. ...

Any man who, having given his consent to assisted reproduction, does not recognise the child born as a result shall incur liability *vis-à-vis* the mother and the child.

A judicial declaration of paternity shall also be issued in his regard. The action shall be brought in conformity with the provisions of Articles 328 and 331."

2. Criminal Code

33. Article 511-10 of the Criminal Code read:

"Any disclosure of information enabling the identification both of an individual or couple who have donated gametes, and of the recipient couple, shall be punished by two years' imprisonment and a fine of 30,000 euros."

3. Public Health Code

34. The relevant provisions of the Public Health Code read:

Article L. 1131-1-2

"... Where either an individual who has donated gametes which have led to the conception of one or more children, or one of the members of a couple who have donated an embryo, is diagnosed with a serious genetic disorder, the consequences of which are susceptible of preventive measures, including genetic counselling, or of treatment, then that individual may authorise the prescribing doctor to contact the head of the assisted reproduction centre so that any children conceived using his or her donation can be informed in accordance with the provisions of the fourth paragraph."

Article L. 1211-5

"The donor may not know the identity of the recipient, nor the recipient that of the donor. No information may be disclosed that would enable the identification either of the donor of a body part or product, or of the recipient thereof.

There shall be no exceptions to this principle of anonymity other than in the event of a therapeutic necessity."

Article L. 1244-6

"The bodies and institutions authorised in accordance with the provisions of Article L. 2142-1 shall provide the health authorities with the relevant information about donors. A doctor may access non-identifying medical information in the event of a therapeutic necessity concerning a donor-conceived child. ..."

Article R. 1244-5

"To fulfil their obligations under Article L. 1244-6, health bodies and institutions authorised to perform the activities referred to in points 1° (d) and 2° (c) and (d) of Article R. 2142-1 shall store information on the donor. The donor's file shall contain the following anonymised information:

1° any personal and family medical history needed for the performance of donor-assisted reproduction;

2° the results of the health screening tests provided for in Articles R. 1211-25 and R. 1211-26;

3° the number of children conceived from the donation;

4° for sperm donations, the date of the donation, the number of straws stored, the date on which sperm was made available and the number of straws made available;

...

6° the written consent of the donor and, if the donor is part of a couple, that of the other member of the couple.

Practicians accredited to perform the activities referred to in the first paragraph, in accordance with Article L. 2142-1-1, shall be responsible for the proper handling of the file and the accuracy of the information contained therein.

The file shall be stored for a minimum of 40 years and shall be anonymised regardless of the storage medium. Archiving shall be carried out under conditions that guarantee confidentiality.

Prior to gamete collection or retrieval, the donor shall give his or her express consent to the storage of this file.

Information pertaining to the identity of donors, the identification of any children born and the biological connections between them shall be stored in such a way as to guarantee its strict confidentiality, regardless of the storage medium. Only practitioners accredited to perform the activities referred to in the first paragraph shall have access to such information."

4. Case-law

35. On 21 September 2012 the Paris Administrative Court requested an opinion from the *Conseil d'État* as to the compatibility of the aforementioned provisions (see paragraphs 29-34 above) with Article 8 of the Convention. The *Conseil d'État* replied as follows in its opinion of 13 June 2013 (no. 362981):

"... 9. Pursuant to Article 8 of the Convention ..., the rules applicable to assisted reproduction have to take into account the various private interests at stake, namely those of the donor and of his or her family, those of the recipient couple, those of the donor-conceived child and those of that child's family. In this context, the rule of gamete-donor anonymity serves first and foremost the aim of protecting the private life of the donor and his or her family. With regard to the recipient couple, the rule of anonymity serves the aim of ensuring respect for family life within the donor-conceived child's legal family, it being specified that, in so far as the recipient is concerned, the rule of anonymity cannot in any event amount to an interference with private life for the purposes of Article 8 of the Convention.

10. As regards the donor-conceived individual, even though the rule of anonymity prevents certain requests for information from being granted, that rule, which applies to all donations of body parts or products, does not in itself entail any interference with the private and family life of the individual thus conceived, especially since it is for the parents alone to decide whether or not to reveal the truth about that individual's conception.

11. As it emerged, in particular, from the recent debate on the Law of 7 July 2011, the legislature's decision to exclude any change to the rule of anonymity was based on several public-interest considerations, including the need to preserve family harmony along with the major risk of undermining the social and emotional nature of parent-child relationships, the risk of a substantial decrease in gamete donations, and the risk of calling into question the ethics of all donations of body parts or products. In this area, it is for the legislature alone to make a fresh assessment, where appropriate, of the public-interest considerations to be taken into account and the consequences that they may have.

12. It follows from the foregoing that in prohibiting the disclosure of any personal information about a gamete donor, the legislature struck a fair balance between the interests at stake and that, accordingly, this ban is not incompatible with the provisions of the Convention ..."

36. In a decision of 28 December 2017 (no. 396571) the *Conseil d'État* confirmed that the principle of anonymous gamete donation was compatible with Article 8. It found as follows:

"5. ... [I]t is apparent from the wording of the impugned judgment that the Administrative Court dismissed the arguments alleging a breach of Articles 8 and 14 of the Convention, after noting that the rules for accessing a gamete donor's personal information, which were set by the legislature and formed the basis of the refusals in issue, were not incompatible with the provisions of those Articles. The applicant submitted that the first-instance court had thereby failed in its duty, since he had also alleged that those Articles had been breached by the refusals he had received, arguing, first, that his legal family agreed with what he was doing and, second, that there had been no prior verification of whether the donor consented to the disclosure of his identity. It is true that the compatibility of the law with the provisions of the Convention does not preclude the possibility, in certain specific circumstances, that the application of legislation amounts to a disproportionate interference with Convention rights. In consequence, where an applicant argues that such specific circumstances are present, it is for the courts to assess whether in practice, given the purpose of the legislation in issue, the interference with the Convention rights and freedoms that results from the application of such legislation – itself Convention-compatible – is not excessive.

6. The legislature's decision to prohibit the disclosure of any personal information about gamete donors and then to exclude any change to the rule of anonymity was based on several public-interest considerations, including the need to preserve family harmony along with the major risk of undermining the social and emotional nature of parent-child relationships, the risk of a substantial decrease in gamete donations, and the risk of calling into question the ethics of all donations of body parts or products. In relation to the last reason, which reflects the French philosophy towards respect for the human body, there are no particular circumstances specific to an applicant's situation under which the application of the legislation on anonymous gamete donation – which inevitably resulted in the rejection of the applications in issue – could be regarded as an excessive interference with Convention rights and freedoms ..."

B. History and development of the principle of anonymous gamete donation

37. Prior to 1994 gamete donation was organised either through the network of CECOSs, which were established in 1973 and were generally hosted by university hospitals, or through the private sector – without strict regulation – by gynaecologists who would purchase sperm straws from private sperm banks or use fresh-sperm donors.

38. Law no. 94-654 of 29 July 1994 on the donation and use of parts and products of the human body, assisted reproduction technology and prenatal diagnosis ("the Law of 1994") enshrined the principle of anonymous gamete donation in line with standard CECOS practice and the rules applicable to any other donations of body parts or products. During the legislative debates, the arguments in favour of anonymity were based, in particular, on a desire not to emphasise the biological aspect of conception and instead to preserve the unity of the legal family. Other arguments included the need to protect the privacy of the donor and his or her family, and to reduce the risk of pressure and trafficking. Anonymity was thus a natural consequence of the principle that parts of the human body were not property and could not be traded for consideration. The legislature also sought to propose a single set of principles applicable to all parts and products of the human body.

39. The report of the National Assembly's commission of enquiry on the rights of children in France, which was adopted in May 1998, suggested the introduction of a system similar to that in the United Kingdom, whereby children conceived by ART were authorised, at the age of 18, to have access to information about their genetic origins. The system would first be rolled out for children whose mother decided to give birth anonymously and thus to keep her identity secret and then, "when the legislature consider[ed] it appropriate, for ART births".

40. In opinion no. 90 of 24 November 2005 on "Access to information about origins, anonymity and secrecy of parentage", the National Ethics Advisory Committee on Life and Health Sciences (*Comité consultatif national d'éthique pour les sciences de la vie et de la santé* – "the CCNE") recommended removing the confidentiality of non-identifying information only. It indicated that the remit of the National Council for Access to Information about Personal Origins (*Conseil national pour l'accès aux origines personnelles* – "the CNAOP"), which had been established to help people born of anonymous parents to access information about their origins (see paragraph 107 below), could be expanded to include donor-conceived individuals of full age.

41. In a study of 6 May 2009 entitled "Review of bioethics laws", the *Conseil d'État* noted a "[clear] trend towards partial or total removal of anonymity" and "research showing that the rigid application of the principle of anonymity laid down in 1994 entail[ed] harmful effects for children in the

long term, essentially because they [were] deprived of an aspect of their history". It recommended the introduction of a system combining access to certain categories of non-identifying information about the gamete donor for any adult child who so requested, and the possibility of removing anonymity at the child's request subject to the donor's consent. In its view, that option had "the advantage of adapting to the needs of the children without giving priority to the interests of the adults". At the same time, it had the "limit of leaving the child at a stalemate if the donor refused", since "it seem[ed] impossible to require the donor to reveal his or her identity".

42. The rule of gamete-donor anonymity was not called into question in the Laws of 6 August 2004 (no. 2004-800) or of 7 July 2011 (no. 2011-814) on bioethics. The Law of 7 July 2011 established the principle of a fresh review of the subject as a whole by Parliament within seven years (previously five years), following a public debate in the form of a consultation (*états généraux*) on bioethics. In a bill submitted to the National Assembly on 20 October 2010, the government had provided for the possibility of access to non-identifying information about the donor and – subject to donor consent – to his or her identity. Those provisions were the topic of considerable debate by the National Assembly's special committee and were ultimately not enacted. They were then restored by the Senate's Social Affairs Committee, which recommended automatically removing anonymity upon request for any child born after 1 January 2014 who had reached the age of majority. The restored provisions were reduced by amendments and were finally rejected in full. During the debates, the members of Parliament voiced concerns about a confusion between biological parentage and a parent-child relationship based on law and upbringing, a decrease in the number of donors, and the risk that the circumstances surrounding children's conception would be hidden more frequently.

43. A report entitled "Parentage, origins and parenthood: the law confronted with new values of generational responsibility", which was submitted to the Minister of Social Affairs and Health in 2014, pointed out that the rule of confidentiality and anonymity was originally universal, based on the model of "out of sight, out of mind". Gradually, a new model of responsibility emerged at international level, which saw many countries offer the possibility, for those who so wished, to have their donor's anonymity removed. That development did not take place in France, where "a real deadlock exist[ed]" on account of the confusion maintained over parentage during the preparation of the law of 2011 and of the accusation that young people wanted to seek out "parents" or even to advocate a "biologicalisation of parentage". The report criticised the failure to take into account, on the one hand, the distinction between parentage and the right to access information about one's origins and, on the other, the Court's case-law. It recommended that a system be introduced to disclose non-identifying information and that

the identity of the donor be made available to any donor-conceived individual of full age who so requested.

44. In a study entitled "Revising the Bioethics Act: options going forward", which was submitted to the Prime Minister on 6 July 2018, the *Conseil d'État* began by pointing out that the choice made in 1994, "even though it [had] reflected CECOS practice, [had] by no means [been] easy and [had] represented a default solution for the members of Parliament". The relevance of "absolute, unconditional and irreversible" anonymity, as prescribed by Article 16-8 of the Civil Code, had started to be questioned when the first donor-conceived children had reached adulthood. A number of such individuals had expressed their suffering at having been deprived of their biological origins and had sought to obtain recognition of the special nature of "donation for conception" and to have donor anonymity removed. The study emphasised factors that potentially argued in favour of a new balance between donor anonymity and access by children to information about their origins. These included the harmful effects of the principle of anonymity on some children; the diversification of family structures, which was gradually normalising the dissociation between legal and biological parentage; and the 2018 CECOS opinion in favour of making non-identifying information accessible. The study considered it imaginable to permit donor-conceived children to access the identity of their donor upon reaching the age of majority, subject to the donor's consent, while noting the need to preserve anonymity at the time of donation to prevent tempting people from choosing donors. It recommended giving children conceived from future donations access to information about their biological origins, and making such disclosure subject to donor consent for children conceived from past donations, because it "[was] constitutionally viable to interfere with pre-existing situations only if the disclosure were subject to the donor's express consent".

45. In opinion no. 129 of 25 September 2018, the CCNE expressed its support for the removal of anonymity. It noted that some donor-conceived individuals made the search for their donor's identity their life's "quest". Furthermore, "continuing to defend anonymity at all costs [was] a delusion in the present and future era of genomics and big data". While in some States that had removed anonymity donations had decreased in the short term, a rebound effect had nonetheless been observed. Removing anonymity could, however, have other consequences, such as changing the motivations and profiles of donors, increasing the risk of commercialisation and exacerbating the culture of secrecy surrounding children's conception.

46. On 24 July 2019 the *Conseil d'État* issued an opinion on a government bill on bioethics, specifically its section 3, which concerned "Recognition of the right of donor-conceived children to know their donor's identity". The first version of that section provided that every donor, even before making a donation, had to consent to the child's having access to his or her

non-identifying information or identity upon reaching the age of majority if the child so requested. The second version (section 3 *bis*) provided for the same system with regard to non-identifying information, but made disclosure of the donor's identity conditional on the donor's consent if and when the child requested access to it upon reaching the age of majority. The *Conseil d'État* recommended choosing section 3 *bis*, on the grounds that in any event the system improved children's access to information about their origins and provided greater protection to the donor. This was because it enabled consent or refusal to be given under circumstances more likely to lead to an informed decision, namely in the context of the donor's private and family life as it stood at the time the request for access to information about origins was made.

47. On 24 July 2019 the bill on bioethics (see paragraph 49 below), accompanied by a very detailed impact study by the government (see paragraph 48 below), was introduced in the National Assembly.

48. The impact study highlighted the need to legislate because "society [had] changed since the first bioethics laws" and France "[was] one of the few countries to have opted for a principle of absolute donor anonymity *vis-à-vis* the infertile couple and the child". The principle of anonymity was strictly construed, with the sole exception being doctors' access to non-identifying medical information in the event of a therapeutic necessity. The study specified that one such necessity was the prevention of the risk of consanguinity in a couple formed by two donor-conceived individuals, noting that "a doctor [could], at their request, check that they [had] not [been] conceived using the same donor, without compromising anonymity". Furthermore, "research by sociologists and psychologists [had] shown that the rigid application of the principle of anonymity laid down in 1994 entail[ed] harmful effects for children, essentially because they [were] deprived of an aspect of their history that nevertheless intimately concern[ed] them". After an exhaustive presentation of all possible options for ensuring the right to access information about one's origins, the government announced its intention to maintain the principal of anonymous donation while granting donor-conceived individuals alone a right to access information about their donor. It specified that a consensus had emerged during the preparatory work surrounding the revised bioethics legislation as to the possibility of including pre-existing donors in the system of disclosure, provided they gave their express consent. The CECOSs, however, expressed misgivings on the matter, citing a lack of resources needed to find files dating back 40 years, and the need to adhere to medical ethics.

49. In its initial version, the bill provided that any donor-conceived child could, upon reaching the age of majority, have access to non-identifying information about the donor and, if he or she so wished, to the donor's identity. The donor had to give express consent to the disclosure of that non-identifying information and his or her identity before the donation could take place. Any requests for disclosure would be made to a Commission on

Access to Donors' Non-Identifying Information and Identity, under the authority of the Health Minister. During the discussion of the bill, numerous divergences emerged between the National Assembly and the Senate, in particular as to when the donor's consent was to be obtained, how the data subjects' information was to be accessed under the legislation in force and what body was to be responsible for processing requests for access to information about origins. After nearly two years of travelling back and forth between the two chambers of Parliament, Law no. 2021-2017 on bioethics ("the Law of 2021") was enacted on 2 August 2021.

C. Law of 2021

50. The Law of 2021 recognised the right of donor-conceived individuals to access the identity of their donors, without calling into question the principle of anonymous donation. That right is now codified in the second paragraph of Article 16-8-1 of the Civil Code, which reads:

> "The principle of anonymous donation shall not prevent donor-conceived individuals of full age from obtaining access, upon request, to their donor's non-identifying information or identity, in accordance with the provisions of Part II, Book I, Title IV, Chapter III of the Public Health Code."

51. Under the new system, gamete donation is subject to the donor's express consent to the collection and storage of his or her identity and certain non-identifying information (age, physical characteristics, family and occupational status, country of birth and reasons for donation), and to the disclosure of that information to the donor-conceived individual upon the latter's request. No donation may be made in the absence of such consent. The Biomedicine Agency centralises this donor information, along with information on any children conceived from the donations. Once these children have reached the age of majority, they may apply to the Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology ("the CAPADD") in order to obtain the donor's identity and non-identifying information (Articles L. 2143-2 to L. 2143-9 of the Public Health Code).

52. Articles 311-19 and 311-20 of the Civil Code (see paragraphs 31 and 32 above) have been repealed. Under the new Articles 342-9 and 342-10 of that Code, it is still impossible to establish a legal parent-child relationship between the donor and the donor-conceived child. Except in the situation provided for in the above-cited Article 16-8-1 of the Civil Code, disclosing information that enables the identification of an individual or a couple who donated gametes, or a couple or an unmarried woman who received those gametes, is punishable by two years' imprisonment and a fine of EUR 30,000 (new Article 511-10 of the Criminal Code).

53. Details on the implementation of the right to access information about one's origins were specified in Decree no. 2022-1187 of 25 August 2022 on

access to donors' non-identifying information and identity, which was issued pursuant to the Law of 2021 and the majority of whose provisions entered into force on 1 September 2022, and in an Order of 29 August 2022. Donations made from 1 September 2022 onwards would be subject to the new procedure. Those made under the previous legislation were to be destroyed if the donors had not consented to the new statutory system.

54. Individuals conceived from a donation made under the previous legislation could apply to the CAPADD from 1 September 2022 onwards. The CAPADD is responsible for contacting donors in order to request and collect their consent for the disclosure of their non-identifying information and identity. Donors may also contact the CAPADD of their own accord to consent to the disclosure of such information. The relevant provisions of Article L. 2143-6 of the Public Health Code provide:

> "[The CAPADD] ... shall be responsible for:
>
> ...
>
> 5° Collecting and recording the consent of donors who were not subject to the provisions of the present Chapter at the time of their donation, to the retrieval of their non-identifying information and their identity and to the transmission of that information to the Biomedicine Agency, which shall store it in accordance with said Article L. 2143-4.
>
> 6° Contacting donors who were not subject to the provisions of the present Chapter at the time of their donation, when it receives applications under Article L. 2143-5, in order to request and collect their consent to the disclosure of their non-identifying information and their identity and to the transmission of that information to the Biomedicine Agency. To perform this duty, the Commission may use the personal registration numbers in the national identity register, and consult that register ... The Commission may also consult the national cross-scheme register of health-insurance beneficiaries in order to obtain the above-mentioned donors' addresses from health-insurance bodies."

55. Paragraph I of Article R. 2143-7 and Article R. 2143-8 of the Public Health Code provide:

> **Article R. 2143-7**
>
> "I. Donors who were not subject to the provisions of Part II, Book I, Title IV, Chapter III of the legislative part of the present Code at the time of their donation may, at any time, contact the Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology, in order to consent to the disclosure of their identity and of the non-identifying information referred to in Article L. 2143-3. They may also give such consent to the Commission when it contacts them after receiving an application for access to their identity or non-identifying information under section 5(VIII)(D) of Law no. 2021-1017 of 2 August 2021 on bioethics.
>
> ..."

Article R. 2143-8

"Donors who inform the Commission of their refusal to consent to the disclosure of their identity and of the non-identifying information referred to in Article L. 2143-3 or who do not reply to the Commission shall retain the ability to consent at a later time by contacting the Commission, in accordance with the provisions of Article R. 2143-7."

56. In a decision of 9 June 2023 (no. 2023-1052 QPC) in response to a preliminary reference on constitutionality, the Constitutional Council declared the first sentence of point 6° of Article L. 2143-6 to be compatible with the Constitution, subject to the reservation indicated in paragraph 14 of that decision. The applicant in that matter had complained that the provision in question enabled donors to be contacted by the CAPADD "without allowing them pre-emptively to refuse to be contacted or guaranteeing that they would not be subjected to repeated requests". The Constitutional Council also raised the complaint of its own motion that, by calling into question the effects that could reasonably be expected of situations arising under previous legislation, the previsions in question breached the constitutional guarantee of rights. The decision provided the following reasoning:

"...

Complaint alleging a breach of the constitutional guarantee of rights

...

6. It is at any time open to the legislature, acting within the scope of its jurisdiction, to amend previous legislation or to repeal it by replacing it, as appropriate, with other provisions. In so doing, however, it cannot deprive constitutional requirements of their legal safeguards. In particular, it cannot, without sufficient public-interest grounds, interfere with lawfully acquired situations or call into question the effects that could reasonably be expected of situations arising under previous legislation.

7. Prior to the Law of 2 August 2021, Articles 16-8 of the Civil Code and L. 1211-5 of the Public Health Code prevented any disclosure of information that could be used to identify the donor in cases of assisted reproduction.

8. Article L. 2143-6 of the Public Health Code, created by the Law of 2 August 2021, now provides that an individual of full age conceived from a gamete or embryo donation made before a date set by decree at 1 September 2022 may apply to the Commission on Access to Donors' Non-Identifying Information and Identity for access to that information.

9. The disputed provisions of that Article provide that, in such an event, the Commission contacts the donor to request and collect his or her consent to the disclosure of his or her non-identifying information and identity and to the transmission of that information to the Biomedicine Agency.

10. While those provisions thus allow the donor-conceived individual to have the donor's non-identifying information and identity disclosed, such disclosure is subject to the donor's consent.

11. Accordingly, they do not call into question the protection of anonymity that could reasonably be expected by a donor who made a donation under the system in place prior to the Law of 2 August 2021.

...

Complaint alleging a breach of the right to respect for private life

14. First, the disputed provisions merely provide that the donor may be contacted by the Commission on Access to Donors' Non-Identifying Information and Identity with a view to collecting his or her consent to the disclosure of that information. Their purpose is not to set the conditions under which consent is given and cannot have the effect, in the event of a refusal, of subjecting the donor to repeated requests from the same person.

15. Second, in enacting the disputed provisions, the legislature was seeking to secure respect for the donor's private life while enabling the donor-conceived individual, to the extent possible and through appropriate measures, to access information about his or her personal origins. It is not for the Constitutional Council to substitute its assessment for that of the legislature with regard to the balance thus struck between the interests of the donor and those of the donor-conceived individual. ..."

57. Lastly, Article L. 1244-6 of the amended Public Health Code provides that a doctor may access non-identifying medical information in the event of a medical necessity, rather than a therapeutic necessity as previously. In addition, should the donor be diagnosed with a genetic disorder, the donor-conceived child must now be informed accordingly; previously, that was optional. Any genetic disorder diagnosed in the child is likewise disclosed to the donor (Article L. 1131-1-1 of the Public Health Code).

II. RELEVANT INTERNATIONAL LAW MATERIAL

A. United Nations Convention on the Rights of the Child

58. Articles 3 § 1, 7 § 1 and 8 of the United Nations Convention on the Rights of the Child ("CRC"), which was adopted on 20 November 1989 (1577 UNTS 3), provide:

Article 3

"1. In 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.

..."

Article 7

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

..."

Article 8

"1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."

B. Hague Adoption Convention

59. Article 30 of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded on 29 May 1993, HCCH Collection of Conventions (1951-2025) ("Hague Adoption Convention")) reads:

"(1) The competent authorities of a Contracting State shall ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical history, is preserved.

(2) They shall ensure that the child or his or her representative has access to such information, under appropriate guidance, in so far as is permitted by the law of that State."

C. Council of Europe material

60. In Recommendation 2156 (2019) on anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, the Parliamentary Assembly of the Council of Europe (PACE) pointed out that "legislation and practices of Council of Europe member States in the field of medically assisted procreation var[ied] significantly". It advised the Committee of Ministers to make recommendations – which could ultimately become legally binding – to member States in order to improve the protection of all the parties concerned, while focussing on the rights of donor-conceived individuals, who were "the most vulnerable" and "for whom the stakes appear[ed] to be higher". PACE emphasised the principles that should govern those recommendations, including that of waiving anonymity for all future gamete donations, which would mean that the donor's identity would be revealed to the donor-conceived child upon his or her 16th or 18th birthday.

61. In the report associated with the draft Recommendation, the rapporteur pointed out that the principle of anonymity raised a public health issue, since it entailed that no information was available regarding the donor's medical history and the risk of consanguinity. Donor-conceived individuals needed to know their donor's identity in order to build their own identity. The principle of anonymity was also becoming obsolete because of the development of genetic technology. Regarding the impact on the number of donations if anonymity were to be waived, she stated (footnotes omitted):

> "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."

62. In its reply to PACE (CM/AS(2019)Rec2156-final), the Committee of Ministers invited the European Committee on Legal Co-operation (CDCJ) to consider "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".

63. At the end of its "Comparative study on access of persons conceived by gamete donation to information on their origins" (Council of Europe, 16 December 2022), the CDCJ recognised the relevance and added value of drawing up a Recommendation on the issue. Its conclusions read:

> "151. ... [T]he 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 [European Convention on Human Rights]. 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."

64. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, opened for signature on 4 April 1997, came into force on 1 December 1999, ETS 164 ("Oviedo Convention on Human Rights and Biomedicine") provides, under Article 10 "Private life and right to information":

> "1. Everyone has the right to respect for private life in relation to information about his or her health.
>
> 2. Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.
>
> 3. In exceptional cases, restrictions may be placed by law on the exercise of the rights contained in paragraph 2 in the interests of the patient."

III. COMPARATIVE LAW MATERIAL

65. In 2008 the French Senate published a comparative law study (no. 186) on anonymous gamete donation. It concludes that "the review of the legislation of eight European countries – Denmark, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland and the United Kingdom – highlights a trend towards removing anonymity".

66. The comparative law data provided in the impact study for the July 2019 bill on bioethics (see paragraph 48 above) and in the CDCJ comparative study of 22 December 2022 (see paragraph 63 above) yield the following insights.

67. Of the 26 States that replied to the CDCJ's questionnaire[1], Türkiye is the only one that does not allow sperm donation. A total of 15 of the 25 States that do allow such donations recognise the right of individuals thus conceived to access the donor's identity. Of those 15 States, one (Spain) permits such access for medical reasons only. The right to access the donor's identity has long existed in some States, including Sweden (1985), Germany (1989), Austria (1992), Switzerland (1992), Norway (2003), the Netherlands (2004) and the United Kingdom (2005), and has been recognised more recently in others, such as Ireland (2015), Malta (2018) and Portugal (2018). Ten States prohibit access to information about origins (Belgium, the Czech Republic, Greece, Latvia, Montenegro, North Macedonia, Poland, Serbia, Slovenia and Ukraine). Among these ten States, Belgium, Greece and Ukraine reported that the situation could change, and the Czech Republic stated that it had made two attempts to enshrine a right to access information about origins.

68. Most States that grant a right to access the donor's identity do so when the child reaches the age of majority. Nevertheless, some open such access before the age of 18, including Germany, the Netherlands and Sweden (minimum age of 16), Norway (15) and Austria (14). As to access to non-identifying information, the minimum age is 16 in the United Kingdom and 12 in the Netherlands (see the CDCJ study, cited above, pp. 27-29).

69. Also according to the above-cited study, 7 of the 15 States allowing access to information about one's origins afford that right only to donor-conceived individuals themselves (Denmark, France, Lithuania, Norway, Sweden, Switzerland and the United Kingdom). The other eight extend that right to parents and the courts (ibid., pp. 29-30).

70. The donor's consent to the disclosure of his or her identity is required at the time of the donation in Austria, Croatia, Denmark, France, Ireland, Switzerland and the United Kingdom, at the time the child makes the request

[1] Austria, Belgium, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Malta, Montenegro, the Netherlands, North Macedonia, Norway, Poland, Serbia, Slovenia, Spain, Sweden, Switzerland, Türkiye, Ukraine and the United Kingdom.

in Lithuania, and at both times in the Netherlands, where the donor's refusal on the latter occasion does not necessarily constitute a veto. The donor's consent is not required in Finland, Norway or Sweden (ibid., p. 30). Most of the 15 States mentioned above allow the donor's identity to be disclosed after his or her death.

71. Of the 25 States concerned, Belgium and Denmark stand out for their dual systems. Belgium does not grant donor-conceived children access to information about their origins, but allows non-anonymous donations on the basis of an agreement between the donor and the recipient or recipients, with the resulting possibility for the child to be informed. In Denmark parents can choose among a permanently anonymous donor, a donor who is anonymous at the time of donation or a donor whose identity is known at the time of donation (ibid., p. 31).

72. States that grant a right to access the donor's identity often also allow the disclosure of non-identifying information. There is no consensus among these States as to the disclosure of donors' medical information. Some States that do not recognise the right to access the donor's identity nevertheless allow the disclosure of non-identifying information (Belgium, the Czech Republic, Greece, Latvia, Poland, Serbia, Slovenia, Spain and Ukraine). In such cases, the non-identifying information concerned relates to medical information, which is disclosed either to the child and his or her legal representatives (Greece, Serbia, Spain and Slovenia) or only to the recipient or recipient couple and to the doctor of the child in question (Belgium). In Poland, information on the donor's state of health and his or her year and place of birth are disclosed to the child once he or she reaches the age of majority. The donor's age, profession and state of health are provided to prospective recipient couples at the time of gamete donation in the Czech Republic, Latvia and Ukraine; so too is information on a donor's physical characteristics in Belgium. Lastly, some States do not allow access to non-identifying information (Austria, Croatia, Germany, Lithuania, Montenegro, North Macedonia, Norway and Sweden) (ibid., pp. 32-34).

73. The CDCJ study concludes that "[t]here is a clear trend in national legislation to establish a right to access information on origins" (ibid., p 35).

THE LAW

I. JOINDER OF THE APPLICATIONS

74. Given their similar factual and legal background, the Court decides that the two applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

75. The applicants submitted that their inability to obtain information concerning their respective biological fathers infringed their right to respect for their private and family life under Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

76. In their further observations of 28 October 2022 the Government submitted, without expressly raising a plea of inadmissibility, that the applicants had lost their victim status on account of the 2021 legislative amendments. They could now make a personal application to the Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology ("the CAPADD") for access to information about their origins under Article L. 2143-6 of the Public Health Code (see paragraph 54 above).

77. In her further observations of 26 and 27 October 2022 the first applicant argued that the new legislation, which would not have provided her with any acknowledgement of, or redress for, the breach she had suffered, had no bearing on the assessment of her complaint. The second applicant, for his part, submitted that he had been the victim of a continuous violation of Article 8 of the Convention since his birth.

78. The Court refers to its settled case-law to the effect that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of the status as a "victim" within the meaning of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 180, ECHR 2006-V). Furthermore, the redress afforded must be appropriate and sufficient. This is dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Gäfgen v. Germany* [GC], no. 22978/05, § 116, ECHR 2010).

79. In the present case, it is true that since 1 September 2022 the applicants have had the option of applying to the CAPADD to obtain information about their biological fathers, where available. The first applicant made such an application and was recently informed that her request had been definitively refused (see paragraph 19 above). However, the option in

question came into existence more than 12 years after the applicants had requested access to information about their origins, and long after the domestic courts had ruled on the alleged violation of the Convention. Neither before the domestic courts nor before the Court did the national authorities expressly acknowledge that there had been a violation of the applicants' Convention rights during the above-mentioned period. Consequently, the Court considers that the applicants can still claim to be victims within the meaning of Article 34 of the Convention.

80. The Court points out that the provisions of Law no. 2021-1017 on bioethics ("the Law of 2021") and the related implementing measures, in so far as relevant to the examination of the complaints in the present case, will be examined in its assessment of the merits of those complaints.

81. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. Parties' submissions

(a) The applicants

(i) Application no. 21424/16

82. The applicant submitted that the inability to obtain information about her biological father amounted to an interference with the exercise of her right to an identity. That interference had had no clear legal basis. First, the use of the verb "disclose" in Article 16-8 of the Civil Code was ambiguous and did not constitute a legal basis for the absolute and unconditional prohibition complained of, because there was no mention of the donor-conceived child. In addition, the scope of the possibility offered solely to the doctors of the donor and of the recipient to access the information in question in the event of a therapeutic necessity (under Article L. 1244-6 of the Public Health Code, quoted in paragraph 34 above) was vague and a source of legal uncertainty for all donor-conceived children.

83. The applicant further argued that the interference did not pursue any legitimate aim, since anonymity precluded the protection of the interests of the donor-conceived child in favour of the legal family alone. She disputed that the principle of anonymity was a matter of public policy, because not all donations were anonymous (between family members, for example) and the rule of anonymity applicable to donations of body parts or products could not serve as a basis for gamete donation, which was of a fundamentally different nature. Lastly, that principle was not a natural consequence of the principle that parts of the human body were not property and could not be traded for consideration, since some States remunerated anonymous sperm and egg donation.

84. With regard to whether the interference was necessary in a democratic society, the applicant argued that the French legislation did not strike a fair balance between the interests at stake, since the principle of absolute anonymity negated the interests of the child and no longer corresponded to present-day conditions. In that connection, she referred to various studies that recommended its elimination in France, including the *Council d'État* studies of 2009 and 2018 (see paragraphs 41 and 44 above).

85. While not challenging the State's margin of appreciation, the applicant asked the Court to interpret Article 8 of the Convention in the light of the trend in Europe towards abolishing the principle of absolute anonymity and gradually recognising the right of all individuals to know their origins.

86. The applicant complained of an utter lack of protection of her interests in the weighing up of the interests at stake. She emphasised the personal development challenges she had faced and the distress experienced by many children in her situation. Knowledge of medical information alone would not, in any event, be sufficient to satisfy children's right to know their genetic inheritance under Article 10 of the Oviedo Convention (see paragraph 64 above). The ability granted to doctors to access non-identifying medical information in the event of a therapeutic necessity was not capable of safeguarding the children concerned from the risks of consanguinity. Nor did it protect them otherwise, since psychological disorders were not considered therapeutic necessities.

87. As to the other interests at stake, the applicant submitted that the legal family would be better protected if it were able to enjoy a peaceful environment, without the suffering caused by the search for identity. In any event, it would not be disrupted because it was protected by the legal parent-child relationship. Her own family had wanted her to be able to obtain the information requested. Furthermore, donor anonymity should not be protected in such a rigid and absolute manner, as shown by the example of her husband (see paragraph 17 above) and a number of donors. Lastly, the risk of a substantial decrease in the number of donors in the event that anonymity were removed was contradicted by studies on the matter.

88. In sum, the applicant criticised the system for taking into account solely the relationship between the donor and the recipient, to the detriment of the child's rights. She objected to the distinction made by the Government (see paragraph 100 below) between her situation and that of children born of anonymous parents, as examined by the Court in the case of *Odièvre v. France* ([GC], no. 42326/98, ECHR 2003-III). In that case, in finding no violation of Article 8 of the Convention, the Court had observed that the applicant had already been given access to non-identifying information about her mother and that the French legislation enacted in 2002 had enabled her to have information disclosed about her biological parents.

89. Lastly, with regard to the new provisions of the Law of 2021, the applicant complained that it was still impossible to obtain information about

donors' medical history and the existence of any biological half-brothers or -sisters. Regarding individuals, like herself, who had been conceived from donations under the former system, she submitted that the Law in question hindered the collection of donor consent for the following reasons: no budget had been set aside to identify and locate donors; there were no plans to tell donors how many people had been conceived using their donations but their consent would be valid for all donations, which would not facilitate the collection of informed consent; and all access to information about origins was blocked upon the donor's death. Moreover, no requirement for legal certainty justified the care taken by the legislature to make access to the donor's identity subject to his or her consent. First, as regards donations made before 1994, no law had guaranteed donors the right to anonymity. Second, for children born between 1994 and 31 August 2022, the anonymity rule had been enshrined in law only between the donor and the recipient, and it had by no means been established that the disclosure of donors' identities without their consent could cause them suffering or distress – unlike for donor-conceived individuals. Lastly, access to all information – including non-identifying information – either depended on the donor's consent or remained impossible, as indicated above.

90. The applicant thus argued that the legislation continued to constitute an interference – which was not necessary in a democratic society – with her right to know information that was essential for the construction of her identity and for her development.

(ii) Application no. 45728/17

91. The applicant pointed out that his complaint covered both private life and family life, which was at stake because he did not know whether he had any brothers or sisters and did not plan to have children without first finding out what genetic inheritance he would pass on.

92. He argued that there had been no legal provision restricting the right to access information about one's origins, as guaranteed by Article 8 of the Convention, at the time of the donation used for his conception in 1989, when donors were merely in a contractual relationship with the CECOS. The Government could not, therefore, rely on the Law of 1994 to justify the lawfulness of the interference with his right to respect for his private and family life and the restriction of that right in favour of the donor.

93. The applicant pointed out that, according to the Government, the aim of the interference was to protect the rights of others. He asked the Court to reject that argument. Regarding his donor, the applicant was seeking solely to know his origins and not to establish a legal parent-child relationship. With regard to his legal family, his parents had been involved in his complaint. As to any children conceived from the same donation, they should in fact be protected from the risk of consanguinity. That would in any event require them to know their origins, as had been pointed out by a large sample of the

anthropological, psychoanalytic and sociological communities, and many reports and studies, during the preparatory work for the Law of 1994 on bioethics.

94. With regard to the State's margin of appreciation, the applicant argued that it should be found to be narrow where the practice of gamete donation was authorised and where the claims made by the children concerned did not raise moral or ethical questions but were simply intended to meet the personal and psychological needs of those children or the adults they had become. In addition, knowledge of family history was a priority concern for healthcare. Lastly, the Government's argument that there was no European consensus on the matter was unfounded, since the principle of a right to access information about one's origins existed in a large number of countries.

95. With regard to balancing interests, the applicant pointed out that Article L. 1244-6 of the Public Health Code provided for access to medical information, but that such information was limited and often inadequate or slow to arrive. He did not challenge the need to protect the donor's private life, but emphasised that his requests concerned non-identifying information that could be disclosed through a doctor. Furthermore, the argument that gamete donations would decrease substantially in the event anonymity was removed was baseless, and evidence from other countries suggested the opposite was true. More generally, the sole protection of the donor and his or her family could not counterbalance the interests of the donor-conceived child. The State had thus failed to discharge its positive obligation to steer the legislative process towards recognition of the right to access information about one's origins.

96. Lastly, with regard to the provisions of the Law of 2021, the applicant argued that it would be difficult for the new commission to locate donor records, because prior to 1994 there had been no obligation to archive information. In addition, the non-identifying information he had requested was not all listed in the Law of 2021. In any event, an application to the CAPADD would be bound to fail, since his biological father had, to date, never come forward and would oppose the disclosure of his identity. Regardless of those circumstances, the applicant asked the Court to assess his complaint in the light of his situation as set out in his application, that is, at a time when the restriction of his right to respect for his private life was not in accordance with the law (see paragraph 92 above). Until the enactment of the Law of 2021, he had indeed been the victim of a violation of Article 8 of the Convention.

(b) The Government

97. The Government submitted that the principle of anonymous gamete donation did amount to an interference with the private life of the applicants, and that interference was based on the provisions of Article 16-8 of the Civil Code, which dealt with matters of public policy. Those provisions had been

introduced by the Law of 29 July 1994 and therefore largely pre-dated both the disclosure to the applicants by their parents of how they had been conceived and, more importantly, the beginning of the process they undertook to obtain information about their gamete donors. The provisions in question were unambiguous, accessible and sufficiently precise to enable the applicants to foresee that their requests to access information about their origins would be refused in the present case.

98. The Government argued that the interference in issue pursued the aim of "the protection of the rights and freedoms of others", namely those of the legal parents, the donor and the donor-conceived child. With regard to the interests of the child, they referred to the report by the initial rapporteur for the 1994 bill on bioethics, which stated that anonymity was the "best of a bad lot" in terms of solutions because removing it would risk "triggering an identity crisis", even though there was no reason for "biological identity" to override identity "resulting from one's upbringing". The legislature had thus taken the child's interests into account when opting for anonymity.

99. The Government further submitted that the interference was necessary and justified in a democratic society. Pointing out that there was no European consensus on access to information about origins for donor-conceived children, they argued that a wide margin of appreciation should be afforded to the States on that matter. The interference was also proportionate, since the principle of anonymity was subject to exceptions and a fair balance had been struck between the interests at stake. First, the legislation provided for access to non-identifying medical information in the event of a therapeutic necessity, thereby protecting the health of the children concerned. Second, the legislature had made a choice, falling within its margin of appreciation, that enabled a fair balance to be struck between the private interests at stake while taking account of the public interest. In that connection, the rules applicable to gamete donation, which were aligned with those governing all parts of the human body, reflected the French philosophy towards respect for the body – one based on ethics and solidarity. The Government also referred to the decisions of the *Conseil d'État*, which had held that the principle of anonymity was compatible with Article 8 of the Convention (see paragraphs 16, 35 and 36 above).

100. The Government further stated that the issue of gamete donation was different from that of anonymous births, which the Court had examined in the judgments in *Odièvre* (cited above) and *Godelli v. Italy* (no. 33783/09, 25 September 2012). The situation of a child born to anonymous parents could not be transposed to that of a donor-conceived child, because the donor's action had no connection either to any intention to start a family or to the reality of the child's birth. Furthermore, gamete donation was an act of solidarity and responsibility, which at no time put the child thus conceived in a situation of distress or uncertainty regarding his or her history that could be compared to that of an abandoned child. The purpose of the interference in

issue was thus to maintain the balance between the competing interests by not placing the interests of one single individual over those of several others and by favouring family harmony – for both the donor and the child – over a wish to obtain information about an act unconnected to any individual's personal experience.

2. Third-party submissions

101. In its observations, the ECLJ submitted that the practice of heterologous ART in itself gave rise to a violation of the applicants' rights under Articles 3, 8 and 14 of the Convention. That practice was contrary to the children's interests, given the many harmful consequences it had for them, and also entailed a violation of Articles 7 and 8 of the Convention on the Rights of the Child. Lastly, the applicants had been discriminated against on the grounds of their birth because they were unaware of their biological identity and their family medical history.

102. ADF International emphasised the harmful impact of donor-assisted human reproduction on children, on account of the existential dilemmas and risk of consanguinity that it entailed, but also on society as a whole, in particular because of the commercialisation of such practices.

3. The Court's assessment

(a) General principles

(i) The nature of States' obligations

103. The essential object of Article 8 of the Convention is to protect the individual against arbitrary interference by the public authorities. In addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. However, the boundaries between the State's positive and negative obligations do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both cases regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (see *Mikulić v. Croatia*, no. 53176/99, § 58, ECHR 2002-I, and *C.E. and Others v. France*, nos. 29775/18 and 29693/19, § 83, 24 March 2022).

104. The notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: the diversity of practices followed and the situations obtaining in the Contracting States mean that the notion's requirements will vary considerably from case to case. Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive

obligations on States. Some of them relate to applicants, for example the importance of the interest at stake and whether "fundamental values" or "essential aspects" of their private life are in issue, or the impact on them of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8. Other factors relate to the impact of the alleged positive obligation at stake on the State concerned, for example whether the alleged obligation is narrow and precise or broad and indeterminate (see *C.E. and Others v. France*, cited above, § 83, and the cases cited therein).

(ii) The margin of appreciation

105. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when deciding any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider. It will in general be wider where the State is required to strike a balance between competing private and public interests or Convention rights (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 94, ECHR 2011, and *C.E. and Others v. France*, cited above, § 85).

(iii) The right to know one's origins

106. Article 8 of the Convention protects a right to identity and personal development. Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see *Odièvre*, cited above, § 29; *Godelli*, cited above, § 45; *Çapın v. Turkey*, no. 44690/09, §§ 33 and 34, 15 October 2019; and *Boljević v. Serbia*, no. 47443/14, § 28, 16 June 2020). Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 (see *Godelli*, cited above, § 46). An individual's interest in discovering his or her parentage does not disappear with age (ibid., § 69).

(iv) Application of those principles in the cases of Odièvre *and* Godelli

107. With regard to disputes concerning access to information about origins by children who were born of anonymous parents and adopted, the Court has previously found that the right to an identity, which includes the

right to know one's parentage, is an integral part of the notion of private life and that, in such cases, particularly rigorous scrutiny is called for when weighing up the competing interests (see *Godelli*, cited above, § 65). In the case of *Odièvre* (cited above), the Court found that there had been no violation of Article 8 of the Convention since the applicant had been given access to non-identifying information about her mother that had enabled her to trace some of her roots, while ensuring the protection of third-party interests, and that France had implemented machinery enabling the applicant to request disclosure of her mother's identity, subject to the latter's consent being obtained. In the case of *Godelli* (cited above), the Court found that Italian law did not attempt to strike any balance between the competing rights and interests at stake, because it gave "blind preference" to the interests of any mother who wished to remain anonymous, by not allowing the individuals concerned to obtain either access to non-identifying information concerning their mother or the disclosure of the mother's identity, and considered that the Italian State had overstepped the margin of appreciation which it had to be afforded.

(b) Application of those principles to the present case

(i) Whether Article 8 is applicable

108. The second applicant submitted that his inability to access information about his origins not only was an interference with his private life but also constituted an obstacle to his family life, in that he had chosen not to have children until he had details about his donor.

109. The Court reiterates that Article 8 of the Convention protects the right to know one's origins (see the case-law cited in paragraph 106 above). It further reiterates that the right to respect for the decisions both to have and not to have a child are also protected by Article 8, as such a choice is an expression of private and family life (see *S.H. and Others v. Austria*, cited above, § 82). Accordingly, it does not consider it necessary in the circumstances of the present case to examine the complaint from the standpoint of family life, since the "private life" limb of Article 8 appears to cover all of the second applicant's grievances.

(ii) Whether the applications concern a negative or a positive obligation

110. The Court notes that at the time the applicants applied to the domestic courts, and then to the Court, French law made no provision for donor-conceived children to know the donor's identity or to access non-identifying information about him or her – if they had learned how they had been conceived and if they so wished. The applicants complained of the shortcomings in the French legal system which had resulted in the refusal of their respective requests for such information. Accordingly, contrary to the Government, the Court considers that the complaint must be examined in the

light of whether the respondent State was under a positive obligation to secure to the applicants a right of access to information about their origins. The issue to be addressed in the present case is whether, in imposing the principle of donor anonymity on the applicants, France failed to comply with its positive obligation to ensure effective respect for their private life.

(iii) The margin of appreciation

111. The Court would point out that in the case of *X, Y and Z v. the United Kingdom* (22 April 1997, § 44, *Reports of Judgments and Decisions* 1997-II) in 1997, it indicated that although ART had been available in Europe for several decades, there was no consensus among the member States on the question whether the interests of a child conceived in such a way were best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity. It now notes that on the basis of the comparative study on access to information about origins by donor-conceived individuals, which spans 25 Council of Europe member States, those States are divided on the question of access to information about origins (see paragraph 67 above). Furthermore, the conditions for accessing such information differ significantly from one State to another (see paragraphs 68-72 above). There is thus no consensus on the matter. The Court further observes that the present case raises sensitive moral and ethical issues, and that public interests are at stake, since the Government cited an ethics-based philosophy towards gamete donation that underpinned all rules governing the donation of body parts or products. These considerations speak in favour of a wide margin of appreciation.

112. The Court notes, however, that an essential facet of a person's identity is at the heart of the present case, because the right to obtain information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's biological parents, and to ensure one's personal development is a fundamental feature of the right to respect for private life (see the case-law cited in paragraph 106 above). As early as the 2000s the Court emphasised the importance of the right to access information about one's biological origins (see, for example, in the context of paternity proceedings, *Mikulić*, cited above, §§ 65 and 66, and *Jäggi v. Switzerland*, no. 58757/00, § 38, ECHR 2006-X; see, in relation to an anonymous birth, *Odièvre*, cited above, § 48). Furthermore, domestic law in a number of member States has evolved, and a recent trend can be seen towards removing gamete-donor anonymity (see paragraph 73 above). In addition to a number of States in which donor-conceived individuals have long been afforded the right to access information about their origins, such right was recognised in the positive law of four States Parties including France between 2015 and 2021, and similar reforms are being discussed in other States Parties (see paragraph 67 above). The impact study by the French government accompanying the most recent bill on bioethics describes that

social change and points out that the principle of absolute anonymity enjoyed by donors in France is an outlier in this context. The trend towards expanding access to donor information and to abolishing donor anonymity to the extent possible is also reflected in the work of the Parliamentary Assembly of the Council of Europe and of the European Committee on Legal Co-operation (see paragraphs 60-63 and 73 above). Lastly, consideration must be given to advances in science and technology, and in particular the development of "recreational" DNA testing, which no longer make it possible to guarantee the anonymity of gamete donors (see paragraph 45 above). It follows that the respondent State enjoys a wide margin of appreciation in choosing the means by which to ensure effective respect for the applicants' private life. That margin of appreciation is nevertheless reduced by the fact that an essential aspect of personal identity is at the very heart of the present applications (see, *mutatis mutandis*, *D.B. and Others v. Switzerland*, nos. 58817/15 and 58252/15, §§ 85 and 87, 22 November 2022, and *Y v. France*, no. 76888/17, §§ 75-76 and 80, 31 January 2023).

(iv) Compliance with Article 8

113. The Court notes that at the time when the applicants lodged their applications, people in their situation had no means, upon learning how they had been conceived, of knowing their donor's identity or obtaining access to non-identifying information about him or her. Starting with the first bioethics legislation in 1994, the legislature opted for an absolute principle of anonymous gamete donation, making it a public-policy rule separating the recipient and the donor and forestalling any question of the ultimate purpose of the donation, namely procreation. The result of such "absolute, unconditional and irreversible anonymity" was that donor-conceived individuals were deprived of all possibility of seeking out and accessing, if they so wished, information on their origins. Doctors were granted an exception to the principle of anonymity in two situations: in the event of a therapeutic necessity, and where the donor was diagnosed with a serious genetic disorder (see paragraphs 29 and 34 above).

114. That situation lasted until 1 September 2022, when new legislation governing access to information about one's origins entered into force, introducing a system whereby individuals conceived from donations made prior to 1 September 2022 could access such information. Access was subject, however, to the donor's consent and – as shown by the preparatory work for the revised bioethics legislation, and as feared by the applicants – provided that the donor and the donor's file could actually be found and that there were resources available to do so (see paragraphs 48 and 54 above).

115. The issue that arises in the instant case is whether or not the respondent State – regard being had to its margin of appreciation – breached its positive obligation to ensure respect for the applicants' private life, by refusing their requests for access to their donors' identities and

non-identifying information, on the basis of the principle of anonymous gamete donation. In this connection, the Court must verify whether, in the light of the grounds relied upon by the domestic courts and those put forward by the Government, the respondent State adequately weighed up the public interest against the applicants' interests.

116. As a preliminary observation, the Court would note that the domestic courts emphasised on several occasions that the applicants' requests would have required far-reaching changes to civil law and to the legislation on reproduction, which were first and foremost matters for the legislature (see paragraphs 16 and 35 above). Respect for the principle of the separation of powers, without which there is no democracy, was therefore central to the domestic courts' considerations. In this regard, the Court reiterates that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight. This is especially true where a social issue is at stake, as in the present case (see, for example, *Dickson v. the United Kingdom* [GC], no. 44362/04, §§ 79-85, ECHR 2007-V, in the context of artificial insemination for prisoners, and *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I, regarding the disposal of frozen embryos).

117. The Court is mindful that this issue also required considering circumstances specific to the situation of individuals such as the applicants from the perspective of their right to respect for their private life, and in particular their right to access information about their origins – a vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity (see *Mikulić*, cited above, §§ 54 and 64; *Odièvre*, cited above, § 29; and *Jäggi*, cited above, § 38). The Court will accordingly examine whether or not the legislative choices that gave rise to the alleged violation, and their impact on the applicants, amounted to a breach of the State's positive obligation to ensure effective respect for their private life.

118. In this connection, the Court first notes that the situation complained of by the applicants arose from choices made by the legislature. It cannot but observe that these were based on extremely in-depth debates of an undoubtedly high standard. Furthermore, each bioethics law was preceded by a public debate in the form of consultations, the aim of which was to take all points of view into consideration and to balance the interests and rights at stake as evenly as possible.

119. It thus observes that although assisted reproduction dates back to 1973, the French State considered it necessary to establish a legal framework for such practices in 1994. At that time, it decided to treat gamete donation as comparable to all donations of body parts or products, within a general legal framework based on the principles of anonymous and unpaid donation. Unlike the first applicant, the Court considers that such a choice at the outset was in line both with the need to uphold ethical standards and with concerns

at the time that donor-assisted reproduction would be called into question; in other words, it had convincing general justifications.

120. In addition, the choices made in 1994 were reaffirmed in 2004 and again in 2011 following pre-legislative consultations on whether donor anonymity was compatible with the right to access information about one's origins. The proportionality of absolute donor anonymity was the topic of in-depth debate. It covered public-interest considerations such as "the need to preserve family harmony along with the major risk of undermining the social and emotional nature of parent-child relationships, the risk of a substantial decrease in gamete donations, and the risk of calling into question the ethics of all donations of body parts or products" (see paragraphs 35 and 36 above). It also encompassed aspects relating to growing awareness of the suffering experienced by some donor-conceived individuals and to the recognition by some States and by the Court of a right to access information about one's origins (see paragraphs 41, 48 and 60 above). In the end, fears that donations would decrease and family harmony and donor protection would be undermined prevailed, and the legislature opted not to distinguish between anonymous donation and donor anonymity, despite proposals to remove the latter on the basis of the system adopted by the National Council for Access to Information about Personal Origins set up for people born of anonymous parents (see paragraph 41 above; see also *Odièvre*, cited above, § 17).

121. The Government submitted that the recognition of a right for children born of anonymous parents to access information about their origins, in the *Odièvre* judgment in particular, could not justify changing the system for donor-conceived individuals. The applicants disputed the distinction between the two situations, arguing that it unjustifiably discriminated among children. The Court, for its part, notes that there is no consensus as to the right of donor-conceived individuals to access information about their origins, but merely a recent trend towards its recognition. This does not enable the Court to find that individuals in the applicants' situation should have been provided with an earlier opportunity to apply to a commission on access to information about origins, as was the case for people born of anonymous parents. Furthermore, the Court would point out that it held in the *Odièvre* judgment that the possibility of applying to such a body was enough to convince it that there had been no violation of Article 8 of the Convention.

122. The Court notes, lastly, that the claims of donor-conceived individuals are increasingly being acknowledged as legitimate and are supported by its case-law to the effect that any mechanism for access to information about one's origins must allow a balancing of the competing interests (see *Godelli*, cited above, § 68). There is also greater awareness not only that fears of a decrease in gamete donations are groundless, but also that the issue of preserving donor anonymity has become irrelevant in view of technological advances, in particular the development of so-called "recreational" DNA tests, and that there is a resulting need to establish a legal

framework for the disclosure of the information in question (see paragraphs 45 and 61 above). However, extremely fraught debates preceded the enactment of the Law of 2 August 2021 and the search for a consensus on how to implement the reform and to acknowledge the right to access information about one's origins (see paragraph 49 above). The legislative process thus demonstrated how sensitive and complex a matter it was to institute such a right.

123. The Court concludes from the above considerations that the legislature duly weighed up the interests and rights at stake following a constructive, in-depth debate on whether to remove donor anonymity. Pointing out once again that there is no clear consensus on the issue of access to information about one's origins, but merely a recent trend towards removing donor anonymity, it considers that the legislature acted within its margin of appreciation, which was admittedly reduced by the fact that an essential aspect of the applicants' private life was in issue. The respondent State cannot therefore be reproached for the pace at which the reform was enacted or for not having brought about such a reform any earlier (see, *mutatis mutandis*, *Schalk and Kopf v. Austria*, no. 30141/04, § 106, ECHR 2010, and *C.E. and Others v. France*, cited above, § 110).

124. Second, with regard to non-identifying medical information – access to which, the applicants complained, was excessively restrictive – the Court notes that such information is also covered by absolute donor anonymity and by medical confidentiality, subject to certain exceptions for doctors (see paragraphs 29 and 34 above).

125. The Court reiterates that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention (see *Z v. Finland*, 25 February 1997, § 95, *Reports* 1997-I). Moreover, although the right to health is not protected as such by the Convention or its Protocols, the Contracting States are under a positive obligation to take appropriate measures to protect the life and health of those within their jurisdiction (see *Vavřička and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 282, 8 April 2021). Similarly, the right of effective access to information concerning health and reproductive status is linked to private and family life within the meaning of Article 8 of the Convention (see *K.H. and Others v. Slovakia*, no. 32881/04, § 44, ECHR 2009 (extracts)).

126. That being said, in the present case, the Court notes that at the time that the applications were lodged with it the principle of anonymous gamete donation did not prevent doctors from accessing medical information in the event of a therapeutic necessity and transmitting it to the donor-conceived individual in question. According to the government's impact study (see paragraph 48 above), such necessities included preventing the risk of consanguinity, which was considered by the applicants to be one of the main infringements of their right to health. In the same vein, the *Conseil d'État*

held in its decision of 12 November 2015 that non-identifying medical information could be obtained for preventive purposes, in particular in the case of a couple formed by two donor-conceived individuals (see paragraph 16 above). Furthermore, the previous legislation also provided that the donor could, if he or she were diagnosed with a genetic disease, authorise the doctor to contact the donation facility so that any children conceived using his or her donation could be informed (see paragraph 34 above).

127. Moreover, the Court emphasises that there is no European consensus as to the disclosure of medical information and the right to be informed about the donor's state of health (see paragraph 72 above).

128. In the light of the above, and in the absence of sufficiently precise information in the files as to the tangible consequences for the applicants of maintaining medical confidentiality, and in particular as to the alleged link between the suffering caused by that confidentiality and knowledge of their medical history, the Court considers that France struck a fair balance between the competing interests at stake with regard to non-identifying medical information. It further notes that the principle of this aspect of anonymous gamete donation, unlike the issue of confidentiality of origins, was never called into question during the successive legislative debates, with the exception of questions about broadening access to the information concerned (see paragraph 57 above). Accordingly, the refusal of the applicants' requests, on grounds related to respect for medical confidentiality, do not amount to a failure by France to fulfil its positive obligation to secure their right to respect for their private life.

129. Third, the Court must still examine the shortcomings complained of by the applicants with regard to the practical aspects of the system in place since 1 September 2022.

130. Regarding the safeguards in place for donor-conceived children born after that date, the Court considers that there is no need to rule on the matter because the present case concerns only the examination of the provisions applicable to the applicants.

131. With regard to donor-conceived children born before that date, the Court notes that they may now apply to the CAPADD in order to request the donor's consent to the disclosure of his or her identity and non-identifying information. The Court does not underestimate the applicants' concerns that the donors might not be found, given the difficulty involved in locating their files, or that they might not consent to the disclosure of personal information, since they had been guaranteed absolute and permanent anonymity. Moreover, the second scenario actually materialised in the first applicant's case. The Court observes, however, that the legislature's decision stemmed from a desire to respect situations that had arisen under previous legislation (see the decision of the Constitutional Council, quoted in paragraph 56 above). It does not see how the legislature could have settled the matter differently (see paragraph 44 above). Accordingly, it does not consider that

the respondent State overstepped its margin of appreciation in choosing to make access to information about one's origins subject to the donor's consent.

132. In the light of all the above considerations, and regard being had to the State's margin of appreciation, narrow as it may have been, the Court concludes that the respondent State did not breach its positive obligation to secure to the applicants effective respect for their private life.

133. Accordingly, there has been no violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 8

134. The applicants submitted that, owing to the manner in which they had been conceived, they faced discrimination in the exercise of their right to respect for their private life in comparison with other children, because it was impossible for them to obtain non-identifying information – particularly medical information – about their donors. They relied on Article 14 of the Convention in conjunction with Article 8.

135. In the light of its findings under Article 8 of the Convention, the Court considers that this complaint does not give rise to any essential separate issue and concludes that there is no need to give a separate ruling on this matter (see, to similar effect, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014).

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by four votes to three, that there has been no violation of Article 8 of the Convention;

4. *Holds*, by four votes to three, that there is no need to examine the complaint under Article 14 in conjunction with Article 8 of the Convention.

Done in French, and notified in writing on 7 September 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Elósegui;
(b) joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy.

G.R.
V.S.

CONCURRING OPINION OF JUDGE ELÓSEGUI

(Translation)

1. The applications concerned the refusal issued to the applicants, who were conceived via donor-assisted reproduction, to disclose their donors' identities and non-identifying information (Articles 8 and 14 of the Convention). By four votes to three, the Chamber has found no violation of the two provisions relied on, for the reasons set out in paragraphs 120-133 of the judgment. I agree with all the arguments put forward in the judgment. My concurring opinion is motivated by a wish to expand on the legal reasoning provided and to discuss certain problems and changes in perspective that are emerging today in relation to the right of individuals conceived using assisted reproduction technologies – be it insemination or *in vitro* fertilisation – to know their biological identity. There is also an in-depth conversation currently taking place about the right of children born through surrogacy to know their birth mother and/or egg donor, and that of adopted children to know their biological parents if they are alive.

2. It is impossible to address all these interconnected issues in a single concurring opinion. I will therefore concentrate on the facts of the specific situation at hand and the reasons they led me to find no violation of the Convention in the present case. I will start by saying that the issues surrounding any right to know one's biological origins relate to a person's deepest sense of self. These issues have been the subject of much debate, since there are many philosophical movements and schools of anthropology with sometimes conflicting views. Fashion and society's changing attitudes and ways of thinking also exert an influence. In practice, the law and the development of the justice system are not always coherent. Instead, they are shaped by new challenges, particularly in the field of biotechnology, arising from various whims, parliamentary majorities and minorities, the prevailing mindset in a country at any given time, cultural and historical specificities and legal action brought before the courts.

For this reason, the judicial landscape and mindset in the 46 member States of the Council of Europe still vary widely on these matters (see paragraphs 65-73 of the judgment). Moreover, each case requires not only the specific application to be taken into account, but also the justice system as a whole, with all its civil, administrative, criminal and other components as they apply to these bioethics issues.

3. Turning to the particular case of France, the legislative developments and changes in mindset that have taken place in this country are eloquently summed up in the judgment. The history and evolution of the principle of anonymous gamete donation show how a preference for virtually absolute donor anonymity has given way to a new approach whereby any right a donor-conceived individual may have to know his or her donor (genetic)

mother or father is taken into account. These changes in mindset and the accompanying legislative developments must not be analysed anachronistically. Context is key when it comes to adjudicating on who has a right to what, the new claims at stake, previously acquired rights and fresh ways of thinking. Across Europe, great changes can be seen, *mutatis mutandis*, in social attitudes and certain legislation on adoption *vis-à-vis* the right to know one's biological parents. To start with, it was not so long ago that even the fact that a child had been adopted could be hidden from him or her. A similar shift is apparent regarding the right of single mothers to give their children up for adoption without establishing any legal parent-child relationship (see paragraphs 106 and 107 of the judgment concerning the right to know one's origins and the cases of *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III, and *Godelli v. Italy*, no. 33783/09, 25 September 2012) in order to protect both mother and child.

4. Most of the judges in the present case considered that the French legislature had acted appropriately, within the margin of appreciation afforded by the Convention in such matters. As judges, we must base our findings on the Convention and case-law, even if, logically, we might also come to different conclusions from a technical point of view or by way of legal interpretation – hence the dissenting votes. Anthropologically speaking, the amendments to Law no. 2021-2017 on bioethics ("the Law of 2021") are more respectful of the rights of donor-conceived individuals to know their biological origin if they so wish. The new law eliminates donor anonymity. Anyone who is not willing to provide their information and to consent to third parties knowing their identity are no longer permitted to make donations (see paragraph 51). The French Constitutional Council, in decision no. 2023-1052 QPC of 9 June 2023, stated as follows:

> "1. Article L. 2143-6 of the Public Health Code, as worded subsequent to the above-mentioned Law of 2 August 2021, provides:
>
> 'A Commission on Access to Donors' Non-Identifying Information and Identity shall be placed under the responsibility of the Health Minister. It shall be responsible for:
>
> 1. Granting requests to access non-identifying information about donors, in accordance with the procedure set out in the decree after consultation of the *Conseil d'État* issued in application of point 3° of Article L. 2143-9.
>
> 2. Granting requests to access the identity of donors, in accordance with the procedure set out in the decree after consultation of the *Conseil d'État* issued in application of said point 3°.
>
> 3. Requesting that the Biomedicine Agency disclose donors' non-identifying information and identity.
>
> 4. Deciding, at the request of a doctor, whether certain information may be characterised as non-identifying, prior to its transmission to the data controller indicated in Article L. 2143-4.
>
> 5. Collecting and recording the consent of donors who were not subject to the provisions of the present Chapter at the time of their donation, to the retrieval of their

non-identifying information and their identity and to the transmission of that information to the Biomedicine Agency, which shall store it in accordance with said Article L. 2143-4.

6. Contacting donors who were not subject to the provisions of the present Chapter at the time of their donation, when it receives applications under Article L. 2143-5, in order to request and collect their consent to the disclosure of their non-identifying information and their identity and to the transmission of that information to the Biomedicine Agency. To perform this duty, the Commission may use the personal registration numbers in the national identity register, and consult that register. The conditions governing such use and consultation shall be set by decree after consultation of the *Conseil d'État*, itself following an opinion from the National Commission on Data Processing and Civil Liberties [*Commission nationale de l'informatique et des libertés* – 'the CNIL']. The Commission may also consult the national cross-scheme register of health-insurance beneficiaries in order to obtain the above-mentioned donors' addresses from health-insurance bodies.

7. Providing information and support to requesters and donors.

Data pertaining to the requests referred to in Article L. 2143-5 shall be stored by the Commission using data processing for which it shall be responsible, under conditions that strictly guarantee their security, integrity and confidentiality, for a limited and appropriate amount of time taking into account the needs resulting from their intended use, set by decree after consultation of the *Conseil d'État*, itself following an opinion from the National Commission on Data Processing and Civil Liberties, which may not exceed 120 years.'"

5. However, the two applicants were conceived using those techniques at an earlier time when the law protected anonymity almost at all costs. In line with changing attitudes, that law was deemed unjust by the French who, following a long debate, decided to amend it. The applicants experienced significant suffering, both psychologically and in their battle before the French courts, in seeking to find out the identity of their donors (see paragraph 19 of the judgment):

"On 21 November 2022 the applicant informed the Court that on 7 October 2022 she had applied to the newly established Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology (*Commission d'accès des personnes nées d'une assistance médicale à la procréation aux données des tiers donneurs* – 'the CAPADD') to obtain access to information about her origins (see paragraph 54 below). On 28 March 2023 the CAPADD replied that it was unable to grant her request because the information gathered had revealed that the donor had passed away, and that it could not, 'without [his] express, personal consent' and 'as legislation currently [stood]', disclose his identifying and non-identifying information to her."

6. I would like to emphasise the importance of always applying the laws in force and the prohibition on retrospective application of the law that could infringe third parties' acquired rights or legal certainty, as is the case here. It follows that although French law was amended to offer greater protection of the right of individuals conceived using such techniques to know their biological origins, that does not create a retrospective right. Legislative amendments are made with a body of statutory safeguards, are applicable

from the entry into force of the relevant legal rule and are accompanied by a transitional legal framework to govern the above-mentioned situations. All this must be respected from the most basic standpoint of legal certainty and legal safeguards. The principle of legality is a part of human rights, democracy and established law-making processes.

7. Decision no. 2023-1052 QPC of 9 June 2023 of the Constitutional Council is very clear about the constitutionality of the new law and the issue of legal certainty, stating:

> "6. It is at any time open to the legislature, acting within the scope of its jurisdiction, to amend previous legislation or to repeal it by replacing it, as appropriate, with other provisions. In so doing, however, it cannot deprive constitutional requirements of their legal safeguards. In particular, it cannot, without sufficient public-interest grounds, interfere with lawfully acquired situations or call into question the effects that could reasonably be expected of situations arising under previous legislation.
>
> 7. Prior to the Law of 2 August 2021, Articles 16-8 of the Civil Code and L. 1211-5 of the Public Health Code prevented any disclosure of information that could be used to identify the donor in cases of assisted reproduction.
>
> 8. Article L. 2143-6 of the Public Health Code, created by the Law of 2 August 2021, now provides that an individual of full age conceived from a gamete or embryo donation made before a date set by decree at 1 September 2022 may apply to the Commission on Access to Donors' Non-Identifying Information and Identity for access to that information.
>
> 9. The disputed provisions of that Article provide that, in such an event, the Commission contacts the donor to request and collect his or her consent to the disclosure of his or her non-identifying information and identity and to the transmission of that information to the Biomedicine Agency.
>
> 10. While those provisions thus allow the donor-conceived individual to have the donor's non-identifying information and identity disclosed, such disclosure is subject to the donor's consent.
>
> 11. Accordingly, they do not call into question the protection of anonymity that could reasonably be expected by a donor who made a donation under the system in place prior to the Law of 2 August 2021."

8. The French legislature attempted to strike a balance between the right to private life of individuals who donated gametes prior to the entry into force of the new law and the right of donor-conceived individuals to know their identity. As stated by the Constitutional Council:

> "15. Second, in enacting the disputed provisions, the legislature was seeking to secure respect for the donor's private life while enabling the donor-conceived individual, to the extent possible and through appropriate measures, to access information about his or her personal origins. It is not for the Constitutional Council to substitute its assessment for that of the legislature with regard to the balance thus struck between the interests of the donor and those of the donor-conceived individual."

Article L. 2143-6 of the Public Health Code provides that an individual conceived under the former system may apply to the Commission. The decree specifies how the law should be implemented and sets 1 September 2022 as

the date from which individuals conceived using donations made under the former system may apply to the new Commission. That date also marks the moment from which all donations are governed by the new rule, namely that referred to in paragraph 4 above.

9. According to the new legislation, individuals who donated gametes before the change in the law may be contacted by the Commission on Access to Donors' Non-Identifying Information and Identity with a view to collecting their consent to the disclosure of that information, but they are under no obligation to give that consent and may refuse.

10. These reasons all support the finding of no violation of Article 8 of the Convention in the specific case of the two applicants.

JOINT DISSENTING OPINION OF JUDGES RAVARANI, MOUROU-VIKSTRÖM AND GNATOVSKYY

(Translation)

We are unable to agree with the majority of the Chamber that there has been no violation of Article 8 of the Convention.

Key issue in the present case

This case concerns the sensitive topic of access to information about origins by donor-conceived individuals prior to the entry into force of the Law of 2 August 2021 on bioethics. While that legislation now governs the issue in a balanced, satisfactory manner, taking into account the interests of the various people concerned – particularly the children themselves, who will no longer come up against a wall of confidentiality – an *in concreto* approach should have been taken to the individual situation of the two applicants. It must be observed, however, that the ruthless severity of the refusals they received, compounded by an extremely slow legislative process which struggled to give due consideration to the direction in which "the history of access to information about origins" was moving, deprived the applicants of their fundamental right to know their identity.

Situation of the applicants

Ms Gauvin-Fournis and Mr Silliau learned in 2009 and 2006 respectively, when they were 29 and 17 years old, that they had been conceived from donor sperm. Beyond the personal and private shock and questioning that such a revelation must have caused, it can easily be understood that the news was the start of a search for their identity, which involved many formalities and procedures. They thus began "the fight of a lifetime", having realised – one while still a minor, the other while a young adult – that the social aspect of the family in which they had been raised did not match the genetic truth of their origins. We consider that the two applicants' situations are identical with respect to the violation of Article 8, since they were both confronted with the same legislative provisions – namely the Law of 6 August 2004 and then the Law of 7 July 2011 which, even if they amended the initial Law of 29 July 1994 and were the subject of a comprehensive debate, did not remove the principle of radical, irreversible anonymity. The Law of 2021 admittedly offers people born under the former legal system the possibility of having the information disclosed. However, it cannot be denied that the refusal issued to Ms Gauvin-Fournis placed her, on account of the death of her biological father, in an irreparable situation, in contrast to Mr Silliau, whose father can

still be contacted and can, at least in theory, give his consent to the disclosure of his personal information.

Administrative steps taken by the applicants before the entry into force of the Law of 2 August 2021 on bioethics

Seeking to obtain identifying information and also non-identifying and medical information about their biological fathers, the applicants both contacted the relevant Centre for Egg and Sperm Research and Preservation (CECOS) but received no reply. They then turned to the Commission for Access to Administrative Documents (CADA), which categorically refused the first applicant's request and told the second applicant that his file had been misplaced, before the Paris regional health authority coldly informed him one year later that the file had finally been found but no information would be disclosed to him as the applicable law stood at the time.

It appears that anonymity enjoyed strong, almost absolute protection from the administrative authorities, which at the same time nevertheless recommended informing children of how they had been conceived as soon as they were "capable of understanding", in the interests of their psychological well-being. This two-step approach – reveal then conceal – seems likely to arouse "a need to know", to aggravate an existential wound, rather than to soothe and to contribute to an individual's personal and psychological stability.

Domestic administrative courts' refusal to allow applicants to know their origins

The applicants, citing the impossibility of enjoying their right to an identity in breach of Articles 8 and 14 of the Convention, complained before the administrative courts about the CECOS's tacit refusal to provide them with all information that would allow them to identify their biological fathers. The proceedings for the two applicants before the Administrative Court, the Administrative Court of Appeal and the *Conseil d'État* spanned from 2010 to 2016.

How did the law stand during that period?

The law was relatively simple and based on unconditional, irreversible and radical anonymity and, in the event that anonymity was breached, a sanction that was both formidable and dissuasive on account of the terms and amounts at stake. The initial legislation, namely the Law of 29 July 1994 applicable to assisted reproduction, introduced a principle of almost total anonymity (although doctors were granted access to non-identifying information for therapeutic purposes), while the Criminal Code provided for sanctions of two years' imprisonment and a 30,000-euro fine for anyone who disclosed identifying information.

On the basis of the applicable legislation, the domestic administrative courts (the first two levels of jurisdiction, then the *Conseil d'État* on points of law) dismissed the applicants' requests to set aside the tacit decision of the CECOS in their respect and to issue a court order to the Paris regional health authority to provide them with the information about their origins.

The domestic courts gave numerous reasons in support of their position, including the protection of the donors' privacy, the preservation of the harmony of the children's birth families, fear of a decrease in gamete donations and, on a more theoretical level, a standardisation of how products of the human body were treated. But while the ethics of donation remained a central concern of those defending anonymity, there was also a very marked desire to protect the legal and emotional family, at the expense of the biological and genetic family. Appearances and social façades were protected, while reality was hidden away.

A long, hard road to legislative progress

But although the concepts were in place, under control and well organised, a slight murmur in favour of a toned-down version of removing radical anonymity began to be heard and to gain hints of approval among the authorities. Was it because the first donor-conceived children born in the 1970s had reached adulthood and started telling stories of their search for their genetic origins and the suffering caused by the specific nature of their donor-assisted conception?

It is nevertheless surprising that the law of 2011 did not amend the legislation concerning the crucial question of anonymity. And yet it was enacted amid a certain legislative exuberance, with European sentiment rather in favour of changes that would pierce through the secrecy shrouding origins. The National Assembly's commission of enquiry on the rights of children in France thus advocated in 1998 a system allowing individuals conceived using assisted reproductive technology to access information about their genetic origins when they turned 18. In 2008 the French Senate published a comparative law study of eight Council of Europe member States in which it noted "a trend towards removing anonymity". And a 2009 report by the *Conseil d'État* acknowledged that "donor-conceived children [were] deprived of an aspect of their history" and that the radical anonymity introduced by the Law of 1994 was detrimental to them. The flaws in the system of absolute anonymity were thus known and documented.

However, two attempts by the government and the Senate in 2010 to amend the pre-existing legislative framework and to cut sizeable loopholes in the principle of anonymity were both rejected.

The idea that genetic inheritance is a relatively unimportant consideration in self-construction and that the combined influence of education and socio-economic, family and emotional environment to a very large extent

determines and shapes an individual's personality and future and should therefore take priority is debatable and reflects an ideological stance.

In 2014 the report on "Parentage, origins and parenthood" to the Minister of Social Affairs and Health pointed out that a real "deadlock" persisted in France while other countries around the world gradually removed anonymity. It seems that this "deadlock" running counter to trends in Europe played a large part in depriving the applicants of their right to access information about their identities.

On 2 August 2021 a substantial legislative reform took place, introducing a system based on transparency. All gamete donations are now conditional on the donor's acceptance that his or her identity and non-identifying information will be disclosed. Anonymity has thus been eliminated from the law.

Steps taken by the applicants after the entry into force of the Law of 2 August 2021

Naturally, the applicants could not take advantage of this new legislative framework, which did not apply retrospectively in accordance with Article 2 of the French Civil Code. The applicants' biological fathers therefore continued to be protected by anonymity.

The new body of legislation did, however, enable individuals conceived through gamete donation under the former system to send a letter from 1 September 2022 to the Commission on Access to Donor Information by Persons Conceived Using Assisted Reproductive Technology (CAPADD), which would in turn contact the biological father to collect his consent.

The first applicant sent such a letter on 7 October 2022. She received a reply on 28 March 2023, almost six months later, informing her that her biological father could not give his consent to the disclosure of his identity or any other personal information because he had passed away, and that as a result no information on her parentage would be provided to her. Besides the length of time it took to reply, it is unfortunate that the administrative authorities did not think it relevant to specify whether the death of her father had taken place before or after she had sent her letter. That information was of fundamental importance.

As to the second applicant, he has not yet sent a request for his genetic father to be contacted in order to obtain his personal information, out of fear of being upset by the foreseen refusal.

An infringement of the applicants' right to an identity has, in our view, been established

We disagree with the majority for two main reasons: we consider that the national authorities' margin of appreciation is narrow in this area, and that

the French legislature did not adequately balance the various interests at stake.

A narrow margin of appreciation

Admittedly, in the light of the Court's criteria, it cannot be said that there is an established consensus among the member States of the Council of Europe concerning access by donor-conceived individuals to information about their origins. That being said, the European Committee on Legal Co-operation has noted that a clear, steady trend towards such access could indeed be observed before the enactment of the Law of 2021. Since a consensus could therefore be said to be "taking shape" and gaining influence, the margin of appreciation should have been considered, at the very least, as relatively narrow. Furthermore, identity is an area in which States are undeniably afforded a narrow margin of appreciation. On the basis of these observations, we conclude that although the margin of appreciation was not very wide, the applicants had no opportunity to access any information whatsoever about their biological fathers for more than 12 years, since their first applications to the CECOS were made in February and March 2010.

Belated consideration of the interests of the child

We are aware that removing anonymity was the topic of comprehensive and no doubt fascinating legislative debate, and we appreciate that the resulting decisions were thoroughly thought through. The refusal of the applicants' requests was based on a general principle of anonymity laid down in the first sentence of Article 16-8 of the Law of 29 July 1994, as amended in 2004 and 2011. However, the wording of the second sentence of that same Article, strangely enough, required absolute respect for anonymity only between the recipient and the donor of the gametes. Completely absent from the initial statutory framework was the child, despite being the chief party concerned – the "victim" of the anonymity whom the CECOS unambiguously recommended informing of the conditions of his or her conception. It should further be pointed out that the body of the administrative decisions echoed that strictly social approach to the family, focussing on the stability of the legal, official family unit without even the least consideration for the best interests of the child – a key concept, nonetheless.

In the Court's case-law, the right to know one's identity and parentage are an integral part of the right to private life, as protected by Article 8. This was reiterated, in particular, in the cases of *Odièvre v. France* ([GC], no. 42326/98, ECHR 2003-III) and *Godelli v. Italy* (no. 33783/09, 25 September 2012) which, beyond principles, offer no useful basis of comparison with the present case. The State therefore had a positive obligation to secure to individuals a right to access information about their origins, a factor contributing to personal development.

Over and above this general obligation of principle, we feel it is important to demonstrate how the Court afforded a special, important status to the best interests of the child in relation to his or her identity. In the case of *D.B. and Others v. Switzerland* (nos. 58817/15 and 58252/15, 22 November 2022), it did not hesitate to make a distinction between the interests of adults and those of children. The case concerned the impossibility for the biological father's same-sex partner to be granted a means of establishing a legal connection with the child. It was only after a long legislative process that the partner was authorised to adopt the child. The Court considered that the child had for a long period of time been placed in a state of uncertainty as to his identity, which had prevented him from growing up in a stable environment. It accordingly found a violation of Article 8 in his respect. It did not, however, find a violation of Article 8 in respect of the biological father or his partner.

After years of having the truth about their conception hidden from them, the applicants are now confronted with secrecy – anonymity having been built up in the years preceding the entry into force of the Law of 2021 as a public-policy rule, one that was absolute, with no exceptions.

Where the interests of the child and the biological father are in conflict, it is our view that the rights and choices of the adult parent should not be given greater weight, which would tip the scales in favour of continued strict, rigorous anonymity.

Despite the comprehensive and, no doubt, fascinating legislative debate that took place in 2011, the prevarications and disagreements of principle had the effect of slowing the preparation of legislation that would finally remove anonymity, thus depriving the applicants of their right to know their parentage.

It is important to note that in most cases donors, who have helped an infertile couple give birth, do not want their identity to be revealed so as to avoid being contacted by children with whom they have chosen not to have a relationship. That was both their right and their duty under the former legislation. But how, under the legal framework implemented in 2021 – and even though no parent-child relationship may be established either before or after the donor's death and no claims to any hypothetical inheritance may be made –, can continued anonymity be justified after the donor's death? Does the obligation to remain silent not lapse after the passing of the only person capable of removing anonymity during his or her lifetime? That question – fundamental as it may be – does not seem to have been considered by the administrative bodies that refused the first applicant's request.

Conclusion

Despite the obvious differences in their situations, the applicants share a single destiny – that of living with unanswered questions and the cruel mystery of their origins, and of having been subjected for years to a law that,

even amended, remained unbending in its principles, despite growing awareness of the suffering of donor-conceived children and a European trend towards access to information about one's origins.

The legislation was amended too late for the first applicant, since the death of her biological father now prevents her definitively from ever knowing the truth. And even though the second applicant still has the possibility of requesting his biological father, via a commission, to disclose his identity or any other identifying information, the years of anonymity guaranteed by the law have deprived him of a fundamental part of his identity, which no subsequent legislative intervention can make up for.