


Is it Safe to Bury the Truth under the Family Tree? The ECtHR's Response in Gauvin-Fournis and Silliau v France

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There have been longstanding ethical concerns regarding the anonymity of gamete donors in the context of medically-assisted reproduction techniques. In recent years, the increasing importance placed on the right to know one's biological origins as a fundamental aspect of personal identity has also raised questions about the principle of donor anonymity from a legal standpoint. Legislatures are therefore faced with the difficult question of how to balance the conflicting interests of the donor, the interests of the donor-conceived children and the interests of their parents; while the ECtHR has the final say on whether the solutions adopted by the member States of the Council of Europe comply with ECHR rights and freedoms.

Gauvin-Fournis and Silliau v France originated from French authorities' refusal to allow the applicants, who were born through assisted reproduction using unknown donor gametes, to access information concerning the biological father. The ruling came approximately eight years after the applications were submitted to the Court.

To decide whether the French authorities breached the positive obligation to ensure the effective respect of private life under Article 8 ECHR, the Court took stock of the legal and societal changes that have occurred in the meantime.

Facts

The Bioethics Act of 29th July 1994 introduced the principle of donor anonymity in the French legal order. This principle allowed exceptions only in the two following cases: when doctors required access to the non-identifying medical data from the donor's dossier in the event of a therapeutic necessity or the donor was diagnosed with a severe genetic disorder. Children conceived through gamete donation were thus prevented from knowing the identity of the biological parent or from obtaining non-identifying information about them.

French legislation changed on 1st September 2022 with the entry into force of the Bioethics Act of 2nd August 2021, under which donors' explicit consent to the recording of their identity and non-identifying information (age, physical characteristics, marital and professional status, country of birth, reasons for donation) is a condition for all gametes donations. Persons conceived through medically assisted reproduction can now apply to the Commission on Access to Third-Party Donor Data for Persons Born through Medically

Assisted Reproduction (CAPADD) in order to access information about their biological parents. Children born from gametes donated before 1st September 2022 may instead apply to the CAPADD to contact the third-party donors to obtain their consent to the disclosure of the relevant information.

In the present case, the applicants were born, through medically assisted reproduction involving a third-party donor, in the 1980s, when the principle of absolute donor anonymity applied. Both applicants sought to obtain information on the identity of their respective biological fathers or non-identifying information about them from the competent national administrative authorities. Having been denied information, they took legal action, but to no avail. In fact, the applicants' appeals to national administrative courts were rejected in the light of the consistent jurisprudence of the *Conseil d'Etat* – the highest administrative court in France – upholding the legitimacy of the regime of absolute donor anonymity.

In 2015 and 2016 respectively, Ms Gauvin-Fournis and Mr Silliau applied to the ECtHR alleging that the impossibility of accessing information about their biological fathers amounted to a violation of the right to respect for the private and family life under Article 8 ECHR. By comparing their situation to that of children born to an anonymous mother, they also raised concerns about discrimination based on the method of conception.

Judgment

Recalling its previous jurisprudence, according to which a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of his or her status as a 'victim' unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention, the ECtHR ruled out that the applicants had lost their status as victims as a result of the legislative amendments introduced in 2021, as claimed by the French Government. In particular, the Court stressed that although the applicants have had the right to apply to the CAPADD from the 1st of September 2022 to obtain information, where possible, about their biological parents, more than twelve years have passed since the applicants sought access to information about their origins. In all this time, the national authorities and courts had failed to explicitly recognise that there had been a violation of the applicants' rights under the Convention.

The Court then analysed the case under the private life limb of Article 8 ECHR, as the concept of 'private life' extends to aspects relating to personal identity and personal development and, according to a well-established case law, entails that everyone should be able to establish critical details concerning one's identity as a human being, as well as to obtain information relevant to ascertaining the truth about an important aspect of one's personal identity, such as the identity of one's parents.

Essentially, the question for the Court was whether the positive obligation – arising from Article 8 ECHR – to ensure effective respect for private life required French authorities to disclose to the applicants details regarding their fathers, notwithstanding the principle of anonymity of gamete donors.

In line with its established approach to cases involving sensitive ethical issues, the Court reiterated that in matters of general policy, where reasonable differences of opinion could exist within a democratic society, particular significance should be attributed to the role of domestic legislature, particularly where social issues are at stake, as in the current case.

On this premise, the Court shifted the focus from a 'substantive review' to a 'procedural review'. It assessed the compatibility of the challenged French legislation with Article 8 ECHR by scrutinising whether that legislation resulted from a democratic process in French society.

In this regard, the Court observed that each French bioethics law was drafted following comprehensive and high-quality debates, as well as public consultations in which all points of view had been considered and the interests and rights at stake had been weighed up as evenly as possible (§ 118).

Finally, the Court considered whether the challenged regime of anonymity in gamete donations had an adverse effect on the applicants' right to health, which is not guaranteed as such by the Convention or its Protocols, but –the Court said- the Contracting States have nevertheless a positive obligation to take the necessary measures to protect the life and health of persons under their jurisdiction (§ 125).

In the absence of evidence of tangible negative effects of the French system of anonymity on the applicants' right to health, and considering that the French legislature had struck a fair balance between the competing interests at stake, the Court held by four votes to three that the respondent State had not breached its positive obligation to ensure effective respect for the applicants' private life and that no separate issue arose under Article 8 taken together with Article 14 (Prohibition of discrimination) of the Convention.

Commentary

The right to know one's origins was first recognised under the notion of the right to respect for private life in terms of a right to establish details an individual's identity in a case concerning foster care (*Gaskin v The United Kingdom*). Subsequently, the ECtHR explicitly stated that uncovering the truth regarding the identity of one's parents is a crucial concern and vital interest for all human beings, in a case on anonymous childbirth (*Odièvre v France*).

Finally, in *Gauvin-Fournis and Silliau v France*, the right to know one's (genetic) origins was invoked in the context of medically-assisted reproduction to challenge the right to anonymity of gamete donors.

Dealing with anonymous birth in *Odièvre v France* (2003), the Grand Chamber hinted that the principle of absolute anonymity of the mother could jeopardise the right to respect for private life of a person born to an anonymous mother. In fact, about ten years later in *Godelli v Italy* the Court found a breach of Article 8 considering that the Italian system of anonymous childbirth, which was founded on the principle of absolute and irreversible anonymity, did not strike a fair balance between the mother's right to privacy and the right of the child to have information on their origins.

On the contrary, in *Gauvin-Fournis and Silliau v France*, the choice made by the French legislature in 1994, and confirmed in 2004 and 2011, in favour of the principle of absolute anonymity of the donor in the context of medically assisted procreation did not, according to the Court, break the balance between the interests of the donor and those of the child.

In this regard, it is interesting to note that the Court's reasoning did not focus on distinguishing between the different interests involved in the case of anonymous childbirth, on the one hand, and heterologous medically assisted procreation, on the other. Actually, the Court was rather reluctant to examine the proportionality of the regime of absolute anonymity of donors, relying on a kind of 'presumption of proportionality' based on the fact that the challenged principle had been extensively debated during the pre-legislative consultations, both from the perspective of safeguarding family peace, privacy and emotional ties; and avoiding any potential challenges to the social nature of parenthood, as well as from the viewpoint of the risk of a substantial decrease in the number of donated gametes and the threat of questioning the ethical aspects of bodily product donation. The suffering of individuals conceived through assisted reproductive technologies was also considered, along with the acknowledgement of their right to access information about their origins (§ 120).

The Court considered then that the French legislature had carefully weighed up the interests and rights involved when it opted to abandon the principle of donor anonymity in 2021.

Essentially, by turning to procedural-type review the Court *de facto* granted to the defendant State a wide margin of appreciation, despite the fact that it expressly mentioned its well-known principle according to which where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State is restricted (§ 105).

However, this approach was not agreed upon by all Judges. In a common dissenting opinion, Judges Ravarani, Mourou-Vikström and Gnatovskyy, posited that the margin of appreciation afforded to States should be restricted for two reasons: firstly, due to the significance of the subject matter at stake, namely personal identity, and, secondly, because of the emerging consensus in Europe to waive the principle of anonymity in gamete donation.

According to Judges Ravarani, Mourou-Vikström and Gnatovskyy, the Court should thus have taken States' positive obligation seriously and ought to have recognised that the State had a positive obligation to guarantee individuals the right to know one's (genetic) origins, which is one of the essential components of personal development.

Indeed, deciding on the applicability of Article 8, the Court stated that the question to answer was whether the respondent State had a positive obligation to guarantee the applicants a right of access to their origins (§110). The (implicit) answer given by the Court was negative, as it found that the respondent State did not breach its positive obligation to guarantee the applicants and the claimant effective respect for their private life (§ 132).

Conclusions

The Court's answer to the central issue in *Gauvin-Fournis and Silliau v France* as indicated in the summary published on HUDOC reads as follows:

‘Refusal to allow persons born through medically assisted reproduction involving a third-party donor to access information about that donor, under the rule guaranteeing anonymity in gamete donations: *no violation.*’

By reading it, one could reasonably conclude that the principle of donor anonymity is consistent with the right to respect for private life under Article 8 ECHR. By reading the judgment, however, it is worth noting that the Court considered the French legislature's decision to waive the principle of donor anonymity to be significant. On this point, the Court emphasised that upholding the principle of donor anonymity would be anachronistic considering –*inter alia*– technological advancements, and in particular the development of so-called recreational genetic testing (§ 122). From the Court's reasoning, we can reasonably assume that current living conditions require a balance of interests that is no longer satisfied by the principle of anonymity.

All in all, it seems fair to conclude that deciding *Gauvin-Fournis and Silliau v France* the Court engaged in a –so to speak- prospective overruling, meaning that, not in the current case, but in future instances, legislation on heterologous medically assisted procreation founded on the principle of absolute donor anonymity may be in violation of Article 8 ECHR.

The Court therefore seems to be following the changing pattern of reproductive secrecy and the growing tendency to favour the disclosure of genetic truths as a form of knowledge deemed crucial to the welfare of children.