Essays

The Right to Know One's Genetic Origins: A Right in Need of Regulation

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Abstract

Leaving aside the evergreen ethical debate surrounding anonymous childbirth and donor insemination, this article analyses them adopting a fundamental rights approach.

This approach brings out the growing importance accorded by Italian courts to the right to know one's genetic origins, which calls into question the right to anonymity of the anonymous mother and the gamete donor. Faced with this irreconcilable tension, the legislature is called upon to rethink the regulation of anonymous childbirth and donor insemination so as to ensure a proper balance between the fundamental rights and interests of the persons concerned, in the light of the principles developed by both the Constitutional Court and the European Court of Human Rights.

I. Introduction

Family law is arguably one of the branches of law most exposed to evolution linked to socio-cultural changes.

In the last decades, the very notion of family itself underwent a rather radical evolution in the Italian legal order, as in many other Western legal systems, due to changing ethical standards and cultural values, as well as to scientific developments. The explosion of divorces and the legal recognition of same-sex civil partnerships multiply family configurations, whereas the development of assisted reproductive technology questions the traditional paradigm of parenthood.

In particular, in the establishment of parenthood the biological link is losing ground to the will of being parents. Bio-medical developments and the transformation of family give rise to a wide range of cases, from surrogacy and donor insemination to same-sex adoption, in which the normative weight of biological truth is diminished.

This does not mean, however, that biological truth has become completely irrelevant in law. Indeed, while the concept of family increasingly moved away from the paradigm of biological truth, the right to know one's biological origins asserted itself as the core of the fundamental right to personal identity.[1]

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[1] As remarked by G. Matucci, 'La dissoluzione del paradigma della verità della filiazione innanzi all'interesse concreto del minore (Nota a sent. Corte costituzionale 18 dicembre 2017 no 272)' *Forum di Quaderni Costituzionali*, 15 February 2018, 1-14, formerly, the ascertainment of

As it emerges from the jurisprudence of the Italian Constitutional Court:

> 'the legislative and systemic evolution of the concept of family, which has been such as to confirm the legal significance of the parent-child relationship as a social fact, even where it does not coincide with biological parentage, also features express recognition by this Court that 'the issue of genetic origin is not an essential prerequisite for the existence of a family'.[2]

Nonetheless, the Court expressly acknowledges that 'the biological facts relating to procreation constitute 'an essential component' of the child's personal identity, which contributes, alongside other components, to defining its content'.[3]

The right to know one's genetic origins was expressly recognized for the first time at the international law level by the United Nations Convention on the Rights of the Child of 1989,[4] and subsequently reiterated by the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993.[5]

Around the same years, the European Court of Human Rights (ECtHR) affirmed that the right to know one's origins, which is not explicitly mentioned in any of the provisions of the European Convention on Human Rights (ECHR), is an implied right under Art 8 (Right to respect for private and family life) of the Convention.

At the national law level, the Italian Constitutional Court first, in the late 1990s, acknowledged that the biological truth of procreation is an essential component of the child's personal identity in terms of a child's right to determine biological paternity;[6] then, it recognized the right to know one's genetic and biographical heritage among the substantive personality rights protected by the Constitution.

Against this background, the article identifies anonymous childbirth and donor insemination as two cases in which the exercise of the right to know one's genetic and biographical heritage is hindered by the principle of anonymity that underpins the regulation of these two legal institutions, and investigates how the courts managed to accommodate the competing interests involved through the chiaroscuro of Italian family law.

biological origins was first and foremost the expression of an objective requirement of the legal system to ensure the certainty of status; whereas today, it is the expression of a subjective need.

[2] See Corte costituzionale 18 December 2017 no 272, para 4.1.6 of Conclusions on points of law. English version available at www.cortecostituzionale.it

[3] ibid.

[4] See, in particular, Art 7, which prescribes that 'the child shall have (...) as far as possible, the right to know and be cared for by his or her parents'.

[5] Art 30 lays down an obligation upon the Contracting State to ensure that information held by them concerning the child's origin, in particular information concerning the identity of his or her parents, is preserved, and made accessible to the child, or his or her representative, under appropriate guidance, in so far as is permitted by the law of that State.

[6] See, Corte costituzionale 14 May 1999 no 170, especially para 4 of Conclusions on points of law, available at www.cortecostituzionale.it

II. The Family as a Point of Fact

Art 29, para 1, of the Italian Constitution recognises 'the family as a natural society founded on marriage'.

The family that the members of the Constituent Assembly had in mind was the traditional one, consisting of two parents, of different sexes, and the biologically-related children under their care.[7]

However, today, in interpreting the concept of family to decide which individual interests and inter-personal relationships deserve protection, Italian courts and the legislature shall also take into account international sources of law, as required by Art 117, para 1, of the Constitution. Among the latter, the ECHR is, unquestionably, of significant relevance to the issues covered by this study.[8]

The ECHR contains two articles that deal directly with family issues: Art 12, which guarantees the right to marry and found a family, and Art 8, which protects everyone's right to his private and family life, his home and his correspondence.

The ECtHR has, so far, abstained from giving a general definition of the concept of 'family'. Indeed, within the ECtHR case law on Art 8, the notion of 'family life' is an autonomous concept,[9] essentially based upon the actual existence in practice of close personal ties. Therefore, following the autonomous concepts doctrine, the Court does not look for a definition of family, but focuses on the different factors, to be appreciated in the light of the circumstances of each given case, that come into play to measure the strength of personal ties.[10]

The ECtHR has consistently stressed that the question of the existence of a family life is first and foremost a point of fact, which depends on the establishment of close personal ties, not limited only to relationships based on marriage.[11]

[7] Indeed, it was based on the notion of marriage as defined by the Civil Code of 1942, which only allowed (and still allows) marriage between two persons of a different sex. During the preparatory work of the Constitution there was considerable discussion on the opportunity to provide for the indissolubility of marriage, in order to bar the introduction of divorce in the national legal order. However, the opinion of those who considered that the decision on the indissolubility of marriage was a matter of legislative policy to be left to the ordinary legislator prevailed. The issue of same-sex unions, on the contrary, was not debated at all. See V. Falzone et al, *La Costituzione della Repubblica Italiana illustrata con i lavori preparatori* (Roma: Colombo, 1948), 65.

[8] It is sufficient here to recall that the Constitutional Court has consistently affirmed that the ECHR, as interpreted by the ECtHR, may serve as a constitutional parameter in the judicial review of national legislation. See Corte costituzionale 24 October 2007 nos 348 and 349. English version available at www.cortecostituzionale.it.

[9] See L.A. Sicilianos, 'La 'vie familiale' en tant que notion autonome au regard de la CEDH', in J. Casadevall et al eds, *Mélanges en l'honneur de Dean Spielmann* (Oisterwijk: Wolf Legal Publishers, 2015), 595-602.

[10] As noted by G. Letsas, 'The Truth in Autonomous Concepts: How To Interpret the ECHR' *European Journal of International Law*, 291, 279-305 (2004), the autonomous concepts doctrine embraced by the ECtHR is based on 'the idea that in legal practice there are no shared-criteria or ready-made definitions', which entails a case-by-case approach.

[11] Eur. Court H.R. (GC), *Paradiso and Campanelli* v *Italy*, Judgment of 24 January 2017, available at www.hudoc.echr.coe.int. See especially para 140, where the Grand Chamber made

The importance accorded by the ECtHR to *de facto* ties does not, however, mean that the legal aspects of a case are irrelevant in deciding whether a given relationship between two or more persons falls within the scope of the family life limb of Art 8. Thus, for instance, with regard to cases in which the relationship at issue is not based on a biological link, the ECtHR refers to the conformity of the applicants' conduct with the law as a factor to be considered in order to ascertain whether a *de facto* family life exists.[12]

In a very different scenario, legal aspects outweighed the factual ones in the *Evers* case.[13] In this case, the applicant relied on Art 8 to challenge national authorities ban to contact V, the mentally disabled daughter of his former partner and with whom he fathered a child, maintaining that he and V constituted a family as they were indeed a couple with a common child.

The ECtHR resorted to findings of domestic courts stating that V was incapable of acting in law and V's child was the result of a severe violation of V's personality rights, to conclude that the relationship between the applicant and V did not 'constitute a family link which would fall under the protection of Art 8 of the Convention under its 'family life' head'.[14]

Therefore, we can conclude that family life is first and foremost a point of fact, however de facto interpersonal ties are protected as long as they comply with domestic legislation aimed at protecting the rights of the person.

Furthermore, from this excursus on the ECtHR case-law, we can also conclude that marriage and biology are only two out of a variety of legal determinants of family and parentage.[15]

clear that: 'The notion of 'family' in Art 8 concerns marriage-based relationships, and also other *de facto* 'family ties' where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy'. The case at issue concerned the removal, by Italian authorities, of a child born abroad as a result of a surrogacy arrangement that was (and even today is) unlawful under Italian law, and brought to Italy by the applicants acting outside any standard adoption procedure. The ECtHR concluded that the conditions enabling a recognition of a *de facto* family life had not been met, by pointing out, in particular: the absence of any biological tie between the child and the intended parents, the short duration (less then a year) of the relationship between the applicants and the child, and, finally, the uncertainty of the ties from a legal perspective. Five out the seventeen judges of the Grand Chamber however expressed a different view in their dissenting opinion attached to the judgement, and maintained that despite the relatively short period of cohabitation, the applicants had acted as parents towards the child and, therefore, their relationship amounted to a *de facto* family life.

[12] See para 156, *Paradiso and Campanelli,* v *Italy*, above, in which the Court distinguished the case at stake from similar cases pointing out that the applicants engaged in conduct that was contrary to Italian law, whereas in the other cases therein mentioned the child's placement with the applicants was recognized or, at least, tolerated by national authorities.

[13] Eur. Court H.R., *Evers* v *Germany* Judgment of 28 May 2020, available at www.hudoc.echr.coe.int.

[14] ibid, para 58.

[15] For a more exhaustive illustration of which interpersonal relationships may be regarded as 'family life' attracting the protection of Art 8 of the ECHR, see D. Coester-Waltjen, 'The Impact of the European Convention on Human Rights and the European Court of Human Rights on European Family Law', in J.M. Scherpe ed, *European Family Law. The Impact of Institutions*

With regard to the Italian legal order, it appears that the influence of the ECtHR jurisprudence on the evolution of family law is twofold: on one hand, it paves the way for the protection of non-traditional families,[16] on the other it fosters the recognition of new fundamental rights impinging upon family ties.[17]

III. The Right to Know One's Genetic and Biographical Heritage as a Fundamental Constitutional Right

In the text of the 1942 Civil Code personality rights found a very marginal place in Arts 5 (right to bodily integrity), 6 (right to a name) and 10 (right to the protection of one's image), which protect those attributes of personality that are susceptible to economic exploitation.

The reason for this is that throughout the first half of the 20th century, the thinking on personality rights was strongly influenced by a dogmatic approach that hindered their inclusion in the category of subjective rights. Personality components, such as one's name and image, therefore, were not considered as objects of subjective rights, but rather as the prerequisite of a right to stop harmful behaviour and obtain compensation for the damage suffered.[18]

A gradual paradigm shift in the interpretation of the Civil Code – and civil law in general – from a purely economic standpoint to one based on personalism and solidarity, was, first and foremost, the result of the entry into force of the Constitution in 1948.[19] As a matter of fact, from the second half of the 20th century, Italian courts and the legislature began to shape civil law rules within the axiological constitutional framework, developing at the same time a greater awareness about threats to individual freedom and dignity posed by private parties.

and Organisations on European Family Law, (Cheltenham-Northampton: Edward Elgar, 2016), I.

[16] For an analysis of the actual contribution of the ECtHR case law to the development of new family models, and the recognition and protection of personal ties not falling within the traditional family concept, see A. Nocco, 'Il diritto di essere figlio di due mamme: come la CEDU aiuta i giudici a (in)seguire le trasformazioni della famiglia' *Minorigiustizia*, 129-135 (2015); M.C. Zarro, '*Gli effetti sul diritto civile del dialogo tra Corte EDU e Corte costituzionale con particolare riferimento alle relazioni familiari e alla filiazione' Rassegna di diritto civile*, 256-288 (2018).

[17] For a narrative of the evolution of family law rules in the light of the legal recognition of new (fundamental) rights, such as the right to change sex, the right of access to medically assisted procreation techniques, and so forth, see, V. Scalisi, 'Le stagioni della famiglia nel diritto dall'unità d'Italia a oggi' *Rivista di diritto civile*, II, 1287-1318 (2013).

[18] Cf G. Pino, 'Teorie e dottrine dei diritti della personalità. Uno studio di meta-giurisprudenza analitica' *Materiali per una storia della cultura giuridica*, 250, 237-274 (2003).

[19] The incorporation of constitutional values into civil law had a revolutionary effect as stressed by A. Proto Pisani, 'La tutela giurisdizionale dei diritti della personalità: strumenti e tecniche di tutela' *Il Foro Italiano*, 19/20, (1990), remarking that: 'la scelta costituzionale di attribuire alla persona valore centrale nel nostro ordinamento (...) ha determinato una vera e propria rivoluzione copernicana nel sistema dei diritti privati' (the Constituent Assembly's decision to recognize the primacy of the person in our legal system (...) has led to a real Copernican revolution in the system of private rights).

This new awareness and legal culture centred on the person, rather than on property, has been fostered by the proliferation of international and supranational human rights law, as well as by the dynamics of cross-fertilization and dialogue among court belonging to different legal systems.[20]

These changes have paved the way for the development, in the Italian legal culture, of the category of personality rights as an autonomous category, to which the right to know one's genetic origins -as a facet of the right to personal identity- also belongs.

The Italian Constitutional Court referred, for the first time, to the right to personal identity as one of the rights that form the 'irretrievable heritage of the human person' protected by Art 2 of the Constitution, in the 1990s. The very first decision dealt with the protection of a person's surname.[21] In this case, the Court acknowledged that the surname should enjoy special protection as it is a means of personal identification, and, as such, it constitutes an essential and inalienable component of one's personality.

This ruling inaugurated a jurisprudential orientation that gave increasing importance to the right to personal identity[22] and that culminated in the affirmation of the child's right to know his or her origins and to have access to his or her parental history, as a 'significant element within the constitutional system ensuring protection for the person'.[23]

In its case law, the Constitutional Court has developed, over the years, a broad conception of the right to personal identity, including therein the protection of *de facto* (and intended) family relations, while affirming the primary and inviolable interest of knowing one's biological identity and parentage.

From a substantive point of view, the right to know one's biological and biographical origins as it resulted from the Constitutional Court case law is consistent with that worked out by the ECtHR, on the basis of Art 8 of the ECHR.

Within ECHR law, the right to know one's biological and biographical origins achieved recognition under the notion of the right to private life, at first as everyone's right to establish details of his or her identity as an individual human being.[24]

[20] Cf G. Palmeri, 'I diritti emergenti della persona', in L. Vacca ed, *Il Codice Civile ha 70 anni ma non li dimostra* (Napoli: Jovene, 2016), 25-37.

[21] Corte costituzionale 3 February 1994 no 13, para 5.1 of Conclusions on points of law, available at https://www.cortecostituzionale.it. The Court declared the unconstitutionality of the legislation on civil status records in so far as it did not recognize to a person, in the event of the rectification of civil status documents for reasons not attributable to him, the right to retain his original surname, which was to be regarded as a distinguishing feature of his personal identity.

[22] For a study on the jurisprudential evolution of, and the doctrinal debate on, the right to personal identity, see G. Pino, *Il diritto all'identità personale: interpretazione costituzionale e creatività giurisprudenziale* (Bologna: il Mulino, 2003).

[23] See Corte costituzionale 22 November 2013 no 278, para 4 of Conclusions on points of law. English version, available at www.cortecostituzionale.it.

[24] Eur. Court H.R., *Gaskin* v *The United Kingdom*, Decision of 13 November 1987, available at www.hudoc.echr.coe.int. The case concerned the applicant's claim to access public care records containing information about his past.

Subsequently, the ECtHR referred expressly to the interest of knowing the truth about the identity of one's parents as a 'vital interest' of every human being.[25]

The corresponding right is framed by the ECtHR as a claim to be entitled, in the name of biological truth, to know one's personal history by gaining access to information about his or her origins and related identifying data.[26] Such a right is not absolute, and it has to be weighed in concrete cases against countervailing fundamental rights of third parties and/or the public interest. Therefore, States enjoy a certain margin of appreciation in accommodating competing rights and interests underlying claims to know one's biological and biographical origins.

As a matter of fact, since the margin of appreciation doctrine is a variable geometry doctrine, it is difficult to forecast the precise discretion left to States. On the basis of the ECtHR case law, if we consider the right to know one's genetic origins as a particularly important facet of an individual's existence or identity, we can maintain that the margin allowed to the State will be narrow; but keeping in mind that the margin will be wider where the case raises sensitive moral or ethical issues.[27]

IV. Anonymous Childbirth is Tested Constitutionality

The Italian legislature took into consideration the right to know one's origins when it reformed the legislation on adoption in 2001,[28] and then again in 2003.[29] As a result of these reforms, the right to access information concerning one's origins and the identity of one's biological parents is today recognised to: a. adoptees over the age of twenty-five; b. adoptees over the age of majority when there are serious and proven reasons concerning their psycho-physical health; c. minors when there are serious and proven reasons.[30] An exception is however provided

[25] Eur. Court H.R. (GC), *Odièvre* v *France*, Judgment of 13 February 2003, para 29, available at www.hudoc.echr.coe.int. For an analysis of the ECtHR case law on this subject matter, see R.J. Blauwhoff, *Foundational Facts, Relative Truths. A Comparative Law Study on Children's Right to know their Genetic Origins* (Antwerp-Oxford-Portland: Intersentia, 2009) 64-100; V. Lorubbio, *The Best Interests of the Child tra Europa e America Latina: emersioni giurisprudenziali comparate* (Torino: Giappichelli, 2021), 43-52.

[26] Cf Eur. Court H.R. (GC), *Odièvre* v *France*, n 26 above, especially para 28.

[27] Cf Eur. Court H.R. (GC), *Dubská and Krejzová* v *the Czech Republic*, Judgment of 15 November 2016, especially para 178, available at www.hudoc.echr.coe.int.

[28] In Italy adoption is regulated by legge 4 May 1983 no 184. The original text of this statute did not contain any rules dealing with the access by adoptees to information concerning the identity of their biological parents. The statute was amended in 2001 by legge 28 March 2001 no 149 that introduced rules allowing adoptees access to data concerning their biological parents, subject to authorisation by the Juvenile Court. The possibility for an adoptee to know the identity of his or her biological parents was, however, excluded if one of the parents had declared that he or she did not wish to be named, or had expressed consent to the adoption on condition that he or she will remain anonymous.

[29] See decreto legislativo 30 June 2003 no 196.

[30] In a recent judgment the Court of Cassation by adopting a teleological interpretation of

with regard to the identity of women who opted for anonymous birth.[31] Allowing this exception, the legislature held on to the principle of absolute anonymity that informs the legal institution of anonymous birth.

Italy is one of the few countries where anonymous birth is legally accepted.[32] More specifically, Art 30 of decreto del Presidente della Repubblica 3 November 2000 no 396, recognizes the right of a woman, regardless of her marital status,[33] to give birth in anonymity, except for the mother of a child born as a result of medically assisted procreation techniques.[34]

To make effective this right the legislation establishes a one-hundred-year ban on the release of a full copy of the medical records relating to the birth, where they include personal data identifying the mother who has opted to give birth anonymously.[35] Furthermore, the rules governing the adoptee's right of access to information concerning his or her origin and the identity of his or her biological parents expressly exclude access to information with regard to the anonymous mother.[36]

This regulation presents critical issues that undermine both its conformity with the ECHR and its constitutionality, as declared by both the ECtHR and the Constitutional Court.

The ECHR in itself does not prevent a State from allowing the practice of anonymous birth,[37] but the ECtHR has set the boundaries of the margin of

the article that regulates the right to know one's genetic origins -namely Art 28, paras 4 and 5 of legge no 184 of 1983-, extended its scope as to include the identity of any adult biological siblings, provided that he or she consents to the disclosure of his or her identity. See Corte di Cassazione 20 March 2018 no 6963, available at https://tinyurl.com/2p88dpy3 (last visited 31 December 2021). For comments see, A. Cocco, 'Do Adopted Children Have a Right to Know Their Biological Siblings?' *The Italian Law Journal*, 531-546 (2018); J. Long, 'L'adottato adulto ha diritto a conoscere l'identità dei fratelli biologici, se essi vi consentono' *La nuova giurisprudenza civile commentata*, 1227-1234 (2018).

[31] See, Art 28 of legge 4 May 1983 no 184.

[32] For a comparative overview on which countries, and to what extent their legislation, enable pregnant women to give birth under anonymity and to retain anonymity, see J. Sosson, et al, *Adults and Children in Postmodern Societies. A Comparative Law and Multidisciplinary Handbook* (Cambridge-Antwerp-Chicago: Intersentia, 2019). For an exhaustive explanation of the Italian anonymous childbirth legislation, see A. Vesto, *La maternità tra regole, divieti e plurigenitorialità. Fecondazione assistita, maternità surrogata, parto anonimo* (Torino: Giappichelli, 2018), 185-231.

[33] This interpretation is corroborated by an *obiter dictum* of the Constitutional Court in which it stated that any woman giving birth has the right to declare that she does not wish to be named in the birth certificate, even when the circumstances suggest that she is married. See Corte costituzionale 5 May 1994 no 171, para 5 of Conclusions on points of law, available at www.cortecostituzionale.it.

[34] See Art 9, para 2, legge 19 February 2004 no 40.

[35] See Art 93, para 2, decreto legislativo 30 June 2003 no 196. During that period, the request for access to the medical records may however be granted, taking appropriate precautions to avoid the mother being identified.

[36] See Art 28, para 7, legge 4 May 1983 no 184.

[37] Eur. Court H.R. (GC), *Odièvre* v *France* n 26 above, in which the Court found that the French system of anonymous birth complied with the Convention. The French regulation of anonymous childbirth differs from the Italian one as it provides for the woman who gives birth

appreciation enjoyed by the State in balancing the conflicting interests of the mother, who asked to remain anonymous, and the child, who wishes to know his or her biological origins.

The Italian regulation does not, according to the ECtHR, respect those boundaries, as it does not guarantee any balance between the interests of the anonymous mother and those of the child. This is the ground on which the ECtHR based its ruling in the *Godelli* v *Italy* case, in which it condemned Italian law for not providing the applicant -a woman born of an anonymous mother- for the opportunity to have her mother contacted to verify whether she wanted to maintain her anonymity.

Indeed, in its decision the Court stressed the fact that, once a woman opts for giving birth anonymously, she is not given, under Italian law, any possibility to change her mind later and withdraw anonymity.[38]

The irreversibility of the mother's choice for anonymity at the time of the birth had already been challenged, some years earlier, before the Italian Constitutional Court, which defended the contested regulation maintaining that it was the result of a reasonable comparative assessment of the fundamental rights at stake. Indeed, according to the Constitutional Court, only the irreversibility of anonymity could effectively guarantee that the birth takes place in optimal conditions for both the mother and the child.[39]

anonymously the option of breaching, at any time, the secret about her identity, allowing the child to have access to it. Seven out of the seventeen judges of the Grand Chamber, did not, however, agree with the view of the majority according to which an appropriate balance had been struck between the mother's right to privacy and the right of the child to have information on his or her origins. Indeed, in their joint dissenting opinion they stressed that: 'the mother's refusal is definitively binding on the child, who has no legal means at its disposal to challenge the mother's unilateral decision. The mother thus has a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance'.

[38] Eur. Court H.R., *Godelli* v *Italy* Judgment of 25 September 2012, available at www.hudoc.echr.coe.int. The ECtHR finally found a violation of Art 8 ECHR, on the ground that 'the Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded' (para 58 of the judgment). This judgment has been widely commented upon by scholars, who have expressed opposing view on the legitimacy of the institution of anonymous childbirth in itself. According to some authors, the ECtHR should take into consideration the approach developed by the Committee of the Rights of the Child, which has consistently condemned States that practise systems of anonymous birth. Others defend that practice by pointing out -as did the ECtHR judge András Sajó in his dissenting opinion in *Godelli* v *Italy*- that the possibility of giving birth anonymously allows the State to fulfil its obligation to protect the right to life, granted by Art 2 ECHR, which could here be declined as the right to give birth and to be born in safe conditions. For the first opinion, see C. Simmonds, 'An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights' 72 *The Cambridge Law Journal*, 263-266 (2013); for the second opinion, see M. Cesare, 'Il parto in anonimato al vaglio della Corte Europea dei Diritti: una condanna davvero convincente?' *Rivista AIC*, 20 November 2012, 1-5.

[39] Corte costituzionale 25 November 2005 no 425, available at www.cortecostituzionale.it. For comments, see: A. O. Cozzi, 'La Corte costituzionale e il diritto di conoscere le proprie origini in caso di parto anonimo: un bilanciamento diverso da quello della Corte europea dei diritti dell'uomo?' *Giurisprudenza costituzionale*, 4602-4611(2005); F. Eramo, 'Il diritto all'anonimato

The same issue has been brought before the Constitutional Court again in 2013, and this time the Court reversed its previous decision, expressly referring to the ECtHR case law.[40]

This time the Constitutional Court acknowledged the excessive rigidity of the provision establishing the irrevocable mother's right to anonymity. In particular, it pointed out that:

> 'whilst the choice to remain anonymous legitimately prevents the establishment of "legal parenthood", which inevitably creates stability for the future, it does not appear to be reasonable that such a choice must necessarily and definitively exclude also a relationship of "biological parenthood": this is because, as regards the latter, the choice may be revocable (on the initiative of the child), precisely because it reflects the reasons why the choice was made and may be maintained'.[41]

della madre partoriente' *Famiglia e diritto*, 130-134 (2006); J. Long, 'Diritto dell'adottato di conoscere le proprie origini: costituzionalmente legittimi i limiti nel caso di parto anonimo' *La nuova giurisprudenza civile commentata*, 549-560 (2006); L. Trucco, 'Anonimato della madre 'versus' 'identità' del figlio davanti alla Corte costituzionale' *Il diritto dell'informazione e dell'informatica*, 107-120 (2006).

[40] Corte costituzionale 22 November 2013 no 278, available at www.cortecostituzionale.it. For comments, see: A. Ambrosi, 'Interesse dell'adottato a conoscere l'identità della madre biologica versus interesse della madre all'anonimato: un nuovo punto di equilibrio' *Studium iuris*, 667-675 (2014); T. Auletta, 'Sul diritto dell'adottato di conoscere la propria storia: un'occasione per ripensare alla disciplina della materia' *Il Corriere giuridico*, 473-487 (2014); B. Barbisan, 'Apprendimento e resistenze nel dialogo fra Corte costituzionale e Corte di Strasburgo: il caso del diritto all'anonimato della madre naturale', available at www.diritticomparati.it, 9 May 2016, 1-13; V. Carbone, 'Un passo avanti del diritto del figlio, abbandonato e adottato, di conoscere le sue origini rispetto all'anonimato materno' *Famiglia e diritto*, 15, 11-23 (2014); G. Casaburi, 'Il parto anonimo dalla ruota degli esposti al diritto alla conoscenza delle origini' *Il Foro Italiano*, 8-19 (2014); B. Checchini, 'Anonimato materno e diritto dell'adottato alla conoscenza delle proprie origini' *Rivista di diritto civile*, 709-725 (2014); S. Favalli, 'Parto anonimo e diritto a conoscere le proprie origini: un dialogo decennale fra CEDU e Corte costituzionale italiana', available at www.forumcostituzionale.it, 9 December 2013, 1-10; E. Frontoni, 'Il diritto del figlio a conoscere le proprie origini tra Corte EDU e Corte costituzionale. Nota a prima lettura sul mancato ricorso all'art. 117, primo comma, Cost., nella sentenza della Corte costituzionale n. 278 del 2013', available at www.osservatorioaic.it, December 2013, 1-8; G. Lisella, 'Volontà della madre biologica di non essere nominata nella dichiarazione di nascita e diritto dell'adottato di conoscere le proprie origini' *Il diritto di famiglia e delle persone*, I, 27, 13-39 (2014); J. Long, 'Adozione e segreti: costituzionalmente illegittima l'irreversibilità dell'anonimato del parto' *La nuova giurisprudenza civile commentata*, I, 285, 289-296 (2014); V. Marcenò, 'Quando da un dispositivo d'incostituzionalità possono derivare incertezze' *La nuova giurisprudenza civile commentata*, 279-289 (2014); M.G. Stanzione, 'Identità del figlio e diritto di conoscere le proprie origini' *Famiglia e diritto* 190-198 (2015); S. Stefanelli, 'Reversibilità del segreto della partoriente e accertamento della filiazione' *Giurisprudenza costituzionale*, 4031-4056 (2013); S. Taccini, 'Verità e segreto nella vicenda dell'adozione: il contributo della Corte costituzionale' *Le nuove leggi civili commentate*, 405-442 (2014); L. Trovato, 'Il desiderio di conoscere le proprie origini. Un diritto irrinunciabile, secondo la sentenza della Corte costituzionale n. 278/2013' *Questione giustizia*, 214-228 (2013); F. Zanovello, 'Anonimato materno e diritto dell'adottato a conoscere le proprie origini: la parola al legislatore' *Studium iuris*, 1183-1191 (2019).

[41] See Corte costituzionale 22 November 2013 no 278, para 5 of Conclusions on points of

The Constitutional Court, therefore, declared the unconstitutionality of Art 28 para 7 of Legge 4 May 1983 no 184 as far as it did not provide for a procedure enabling the judge to contact the anonymous mother, at the request of the adopted child, for a possible withdrawal of anonymity, through a process regulated by law and ensuring maximum confidentiality to the mother.

V. The Italian Supreme Court as Surrogate Legislature

According to constitutional rules, the pieces of legislation that are declared unconstitutional cease to have effect from the day following the publication of the decision, and thus they can no longer be applied.[42]

Although several years have passed since the ruling of the Constitutional Court no 278 of 2013 declaring Art 28 para 7 of Legge no 184 of 4 May 1983 partly unconstitutional, the article has not yet been amended by the legislature.[43] Therefore, since November 23rd, 2013 Italian courts have had to decide on the requests to disclose the identity of their biological mothers, brought by adopted persons born of anonymous mothers, in a legislative vacuum.

Against this legislative gap, first instance and appeal courts developed contrasting solutions: some courts decided to consult the anonymous mother and ask her consent to the disclosure of her identity; others, on the contrary, held that they had to wait for the intervention of the legislature.

This contrast has been resolved by the Joined Chambers of the Court of Cassation with the ruling no 1946 of 2017, which has recognized to ordinary courts the power to consult anonymous mothers to ask whether they intend to remain anonymous.[44]

The Court of Cassation took care to clearly and precisely delimit the scope of action of the ordinary courts, reminding them of the difference between their powers and those of the legislature. Based on the assumption that the Constitutional Court judgment of 2013 is an 'additive judgment',[45] the Court of Cassation stated that the ordinary courts are called upon to seek the rule to apply to the specific

law. English version available at www.cortecostituzionale.it.

[42] See Art 136 of the Constitution and Art 30 para 3 of legge 11 March 1953 no 87.

[43] Actually a draft bill was submitted to Parliament on 19 June 2015 but the parliamentary term ended before the bill became law. The text of the bill is available at www.senato.it.

[44] Corte di Cassazione-Sezioni unite 25 January 2017 no 1946. For comments, see: P. Di Marzio, 'Parto anonimo e diritto alla conoscenza delle origini' *Famiglia e Diritto*, 740-755 (2017); M. N. Bugetti, 'Sul difficile equilibrio tra anonimato materno e diritto alla conoscenza delle proprie origini: l'intervento delle sezioni unite' *Corriere giuridico*, 624-634 (2017); J. Mineo, 'Parto anonimo e diritto a conoscere le proprie origini: le Sezioni Unite dettano le concrete modalità di azione in seguito all'intervento della Corte costituzionale' *Il Diritto di Famiglia e delle Persone*, 435, 413-452 (2018).

[45] The so-called 'additive judgments' (*sentenze additive*) are rulings where the Constitutional Court declaration of unconstitutionality concern an omission of the legislature, namely a provision is declared unconstitutional not because of what it provides for, but rather for what it does not provide for.

case within the applicable law - of which the binding principle declared by the Constitutional Court in its additive ruling is also a part -, while leaving the legislature with the task to establish a general discipline. Indeed, according to the Court of Cassation, Constitutional Court additive judgments play a dual function: on the one hand, they provide guidance to the legislature in remedying the unconstitutional omission; on the other hand, they guide ordinary courts in identifying the rules that can be applied in the medium term, extrapolating them from the existing general legal framework and from the principle set out in the additive judgment itself.

Thus, to draw the conclusions from the Court of Cassation judgment, awaiting for the revision of the existing legislation, ordinary courts must grant to adopted persons born of anonymous mothers, the right to consult them to inquire about the possibility to allow their identity to be revealed to their biological children.[46]

If the anonymous mother confirms her wish to remain anonymous, her identity cannot be revealed to the child who asked for it and the latter cannot make the request again in the future. In other words, the adoptee's right to know his or her biological origins meets an insurmountable limit in the will of the anonymous mother.

In conclusion, it appears that the Court of Cassation acted as a surrogate legislature by identifying itself the principles that shall guide the exercise of the right to consult the anonymous mother about a possible withdrawal of anonymity, without limiting itself to the analogical application of existing rules.

This attitude of the Italian Supreme Court also emerges from the decisions concerning the right to know the identity of the biological mother after she is dead*, that are* discussed below.

VI. The Enforcement of the Right to Know One's Genetic Origins after the Death of the Anonymous Mother

The Joined Sections of the Court of Cassation to support, in the above discussed judgment, the adoptee's right to consult the biological mother who opted for anonymous birth, put forward an argument based on its case law allowing adopted persons to know the identity of their biological mother after her death.

In two judgments delivered in 2016, the Court of Cassation affirmed that, after the death of the mother, the interest in protecting her anonymity no longer prevails over the child's right to know his or her biological origins.[47] More precisely,

[46] For this purpose ordinary courts may have recourse to the procedure provided for by the legislation on adoption applied to disclose the identity of biological parents to adult adoptees, in cases where the mother did not opt for anonymity. See, Art 28 paras 5 and 6, legge 04 May 1983 no 184. Based on this article, some courts have adopted their own guidelines, see for instance, those of the Juvenile Court of Emilia-Romagna, available at www.tribmin.bologna.giustizia.it.

[47] See, Corte di Cassazione - I 21 July 2016 no 15024 available at https://tinyurl.com/2x3fmehc (last visited 31 December 2021) and 09 November 2016 no 22838 available at

the Court stressed that the assessment of the actual relevance of anonymity plays a central role in ensuring the equilibrium between the competing interests at stake; consequently, the reversibility of anonymity is a condition of legitimacy of the institution of anonymous childbirth as such. It follows that given the impossibility to verify the actual will of the mother, due to her unavailability or death, the choice for anonymity cannot be crystallised, since this would lead, on the one hand, to the definitive extinction of the child's fundamental right to know his or her genetic origins and, on the other, to an unjustified difference in treatment between children born of women who have chosen to be anonymous but are no longer alive, and children of women who can be questioned about the choice for anonymity made when giving birth.

Furthermore, the mother's right to anonymity is a personal and inalienable right and, as such, it expires at her death, without prejudice to her social identity.

To sum up, the Court of Cassation ruled that the right of the adopted person - born of a woman who opted for anonymous birth - to have access to information concerning her or his origins and the identity of her or his biological mother may be enforced after the latter's death, without prejudice to the rights to image and reputation and other interests of primary constitutional importance of any third parties concerned (descendants and/or relatives of the woman).

These judgments paved the way for the Court of Cassation to declare, in a subsequent case, the admissibility of the action to establish maternity brought by a man born of an anonymous mother, who was not given up for adoption.[48]

To decide the case, the Court resorted to the balancing approach. It considered the plaintiff's interest in ascertaining a status filiationis corresponding to the biological truth as an essential component of his -constitutionally protected- right to personal identity. This interest, reasoned the Court, as important as it can be, shall nonetheless be balanced against the mother's right to remain anonymous, which is aimed to guarantee other constitutionally protected values, especially life and health.

Following the reasoning of the Court of Cassation, the death of the mother is to be seen as a decisive factor when it comes to tip the scale between these

https://tinyurl.com/2p8kx2r6 (last visited 31 December 2021). For comments, see: E. Andreola, 'Accesso alle informazioni sulla nascita e morte della madre anonima' *Famiglia e Diritto,* 15-32 (2017); V. Carbone, 'Con la morte della madre al figlio non è più opponibile l'anonimato: i giudici di merito e la Cassazione a confronto' *Corriere giuridico,* 29-38 (2017); M.G. Stanzione, 'Scelta della madre per l'anonimato e diritto dell'adottato a conoscere le proprie origini' *La nuova giurisprudenza civile commentata,* 319-329 (2017).

[48] Corte di Cassazione 22 September 2020 no 19824, available at www.cortedicassazione.it. For comments see, M. N. Bugetti, 'L'accertamento della maternità nei confronti della madre che si sia avvalsa dell'anonimato' *Corriere giuridico,* 1478-1482 (2020); A. Mendola, 'Azione di accertamento dello stato di figlio e limiti al diritto all'anonimato materno' *Famiglia e Diritto,* 163-173 (2021); C. Ingenito, 'Il diritto all'identità dei figli in due recenti pronunce della Corte Costituzionale e della Corte di Cassazione' *BioLaw Journal-Rivista di BioDiritto,* 337-358 (2021). It is important to stress that the fact that the child born of an anonymous mother had not been adopted is conclusive, as adoption removes all the legal effects of biological filiation.

competing interests: indeed, the mother's right to anonymity may in no way be sacrificed or curtailed during her lifetime; whereas, with regard to the period after her death, it may be curtailed or weakened in order to provide full protection for the child's right to ascertain his or her parentage.

Such an accommodation of the mother's and child's competing interests effectively means that the protection of the rights of the heirs and descendants of the woman who has opted for anonymity must also avoid impeding the rights of the child who claims his or her status.

Accordingly, in the present case, the fact that the action for the ascertainment of maternity was brought after the death of the mother was one out of two fundamental grounds for declaring the admissibility of the action. The other ground concerned the behaviour of the mother who, despite choosing to remain anonymous, had treated the child as her own, and this filial relationship was also known within the circle of her social relations.

The judgment of the Court of Cassation should be view favourably as far as it fills a gap in the law, which makes no provision on the effect of the choice for anonymity with regard to the admissibility of actions aimed at the recognition of legal maternity for the case in which the unadopted child of an anonymous mother becomes aware of her identity.[49] However the application by analogy of the principle about the weakening the mother's right to anonymity after her death, developed by the same Court in the above-mentioned judgments delivered in 2016, is open to criticism. Indeed, as it has already been noted by others, the subject-matter of the cases is different (knowledge of one's origins, on the one hand, and the establishment of parenthood, on the other), and therefore the rules applied in one case cannot be applied by analogy to the other. As a matter of fact, the cases appear to be antithetical: the 2016 judgments concern persons who are precluded from having their biological parentage established (since they are adopted children) and who wish to know the identity of their respective biological mothers, who are unknown to them; the 2020 judgment, on the other hand, concerns a person who knows the identity of his mother and wishes to have his parentage established.[50]

[49] In the silence of the law, the Tribunale di Milano rejected an action for judicial declaration of maternity brought by a woman born of anonymous childbirth, and that had been recognised by her biological father, who disclosed to her the identity of the biological mother. The Tribunale indeed declared the plaintiff's application inadmissible, stressing the need to comply with the twofold rationale behind the institution of anonymous childbirth, namely the need to safeguard the legitimate family and the honour of the mother, on the one hand, and to prevent recourse to abortion or infanticide in order to avoid unwanted births, on the other. See, Tribunale di Milano, 14 October 2015 no 11475, available at www.biodiritto.org. For comments see, M. N. Bugetti, 'Sull'esperibilità delle azioni ex artt. 269 e 279 c.c. nei confronti della madre che abbia partorito nell'anonimato' *Famiglia e Diritto,* 476-495 (2016). As remarked by the Tribunale di Milano, in the present case the right to know one's origins was not at stake, as the plaintiff was recognised by her father and declared herself certain of the identity of her biological mother.

[50] Cf M. N. Bugetti, 'L'accertamento della maternità' n 49 above.

VII. Donor Insemination: Towards the End of Absolute Anonymity?

Like children born of anonymous mothers, children conceived with a donated gamete cannot access information about their biological parent(s).[51]

The Italian legislation on medical assisted procreation expressly prohibits the use of heterologous medically assisted procreation techniques,[52] and provides for a specific administrative fine to be imposed on anyone who contravenes the prohibition.[53] In 2014, this prohibition has been declared unconstitutional insofar as it applies to couples diagnosed with an illness that is the cause of absolute and irreversible sterility or infertility.[54]

According to the Constitutional Court, the repeal of the prohibition did not create a legislative vacuum, as there is no uncertainty as to the cases in which it is legitimate to resort to heterologous medically assisted procreation. Therefore, as a result of this decision, married, or *de facto*, couples formed by two living persons of different sexes have the right to access to heterologous medically assisted procreation techniques within the limits established by the Constitutional Court.

Furthermore, the Court referred to the legislation on organs donation[55] as a reference text from which to extrapolate the general principles to be applied in the procurement and distribution of gametes.

Among the principles therein established, the Constitutional Court referred, *inter alia*, to the principle of anonymity of the identity of the donor and expressly addressed the question of the right to genetic identity, without however providing clear recommendations.[56] As a matter of fact, the Court merely referred to its own jurisprudence on the rights to know one's origins in the context of adoption and anonymous childbirth, expressly acknowledging the diversity of the cases.

The principle of donor anonymity has actually been transposed to the field of gamete donation. In fact, according to the guidelines adopted on 4 September 2014 by Conferenza delle Regioni e delle Province autonome, donors do not have the right to know the identity of the persons born as a result of heterologous fertilisation, and the latter cannot have access to the identity of the donors.[57]

[51] For a discussion on the role of genetics in defining parental relations and personal identity, see T. Penna, 'Nati da dono di gameti: il diritto di accesso alle origini tra *Cross Border Reproductive Care*, pluralismo giuridico e genetica' *BioLaw - Journal Rivista di BioDiritto,* 55-74 (2021).

[52] Legge 19 February 2004 no 40. Art 4 para 3. This provision has been the object of a repeal referendum that was held in 2015, but the quorum required by Art 75 of the Constitution for the referendum to be valid was not reached.

[53] Art 12 para 1 of legge 19 February 2004 no 40.

[54] Corte costituzionale 16 June 2014 no 162, English version available at www.cortecostituzionale.it. For comments see, E. Prascina, 'The Prohibition of Gametes' Donation: When the Constitutional Court 'Decides to Decide' ' 2 *The Italian Law Journal*, 213-236 (2016).

[55] Decreto legislativo 6 November 2007 no 191.

[56] The common utilitarian argument put forward to support the gamete-donors anonymity doctrine is that its abolition would seriously undermine donation.

[57] See, Documento sulle problematiche relative alla fecondazione eterologa a seguito della sentenza della Corte Costituzionale no. 162/2014, available at www.camera.it

Consistently with the guidelines, the law setting up a register of gamete donors provides that personal details of donors are kept in such a way as to ensure their anonymity.[58]

To date, there is no specific regulation concerning the right of persons *born* as the *result of heterologous* artificial insemination to know one's genetic origins.[59] Italian courts have not yet ruled on cases involving this issue, and the doctrine is not unanimous in acknowledging the need to recognize the right to know one's genetic origins to persons born as a result of heterologous fertilisation.[60]

Nevertheless it is possible to make some observations concerning the way forward to regulate the issue of anonymity of gamete donors consistently with constitutional principles.

The Constitutional Court reference, in its judgement no 162 of 2014, to adoption rules on access to the identity of biological parents shall be considered as the first indication that legislation on donor insemination providing for the absolute anonymity of donors would unlikely pass the constitutionality test. Moreover, such a legislation could hardly be considered as compliant with ECHR law, which, as well known, amounts to a parameter of constitutionality.

The ECtHR has not yet ruled on issues dealing explicitly on donor anonymity and the right to know one's origins in the context of medically assisted reproduction.[61] It is, however, plausible to argue that it will look unfavourably on legislation that grants absolute anonymity to donors.

Indeed, even though the right to know of one's origin is not an absolute one

[58] See, Art 1 para 298 of legge 23 December 2014 no 190.

[59] In the previous parliamentary term, several bills to regulate heterologous medically assisted procreation were submitted to the Parliament; however, any of them was adopted. For a survey of the various draft bills, see, D. Rosani, 'Il diritto a conoscere le proprie origini nella fecondazione eterologa: il caso italiano e l'esperienza straniera' *BioLaw Journal - Rivista di BioDiritto*, 235, 211-239 (2016).

[60] In favour see: A. Nicolussi, 'Fecondazione eterologa e diritto di conoscere le proprie origini. Per un'analisi giuridica di una possibilità tecnica' *Rivista AIC*, 22 February 2012, 1-18; L. Poli, 'Il diritto a conoscere le proprie origini e le tecniche di fecondazione assistite: profili di diritto internazionale' *GenIus*, 43-55 (2016); D. Rosani, 'Il diritto a conoscere le proprie origini nella fecondazione eterologa: il caso italiano e l'esperienza straniera' n 58 above; L. Bozzi, 'La parabola del diritto a conoscere le proprie origini. Brevi riflessioni' *La nuova giurisprudenza civile commentata*, 170-178 (2019). Against, see: A. Morace Pinelli, 'Il diritto di conoscere le proprie origini e i recenti interventi della Corte Costituzionale. Il caso dell'Ospedale Sandro Pertini' *Rivista di diritto civile*, 242-272 (2016); A. Musumeci, ' "La fine è nota". Osservazioni a prima lettura alla sentenza n. 162 del 2014 della Corte costituzionale sul divieto di fecondazione eterologa', available at www.associazionedeicostituzionalisti.osservatorio.it, 1-11 (2014).

[61] Currently two cases are pending against France, whose legislation provides that both identifying and non-identifying information about the donor remains inaccessible to the donor-conceived child at all times. In both cases, the applicants were born as a result of artificial insemination using donor sperm. They claim that French legal rules on egg and sperm donation, preventing them to obtain information concerning the identity of their respective biological fathers infringe their right to know their genetic origins and are discriminatory. See, Eur. Court H.R., *Gauvin-Fournis* v *France* (communicated case) no 21424/16 and *Silliau* v *France* (communicated case) no 45728/17, available at www.hudoc.echr.coe.int.

and the ECtHR, relying on the margin of appreciation doctrine, leaves States with room to manoeuvre in balancing it with others' rights,[62] the Parliamentary Assembly of the Council of Europe in its Recommendation no 2156 of 12 April 2019 gave a clear signal on the direction to take,[63] which the ECtHR is unlikely to ignore.

In this Recommendation, the Parliamentary Assembly acknowledged that most States have traditionally favoured anonymous donation models,[64] nevertheless, it stressed the relevance acquired in recent decades by the right to know one's origins, and affirmed the principle according to which: 'anonymity should be waived for all future gamete donations in Council of Europe member States'.[65]

Recommendation no 2156 of 2019 would therefore offers to ECtHR a solid basis for narrowing the margin of discretion left to States by relying on the European consensus standard.

All that considered, it is safe to maintain that the paradigm of absolute donor anonymity shall be abandoned by the Italian legislature.

VIII. Conclusions

Anonymous childbirth and donor insemination are two legal institutions that are diametrically different in their assumptions, as the first gives legal recognition and protection to the desire of a pregnant woman not to become a parent, while the second gives legal recognition and protection to the desire of infertile persons to become a parent. Nonetheless, they share a common result, namely, to allow the birth of a child that would not otherwise have been born, and the common feature of not attributing normative weight to genetic links in establishing the *status filiationis* of the child. This leads to a mismatch between biological and legal truth, where the latter prevails as far as family and inheritance rights are concerned.

Courts, more than the Italian legislature, have nevertheless taken seriously biological truth, by recognising the fundamental right to know one's genetic and biographical heritage. This right puts into question the principle of anonymity, which is a pivotal principle of both anonymous childbirth and donor insemination. When seeking to erode this principle in order to enforce the right to know one's

[62] For a deeper analysis of the ECtHR approach, see S. Besson, 'Enforcing the child' s right to know her origins: contrasting approaches under the convention on the rights of the child and the European convention on human rights' *International Journal of Law, Policy and the Family*, 150-152 (2007).

[63] Recommendation 2156: Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children, 12 April 2019, available at www.assembly.coe.int.

[64] As far as European States are concerned, they can be distinguished in three groups: States that grant access to identifying information; States that allow both open-identity and anonymous donation, and States that hold on to absolute anonymity. For an overview of the different legislation, see E. Decorte, 'Donor Conception: From Anonymity to Openness', in K. Boele-Woelki and D. Martiny eds, *Plurality and Diversity of Family Relations in Europe* (Cambridge: Intersentia, 2019), 143-172.

[65] n 64 above, point 7.1.

genetic origins, the courts however have found themselves confronted with a conflict of opposed interests, all of which are of constitutional significance.

The present article found that the legislature was in quandary when it came to regulate new issues resulting from the combination of scientific possibilities and cultural factors.[66] The *défaillance* of the legislature has nonetheless given way to a fruitful dialogue between courts -including the ECtHR-, which has made it possible to respond promptly to new demands for the protection of the fundamental right to know one's biological and biographical origins.

However, the activism of the courts has not diminished, but rather it has made even more evident and urgent, the need for the intervention of the legislature. The issues raised by the courts and awaiting precise regulation are indeed manifold: ranging from the precise definition of the scope of the right to know one's origins to the regulation of the legal effects of anonymous childbirth with regard to unadopted children, and from the regulation of the practical aspects inherent in the search for the anonymous mother to the regulation of the enforcement of the right to know one's origins after the death of the anonymous mother.

[66] Bio-law, in particular, is a special field of law in which judge-made law plays a central role, in part because of the lack of legislative regulation. See, A. D'Aloia, 'Giudice e legge nelle dinamiche del biodiritto' *BioLaw Journal - Rivista di BioDiritto,* 105-113 (2016).