Special issue

Biotechnologies, Birth and the Right to Know One's Genetic Origins

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ABSTRACT: The aim of this paper is to investigate whether the right to know one's genetic origins (RKGO) encounters significant differences in the level of guarantee when it applies to adoption, to assisted reproduction or to surrogacy. The results of this analysis are aimed at understanding the degree of effectiveness of this right in different legal systems. To this end, the main features of the right to know one's genetic origins are carefully considered, the research being based both on legislative and on jurisdictional materials. Namely, the essay focuses on information and consent, on the structure of relevant regulation in the balance between collection and storage of personal information or protection of anonymity and privacy and, finally, on the most crucial factor for the enforcement of this right, namely time.

KEYWORDS: Right to know genetic origins, anonymous birth, assisted reproduction, surrogacy, personal identity

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1. The right to know one's genetic origins: theoretical background

The starting point to address the evolution of the right to know one's genetic origins in the contemporary context of fundamental rights' protection and in the specific area of law and genetics can be found in its theoretical background and its legal acknowledgement in international treaties and in national laws.

We can start from the assumption that the right to know one's genetic origins is a right linked to the "understanding of who we are and how we are connected to others".[1] Therefore, it should be recog-

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nised and granted both by national States and international conventions, because it is inherent to individual autonomy and human dignity. In fact, the right to know one's genetic origins gives an individual a freedom connected to personal identity, i.e. the liberty to choose what meaning to assign to the genetic components of individual identity. Acknowledging the right to access information on genetic origins makes the individual free to choose whether to obtain them or not; depriving the individual of such rights means denying a liberty which is strictly connected to the development of personhood.[2] The importance of recognising this right reveals the value of pluralism in contemporary democratic societies: if a legal system regulates access to genetic information, then the State proves to be aware of the inherent diversity of human beings.[3] Not all of us need to know such information but some do and this depends on the different paths we follow to develop our personhood. It is not for the State to deprive individuals of such possibility, especially if it is easily available, but rather it is a matter of individual choice to decide whether to get access to such information or not.

1.1. A right for the future

Above all, the most relevant aspect of the right to know one's genetic origins is that it is a right for the future. In fact, it is granted to children or to a child-to-be (unborn or unconceived) and it could be enforced only once they are adults. This profile makes this right absolutely interesting when dealing with the relationship between scientific development, fundamental rights and individuals' aspirations.

With regard to this feature of the right, it has been noted that, once a State decides to regulate the right to know, for example, for children born through assisted reproduction with gamete donation, it is regulating a possibility that will be effective several years later. This means, for example, that if anonymity in gamete donation is abolished, it is questionable whether the right to know genetic origins should be applied retroactively: the decision to donate may be, in fact, also influenced by the anonymity of donation.[4] Thus, the notion of the right to know one's genetic origins should be carefully considered, as it raises some very important questions and complex issues.

The most significant legal acknowledgment of the right of a person to be able to access information on his/her parental origins is Article 7 of the International Convention on the Rights of the Child (CRC), which provides that the child shall have "as far as possible, the right to know and be cared for by his or her parents". The Convention, moreover, provides that States have an obligation to ensure the effectiveness of these rights "in accordance with their national law and their obligations under the relevant international instruments in this field". On the matter, in 2002, the UN Committee on the Rights of the Child recommended that all States shall take all necessary measures, in relation to

[1] V. RAVITSKY, *Autonomous Choice and the Right to Know One's Genetic Origins*, in *Hastings Center Report*, March-April 2014, 36.

[2] On these matters see K. WADE, *Reconceptualising the Interest in Knowing One's Origins: A Case for Mandatory Disclosure*, in *Medical Law Review*, 28, 4, 2020, 731 ss.

[3] In this perspective see also V. RAVITSKY, *Autonomous Choice and the Right to Know One's Genetic Origins*, cit., 37.

[4] E. FARNÓS AMORÓS, *Donor anonymity, or the right to know one's origins?*, in *Catalan Social Sciences Review*, 5, 2015, 5.

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the superior interest of the minor, to allow children "to obtain information on the identity of their parents, to the extent possible".[5]

The CRC creates a strong link between the right of the child to have information on his/her parents and the empowerment of the child, which represents the core of the whole convention: children are considered as persons, therefore they have always the right to obtain information on their lives, situation and identity and they also must be considered (and their opinion heard) in any decision concerning them.[6] Therefore, from the viewpoint of the child, the right to know assumes a very crucial role for the development of individual personality.

We should, nevertheless, bear in mind that we are not dealing with an absolute right: the right to know one's genetic origins (RKGO) is instead a relational right. The existence of the possibility to claim the acknowledgment of this right means, per se, that other people are involved in such a request. Indeed, a person's genetic origins are necessarily linked to the "source" of this information, namely a parent or an ancestor. For this reason, the RKGO could be considered as a relational right and involves a complex balance between the right to know, on the one hand, and the right to privacy, on the other hand. As we will see in the following paragraphs, though, these are not the only interests involved and the matter is even more complicated.

This assumption has two implications. The first one is that the RKGO is crucial to the development of personal identity. Questions related to ancestral origins and to the human basic need to know one's provenance are essential parts of the building of personal identity and self-awareness.[7]

The second consequence is quite challenging from a legal point of view, because it involves legal regulation, legislative approach towards new reproductive technologies and family types, but also individual stories, their claim in courts and consequent judicial decisions. If the right to know one's genetic origins is a relational right, then its level of guarantee and enforcement, as well as the role of "others" (i.e. the biological mother, the gamete donor, etc.) depends on the legal regulation or on court decisions. Both legislative enforcement and court adjudication, though, depend on the theoretical construction of this right (a freedom connected to the development of personhood) and on its entrenchment in the constitutional tissue of the legal order concerned, either through a connection in the constitutional text or indirectly by means of international ties.

In all contexts, anyway, the actual degree of acknowledgement is linked to the interpretation given, from time to time and case by case, to the essence of such a right. For example, it has to be considered that there are several and very relevant differences between the legal solutions available. As we will see in the final paragraph, they depend on the degree of information that could be accessed by the child: RKGO is an "umbrella term" that covers the "medical aspect" (i.e. access to information on

[5] Concluding observations, recommendations 31 and 32, CRC/C/15/add.188, 8). See E. FARNÓS AMORÓS, *Donor anonymity, or the right to know one's origins?*, cit., 5.

[6] On the Convention see J. TOBIN (ed.), *The UN Convention on the Rights of the Child: A Commentary*, Oxford, 2019.

[7] The literature in favour and opposing this assumption is very rich. For some references see V. RAVITSKY, *Donor Conception and Lack of Access to Genetic Heritage*, in *American Journal of Bioethics*, 16, 12, 2016, 45-46; S. GOLOMBOK, *Disclosure and donor-conceived children*, in *Human Reproduction*, 32, 7, 2017, 1532-1536.; G. PENNINGS, *Disclosure of donor conception, age of disclosure and the well-being of donor offspring*, in *Human Reproduction*, 32, 5, 2017, 969-973.

health, medical history or relevant genetic information of the parent/donor), the "identity aspect" (i.e. information on the biographical history of the parent/donor, without revealing his/her full identity) and the "relational aspect", which means access to full identity to have the possibility to establish a connection.[8]

Moreover, the degree of enforcement depends on the weight of this right in the balance with other fundamental rights. Therefore, as we will discuss more in detail in the next paragraphs, the legal enforcement and effectiveness of the right to know one's genetic origins depend on the instrument of its regulation at a national level. On the other hand, though, its regulation and, possibly, its jurisdictional acknowledgment depend on the theoretical background on which this right is founded.

1.2. The right to know one's origins beyond State borders

Another relevant aspect of this right is that it often involves cross-border issues. Indeed, it is not infrequent that the genetic background of a person who wants to take advantage of the right to know raises cross-border issues. It might happen with adoption, but also with medically assisted reproduction and with surrogacy. Intending parents might go abroad to adopt a child, or to realise their desire to become parents through reproduction technologies.

In these cases, the effective enforceability of this right depends not only on its regulation at a national level, but also on its acknowledgement in the State in which genetic origins might be found or on the degree of reciprocity of the two legislations. In some cases, the combination of two different regulations might cause a clash or, more easily, might reveal a lack of effectiveness.

For this reason, the analysis of the RKGO should move from a focus on its main features, which encounter different levels of regulation not only depending on the legal system involved, but also on the specific situation in which it has to be applied.

The aim of this paper is therefore to investigate whether the RKGO encounters significant variations when it applies to adoption, to assisted reproduction or to surrogacy. The results will allow us to understand its degree of effectiveness in different legal systems and the need to identify a minimum standard to grant its applicability notwithstanding the intrinsic differences between national regulations. To this end, the main features of the right to know genetic origins will be considered. Namely, the essay will focus on information and consent, on the structure of relevant regulation in the balance between collection and storage of personal information or protection of anonymity and privacy and, finally, on the most crucial factor for the enforcement of this right, which is time.

2. From the European Court of Human Rights to domestic judges: the case of anonymous birth

Adoption is the first area in which RKGO has been recognised and regulated. For example, in the UK adopted children have the right to see their original birth certificate once they reach the age of 18

[8] V. RAVITSKY, *The right to know one's genetic origins and cross-border medically assisted reproduction*, in *Israel Journal of Health Policy and research*, 6, 3, 2017, 2.

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(16 in Scotland).[9] In Italy, the law on adoption was amended in 2001 to provide for the right of the child to access information on his/her biological parents once he/she is 25 years old.[10] In Spain it is now provided by Law no. 54 of 2007 and it is possible once the adopted child reaches the age of 18.[11]
In the broad field of adoption, the discipline of anonymous birth in recent years has raised some interesting legal issues concerning the content of the right to know genetic origins.
Interestingly enough, similar issues emerged in Italy and in France and were decided by the European Court of Human Rights. In Italy, a significant number of cases concerning people adopted after anonymous birth who applied for disclosure of information on their origins ended up before courts because of the impossibility to get in contact with the biological mother, her refusal or her death. As we will see *infra*, the balancing between the offspring's fundamental right to know their origins, on the one hand, and the mother's right to privacy, on the other hand, might bring to different solutions, especially when the relevant legal framework on the matter is not clear.
Actually, in this respect, it is worth pointing out that the case law of the ECHR on the RKGO always concerns the interpretation of the right to private and family life and, in this context, is considered a matter of personal identity. Most of the case law of the ECtHR developed in the last decades concerns cases of adoption or anonymous birth, whereas there has not yet been case law on the RKGO after assisted reproduction.[12]

2.1. Adoption, anonymity and the European Court of Human Rights

In particular, the starting point for any investigation over the nature of this right is the case of *Gaskin v. UK*, decided in 1989. Here, the applicant claimed that the refusal to access to his personal and confidential information on the part of the City Council violated Article 8 (right to a private life) by failing to meet its positive obligation to give him access to the requested information. After his mother's death, Mr. Gaskin had been taken into the care of the local City Council and had stayed with foster parents until he was 18 years old. He then asked for discovery of his case records, including information on his family of origin and the administration refused on grounds of public interest. The case went to the European Court of Human Rights, which found a breach of Article 8.
In the opinion of Strasbourg judges, a person who has been given in custody during childhood has a "vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development".[13] On the other hand, the Court noticed that British law, by making access to records dependent on the consent of the contributor, can abstractly be considered compatible with Article 8 ECHR. Nevertheless, if it is within the margin of appreciation that a state can decide to subject access to records to third parties' consent, then it should in any

[9] This has been possible since 1975 and is now regulated by sections 60 ff. of the Adoption and Children Act 2002. It was previously provided by the Children Act 1989. For further information see https://www.gov.uk/adoption-records
[10] See Article 28 of Italian Law no. 184 of 1983, on adoption.
[11] Article 12 of the Spanish law on international adoption (ley 54 of 2007). See E. FARNÓS AMORÓS, *Donor anonymity, or the right to know one's origins?,* cit., 4.
[12] European Court of Human Rights, *Gaskin v. the United Kingdom*, appl. n. 10454/83, 07/07/1989, *Odievre v. France*, appl. n. 42326/98, 13/02/2033; *Godelli v. Italy*, appl. n. 33783/09, 25/09/2012.
[13] *Gaskin v. UK*, para 49.

case provide for an exception for cases in which the person who should consent is not available or improperly refuses disclosure.

The Court finally stated that the principle of proportionality is respected if the national regulation provides for an independent authority's decision when a contributor fails to answer or withholds consent. The lack of such procedure was found to be in breach of the claimant's right to personal and family life.

Gaskin represents a very significant precedent in the case law of the ECtHR with regards to the right to know personal origins, for two reasons. Firstly, the Court defined its nature, making it a "vital interest" and connecting the right to the development of the individual. Secondly, the Court started to outline procedural rights that contribute to grant effectiveness to the substantial right to know one's origins. Indeed, the need that an independent authority could evaluate the individual request to have access to personal records, in the event of the other parties involved improperly refusing to give consent, may be the only practicable solution to realise an appropriate balance of fundamental rights.[14]

The following step on this path is represented by the Grand Chamber's decision in *Odievre v. France*, in 2003. Here, the Court excluded the violation of Art. 8 ECHR by French authorities, but the case represents a very important precedent because it was the first time in which the Court dealt with the issue of anonymous birth. Indeed, the Court confirmed that the right to know has to be traced back to the provisions on private and family life, because it is a matter of relevance to personal development, which is protected by Article 8 ECHR. In particular, the Court noted that birth and the circumstances of birth form a part of the identity, and the right to respect for private life, of the adult.[15]

Nevertheless, the Court excluded the breach of this right in the case in question. Indeed, the Court traced a balancing between the claimant's "vital interest in its personal development" and "a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions" (para 44). By taking into account the specificity of the French law, the general interest in protecting the life and health of women giving birth and children and the fact that the claimant was given access to non-identifying information about her mother and natural family, the Court excluded the violation of Article 8 ECHR. It should be noted that, for the purposes of the Convention, the Strasbourg judges underlined that the right to private and family life was protected by providing the claimant with the possibility to know some information on her roots, safeguarding at the same time the interests of third parties (para. 48). Finally, in the opinion of the Court, States have a margin of appreciation in the determination of the means through which they achieve the aim of reconciling those competing interests. In the case in question, the French legislation respects this margin of appreciation and therefore does not violate the right to respect for private life of the claimant.[16]

[14] Other decisions concerning the RKGO have been issued with reference to paternity testing. See *Mikulic v. Croatia*, appl. n. 53176/99, 7/02/2002; *Jäggi v. Switzerland*, appl. n. 58757/00, 13/07/2006; *Backlund v. Finland*, appl. n. 36498/05, 6/07/2010.

[15] *Odievre v. France*, para 29.

[16] E. STEINER, *Desperately Seeking Mother – Anonymous Births in the European Court of Human*, in *Child and Family Law Quarterly*, 15, 4, 2003, 425-448.

The use of the margin of appreciation doctrine by the Court, in circumstances in which a difficult balancing of interests has to be made by the state legislator, can lead us to some reflections. It is not unusual, for the Strasbourg judges, to refer to these criteria when the balancing of two competing rights under the Convention is so difficult to be drawn and when this assessment recalls several aspects of the national legal framework (such as, in this case, the prevention of abortions and of illegal abandonment of children and the protection of vulnerable subjects).[17]

Interestingly enough, the French Conseil Constitutionnel was involved in a preliminary question of constitutionality on the same matter, ten years after the ECtHR decision.[18] Once again, the law was found to be compatible with the Constitution. In this circumstance, the Conseil considered that the identity of the mother was correctly protected by the French law, which provides that the woman can object to disclosure of her identity even after her death. At the same time, the right to know the origins of the child are protected because there is the possibility to apply for the disclosure of the woman's identity and the mother must be informed, at the moment of birth, that she could consent to reveal her data, once the child is an adult. In the opinion of the judges, the right of the child is guaranteed "as far as possible" and this is considered to be enough with respect to the general aim of the law on anonymous birth, which is intended to avoid the dramatic events we have referred to above. A critical aspect of this decision, which is also underlined in the commentary that the Council offers together with the decision, is that the individual's right to know his/her origins does not have autonomous identity. Indeed, it is completely dependent on the right of the mother to choose not to be named in the birth certificate and is not at all considered as an autonomous right. Actually, it should be pointed out that the Conseil Constitutionnel refers to "interests" of the woman and of the adult child which must be assessed by the law-maker.[19] The deference that the Conseil shows for legislation reveals the difficulties in tracing a line in the definition of the two competing legal positions.

2.2. A necessary legislative balance in the French and Italian cases

It was in the same years that a similar case, concerning the Italian provision on anonymous birth, ended up before the European Court of Human Rights and, a few months later, also before the Constitutional Court.[20] Here, the results were pretty different from the French ones, as the ECtHR found a violation of Article 8, whereas the Constitutional Court found a violation of Articles 2 and 3 of the Italian Constitution.

[17] The margin of appreciation doctrine was also used by the ECtHR in the leading abortion case *A, B, and C v. Ireland*, appl. no. 25579/05, 16/12/2010. In comment to this decision and on the use of the margin of appreciation see S. McGuinness, *A, B, and C leads to D (for Delegation!)*, in *Medical Law Review*, 19, 3, 2011, 476-491; J.N. Erdman, *Procedural abortion rights: Ireland and the European Court of Human Rights*, in *Reproductive Health Matters*, 44, 2014, 22-30.

[18] French Conseil Constitutionnel, Decision no. 2012-248 QPC, 16/05/2012.

[19] Literally: "l'équilibre ainsi défini entre les intérêts de la mère de naissance et ceux de l'enfant", Decision no. 2012-248 QPC, para. 7.

[20] The ECtHR decision is *Godelli v. Italy*, appl. n. 33783/09, decided on 25 September 2012; the Constitutional Court decision is no. 278/2013.

Under Italian law, a woman who gives birth has the right not to be named in the child's birth certificate.[21] In this case, the law provides for the mother's right to remain anonymous; the child is therefore given up for adoption and the relevant law on adoption is applicable with regard to the creation of a legal link between the child and the adoptive parents. The legal issues before both the Strasbourg Court and the Italian Constitutional judge concerned the unreasonableness of the difference between the right to know the child's biological origins, provided by the law on adoption,[22] and the exclusion of this possibility in the case of anonymous birth.

In this respect, we should firstly underline that, in *Godelli v. Italy*, in 2012, the Strasbourg Court recalled the precedent represented by *Odievre v. France*, reconfirming the applicability of Article 8 ECHR, because access to information about one's origins and the identity of one's natural parents is an important part of the development of personhood, protected by the right to respect for private and family life.[23] Moreover, and differently from the previous case, Italian law provides no mechanisms to balance the interest to anonymity of the mother and those of the child, once an adult, to know his/her origins. Therefore, the complete lack of any possibility to request the disclosure of the information concerning the natural mother (not even non-identifying information) is a decision that oversteps the margin of appreciation. In principle, States can choose between the several possibilities available in order to protect both interests, but the complete sacrifice of the position of the child amounts to a violation of the Convention. Unlike French law, the Italian legislation does not allow the woman to change her mind at a later stage and decide to identify herself.[24]

As in the French case, though, the position of the ECtHR is very much focused on parental rights, rather than on the essence of the right to know genetic origins. Indeed, the breach of the Convention and also of the margin of appreciation was found, in *Godelli*, in the absence of the possibility *for the woman* to change her mind, and not in the disproportionate sacrifice for the rights of the child.[25] It is no coincidence that neither of these judgements makes reference to the UN Convention on the Rights of the Child, which expressly recognises and promotes the right to know, as far as possible, one's origins.

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[21] DPR 396/2000, Article. 30. It is worth noticing, however, that this possibility is explicitly excluded in case of artificial reproductive technologies, as provided by Article 9, par. 2, of law no. 40/2004.

[22] The Italian law on adoption, Law n. 184/1983, provides for the right of the child to have access to the information concerning his/her biological origins and the identity of his/her biological parents at the age of 25. To this end, he/she should file an application before the competent juvenile court.

[23] The case brought before the European Court of Human Rights concerned a woman, born from an anonymous birth, who filed an application to have access to the information concerning her biological mother. The Tribunal, applying the law, refused her request; therefore, she appealed to the ECtHR, affirming that the Tribunal's denial and the Italian legal framework violate her right to respect of private and family life, protected by Article 8 of the Convention. The Strasbourg Court acknowledged that the relevant legal framework represented the result of a wrong balancing made by the Italian law-maker between competing fundamental rights and therefore Italy was condemned for violation of art. 8 ECHR. For a comment to *Godelli v. Italy*, see C. SIMMONDS, *An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights*, in *The Cambridge Law Journal*, 72, 2, 2013, 263-266.

[24] On the matter see also A. MARGARIA, *Anonymous Birth: Expanding the Terms of Debate*, in *International Journal of Children's Rights*, 22, 3, 2014, 552-580.

[25] In this respect, see also C. SIMMONDS, *An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights*, cit., 265.

It was a few months later that the Italian Constitutional Court was called to evaluate the compatibility with Constitutional provisions of the law on anonymous birth, and confirmed the principles established in *Godelli*. The Court overruled its precedent decision no. 425 of 2005 (in the Court's words, a 'fully analogous case' in which the question of unconstitutionality was judged as clearly unfounded). In particular, in decision no. 278 of 2013, the Court noted that the irreversibility of the mother's anonymity is unreasonable, as the right of the mother must be balanced with the right of the child to know his/her biological origins, which is protected by article 2 of the Italian Constitution. Moreover, the Court also found a violation of the principle of equality (Article 3 Const.), as this right is granted to adopted children, with the only exception of those born from anonymous birth.

The Court finally suggested that it is for the law-maker to set a balanced system of rules permitting the assessment of the subsistence of the willingness of the mother to remain unknown. The intent of the law, anyway, should be to try to reconcile these two opposite positions, by giving to the child the possibility of accessing information on the identity of the mother.[26]

The Italian Court balanced the two opposite interests. On the one hand, anonymity is justified by the need to protect not only the privacy of the mother, but also her health, and the child's health to avoid risks for the newly born life, and to ensure a framework for the birth to occur in the best possible conditions. On the other hand, consideration is also given to the right of the child, which "represents a significant element within the constitutional system ensuring protection for the person" and which "constitutes one of the aspects of the personality that can condition the intimacy and the very social life of a person as such".[27] It should be underlined, however, that although the irreversible secrecy of the mother's identity and information was found to be unconstitutional, the Court stressed the need for a legal intervention to properly address the necessity to reconcile these two opposite positions. Actually, this is a problem which is shared among most jurisdictions: the provision on anonymous birth is made to safeguard the safety of birth and to avoid or reduce abortion. Nevertheless, this interest in protecting the vulnerability of a particular situation cannot completely cancel the right of a person to obtain information on his/her biological origins, especially several years after birth.[28]

In Italy, at the moment, no legislative intervention has followed the mentioned decisions; therefore, every time a child whose mother did not want to be named on the birth certificate wants to have access to the information on his/her origins, he/she has to go to court. Courts gave very different interpretations of the principle of disclosure, until a landmark decision by the Court of Cassation in 2017.[29] Here, the Italian Supreme Court stated that the decision by the Constitutional Court clearly indicates

[26] For a comment to the decision of the Italian Constitutional Court, see V. COLCELLI, *Anonymous Birth, Birth Registration and the Child's Right to Know Their Origins in the Italian Legal System: a Short Comment*, in *Journal of Civil and Legal Sciences*, 1, 2012, 101.

[27] Italian Constitutional Court, decision n. 278 of 2013, para. 4. Translation by the Constitutional Court, available at https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/278-2013.pdf

[28] Several states, in this respect, provide that the woman must leave non-identifying information that the child could obtain once he/she reaches a sound age. See C. SIMMONDS, *An Unbalanced Scale: Anonymous Birth and the European Court of Human Rights*, cit., 265, making reference to Austria and Germany.

[29] Court of Cassation, decision no. 1946 of 2017. On previous decisions by Italian tribunals see the following address https://www.biodiritto.org/Biolaw-pedia/Giurisprudenza/Tribunale-di-Milano-sent.-11475-2015-parto-anonimo and the essay by S. AGOSTA in this volume.

a principle that judges can (and shall) follow in order to recognise the right to know the origins of a child born from anonymous birth. Even if the Constitutional judges said that it is for the law-maker to identify the most appropriate point of balance between the opposite interests of the mother and of the child (once an adult), in the absence of new discipline on the matter, judges should make all reasonable efforts to ascertain the present will of the mother and to ask her consent to disclose her identity. Some time later, the Court of Cassation also specified that, in case the woman is already dead at the moment of such request, then her privacy can never prevail over the right of the son/daughter to have access to information on his/her origin.[30]

2.3. Summing up: the right to know and anonymous birth between past, present and future

Beyond the concrete national disciplines on this specific matter, in this context it is worth stressing the delicate role of the Strasbourg Court in addressing the main features of the right to know one's origins in this field. In matters concerning rights connected to personal identity and complex balancing, the ECtHR often plays a decisive role, which proves to influence subsequent national decisions. In ethically controversial matters, Strasbourg decisions could concretely help in drafting a minimum standard for the protection of fundamental rights in Europe and contribute to an advancement of the legal debate on the matter.[31]

The discipline of anonymous birth raises very complicated questions, because it requires a careful balancing between opposite positions which deserve due protection, being linked to fundamental rights of the person. This issue reveals several aspects of interest that help us to take a further step in the identification of the basic features of the right to know one's origins.

First of all, when born from an anonymous birth, the right to know must *always* be balanced with the right to privacy of the mother. Interestingly enough, the reason to protect the mother's identity is also rooted in the need to protect the child: the discipline of anonymous birth, in fact, is created to allow the woman to give birth in a protected and safe environment, also in order to avoid a decision on her part to give birth in risky situations or to have an abortion. Therefore, the right to know must be balanced also with the right of the child to have a safe birth. It is not only a matter of conflict between the rights of the mother and those of the child. As previously outlined, the right to know has a profound relational nature, because it can never be considered an absolute right, but it always has to be considered together with other fundamental rights.

Secondly, this right has a very particular time frame. Indeed, the concrete situation in which the relevant legal position arises occurs in a given time and context, which is the time of birth of the child and the will of the mother not to be named in the birth certificate. Nonetheless, the right itself can be enforced only several years after the moment when the relevant circumstance occurred, which is the moment in which the child becomes an adult or reaches the age established by law to apply to have access to information on his/her origin. As we will see in the following paragraphs, this is a feature of the right that is relevant also in the other fields of its application. In this specific context, time represents the factor on which the balancing is based. The need to ascertain the current will of the

[30] Court of Cassation, ordinance no. 3004 of 2018.

[31] See D. FENWICK, *Abortion jurisprudence' at Strasbourg: Deferential, avoidant and normatively neutral?*, in *Legal Studies*, 34, 2, 2014, 214-241.

woman depends on the time that has elapsed, which is the criterion that permits disclosure of the identity of the mother, which otherwise would remain secret in order to protect the vulnerability and the need for safety mentioned before. This is the main reason that brought both the Strasbourg Court and the Italian Constitutional judge to hold that the Italian law which does not provide for instruments to ascertain the current will of the mother is disproportionate and unconstitutional. Asking the mother should better satisfy this controversial balance.

In brief, the need to protect a potentially vulnerable woman and her decision (in the present) to give birth to a child without being named in the birth certificate, could be determinant and could – with adequate guarantees – even be prevalent over the right of the "future" child (once an adult) to have effective access to the information concerning the woman's identity. Exceptions should also be made in the event of the woman being already dead when the child, having reached adulthood, wants to have access to information on his/her origin.

Thirdly and finally, in the field of adoption and in the specific context of anonymous birth, genetic information has very little relevance. Indeed, we have rather been referring to a right to know origins or information on the natural mother. In this field, genetic information *per se* is not at the centre of the legal guarantee of the right, which is rooted instead in the inherent need for a person to know the circumstances of his/her birth as a matter of personal identity (i.e. identity and relational aspects, in conformity with the distinctions we have drawn before). Actually, in this context, genetic information is linked to the disclosure of the medical data of the mother, which should in any case be made accessible for health reasons. Indeed, in all cases health proves to be prevalent over the need to respect or protect the privacy of the natural mother.

3. Applying the right to know to the field of assisted reproduction and gamete donation

The features and the understanding of the right to know reveals different facets if we move from anonymous birth to medically assisted reproduction.

First of all, when dealing with assisted reproduction with gamete donation, we are considering voluntary donation, which means that the donor consciously offers his/her genetic material to contribute to the creation of new human life. Differently, the discipline on adoption and anonymous birth is based on the need to protect an existing child who cannot be raised by his/her natural parents. Moreover, and differently from anonymous birth, the child is not yet born, nor is he/she even conceived, at the moment of donation, that is when is it necessary to inform the donor on the future possibility of disclosure. Hence, the discipline concerning the right to have access to information on biological/genetic origins foreruns both conception and birth and is intended to determine the concrete fact (birth) that causes the applicability (in a quite remote future) of the relevant legal discipline at the time of donation.

Therefore, there is no balance to be struck between the interests of the donors and the right to know the genetic origins of the child. Yet, the regulation of gamete donation and the continual technologi-

cal progress[32] in this field have caused a significant scientific debate that counterposes those in favour of donor disclosure to those that prefer anonymity of donation.

In this particular area, the starting point for a legal dissertation on the inherent nature of the RKGO is that it is a widely common opinion that the disclosure of conception is strongly recommended both in medically assisted reproduction in general and with gamete donation.[33] The possibility to have access to information on conception and birth is regarded as a very important part in the construction of a child's identity.[34] Nevertheless, anonymous donation is still quite widespread at a normative level and, in any case, donor records are not necessarily kept for a long time.[35] It is worth mentioning, moreover, that in some countries where donor disclosure has been regulated for a long time, there are some studies which show that intending parents have a reluctant attitude towards the disclosure of the circumstances of conception.[36] In other words, parents who have access to assisted reproduction with gamete donation may choose not to disclose to their offspring that there was a third party contribution to their existence, with the fear of possible negative or disruptive consequences for their family equilibrium. It is not surprising that this problem is relevant almost only among heterosexual couples, as same-sex parents or singles are forced to give such explanations to their children at a certain stage and, therefore, the path towards the discovery of genetic origins is more natural.[37]

Notwithstanding this wide agreement on the need to inform the child that he/she was conceived and born thanks to reproduction technologies, the possibility to have access to information on the donor's identity is more controversial.[38] Therefore, the right of a child to have access to information on his/her origin is abstractly guaranteed by both approaches, but in the first case it is limited to the information on the circumstances of conception and does not extend to the identity of the donor. In particular, it has to be remarked that, in any case, this right is hardly enforceable: indeed, even if the law provides for the opportunity to inform the child on the method of conception, obviously it is not

[32] See, for example, the possibilities offered by mitochondrial donation, which has already been regulated in the UK, or the application of gene editing (CRISPR-Cas9) to embryos.

[33] See for example: ASRM (Ethics Committee of the American Society for Reproductive Medicine), Informing offspring of their conception by gamete or embryo donation: a committee opinion, in Fertility and Sterility, 100, 2013, 45–9.

[34] For example, V. RAVITSKY, *The right to know one's genetic origins*, cit., is very much in favour of disclosure. More recently, on the European perspective on this issue see K. WADE, *Reconceptualising the Interest in Knowing One's Origins: A Case for Mandatory Disclosure*, cit.

[35] V. RAVITSKY, *The right to know one's genetic origins*, cit., 2.

[36] A. BREWAEYS et al., *Anonymous or Identity-Registered Sperm Donors? A Study of Dutch Recipients' Choices*, in *Human Reproduction*, 20, 2004, 820, finding that only 17% of parents choosing an anonymous donor intended to disclose to the child the circumstances of his or her conception; C. GOTTLIEB et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, in *Human Reproduction*, 15, 2000, 2052; M. KIRKMAN, *Parents' Contributions to the Narrative Identity of Offspring of Donor-Assisted Conception*, in *Social Science & Medicine*, 57, 2003, 2234–35. See also V. RAVITSKY, *The right to know one's genetic origins*, cit., 3.

[37] E. FARNÓS AMORÓS, *Donor anonymity, or the right to know one's origins?,* cit., 7.

[38] A strong opposition is expressed by I. DE MELO MARTÍN, *The ethics of anonymous gamete donation: Is there a right to know one's genetic origins?*, in *Hastings Center Report*, 44, 2, 2014, 28-35.

possible to force parents to do so,[39] unless the application of medically assisted reproduction technologies or donated gametes is written in the birth certificate.[40]

The problem is that, in any case, the right of the child to have access to information on the donor's identity is not enforceable, unless the relevant legislation provides for concrete instruments to make it effective. More specifically, if the law does not provide for the duty, firstly, to tell the child about assisted reproduction, and, secondly, to disclose the donor's identity at the request of the child (once he/she is an adult), then it is not possible to obtain information on the personal identity of the donors, except to raise a question of constitutional legitimacy. The only exception, obviously, regards information that is necessary for medical reasons. In this regard, several solutions on the instruments of legal regulation have been proposed. They space from the provision of a sort of notification to be sent by letter when the child is of sound age (for example, at 16 or 18 years old) to a set of socio-cultural incentives to make parents comfortable with the idea that telling the truth to the child will not be disruptive for their family relationships.[41]

Another relevant aspect concerns original intentions.

Whereas in anonymous birth we can identify a significant connection between the child and the biological mother, which regards the carrying of the pregnancy and the decision to give the child up for adoption, in gamete donation the biographical link is much too weak to offer a contribution to the development of the personality of the child. In fact, when dealing with assisted reproduction (with or without donation), the central role is played by the intending parents, whose extremely strong desire to have a child is the key determinant of the new life. In assisted reproduction, the genetic material comes from intending donors, who consciously offer their gametes to allow other people to become parents. They are aware of their role since the beginning and they know that there will be no further relationship with the child. Similarly, the parents are aware they are benefiting from the gametes of an unknown donor to realise their desire to have a family.

In these circumstances, does a full understanding of the right to know one's origins really contribute to the development of individual personality, in the sense we have been dealing with in the field of anonymous birth? Here, we do not have an individual biographical story to discover. Relevance has to be given to the stories of intending parent(s), but the donor seems to have a more marginal role.

Therefore, if we take this perspective, then access to genetic information might be even more important than in the previous example. Indeed, in this case, genetic information is the data that a person may be really interested in, for their medical relevance.

[39] On this, S. GOLOMBOK et al., *The European study of assisted reproduction families: The transition to adolescence*, in *Human Reproduction*, 17, 3, 2002, 830-840, makes reference to the uncertainty of leaving the decision to parents.

[40] K. WADE, *Reconceptualising the Interest in Knowing One's Origins: A Case for Mandatory Disclosure*, cit., 749.

[41] The topic has been widely investigated. Beyond K. WADE, *Reconceptualising the Interest in Knowing One's Origins*, cit., see M. GARRIGA GORINA, *El conocimiento de los orígenes genéticos de la filiación por reproducción asistida con gametos donados por un tercero*, in *Derecho Privado y Constitución*, 21, 2007, 167-228; Nuffield Council on Bioethics, *Donor Conception: Ethical Aspects of Information Sharing*, London, 2013.

Among European countries, Sweden became the first one, in 1985,[42] to legally regulate gamete donation and to recognise the right for all offspring "to obtain identifying information about the donor when they are sufficiently mature".[43] For the law to be properly effective, at least two conditions must be fulfilled: first of all, recipient parents should tell their children about the way they were conceived; secondly, the offspring should be made aware of this possibility and should apply to the competent authorities for donor data disclosure.[44] Quite interestingly, several arguments can be made either to favour or to oppose donor identity disclosure to the offspring. In any event, it is a matter for national regulation and might deeply differ on a State by State basis, given also the specificities of the discipline on medically assisted reproduction.

3.1. Right to know and assisted reproduction: just a matter of regulation?

As we have seen, from a biographical or anthropological viewpoint, the need to discover one's origins might have different dimensions if it is related to anonymous birth or to assisted reproduction. In the former case, the relevance of the disclosure is represented by the identity of the natural mother and by her story; in the latter case, the right of the child is more closely linked to the need to know his/her genetic asset. The need to know the identity of the donor is somewhat rare and the possibility to have access hardly takes prevalence over the donor's right to anonymity and privacy.

The ways in which a person born through gamete donation can have access to information on his/her donors is strictly regulated by legislation. In case of lack of a dedicated discipline, there is no enforceability for the right to have access to information on the donor, with the only exception of medical data. In general terms, the regulation of medically assisted reproduction frequently adopts the approach of donor anonymity, with the exception of the disclosure of health data. Therefore, the most widespread model seems to be the one concerning access to the medical aspect, and less frequently to the identity or even the relational aspects.

Moreover, also in this field, the time factor has a crucial role. Even if international conventions and national laws provide for the right of the child to know his/her origins, which means being informed of the circumstances of conception, the enforceability of the right to know one's identity in the case of gamete donation is enforceable only when the child has grown up. This means that, even if there is a general (moral) obligation for the parents to tell the truth and to explain to the child how he/she was conceived, the person can have access to the information on the donor only once he/she is 18-25 years old (depending on the national legislation) or, before, only for exceptional circumstances (such as health needs). The long time between donation and the possibility of disclosure requires the law to provide for concrete mechanisms for the enforceability of the right, which include the regula-

[42] The law is no. 1140/1985, known as the Genetic Integrity Act, amended in 2006 (2006:351) and available at http://www.smer.se/news/the-genetic-integrity-act-2006351/ .

[43] S. ISAKSSON et al., *Two decades after legislation on identifiable donors in Sweden: are recipient couples ready to be open about using gamete donation?*, in *Human Reproduction*, 26, 4, 2011, 853. See also M. DENNISON, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, in *Journal of Law and Health*, 21, 2008, 8.

[44] Some recent studies investigated the impact of the law in Sweden and its effectiveness, as it seems that not all parents told their children about donation. S. ISAKSSON et al., *Two decades after legislation on identifiable donors in Sweden*, cit.

tion of registries. In other words, once the decision to regulate access to information on the donors' identity is adopted, then it is necessary to provide all forms of contact and consent possible to make the right really effective.

On the donor's side, the full disclosure of his/her identity, after more or less twenty years from when the donation took place, might be disincentivizing for a prospective donor. In this regard, regulatory instruments should also take into account the ongoing problem of gamete shortage, which compels some states to purchase gametes from abroad.

Taking into account all relevant variables, it seems that the most balanced solution, in the field of gamete donation, is to balance the right to have access to information on one's identity with the nature of the donation, with the original intent of both donors and intending parents and with the need to maintain the functionality of donation, mainly through the availability of gametes coming from different donors. Therefore, access to health information as well as to general information on origins shall be ensured in order to satisfy the right to know. This has to be done through adequate registries and informing prospective donors and intending parents of the possibility to disclose this information. The decision to reveal the whole identity (i.e. the relational model) might be considered as a matter of discretionary power, in consideration of the different values involved. The most balanced solution seems that of giving to the child the possibility to choose whether to have access to full or partial information and, respectively, to leave the donor the possibility to disclose just some information or his/her full identity.[45]

4. Right to know and surrogacy: the triplication of motherhood(s) and the best interest(s) of the child

Surrogacy is the third context in which the issue of the right to know one's genetic origin is analysed. Here, some of the suggestions already raised with specific regard to assisted reproduction can be easily referred also to surrogacy, especially if we consider that, in many countries where the latter technique is allowed and disciplined, the donation of an ovum by a woman other than the one who will carry the pregnancy is a condition for the lawfulness of this practice.[46] Therefore, in the case of surrogacy, the level of complexity – in social, ethical and legal terms – related to the specific characteristics of this practice becomes even higher, due to the distinction between genetic and biological motherhood, which can occur at the biological/medical level due the specific techniques implemented (ova donation); and the potential separation between gestational and social motherhood, which represents one of the main challenges posed by the regulation of surrogacy agreement effects (more specifically, by the birth of a child via surrogacy).[47]

[45] K. WADE, *A case for mandatory disclosure*, cit., is very much in favour of full disclosure of the donors' identity.

[46] For a recent comparative study, see R. LA RUSSA, *Le pratiche di maternità surrogata nel mondo: analisi comparatistica tra legislazioni proibizioniste e liberali*, in *Responsabilità Civile e Previdenza*, 2, 2017, 683-716.

[47] S. CECCHINI, *Il divieto di maternità surrogata osservato da una prospettiva costituzionale*, in *BioLaw Journal-Rivista di BioDiritto*, 2, 2109, 335, highlights that the involvement of at least one woman who is not part of the couple and who shares the parental project is capable of splitting motherhood into three different roles: biological, genetic and social mother. The biological mother is the one who carries the pregnancy and gives birth. The genetic mother, on the other hand, is generally anonymous and provides the eggs. Lastly, the social moth-

With regard to the first dimension – the separation between genetic and biological motherhood – the recognition of a right to know the identity or at least have access to specific information referring to the ova donor (e.g., of a medical nature) is usually coherent with the existing regulation of assisted reproduction via gamete donation, except when a surrogacy-tailored exception is provided.[48] Accordingly, if anonymity is the rule in the case of ova donation, it will apply also in the case of surrogacy, as well as when the law allows one to obtain – under specific conditions – certain information about the donor (e.g. related to health condition). With regard to the second dimension – gestational *vis a vis* social motherhood – the right to know the identity of the gestational mother becomes crucial in the perspective of the concrete definition of the best interest of the child born via surrogacy.[49] In this case, *ad hoc* rules are usually set forth by national legislations which regulate this practice. Interestingly enough, even where surrogacy is explicitly forbidden by law – such as in Italy, Spain, and France – the matter of knowing one's genetic origins forms part of the broader issue of the right to an identity of the person born. The analysis will focus on the latter dimension, where the right to know one's genetic origins may serve two purposes: as a fundamental right of the newborn via surrogacy; and as a criterion for the acknowledgment of the *status filiationis*, both directly when surrogacy is allowed and regulated or indirectly, in all those cases where the law prohibits the practice and does not provide any *ad hoc* criteria for status determination in the case of cross-border surrogacy. In the former case, the right to know may be part of the balancing between the public and private rights and interests at stake, which legislature is primarily called to define when regulating surrogacy; in the latter case, it can become relevant in the light of guaranteeing the child's right to personal identity within the broader context of the *status filiationis* determination, in which genetic identity seems to be less relevant than – or at least functional to –the need to establish the most adequate normative framework to protect child's personal identity.

4.1. Surrogacy and the Parliament: the right to know, genetic link and social/intended parenthood

If we adopt the perspective of the legislative approach to surrogacy, then, the effective recognition and protection of RKGO depends mainly on the existing regulation of gamete donation in the broader framework of assisted reproduction.[50] At the same time, the legislative choice to provide for the absolute ban of this technique may also be grounded in the aim of guaranteeing the genetic identity of the child born via surrogacy as a public absolute value which would be – together with other public interests, such as the prevention of women's exploitation and the security of the parental relationship – violated by such practice. Italy is a paradigmatic example of this attitude, even if there is not a direct reference to the need of protecting a child's genetic identity at the legislative level as a reason

er, also known as the commissioning mother, is the one who has expressed, together with her partner, her wish to assume full parental responsibility for the newborn child.

[48] See the Portuguese case below.

[49] I. RIVERA, *La complessa questione della maternità surrogata tra rispetto dell'ordine pubblico e protezione del "best interest of the child": un percorso ermeneutico non sempre coerente*, in *Sociologia del diritto*, 1, 2020, 201-222.

[50] On this issue, see from a broader perspective L. POLI, *Artificial reproductive technologies and the right to the truth about genetic and biographic origins*, in *International Journal of Technology Policy and Law*, 3, 1, 2017, 56-67.

to provide for the absolute ban of surrogacy. With regard to the Italian case, it is worth mentioning that the Constitutional Court explicitly referred to women's vulnerability and dignity as constitutional goods violated by surrogacy; it did not mention the child's right to know or the right to genetic identity.[51] In broader terms, the Italian Constitutional Court – albeit in the different context of assisted reproduction via ova donation – clarified that, in the light of the social and cultural evolution which has been characterising the idea of familial and parental relationships in contemporary societies, the issue of the genetic origin of a child is not an essential prerequisite for the existence of a family.[52] At the same time, the separation between genetic and biological ties, on the one hand, and social ties, on the other, in the light of assessing the determination of a parental linkage, does not automatically eliminate the distinct issue represented by the possible will of the child born via surrogacy to know his or her own genetic or biological origins, intended as an expression of the right to personal identity.

If analysed from the latter perspective, the issue of access to information related to the genetic or biological linkage of the child born via surrogacy, both directly or through the legal parent(s), may find an explicit answer when this practice is regulated at the national level. The Portuguese case is particularly relevant. Article 8 of Law 32/2006 on Medically Assisted Procreation (following the reform introduced by Law 25/2016) allows surrogacy, exclusively on an exceptional and altruistic basis, without remuneration and voluntarily, subject to prior authorisation by an independent body, the National Commission for Medically Assisted Reproduction. Within this legal framework, Article 15 introduces the principle of the anonymity of donors and surrogate mother, with the exception of unspecified cases where information on the identity of the donor may also be obtained for important reasons recognised by a court judgment.[53] In 2019 (Law 48/2019), a new exception was provided, which applies also to surrogacy, according to which "the people born as a result of reproductive procedures through the use of gametes or embryos may obtain, from the competent health services, genetic information concerning them, as well as information on the donor's civil identification, obtained from the National Council for Medically Assisted Procreation, provided that they are over 18 years old".[54] The assessment made by the Portuguese Constitutional Court of the anonymity regime is especially relevant in expressing the complexity that the separation between motherhoods inevi-

[51] Italian Constitutional Court, judgments no. 33 of 2021 and 272 of 2017.

[52] Italian Constitutional Court, Judgment no. 162 of 2014.

[53] Art. 15, paragraph 4. See V.L. RAPOSO, *Rise and fall of surrogacy arrangements in Portugal (in the aftermath of decision n. 465/2019 of the Portuguese Constitutional Court)*, in *BioLaw Journal – Rivista di BioDiritto*, 1, 2020, 10/15. See also the Greek legislation, which adopts the principle of anonymity regarding any donation (in this Journal, T. CHORTARA, S. PENASA, L. BUSATTA, *The best interests of the child born via cross-border surrogacy. A comparison between Greece and Italy*, in *BioLaw Journal-Rivista di BioDiritto*, 1, 2016, 189-210. Art. 8 of the Law n. 3305/2005 on the Application of medically assisted procreation provides that medical information referring to the donor must be kept in an anonymous codified form in the Cryopreservation Bank and in the National Registry of Donors and Receivers.

[54] V.L. RAPOSO, *Rise and fall of surrogacy arrangements in Portugal (in the aftermath of decision n. 465/2019 of the Portuguese Constitutional Court)*, cit., 350, clarifies that "Law 32/2006 never enshrined a pure anonymity regime. From the very beginning, Article 15/4 stated that "information may also be obtained on the identity of the donor for significant reasons recognised by court decision". The exact meaning of the wording "significant reasons" was never clarified, but some have asserted that this clause includes situations of severe emotional distress caused by the lack of knowledge of the child's genetic origins".

tably provokes also in legal and constitutional terms. At first, the Constitutional Court (judgment no. 2009) considered justified the mitigated regime of anonymity set forth by Article 15, as it aims to weigh the right to know one's genetic ancestry, which is an expression of the right to personal identity, with other constitutional values, such as the right to found a family and the right to respect of private and family life. In 2018 (Judgment no. 225), the same Court reached a completely opposite conclusion. It stated that, in the light of the centrality of knowledge of one's origins as a fundamental element in the development of personal identity, the regime of temperate anonymity introduced by Article 15 infringes the essential core of the right to personal identity and the right to the development of the unborn child's personality.[55] According to the Court, an opposite legal regime, which enshrines the possibility of anonymity of donors and surrogate mother exclusively when serious grounds for doing so exist, to be assessed on a case-by-case basis, would be a more acceptable solution (§80). For the sake of analysis, it is worth highlighting that the Court associated the desire to know the identity of the person who carried out the pregnancy – the biological mother – to the claim to know one's genetic origins, by acknowledging that pregnancy must be considered a "differentiating personal experience" and that the surrogate mother may become a relevant reference point for the newborn child's biographical itinerary (§ 79). Thus, the Portuguese trajectory in the regulation of surrogacy clearly shows that it is primarily the Parliament's duty to design the legislation on surrogacy – in the case of an absolute ban as well as of conditional admissibility of the practice – taking into account also the issue of the child's origin, both from a genetic and a biological perspective. It must also be clarified that Parliaments enjoy a broad margin of appreciation in performing this assessment, as emerges for instance from the consolidated case-law of the European Court of Human Rights.[56]

In the context of the valorisation of genetic linkage at the legislative level, the existence of a genetic link between the child born via surrogacy and the intended parents can be prescribed by law as an essential condition for the admissibility of the practice. In this case, it is worth noting that the rationale of the requirement is essentially to guarantee the best interest of the child, on the one hand; and that it directly forms part of the discipline on surrogacy and it does not become relevant only *ex post*, when it is usually enforced as a condition to determine the parental relationship with the intended parents (as happens in Italy and according to the ECtHR case-law),[57] on the other hand. From a comparative perspective, section 294 of the South African Children's Act[58] provides that "no surrogate motherhood agreement is valid unless the conception of the child contemplated in the agree-

[55] *Ivi*, 348.

[56] On States' margin of appreciation in the context of surrogacy law according to the ECtHR's case-law, see recently A. MARGARIA, *Parenthood and Cross-Border Surrogacy: What Is 'New'? The ECtHR's First Advisory Opinion*, in *Medical Law Review*, 28, 2, 2020, 418 ff.

[57] See i.e. the ECtHR, case *Mennesson v. France*, 26 June 2014, n. 65192/11, where the genetic link with at least one parent is identified as the criterion for status determination (§100).

[58] Law no. 38 of 2005. See the 2017 Legal Grounds III: Reproductive and Sexual Rights in Sub-Saharan African Courts, edited by the International Reproductive and Sexual Health Law Program, University of Toronto, Centre for Human Rights, Faculty of Law, University of Pretoria, South Africa e Center for Reproductive Rights, New York, Pretoria University Law Press (PULP), 2017, 106-110 (www.pulp.up.ac.za/legal-compilations/legal-grounds); M. SLABBERT, C. ROODT, South Africa, in K. TRIMMINGS, P. BEAUMONT (eds.), *International Surrogacy Arrangements: Legal Regulation at the International Level*, Hart, 2013, 325-346.

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ment is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person". This requirement is recurrent also in other legal systems in which specific forms of surrogacy are allowed (i.e. Portugal and the United Kingdom). Notwithstanding, South Africa's case is particularly relevant because the Constitutional Court of that legal order has been called to assess the compatibility of such criterion, which is considered part of the best interest of the child, with other constitutional rights, such as the right to privacy, the right to physical and psychological integrity and the right to health of the intended parents that are unable to contribute with their own gametes to a surrogacy agreement, as well as the principle of equality and dignity. According to the Court, which eventually declared the question groundless, the requirement of a genetic linkage with at least one of the intended parents enacts the principle of the best interest of the child born via surrogacy, which finds formal constitutional grounds.[59] Thus, "The requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose (…) of creating a bond between the child and the commissioning parents or parent", which is designed "to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s)" (§ 286).

4.2. Surrogacy and the courts: self-restraint, the concrete best interest of the child and social parents' duty to disclose

If we refer to the link between the RKGO and the determination of the *status filiationis*, the courts' perspective becomes particularly relevant in order to try to understand which normative function genetic ties can play in this specific context, which is independent of the legislative model chosen by a legal order to regulate surrogacy. From a comparative perspective, courts may assume different stances when assessing the role played by genetic origins in the context of determining parental relationships between all the subjects involved in surrogacy agreements.[60]

Courts may be deferential to the choices made by legislature. Accordingly, genetic or biological truth may be considered prevalent even when clear and explicit consent has been given by the intended parents, if an *ad-hoc* rule for determining parenthood in the context of surrogacy has not been explicitly set forth at the legislative level. Within this judicial approach, a judgment of the Supreme Court of Ireland, related to the determination of the parental relationship of a child born via surrogacy, is particularly significant. The High Court had previously ordered the registration in the civil status registry of the intended mother, as the genetic mother of the child, instead of the woman who had given birth to him, on the basis of the existence of both a genetic link (the intended mother's ova had been used) and the parental will. On the contrary, the Supreme Court overturned the High Court's judgment, on the grounds that a legislation on surrogacy and its effect in terms of parenthood does not exist in the Irish legal system and that "It is, thus, quintessentially a matter for the Oireachtas

[59] Article 28 of South African Constitution, according to which "A child's best interests are of paramount importance in every matter concerning the child".

[60] See D. ROSANI, *"The best interest of the parents". La maternità surrogata in Europa tra interessi del bambino, Corti supreme e silenzio dei legislatori*, in *BioLaw Journal - Rivista di BioDiritto*, 1, 2017, 24 ff.

[the Irish Parliament]".[61] The Supreme Court does not assess the merit of the issue, nor does it clarify the relevance of the existence of a genetic link with the intended mother; it merely refers to the appreciation of the legislature, based on the fact that the issues raised – related to the status and rights of children and family – are "important, complex and social, which are matters of public policy for the Oireachtas" and cannot be addressed by a court.[62]

Courts generally recognise the prevalence of the need to guarantee the best interest of the child, which is a very broad concept consisting of a bundle of different rights and principles, where the right to know genetic origin represents only one of the possible relevant components. Therefore, the need to protect one's genetic identity shall not act as a limit for the effective protection of the broader personal identity of the child born via surrogacy, of which genetic or biological linkage is only one of the constitutive elements. In order to show different approaches to the definition of the connection between the best interest of the child and the existence of a genetic link with the intentional parents, it is worth recalling a judgment of the Italian Constitutional Court, related to the disavowal of paternity following a surrogacy agreement (Judgment no. 272 of 2017).[63] According to the Italian Court, "whilst it is necessary to acknowledge a marked preference expressed by the legal order that the status of an individual should reflect the actual circumstances of his or her procreation, it cannot be asserted that the establishment of the biological and genetic parentage of an individual is a value of absolute constitutional significance, as such immune to any balancing operation". Therefore, the right to know or the right to genetic (or biological) identity can be functional to the effective protection of the best interest of the child born via surrogacy. At the same time, genetic identity cannot be intended as an absolute constitutional value, the protection of which would in practice be contrary to the concrete best interests of the child; it must coexist, within the "comparative assessment" of the "concrete" best interest of the child, with other relevant variables, such as – among others – social parenthood, the duration of the relationship that has been established with the child and thus the feeling of identity already acquired by the latter, and the existence of a legislative ban on surrogacy. Therefore, according to the Court, "in all cases in which genetic identity may differ from legal identity, the requirement to strike a balance between the need to establish the truth and the best interests of the child is apparent from the evolution of the law over time".[64]

Lastly, courts may formally grant protection to the right to know one's origins even when they give priority to the "reproductive will" of social parents over the genetic or biological truth of childbirth. In this case, courts recognise the right to know the conditions of birth (which is a broader concept than genetic identity) and a resulting duty to disclose on the part of the intended parents. This happened in Argentina, where the courts, confronted with a legislative lacuna in the field of surrogacy,

[61] M.R. and D.R. (suing by their father and next friend O.R.) &ors -v- An t-Ard-Chláraitheoir&ors, [2014] IESC 60, 7 November 2014.

[62] Denham C.J., § 113-119; see A. MARGARIA, *Nuove forme di filiazione e genitorialità. Leggi e giudici di fronte alle nuove realtà*, Bologna, 2018, 240.

[63] F. ANGELINI, *Bilanciare insieme verità di parto e interesse del minore. La Corte costituzionale in materia di maternità surrogata mostra al giudice come non buttare il bambino con l'acqua sporca*, in *Costituzionalismo.it*, 1, 2018,149-177.

[64] Italian Constitutional Court, Judgment no. 272 of 2017, cit.

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have adopted a mechanism of *ex ante* judicial authorisation of surrogacy agreements,[65] which include the duty to inform the child about the circumstances of birth, in the light of respect for the child's right to personal identity.[66] Concretely, the courts systematically ordered that, in safeguarding the right to identity, which is also constitutionally protected, in the event of birth, intended parents must make their child aware of his/her gestational truth, for when he/she is old and mature enough to understand his/her life history.[67] A common line of reasoning is the assertion that children born under a surrogacy agreement, as part of their identity, have the right to know that they were born through the use of surrogacy and have also the right to know the identity of the surrogate mother.[68]

4.3. Surrogacy and the relevance of genetic and biological ties: a multifaceted issue

Within the framework of surrogacy, the role played by the right to know one's genetic origins is decisively oriented by the triplication of the possible forms of motherhood – genetic, biological and social – on the one hand; but it is also directly interested by a distinction within the concept of personal origins, which derives from the combination between gamete donation and surrogacy. Therefore, if the dichotomy between genetic and biological mother usually follows the rules on the anonymity of donor identity or sensitive data set forth in any legal system in the context of assisted reproduction technologies, the role played by the right to know one's genetic or biological origins becomes more complex and unpredictable when the separation between gestational and social parenthood comes into play. Here, legislature is the pivotal authority called to find a reasonable balancing between competing rights and interests, both in cases where surrogacy is regulated and when the law provides for a total ban of such practice. The right to know can be limited similarly to the case of gamete donation, even though we have seen that courts may reverse the anonymity rule in order to guarantee the personal identity of the child born via surrogacy in a more effective way (Portugal). Alternatively, it can be particularly valorised as a form of expression of the best interest of the child, when the law provides that a genetic link with the intended parents must exist for the surrogacy agreement to be lawful (South Africa). If we consider the courts' attitude, it is possible to detect different approaches, which range from an absolute self-restraint with regard to the legislature's margin of appreciation, even if the need for a clear normative framework is explicitly declared (Ireland); to the recognition of the paramount nature of the best interest of the child, within which the need to protect one's genetic identity shall not act as a limit for the effective protection of the broader personal identity of the child born via surrogacy (Italy); and to the definition of a formal duty for the intended

[65] D.M. CASTANO VARGAS, *La procreazione medicalmente assistita. Prospettiva di bilanciamento dei diritti nell'esperienza argentina*, in *Biolaw Journal-Rivista di BioDiritto*, 3, 2018, 215-217.

[66] According to L. POLI, *Artificial reproductive technologies and the right to the truth about genetic and biographic origins*, cit., 60, "Mutatis mutandis, a similar principle is applicable in the case of surrogacy, especially considering that prenatal attachment to the gestational mother might be relevant for the definition of the individual identity".

[67] *R., L. S. y Otros s/ Solicita Homologación* sentencia 22 de Noviembre de 2017 Juzgado de Familia 2da Nominación, Cordoba (SAIJ: FA17160037).

[68] Tribunal Colegiado de Familia Nº 7 de Rosario 5 de diciembre de 2017 *H., M.E. y Otros S/Venias y Dispensas*, 32.

parents to disclose the conditions of birth to the child born via surrogacy, even in the context of a regulatory regime based on the *ex-ante* judicial authorisation of surrogacy agreements (Argentina).

5. Concluding remarks: the right to know one's genetic and biological origins; a relational and multidimensional right

The right to know one's genetic origin has a relational nature, as it must find a balance with other competing individual rights, which belong to donors, to the gestational mother and even to the child him/herself (i.e. the right to a safe birth, as in the case of anonymous birth). It may also be formed by different dimensions, strictly dependent upon the concrete context at stake (anonymous birth, gamete donation, surrogacy) and mainly based on the distinction between genetic and biological identity, which must both be understood as functional and not in competition with the child's right to personal identity and his/her best interest.

With regard to its concrete normative content, the analysis of the framework concerning this right in the context of adoption, anonymous birth, assisted reproduction and surrogacy confirmed that "genetic origin" can be legitimately defined as an "umbrella term", which covers different kinds of information related to donors or the gestational mother. Accordingly, the right at stake may find at least three different forms of legal recognition. The first one is the right to have access to health or genetic information linked to the donors or the biological mother. This is usually enforceable, as it represents the essential core of the right. Secondly, the duty belonging to social parents to disclose the conditions in which birth occurred. As we have seen, this might be hard to enforce, due to the very intimate nature of the relationship between parents and children and family ties. Finally, the highest level of recognition, which corresponds to the right to know the full identity of donors and the gestational mother and which can be considered an exception at the legislative level. As we have seen, it has raised several complex issues in the delicate field of anonymous birth, which gives origin to a special form of adoption.

The relational and multidimensional nature of the right to know one's genetic origins also guides the concrete legal framework designed by the legislature, to which a broad margin of appreciation is usually granted, in order to set a reasonable balance between the competing rights and interests at stake. At the same time, courts may be directly or indirectly involved in the concrete enforcement of the legislative framework. It may happen directly, when the law provides for requirements, criteria or procedures upon which the effective implementation of the child's right related to one's origins is conditioned; or when, from a constitutional perspective, a judicial assessment based on a case-by-case approach is required in order to define the concrete best interest of the child. It may occur also indirectly, when courts are called to assess the legitimacy of legislative choices able to limit or affect the child's right also from the perspective of the protection of his or her biological or genetic identity. In any case, the recognition of the prerogatives linked with the process or characteristics of birth must be functional to the determination of the concrete best interest of the child intended in a dynamic and comprehensive way, in which the right to know may be designed to represent an essential object of protection without becoming an obstacle to the building and the development of the child's personal identity as a whole.