



Strasbourg, 12 December 2016

CDL-PI(2016)013

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMPILATION
OF VENICE COMMISSION OPINIONS
CONCERNING BIOETHICS

I. Introduction

This document is a compilation of extracts taken from opinions and reports/studies adopted by the Venice Commission on issues concerning bioethics. Its aim is to provide an overview of the approach of the Venice Commission with regard to these topics.

The compilation is intended to serve as a source of reference for drafters of constitutions and of legislation regulating bioethics, for researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports concerning legislation dealing with such issues. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the opinions (as opposed to general reports and studies) from which extracts are cited in the compilation relate to individual countries and take into account the specific situations there. The citations will therefore not necessarily be applicable in the context of other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

Venice Commission reports and studies quoted in this compilation seek to present general standards and principles for all member and observer States of the Venice Commission. Recommendations made in the reports and studies will therefore be of a more general application, although the specificity of national/local situations is an important factor and should be taken into account adequately.

Each citation in the compilation has a reference that sets out its exact position in the opinion/report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read whole text of the opinion in question and the complete chapter in the Compilation on the relevant theme. Most of further references and footnotes are omitted in the text of citations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

II. Abortion

“63. According to the ECtHR case law, while the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (ECtHR judgement of 7. 2. 2006, *Tysiak. / POL*, no. 5410/03, § 107). Concerning Article 2 ECHR, the ECtHR is of the view that, in the absence of common standards in this field, the decision where to set the legal point from which the right to life shall begin lies in the margin of appreciation of the states, in the light of the specific circumstances and needs of their own population (ECtHR judgement of 8. 7. 2004 (*GC*), *VO. FRA*, no. 53924/00, § 82).”

“65. However, this does not result in the recognition of an absolute right to life of the foetus. If Article 2 ECHR were held to cover the foetus, and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be

considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the unborn life of the foetus would be regarded as being of a higher value than the life of the pregnant woman (Commission decision of 13. 5. 1980, X./J. UK, no. 8416/78, § 19).

66. In the light of the above, Article II of the Hungarian Constitution cannot be read as considering the life of the unborn child to be of higher value than the life of the mother and does not necessarily imply an obligation for the Hungarian State to penalise abortion. Weighing up the various, and sometimes conflicting, rights or freedoms of the mother and the unborn child is mandatory. Provided that such a balance of interests is met, the extension of the safeguards of Article II to the unborn child is in line with the requirements of the ECHR.

67. It is, at present, not clear how the Hungarian legislator will regulate abortion in the future. Concerns have been expressed that this provision might be used to justify legislative and administrative action restricting or even prohibiting abortion. For such a situation, the Venice Commission considers that the Hungarian authorities should pay particular attention to the ECtHR case law, including the recent judgment of 16 December 2010, in the case of *A, B and C v. Ireland*. In this judgement, the Court assessed that the Irish legislation struck '*fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.*' In its judgment, the Court had inter alia taken into account that Ireland allows abortion where there is a risk to the life of the expectant mother."

[CDL-AD\(2011\)016](#) *Opinion on the New Constitution of Hungary*

"46. This provision states that '*Everyone is born with the right to life*' without any further specification. The Venice Commission understands from this wording that, under the Icelandic Bill, the right to life commences at birth. No guidance is provided in the proposed Constitution with regard to the complex and difficult issue of abortion."

[CDL-AD\(2013\)010](#) *Opinion on the Draft New Constitution of Iceland*

"93. Although *Snyder v. Phelps* pertained to a civil suit rather than a municipal ordinance, this decision throws doubt on the constitutionality of recent attempts to restrict the exercise of First Amendment rights near funerals. It also suggests that the Court may be disinclined to uphold broad zonal approaches to ensuring access to abortion clinics in the future."

"100. As with permits, court injunctions directing parties to act or refrain from certain acts can suppress disfavoured expression. First Amendment challenges in the context of anti-abortion protests have given rise to a special rule that seems to demand slightly more rigorous examination of content-neutral injunctions than other content-neutral restrictions on expression: Valid injunctions may not '*burden ... more speech than necessary to serve a significant government interest.*' On this basis, the Supreme Court has provided detailed guidelines for injunctions which restrict assembly near health clinics, accepting as constitutional restrictions aimed at preventing physical obstruction or severe harassment which would prevent physical access."

"511. Other countries such as the U.S. designate '*frozen*' or '*buffer zones*' around polling places and certain buildings without an obvious political function such as schools, hospitals (in particular: abortion clinics) and private residences. However, the issue is constitutionally debated and the Supreme Court has rendered some decisions in which it has limited these zones, arguing that these constituted invalid content-based restrictions, failed to promote significant governmental interests, or were overbroad."

“601. In the case Plattform ‘Ärzte für das Leben’ v AUT the ECtHR dealt with the question, whether Art. 11 ‘impliedly required the State to protect demonstrations from those wishing to interfere with or disrupt them.’ The case was about an association of doctors, who intended to hold two demonstrations against abortions. Despite the presence of the police, the demonstrations were violently disrupted by counter-demonstrators. The Court came to the conclusion that even in the sphere of individuals positive action has to be taken by the Contracting States to ensure effectively the freedom of assembly. The participants of a demonstration must therefore be able to hold their assembly without being subjected to physical violence by their opponents. Consequently ‘in a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.’”

[CDL-AD\(2014\)024](#) *Comparative Study on National Legislation on Freedom of Peaceful Assembly*

“182. The legislator must bear in mind that the rights to freedom of expression and to freedom of association entitle associations to pursue objectives or conduct activities that are not always congruent with the opinions and beliefs of the majority or run precisely counter to them. Long-standing ECtHR jurisprudence holds that a vibrant democracy also implies the expression of views that may “offend, shock or disturb” the state or any sector of the population. This includes imparting information or ideas contesting the established order or advocating for a peaceful change of the Constitution or legislation by, for example, advocating for the decriminalization of abortion, asserting a minority consciousness, protecting the human rights of LGBTI people, calling for regional autonomy, or even requesting secession of part of the country’s territory. In any event, authorities need to avoid drawing hasty and negative conclusions about the proposed objectives of an association.”

[CDL-AD\(2014\)046](#) *Joint Guidelines on Freedom of Association*

III. Biometric Data

“56. A right of access to personal data held by a public agency is guaranteed in the fourth paragraph. The right of access to data may also include, under certain conditions, the right of access to data of other persons that are of direct interest to the person requesting access, e.g., data concerning the natural parent (donor of sperm) or DNA-data concerning a person accused of a sexual crime.”

[CDL-AD\(2005\)003](#) *Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia*

“48. Any discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. Moreover, the failure of the State to prevent or take steps in response to acts of discrimination committed by private individuals may also constitute a breach of the right to freedom from discrimination.”

[CDL-AD\(2010\)020](#) *OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd Edition)*

“161. Protocols for the stop and search, detention, or arrest of participants should be established: It is of paramount importance that States establish clear and prospective protocols for the lawful stop and search or arrest of participants in assemblies. Such protocols should provide guidance as to when such measures are appropriate and when they are not, how they should be conducted, and how individuals are to be dealt with following arrest. In drafting these protocols, regard should be had to international

jurisprudence concerning the right to private and family life, the right to liberty, and the right to freedom of movement. While mass arrests are to be avoided, there may be occasions involving public assemblies when numerous arrests are deemed necessary. However, large numbers of participants should not be deprived of their liberty simply because the law enforcement agencies do not have sufficient resources to effect individual arrests – adequate resourcing forms part of the positive obligation of participating States to protect the right to assemble (see paragraphs 31-34 and 104 above). The retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences must be strictly limited by law.”

[CDL-AD\(2010\)020](#) OSCE/ODIHR – *Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd Edition)*

“190. Some stop and search powers of the police are also used in relation to demonstrations and against peaceful protestors. The revised Law on the Duties and Powers of the Police of 14 June 2007 gave the police powers to carry out identity checks, to establish a bank of fingerprints and photographic identification of individuals, and to carry out preventive searches of public places. In cases where a delay might prove an obstacle, this power was granted to the police without the need for judicial authorization. Although in practice some of the stop and search powers were already extensively used by the police in demonstrations, this was the first time such provisions had been codified in the law.”

“Footnote n. 103 The retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences must be strictly limited by law, see *S. and Marper v. United Kingdom* (2008) in which the blanket and indiscriminate nature of powers concerning the retention of such data led the ECtHR to find a violation of Art. 8. The recording of such data and the systematic processing or permanent nature of the record kept may give rise to violations of privacy, *Perry v. the United Kingdom* (2003) at para. 38. Transferring this to freedom of assembly, it can amount to a chilling effect, seriously infringing the free exercise of this right, see also para. 161 of the OSCE guidelines for this issue, *supra* fn. 5.”

[CDL-AD\(2014\)024](#) *Comparative Study on National Legislation on Freedom of Peaceful Assembly*

“66. In the draft code, as submitted by the authorities on 18 April, a mechanism for electronically collecting the fingerprints of voters at polling stations is provided. The data collected will be checked for cases of potential multiple voting (Article 75.2). This could help to limit potential voter impersonation and multiple voting, if the system functions properly. The draft code does not clearly define the competences of the various state bodies involved in the collection, storage, and use of this personal biometric data, or the consequences of discovering cases of matching fingerprints. In any case, should any new technologies be introduced in the electoral process, a number of issues should be thoroughly considered, including a risk assessment of the costs, benefits and challenges of introducing such technologies, harmonisation of new provisions with existing data protection laws and standards, but also ensuring trust in the process, necessary check-ups and pilot procedures, proper procedures for procurement, public testing and certification of the equipment, contingency planning if the technology fails, sufficient efforts for training electoral staff, and effective awareness-raising among voters and political parties. *If new technologies are to be introduced, it is recommended that a gradual approach to the introduction of such technologies be adopted through pilots over the course of several elections, starting from the upcoming local elections. This would serve as an important measure to enhance confidence in the system and provide opportunities to address technical issues and ensure effective implementation.*”

[CDL-AD\(2016\)019](#) *Armenia – Joint Opinion on the Draft Electoral Code*

IV. Cloning

“37. Concerning cloning, it could be appropriate to use the formula of Article 1 of the Council of Europe Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, according to which ‘Any intervention seeking to create a human being genetically identical to another human being, whether living or dead, is prohibited.’”

[CDL-AD\(2007\)017](#) *Interim Opinion on the Draft Constitution of Montenegro*

V. Consent to Medical Examination

“63. Private life under Article 8 covers a person's moral and physical integrity, his privacy and the capacity of the individual to determine his or her identity. According to the ECtHR's case law, any medical intervention against the subject's will, or without the free, informed and express consent of the subject, constitutes an interference with his or her private life. For instance, a compulsory test of tuberculosis for children, or the administration of force-feeding or diamorphine to a seriously ill and handicapped child against the firm opposition of the mother to this form of treatment. In this context it must also be mentioned that questions concerning medically assisted procreation can also be regarded to fall within the ambit of Article 8 ECHR.”

[CDL-AD\(2014\)005](#) *Report on the Protection of Children's Rights: International standards and Domestic Constitutions*

VI. Medically Assisted Procreation

“63. Private life under Article 8 covers a person's moral and physical integrity, his privacy and the capacity of the individual to determine his or her identity. According to the ECtHR's case law, any medical intervention against the subject's will, or without the free, informed and express consent of the subject, constitutes an interference with his or her private life. For instance, a compulsory test of tuberculosis for children, or the administration of force-feeding or diamorphine to a seriously ill and handicapped child against the firm opposition of the mother to this form of treatment. In this context it must also be mentioned that questions concerning medically assisted procreation can also be regarded to fall within the ambit of Article 8 ECHR.”

[CDL-AD\(2014\)005](#) *Report on the Protection of Children's Rights: International Standards and Domestic Constitutions*

VII. Medical Confidentiality

“59. The deceased's family members' right to privacy is normally entitled to a lower level of protection – or can justify only lesser interferences in other persons' rights – than a living person's own privacy rights. For instance, in *Editions Plon v. France*, the ECtHR ruled that it is impermissible to prevent the publication of a book about the late President Mitterrand, even though the publication breached the duty of medical confidentiality towards the deceased: ‘[D]istribution of the book [...] soon after the [deceased's] death could only have intensified the legitimate emotions of the deceased's relatives, who inherited the rights vested in him [...]. [However,] in the Court's opinion, as the [deceased's] death became more distant in time, this factor became less important. Likewise, the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to

medical confidentiality'. The Court stressed that the book had been published in the context of a wide-ranging debate in France on a matter of public interest, in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether a person who knew that he was seriously ill was fit to hold the highest national office."

[CDL-AD\(2014\)040](#) *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*

VIII. Organ Transplants

"29. One may well argue that these concerns are irrational. But human rights are not limited to interests and beliefs that meet some strict rational test, as is evident, for instance, from the norms applicable in protecting freedom of religion. Indeed, almost any democratic system protects some interests and choices of the deceased. The most notable interest universally protected is the determination, in a will, of the material interests of the heirs of the deceased. Other notable protected interests include the right to make decisions about funerals, organ transplantation, and so forth. Personal interests of the author of a copyrighted work exist after the author's death. Thus, some interests transcend death."

[CDL-AD\(2014\)040](#) *Amicus Curiae Brief for the Constitutional Court of Georgia on the Question of the Defamation of the Deceased*

ANNEX**List of opinions and reports cited in the compilation**

- [CDL-AD\(2016\)019](#) *Armenia – Joint Opinion on the Draft Electoral Code*
- [CDL-AD\(2014\)005](#) *Report on the Protection of Children’s Rights: International Standards and Domestic Constitutions*
- [CDL-AD\(2014\)024](#) *Comparative Study on National Legislation on Freedom of Peaceful Assembly*
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