

Anonymous Birth, Birth Registration and the Child's Right to Know Their Origins in the Italian Legal System: a Short Comment

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Abstract

The paper aims to investigate the relationship of interaction between the mother's right to remain anonymous and the newborn's right to know his/her own origin in the Italian legal system. The "*Decreto del Presidente della Repubblica*" of November, 3, 2000, n. 396, allows the mother the right to be unmentioned in the Birth Certificate. The problem of the compatibility of the mother's right to remain anonymous and the child's to know his/her own origins was analysed by the Italian Constitutional Court in comparison with the European Convention of Human Rights. This analysis introduces that none of the interests and rights mentioned above (child's right to know his/her origins and mother's right to remain anonymous) should be regarded as absolute, and suggests ways in which they can be balanced against each other.

Introduction

In the Italian legal system, the "*Decreto del Presidente della Repubblica*" of November 3rd 2000, n. 396 (Civil Status Law), allows the mother the right not to be named on the birth certificate. This paper aims to investigate the relationship between the mother's right to remain anonymous and the newborn's right to know their own origins in the Italian legal system, and the degree of compatibility between these two rights. The paper starts by presenting some definitions and distinctions pertaining to the child's right to know their origins, in contrast with the right of the mother to remain anonymous. Then, following an explanation of this conflict between the right to anonymous birth and the child's right to know their own origins in some European countries, the article goes on to analyse the function of birth registration in the Italian legal system. The article further goes on to present issues relating to the conflicting interests of the mother's right to remain anonymous and the newborn's right to know their own origins in the Italian legal system. The child's right to know his/her own origins contrasts with the mother's right to remain anonymous on the birth certificate; at the same time the legitimate choice of the mother to remain anonymous could damage the position of the biological father, in that he could be left without means of finding out that his child exists when the birth is registered. It should be noted that the father can also decide to remain unnamed on the child's birth certificate. Birth registration regulation, laws concerning privacy, and specific rules regarding the abandonment of children could prove to be of considerable importance in striking the balance between the child's right to know their own origins and the mother's right to anonymity.

The problem of the compatibility of the mother's right to remain anonymous and the child's right to know their origins has been analysed by the Constitutional Court and by the European Convention of Human Rights. This paper ends by assessing the implementation of the right to know one's origins and the mother's right to remain anonymous in the framework of the EU legal system. This paper finds that neither of the above mentioned interests and rights (the child's right to know their origins, and the mother's right to remain anonymous) should be regarded as absolute, and suggests ways in which a balance can be found between them.

Anonymous Birth and the Child's Right to Know Their Own Origins; a Comparison View

Legal proposals concerning the introduction of anonymous birth in Germany go back to 2002. The first of these was rejected by the *Bundestag*; the second, proposed by the *Brandenburg* state to the *Bun-*

desrad, was addressed to the competent commissions in order to be re-submitted to the *Bundestag*. Meanwhile, in many German cities, various *Babyklappe* have been opened. *Babyklappe* are places in which mothers may leave their newborn children in safe conditions. At the same time, the debate about the child's right to know his/her own origins has been under way since the 1970s, and the constitutional support for this as a right of the individual is now extensively recognized and accepted in the related literature (*Recht auf die freie Entfaltung seiner Persönlichkeit*, art. 2 (1) *Grundgesetz* and *Menschenwürde*, art. 1 (1) *Grundgesetz*) [1]. In the decision of February 13th 2007, the Federal Constitutional Court invited the German legislator to introduce a system to guarantee the child's right to know their origins by carrying out exams in order to ascertain genetic links with the child. Thus, the law of March 26th 2008, *Gesetz zur Klärung der Vaterschaft unabhängig vom Anfechtungsverfahren*, consequently amended § 1598 of the *Bürgerliches Gesetzbuch*, introducing the *Kindschaftssache* (§ 640 *Zivilprozessordnung*). As a result, a judge can order a paternity inquiry, even in the absence of the other parent's consent. For adoptions, the § 61, second paragraph of *PstG*, allows the adopted child once they reach 16 years old, to consult the *Civil Status Register* in which their genetic origin is listed [2,3].

In the UK legal system, the 1989 *Children Act* — which came into force in 1991 — simultaneously introduced the *Adoption Contact Register*, in order to allow contact between the adopted individual and their biological parents. This law allows the adopted adult to access all relevant information about their pre-adoption history [4].

In the Netherlands the Supreme Court recognised, in the judgement of April 15th 1994, the fundamental right of the child to fully and freely develop their own personality, including the right to know the identity of their biological parents. This, however, is not yet absolute [1].

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The Spanish literature supports the right of the individual to know their own biological origins as an aspect of human dignity and the right to free personal development [5-9]. Similarly, in Portugal, this right is based on art. 1 of the Constitution (human dignity), art. 26 n.1 (right to personal identity) and art. 25 n. 1 (the right of personal development) [10].

Baby boxes, or baby nests, exist in Prague, Krakow, Warsaw, Johannesburg, Budapest, Antwerp, Switzerland and Austria. In Hungary, mothers can anonymously leave newborn children in an unattended room in public hospitals [1].

The Conflict of Interest between the Mothers's Right to Anonymity and the Child's Right to know their own Origins

With the Law of Civil Status, reformed by "*Decreto del Presidente della Repubblica*" of November 3rd 2000, n. 396, the Italian legal system allows the mother the right not to be named¹ on the birth certificate. The mother may therefore decide to remain anonymous. In Italy there are 22 places in which a mother can leave newborn children, based on the model of *babyklappe* [1]. But the legal recognition of the child regards the fundamental and constitutional principle that every child has the right to be maintained and educated by their own parents, as a consequence of the decision taken at the moment of the procreation [11-13].

As well as the mother's right to be anonymous, there are other strongly related and interacting rights that have a problematic coexistence. Potentially contrasting rights include the right of the newborn to know his/her own origins, and the possible exclusion of the biological father from the birth registration, which may make it impossible for him to have a parental relationship with his child as a result of the mother's choice to remain anonymous.

Art. 30, point 1, of "*Decreto del Presidente della Repubblica*" of November, 3, 2000, n. 396.

Knowledge of one's own origins could prove to be important. For instance, it could have a meaningful role in an individual's health, if a genetic diagnosis of a child's illness is made possible through the knowledge of their mother or father's DNA. At the same time, being able to answer the questions "who am I?" and "where do I come from?" can be important in the development of the individual [14]. But it may not be so easy to satisfy the child's aspirations without granting them the necessary tools, also in legal terms. Psychological studies have shown that the question of one's own origins often arises during adolescence, or post-adolescent age, in adopted children [14]. Indeed, knowledge of one's own origins can play a role in an individual's health, when the onset of genetic pathologies call for the genetic diagnosis of the child's illness by making use of knowledge of the mother or father's DNA.

Furthermore, the idealization of a biological mother and father is typical among individuals with no knowledge of their origins, such as those who have been adopted [15]. Such representations of biological parents can have a magnetic strength, as they do not allow any room for the intrusion of reality or any correction of idealized aspects. This is another reason why the adoptive parents may feel the need to know the

identity of the natural parents of the child, to overcome the dawning difficulties that may develop as they bring up the adopted child, in particular, in trying to help the child overcome any problems or suffering they may feel as a result of the adoption.

Both the adopted child and the adoptive parents are interested in creating calm and balanced family relationship. This legitimizes the adoptive parents' interest in finding out about the natural origin of the child.

The Mother's Right to Remain Anonymous on the Birth Certificate in the Italian Legal System

The mother need not be named during the registration of the birth in the Italian legal system². This legal recognition of the child can be defined as a "formal document" prepared by the person who registers the event of the birth³. The event of the birth precedes the registration of the birth, and thus the birth certificate is the public declaration of the event [16].

The system of legal recognition of a child and the declaration of filiations may be studied in a unitary manner, without distinctions being made between children born to married and unmarried parents⁴.

When family law was reformed in 1975, full effect was given to article 30 of the Italian Constitution, which provides that the law must guarantee children born outside wedlock full legal and social protection, compatible with the rights of the members of a legitimate family. Exact equality was thus established, from the viewpoint of patrimonial rights, between the legal status of a natural child (born out of wedlock) and that of a legitimate child. The status of filiations — the status of the child as legitimate or illegitimate — is recognized through an act, that is to say, a formal act [17], because the legal recognition of the child occurs with the registration of birth⁵.

In the Italian legal system the registration of a birth can be made during the three days following the date of birth, the responsibility for which lies with the general manager of the hospital (Direttore Sanitario)⁶.

With regard to the mother's right not be named, the hospital registration of birth may be made by the doctor, obstetrician or other persons present at the birth. The mother who wants to remain anonymous has to express her will to the doctor, obstetrician or other persons who were present at the birth, or, before giving birth, to a hospital social worker.

A declaration of birth made to the general manager of the hospital does not require a prescribed form. On the contrary, registration in the register of births, marriages and deaths requires an attestation of birth by the doctor, the birth assistance certificate.

Within ten days of the date of birth the child should be registered in the register of births, marriages and deaths at the town hall of the city in which the father or mother is domiciled, in this case immaterial of whether or not they both agree to this. At the same time, the child should also be registered at the town hall of the city in which the child was born. The registration may be made by the father or the mother, or

¹Art. 30, point 1, of "*Decreto del Presidente della Repubblica*" of November, 3, 2000, n. 396.

²Art. 30 "*Decreto del Presidente della Repubblica*" n. 396/2000 (called "Nuovo ordinamento dello stato civile" Civil Status Law).

³Art. 236, 1, Italian Civil Code.

⁴Artt. 29 and 30 "*Decreto del Presidente della Repubblica*" n. 396/2000.

⁵See art. 24 International Covenant on Civil and Political Rights, United Nations General Assembly.

⁶See "*Decreto del Presidente della Repubblica*" n. 396/2000.

jointly by both parents, or by a special procurator⁷, with the mother's desire not to be named always taken into account. The child's registration in the "Register of births, marriages and deaths" is the act of birth. The act of birth is a declaration of the legal recognition of the child made by one or both parents with the formal support of declaration of birth. The birth certificate is the formal document filled out by a public officer that files the information present in the act of birth and has the function of noting the place and date of birth.

The Registration of Birth and the Child's Filiation Status

The act of birth and the birth certificate provide a person with documentary evidence of their *status*. Their *status* (the fact of birth) is therefore incorporated in the document (act of birth and birth certificate) [11]. According to the literature⁸, the document is the fact on which the juridical legal system determines the juridical relationship between child and parents. The act of birth qualifies as a fact the *status* of filiations [18]. The act of birth qualifies the child's *status* in relation to the *status* of the parents. This depends on whether the father and mother are married or not at the time of the registration of the child's birth, because the declaration of the parents may or may not be integrated by the presumption of legitimacy⁹. According to the legal system, a child born to a married woman is the legitimate child of her husband [19]. A legitimate child is a member of the family and therefore has a relationship, in legal terms, with the family and its relatives by marriage. The husband is presumed to be the father of a child conceived in marriage (art. 231 of the Civil Code). Conception during marriage is presumed to have taken place in the period from the 180th day following the celebration of the marriage to 300 days after the husband's death or divorce (art. 232 of the Civil Code).

In the Italian legal system, for children born to married parents, the child is formally and legally recognized through their registration by the mother or father in a formal document of birth. Legitimate filiation is evidenced by the act of birth and the birth certificate recorded in the civil registry. Thus, the act of birth and birth certificate are preclusive evidence and have greater effect with respect to the presumption of legitimacy [11]. In the absence of a birth certificate, the child's legitimacy may be proved by continuous apparent *status* established by various facts (name, treatment, reputation), which reveal its filiations and relationship (art. 236 of the Civil Code). Any person who does not have the *status* of a legitimate child and wishes to acquire it may bring a legitimacy suit. A child may bring such a suit against their parents or their heirs. Should the child die, the suit may be transmitted to their descendants. The suit is not subject to limitations for the child (art. 249 of the Civil Code).

For children born to unmarried parents, the child is formally and legally recognized by the mother, or the registration of a formal document of birth, as filed by the mother or the father, but also requires a statement in a will or other prescribed document signed by a Notary (art. 254 of the Civil Code). Indeed, a natural child may be recognized (jointly or separately) by the father or the mother, provided that they are at least 16 years old, even if they were married to another person at the time of conception (art. 250 of the Civil Code).

A predeceased child may also be recognized in favour of the legitimate descendants and recognized natural children (art. 255 of the

Civil Code). Recognition is also possible prior to birth, but following conception (art. 254 of the Civil Code). Recognition is irrevocable, but its veracity may be contested by its author and by the child recognized (arts. 263-264 of the Civil Code).

In the new Italian system of birth registration, the public officer in charge of the register of births, marriages and deaths has no power to check the validity of the parents' declaration, or that of other persons who are qualified to give information concerning a birth [11].

Tracing back to the Mother's Name in the Italian Legal System

As previously noted, the mother's name may be omitted during the registration of a birth. However, in the Italian legal system it is possible to trace back to the mother's name and address, starting with the information provided to the nurses at birth, in particular according to "Decreto Ministeriale" n. 349/2001. The form used for certification renders this possible, even if, in accordance with the articles of the Italian Civil Code, the mother wishes to give birth anonymously (non recognised child or anonymous filiations). In any case, the birth assistance certificate filed by the general manager of the hospital (with no data) can be linked to the information provided in the clinical folder at the hospital where the birth takes place. Under these conditions, the identification of the biological mother is technically possible [1].

Tracing back to the mother's name in the case of an adopted child

This can also apply to the case of an abandoned child who is subsequently adopted.

According to article 93, par 2, of the Italian law on Adoption (May 4th 1983 n. 184), the birth assistance certificate, as filed by the general manager of the hospital, in which the data relating to the mother who asks to remain anonymous are included, can be accessed. This certificate can be released to any interested parties, according to the law, ten years after the form's compilation. After this period, the limits of paragraph. 3 of the above mentioned article 93 are no longer applicable, and the mother may be identified.

As a result, a legally recognised child that is later adopted according to art. 29, par. 5, of law May 4th 1983 n. 184, at the age of 25, can unconditionally access information about their origins, or about their parents' identity; the same norm does not apply to the legally unrecognised child, if its mother had stated that she did not want to be identified.

Adoption law reform [20-22] has introduced profound innovations on this point, when compared to the previously existing norms, which state that adopted children have the right to be informed of their adoptive history and that biological parents should provide this information in the form and timeframe considered most suitable. This right to information is due to the guarantee of the psychological balance of personal dignity [23,24] and also common sense considerations, in order to avoid the knowledge of one's personal history becoming the result of unfortunate circumstances or being unexpectedly disclosed by third parties. In this regard the consideration of the child being aware of their own individual history is crucial, in making them feel part of a family, and later part of society at large.

⁷See artt. 29 e 30 Italian Civil Status Law.

⁸D. Barbero, Titolo di stato e stato di filiazione legittima, in Studi legislativi sulla filiazione, Milano, 1952, p. 76 ss

⁹See art. 232, 1 §, of Italian Civil Code.

This knowledge can be provided before the above-mentioned 25 years have passed if serious reasons exist relating to the child's mental and physical health. The decision is made on a request for anticipated information by a decree of the "Tribunale dei Minorenni" (juvenile court). The juvenile court first gathers all relevant information regarding the mental and physical health of the requesting party, in order to understand if access to this information might prove harmful to the mental condition of the individual¹⁰. This authorisation is not needed if the adopted person (in adulthood) has lost their adoptive parents, be it because they have passed away or if they cannot be found¹¹. The adoptive parents of a child can similarly access reserved information for serious reasons¹². The hospital that holds the personal data can also have access to the information in cases of urgent need, if the health of the child is in danger¹³.

According to article 3, par 1, of "Decreto del Presidente della Repubblica" of November 3rd 2000, n. 396 (Civil *Status* law), the juridical obstacle persists if the mother does not want to be named. The norm re-states the content of the previous article. 70 of the Royal Decree of July 9th 1939, n. 1238.

According to article 11 of the adoption law, immediately after an anonymous birth the declaration of adoptability can be delayed for up to two months, in order to offer the mother the possibility to change her mind when she, or the father, asks for the term to decide on recognition.

At birth, and if possible even before, assistance and information services support the mother in these delicate decisions, which must be treated with sensitivity and care.

After 70 years, the secret documents stored in the state archives, relating to people's private situations, are removed¹⁴.

All the documents regarding the adopted child can then be accessed, with the exception of the birth assistance certificate in the clinical folder, which would allow for the identification of the mother. However, this norm was deleted by the Legislative Decree of 22nd January 2004, n. 42, which re-proposes an identical term¹⁵ for documents stored in state, regional, or other public archives. After one hundred years, the adopted person (if still alive) or other qualified persons can access previously confidential documents without authorisation by a judge.

If the mother's decision to remain anonymous is not removed after 100 years, it would represent one of the rare exceptions¹⁶ to the right of access to administrative documents. This is an exception to the general principle according to which the right to access prevails over the right to confidentiality when access is needed for the care and defence of the juridical rights of the requesting party.

The Position of the Italian Constitutional Court

The Italian Constitutional Court recognised the right of the mother (whatever her marital *status*) not to be mentioned on the child's birth certificate for the first time in 1994¹⁷. In the opinion of the Italian Con-

stitutional Court, any pregnant woman – even if married – can choose to remain anonymous on the birth certificate. Thus, if the name of the mother does not result on the birth certificate, it is not possible to identify the father, the husband of the anonymous mother, and presumed father of a child conceived during marriage (art. 231 of the Italian Civil Code). The choice of the mother is a preclusion of the operability of the legal presumption of legitimacy (Constitutional Court, 5th May 1994, n. 171).

Following this, the Constitutional Court¹⁸ again recognised a woman's right to have a child in an appropriate health centre, and to maintain anonymity in the registration of the birth. For the Italian Constitutional Court such a right is compatible with adoption regulations, which were modified by the recent code of privacy¹⁹, which excludes the possibility of authorizing the adopted person to have access to information on their origins without the prior verification of the continued validity of the biological mother's right to not be named.

The Italian Constitutional Court does not go into depth on the nature of the child's right to know his/her origins, but concentrates its attention exclusively on the mother's right to remain anonymous in the light of the public interest of the child and the mother's health. Thus, according to the Constitutional Court, in the balance of both fundamental rights, the mother's right to remain anonymous takes precedence over the child's fundamental right to know their origins.

In the opinion of the Constitutional Court, the normative choice represents the final point of the legislative evolution of the relationship between the adopted child and his/her family of origin. The option of the pre-existing law was the total cessation of the relationship between the adopted child and his/her natural family, with only a few exceptions. The legislation has introduced the protection of the interest of the adopted person to know their origins, taking into account the conflict between this interest and those of the biological and adoptive parents. The Court also takes into consideration the situation of a mother in difficulty and her choice to have an anonymous birth in a suitable medical centre. However, the denial of access to information is not unlimited. In other words, different phases in the history of the non-recognised child (or of the person whose mother wants to remain anonymous) can be identified.

The Italian Constitutional Court uses the Right to Life (see art. 2 Italian Constitution) as grounds for the legislative rule on the secret nature of birth, with the aim being to discourage the choice of abortion, or unsafe abandonment which may jeopardize the survival of the newborn. Also, the same Italian administrative Court defines the mother's right to remain anonymous as an instrument in the pursuit of public interests²⁰. The public interest referred is to be the guarantee of the child's survival, the possibility of adoption and the assurance that the child is not abandoned in a dangerous place.

But this finding of the Constitutional Court must be appraised on its dynamics. A child that is not recognized by a mother who has chosen to maintain anonymity, and to submit the newborn to appropriate

¹⁰Art. 28, par. 5, Italian Adoption law.

¹¹Art. 28, par. 8, Italian Adoption law.

¹²Art. 28, par. 4, Italian Adoption law.

¹³Art. 28, par. 4, Italian Adoption law.

¹⁴Art. 107 and 108 of Legislative Decree n. 490/99, "Testo Unico dei beni Culturali".

¹⁵Art. 122, par. I, point b, of Legislative Decree n. 490/99, "Testo Unico dei beni Culturali".

¹⁶Art. 24, par. 1, point (a) of law n. 241/1990.

¹⁷The reference is C. Cost., May, 5, 1994, n. 171.

¹⁸Constitutional Court, 16-25 November 2005, n. 425 published in "Gazzetta Ufficiale" of 30 November 2005, n. 48, 1^a "Serie speciale".

¹⁹Dlgs 196/2003.

structures to guarantee their survival (when the possibility of adoption is no longer seen as protection from abortion or from abandonment in a dangerous place), could develop a genetic illness, the diagnosis and care of which may absolutely require knowledge of their genetic profile and that of their biological parents. Furthermore, such a child lives with the possible risk of psychiatric syndromes that may result from a lack of knowledge regarding their ancestry and the reasons behind their abandonment. Thus, in the above-mentioned sentence, the Constitutional Court has qualified the Right to Life as the right to a physically healthy existence, by recognizing the value of the rules that a juridical civilization produces. The Constitutional Court seeks to safeguard the values of liberty and human dignity more and more carefully with regard to minors and anomalous situations.

In other words, this means that the consideration of a person's psychiatric health is a fundamental value that can be of only secondary importance in a case where a person's life is threatened. For example, article 6 of the law 194/1978, which permits the voluntary abortion of a pregnancy, after ninety days of gestation, if there are malformations or pathologies which affect the child, and would not allow it to have a normal life, and are determined to represent a serious danger for the psychological health of the mother.

At the same time, art. 2 of the Italian Constitution represent the norm that protects the right of the child not to be deprived of his name, his personal identity, and to have a father and a mother. It deals with understanding provisions dictated by art. 96 and 93 of the Italian Code of Privacy, safeguarding the health of the third party by communicating information related to the mother that wants to remain anonymous, while at the same time respecting her wish not to be identified.

The Mother's Right to Remain Anonymous and the Child's Conflicting Right to Know their Origins, In Accordance with the Findings of the European Court of Human Rights

The problem of the compatibility of the mother's right to remain anonymous and the child's right to know his/her own origins can be analysed through a reading of the jurisprudence of the European Court of Human Rights. ECHR judgements can help to analyze the consistency of the contrasting fundamental rights of the different subjects involved (the mother, father and child). The recent evolution of European Court of Human Rights case law is more nuanced in the balancing of the competing rights²¹. Despite the recent evolution at the ECtHR, the traditional approach of the European Court of Human Rights²² put the focus on the child's paramount interests [25], in marked contrast with the Italian Constitutional Court's approach, which favours the public interest.

The European Court of Human Rights, in explaining its judgments, makes reference to articles on claims concerning the confirmation of paternity and maternity²³, using art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms²⁴.

It also takes into consideration the right of a person to have access

to personal data regarding their own origins as part of the notion of "respect" for his/her "private and family life", as present in the same art. 8²⁵ [26,27].

Article 8 of the European Court of Human Rights²⁶ safeguards potentially conflicting rights. It is, for instance, guardian of the right to privacy and the protection of personal data²⁷, while at the same time guaranteeing the right to know one's own origins. It also guarantees the integrity of the family on the presumption that the European Court of Human Rights has often based its decisions on the sustained ascertainment of maternity and paternity on article 8 of the Convention

Article 8 summarizes the tension and the conflict of the rights involved, while at the same time certifying the existence of these rights. In its interpretive activity, The European Court of Human Rights takes the circumstances of each case into consideration, along with the correlations this has with the evolution of social values. The function of norms dealing with fundamental human rights is general and abstract in nature, in order to protect a great number of values concerning human dignity.

The right of an individual to access personal data regarding their origins and the notion of "respect" for "private and family life"

The European Convention of Human Rights could be defined as the catalogue of rights that represents the traditional European Legal Constitution. Thus the norms are built on abstract terms that can be best interpreted by judges on a case by case basis. European Fundamental Rights developed from the jurisprudential interpretation of the Court [28], and The European Convention of Human Rights is only the starting point [29].

Because of the various juridical positions of individuals protected by the notion of "Private and Family Life" art. 8 cit., the Court usually analyses claims with a concrete, rather than formal, approach. On the topic of the child's right to know their origin, an exemplum could be the Case of Mikulić v. Croatia²⁸. In the Court's opinion, persons in the applicant's situation have a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth regarding an important aspect of their personal identity²⁹. Furthermore, in determining an application to have paternity established, the courts are required to consider the basic principle of the best interests of the child.

The Court found that the procedure available in Croatia does not strike a fair balance between the right of the plaintiff to have her uncertainty regarding her personal identity eliminated without needless delay, and that of her alleged father not to undergo DNA tests, and considers that the protection of the interests involved is not proportionate. The inefficiency of the Croatian legal system has left the applicant in a state of prolonged uncertainty as to her personal identity, in failing to secure for the plaintiff the "respect" for her private life to which she is entitled under the Convention.

It is clear that the principal aim of Article 8 is to protect the indi-

²⁰Cons. Stato, IV sez., 17 June 2003, n. 3402, in *Fam. e dir.*, 2004, 74.

²¹European Court of Human rights, *Odièvre v. France*, judgment of February 13, 2003, *Reports of Judgments and Decisions*, 2003-III.

²²European Court of Human rights, *Johnston and Others v. Ireland*, judgment of December 18, 1986, Series A, n. 112, p. 25, § 55.

²³See European Court of Human rights, *Rasmussen v. Danimarca*, judgment of November 28, 1984, Series A n. 87, p. 13, § 33, e *Keegan c. Irlanda*, 26 May 1994, A n. 290, p. 18, § 45.

²⁴Council of Europe, *The European Convention On Human Rights*, Rome, 4 November 1950.

²⁵European Court of Human Rights, *Odièvre v. France*, judgment of February 13, 2003.

²⁶Article 8 ECHR on Right to respect for private and family life.

²⁷European Court of Human Rights, *X et Y c. Paesi Bassi*, judgment of March 26, 1985, *Eur. Court HR*, Series A, 91, 1985, p. 11.

vidual against arbitrary interference by public authorities; it does not merely compel the State to abstain from such interference. In addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life, even in the sphere of the relationships between individuals³⁰.

In the case cited the broad notion of "Private Life" and "Family Life" is clear. In the notion of "Private Life", the European Court of Human Rights includes a person's physical and psychological integrity, which can sometimes incorporate aspects of an individual's physical and social identity. Respect for "Private Life" must also comprise, to a certain degree, the right to establish relationships with other human beings³¹, and includes the physical and psychological integrity of an individual as the notion of "Private Life" is also an expression of aspects connected with the individual's social identity. The respect for "Private Life" includes the right to have close personal relationships with other individuals.

For this reason, having access to information concerning one's own origins is a necessary consequence of a personal interest in developing one's own personality, and building one's own identity, while respecting Private Life³². The European Court of Human Rights has held that respect for Private Life requires that everyone should be able to establish details of their identity as individual human beings, and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality³³ [30,31].

The Position of the European Union Regarding the Abandonment of Children. Helping to Resolve the Conflict of Interests between the Mother's Right to Anonymity and the Child's Right to know Their Own Origins

The new European Union provision on the Abandonment of Children may prove to be an important guideline in finding a balance in this conflict of interests.

The European Union has no direct competence or power in the

field of family and personal relationships. That being said, the European Parliament dealt with such problems in Resolution 1624 of June 27th 2008, "Preventing the First Form of Violence against Children: Abandonment at Birth" [32]. The Resolution states, in its premise, that in the past certain European States had policies which "institutionalised" the abandonment of babies, or which encouraged parents experiencing difficulties to hand their babies over to the State. Traces of these policies can be found in the attitudes of the public and maternity hospital staff. The European Parliament indicates that an increase in such cases of abandonment could be due to economic difficulty, poverty, or AIDS. There will always be mothers in distress who feel they have good reasons to abandon their children at birth (denial of pregnancy, pregnancy outside marriage, or at an early age, poverty and HIV/Aids etc.); in such cases the mother should be supported³⁴ [1].

On the other hand, no penal punishment for abandonment is justified to decrease abortions, to prevent infanticide, or the maltreatment of newborn children, such as abandonment in public places. The fact that no penal punishment exists is criticized in some quarters, as it might be seen as an incitement to commit a crime or to encourage mothers not to assume responsibility.

Thus the European Parliament reasserts its position in favour of the de-institutionalisation of abandoned infants, and of priority being given to the provision of alternative and family-based care for these children. It also reiterates that national adoption should take precedence over international adoption. The Assembly invites the Member States to: "1. Centre their family policy on one inviolable and pre-eminent principle, namely respect for the rights of children, in particular the right of children to live with their families and find out about their origins, which is a fundamental human right and is crucial for their development; 2. Provide support for pregnant women and young mothers and fathers through measures including medical-social monitoring of pregnancies, protection against the HIV/Aids virus and measures to prevent mother-to-child transmission, assistance during childbirth, non-separation of the child from the mother after delivery, and postnatal medical and social support for mother and father as well as for the child; 3. Take due account of the financial pressures that the birth of a child creates for families or single mothers; 4. Recognise a woman's full right to freely choose pregnancy, which means legal and easier access

²⁸European Court of Human Rights, *Mikulić v. Croatia*, judgment of February 7, 2002, Series A. The plaintiff, Montana Lorena Mikulić, is a child born out of wedlock on 25 November 1996. On 30 January 1997 the plaintiff and her mother filed a civil suit against H.P. before the Zagreb Municipal Court (*Općinski sud u Zagrebu*) in order to establish paternity. At the hearing on 17 June 1997 the Municipal Court pronounced judgment by default against the defendant. The adoption of such a judgment, however, is expressly prohibited by the Marriage and Family Act (*Zakon o braku i porodičnim odnosima* – 1977, 1980, 1982, 1984, 1987, 1989, 1990, 1992 and 1999) in "civil-status matters" (*statusni sporovi*). On 1 July 1997 the defendant appealed against that judgment. At the hearing on 6 October 1997 the Zagreb Municipal Court annulled its own judgment. In front of the European Court of Human Rights (Req. n. 53176/99), the plaintiff Montana Lorena Mikulić, claimed that her right to respect for her private and family life had been violated because the domestic courts had been inefficient in deciding her paternity claim and had therefore left her uncertain as to her personal identity. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, there must be regard for to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation.

²⁹See, for instance, *Keegan*, cited above, p. 19, § 49, and *M.B. v. the United Kingdom*, no. 22920/93, Commission decision of 6 April 1994, Decisions and Reports 77-A, p. 116.

³⁰See *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23, and *Botta v. Italy*, judgment of 24 February 1998, Reports 1998-I, p. 422, § 33.

³¹See European Court of Human Rights, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29.

³²European Court of Human Rights, *Leander/Svezia*, judgment of 26 March 1987, Racc., Series A, 116, p. 22; European Court of Human Rights, *Gaskin/Regno Unito*, judgment of 7 July 1989, Racc., Series A, p. 160.

³³See European Court of Human Rights, *Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A no. 160, p. 16, § 39;

³⁴Art. L.222-6, Code de l'action sociale et des familles, modifié par Loi n 2002-93 du 22 janvier 2002 - art. 2 JORF 23 janvier 2002: "1. Toute femme qui demande, lors de son accouchement, la préservation du secret de son admission et de son identité par un établissement de santé est informée des conséquences juridiques de cette demande et de l'importance pour toute personne de connaître ses origines et son histoire. Elle est donc invitée à laisser, si elle l'accepte, des renseignements sur sa santé et celle du père, les origines de l'enfant et les circonstances de la naissance ainsi que, sous pli fermé, son identité. Elle est informée de la possibilité qu'elle a de lever à tout moment le secret de son identité et, qu'à défaut, son identité ne pourra être communiquée que dans les conditions prévues à l'article L. 147-6. Elle est également informée qu'elle peut à tout moment donner son identité sous pli fermé ou compléter les renseignements qu'elle a donnés au moment de la naissance. 2. Les prénoms donnés à l'enfant et, le cas échéant, mention du fait qu'ils l'ont été par la mère, ainsi que le sexe de l'enfant et la date, le lieu et l'heure de sa naissance sont mentionnés à l'extérieur de ce pli. Ces formalités sont accomplies par les personnes visées à l'article L. 223-7 avisées sous la responsabilité du directeur de l'établissement de santé. À défaut, elles sont accomplies sous la responsabilité de ce directeur, ..."

to sexual rights and reproductive health services; 5. Pay particular attention to especially vulnerable groups of young girls and women such as migrant women, women with HIV/Aids and women from minority groups³⁵.

According to the European Parliament, there is a growing black market in adoptions, tied to child trafficking, and abandonment at birth; this puts at risk not only the rights of the mother, but also those of the child and the father, particularly the right of the child to live with their own family and to know their own origins; this right cannot simply be eliminated.

For these reasons, the European Union Parliament invites Member States to concentrate their policies on the fundamental rights of children, to provide an efficient system for the prevention of unwanted pregnancies and abandonment; as well as the struggle against the abandonment of newborns due to any form of incitement from physicians, paramedics and administrative authority, and to provide support to the new mother before and after the birth. It is important that the mother and father have access to all available information on the measures of economic help available for the additional expenses incurred by the birth of the child, in addition to *post partum* psychological support, and – if necessary – the provision of temporary accommodation for the mother and child. The Member States of the European Union must also encourage mothers to state their identity, even if it is opportune to provide forms of anonymous birth. Thus the child may not be deprived of knowing their origins before becoming an adult.

“Member States are also invited to draw up a proactive policy to fight against the abandonment of newborn babies which: 1. Prohibits all incitement or pressure that could be put on mothers from medical and paramedical staff or government authorities to abandon their children; 2. Prevents “dumping”, which endangers the life of the newborn baby, by appropriate measures such as accessible reception facilities; 3. Prevents early and unwanted pregnancies through information and sex education for girls and boys, particularly at school; 4. Provides mothers, especially mothers belonging to vulnerable groups, and fathers with better information about all the assistance available to them, particularly financial support to help them cope with the added expenses that a child represents; 5. Helps with the setting up and expansion of care and temporary accommodation centres for mothers and their children³⁶.”

The obligation to record the birth and genetic profile of all newborns may prove to be a useful tool against the trafficking of newborns. The European Parliament asks members to regulate transparent procedures concerning the abandonment of newborns for the purpose of national and international adoption. A reasonable interval of time must be given to allow the mother to revoke her choice of whether or not she wants to keep her child, and the consent of the father, if possible, must also be sought. The appeal to national or international adoption must not deprive the child of the possibility to access information about their own origins.

Closing Remarks

The child's right to know their own biological origins is one aspect of the fundamental rights of the individual in the full and healthy development of their personality.

³⁵See on the return to medieval forms of “*boîtes a bébé*” and the lack of support to the maternity fit to avoid to the mother this painful choice.

³⁶Resolution 1624 of 27 June 2008, called “Preventing the first form of violence against children: abandonment at birth”.

³⁷Resolution 1624 of 27 June 2008, cit.

In such cases it is important to consider safeguarding the biological parents' right to remain anonymous, as regards the identification of the mother, in accordance with the Civil *Status* Law (in the Italian legal system the reference is “*Decreto del Presidente della Repubblica*” of November 3rd 2000, n. 396). Of course, it is necessary to strike a balance in the light of the child's superior interests. For instance, a fully adopted child has the right to receive information normally protected by the privacy law, such as information about possible genetic diseases when the child's health is at stake.

The right to physical, as well as psychological, health does not give the mother the right to ask the child to give up their right to life, but, in a more limited way, may ask for limitations on her right to privacy, with regard to her choice of anonymity at the birth. Such parameters must be suitable to the equitable appreciation of the Italian judge, who is called on to define the superior interest of child to know the identity of their anonymous mother, on the grounds of serious needs such as medical pathologies.

The Italian judge must therefore make his decision regarding the child's right to a healthy existence in the framework of the norms of the Italian Constitution.

In this light, the possible introduction of an information system similar to that adopted in France should be considered (Article L222-6, Code de l'Action Sociale et des Familles)³⁷. In such a system, women who ask for health assistance at birth must furnish their own genetic profile, and, wherever possible, that of the father, together with complete information on the historical anamnesis of their respective families. In this way a clinical file, which is as complete as possible, is produced, in the hope of one day being able to use this knowledge to safeguard the health of the child and their descendants [33,34].

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