Special issue

# *Coming* without *coming from*: The adoptee's right of access to origins within the constraints of maternal anonymity

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ABSTRACT: This article analyses the judicial path, crossed by lights and shadows, and its ability to make it feasible to more easily learn information about one's own parental history in anonymous birth. A comparison is made between the European Court of Human Rights (ECtHR) case law and the Italian Constitutional Court case law, showing differences in the methods but strong similarities in the substantive solutions. Conclusively, in the Italian legal system, the mother's decision to confirm her original choice for anonymity has an undisputed prevalence when it tries to balance with the child's constitutional right to have his or her own personal experience recognised.

KEYWORDS: Anonymous birth; right to know one's origins; right to respect for private life

SUMMARY: 1. Personal identity and knowledge of origins: introduction. – 2. A comparison between the mother's right not to be found and the adoptee's right to seek: a static perspective. – 3. (*continue*) The constitutional mosaic (between health, privacy and personal identity). – 4. (*continue*) The dynamic perspective. – 5. The centrality of the maternal veto and the residual ambiguities of a (disguised) balancing.

## 1. Personal identity and knowledge of origins: introduction

Among the many intersections that inevitably exist at present between law and genetics – for reasons that can be easily understood, depending on medical-scientific progress – during the last few years, a place in adjudication and doctrine has surely been carved out (and continued to hold strongly) by the right of the individual to research his genetic and biological origins.

There are at least two viewpoints from which the delicate issue of the knowledge of one's personal history can be looked at as a whole in our legal system – that is, respectively, from the perspective of powers or from the perspective of rights. Here, particular attention will be paid only to the second perspective,[1] with specific reference to the right to personal identity pursuant to Article 2 of the Italian Constitution, with the need to access one's past experience representing one of its most salient

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[1] … the first of these two viewpoints could be examined in greater detail on another occasion.


ISSN 2284-4503

aspects.[2] It is no mystery that "the balanced development of the individual and relational personality" passes through the "construction of one's external identity, whose essential elements are the name and a recognisable descent" and, on the other hand, through the construction of a specular "internal" identity, requiring "the knowledge and acceptance of the biological descent and of the closest parental network".[3]

From this point of view, it is therefore obvious that the individual's relational life is profoundly affected by satisfying the innate need to learn information about his or her previous parental history.[4] This is true for the adopted child (to whom this contribution is expressly dedicated), but is all the more true for other situations that are to some extent comparable to the former. For example, that of the child born through heterologous insemination[5] or, backwards (and *in limine*), of supernumerary embryos that can potentially be adopted at birth.[6]

[2] In this sense, Italian Constitutional Court (ItCC in the following) no. 286/2016 (p. 3.4.1. *cons. dir.*, first subparagraph). See, *ex multis*, E. MALFATTI, *Illegittimità dell'automatismo nell'attribuzione del cognome paterno: la "cornice" (giurisprudenziale europea) non fa il quadro,* in *forum costituzionale* (5 January 2017); S. SCAGLIARINI, *Dubbie certezze e sicure incertezze in tema di cognome dei figli*, in *rivista AIC* (19 May 2017, available at: https://www.rivistaaic.it/images/rivista/pdf/2_2017_Scagliarini.pdf); C. INGENITO, *L'epilogo dell'automatica attribuzione del cognome paterno al figlio (Nota a Corte costituzionale n. 286/2016* (https://www.osservatorioaic.it/images/rivista/pdf/INGENITO%20definitivo.pdf) and A. FUSCO, *"Chi fuor li maggior tui?": la nuova risposta del Giudice delle leggi alla questione sull'attribuzione automatica del cognome paterno. Riflessioni a margine di C. cost. sent. n. 286 del 2016* (https://bit.ly/3hmtg3g), both in www.*osservatorioaic*.it (respectively 31 May e 5 September 2017).

[3] In this direction, Italian Court of Cassation, sec. I civ., judgment 29 May 2017-20 March 2018, no. 6963 (respectively, pp. 8 and 8.1, first subparagraph, *cons. dir.*), with notes by, *ex multis*, G. VASSALLO, *Parto anonimo: diritto di conoscere le proprie origini va esteso alle sorelle*, in www.altalex.com (12 April 2018); E. CATALANO, *Il diritto alla conoscenza delle proprie origini*, in www.salvisjuribus.it (4 July 2018); A. GIURLANDA, *Il diritto a conoscere le proprie origini può essere esercitato anche nei confronti delle sorelle e dei fratelli biologici dell'adottato?*, in www.questionegiustizia.it (26 September 2018); G. CASABURI, *Riflessioni estemporanee su azioni di stato, nuova genitorialità, tutela del minore,* en attendant *le SS.UU. del 6 novembre 2018*, in www.articolo29.it (8 November 2018); C. GRANATA, *Il diritto alla ricerca delle proprie origini: i punti rimasti irrisolti dopo la sentenza n. 6963 della Corte di Cassazione, Sez. I, del 20.03.2018*, in www.rivista.camminodiritto.it (16 December 2019); I. LOMBARDINI, *Il procedimento di "interpello" della madre biologica, che abbia dichiarato di non voler essere nominata al momento del parto, ai fini dell'eventuale revoca dell'originaria dichiarazione, e la progressiva espansione del diritto dell'adottato alla conoscenza delle proprie origini biologiche ad opera della recente giurisprudenza*, in www.diritto.it (5 June 2020).

[4] In this sense, ItCC no. 278/2013 (p. 4 *cons. dir.*, eight subparagraph) with notes of, *ex plurimis*, E. FRONTONI, *Il diritto del figlio a conoscere le proprie origini tra Corte EDU e Corte costituzionale. Nota a prima lettura sul mancato ricorso all'art. 117, primo comma, Cost., nella sentenza della Corte costituzionale n. 278 del 2013* (https://www.osservatorioaic.it/images/rivista/pdf/contributo%20Frontoni.pdf) and A. RAPPOSELLI, *Illegittimità costituzionale dichiarata ma non rimossa: un "nuovo" tipo di sentenze additive?* (https://bit.ly/2Qajbvh), both in www.osservatorioaic.it (respectively, December 2013 and January 2015).

[5] "In this personal dimension", in fact, "the possibilities offered by PMA techniques, known as "heterologous", solve medical problems, but profoundly modify parenthood and complicate questions about the search for one's origins'": in this sense, for example, V. DE SANTIS, *Diritto a conoscere le proprie origini come aspetto della relazione materna. Adozione, PMA eterologa e cognome materno*, in www.nomos-leattualitaneldiritto.it (March 2018), spec. 1. On the other side, it is precisely "the entry of 'donors' on the scene" that raises "the serious question of the human right to know one's origins, a question that cannot be overlooked, minimised or crushed by the weight of technical and health aspects": M. CASINI, C. CASINI, *Il dibattito sulla PMA eterologa*


ISSN 2284-4503

As a peculiar aspect of the broader and multifaceted right to personal identity – to return to the specific situation of adoption – in recent years, the right to search for one's origins has benefited from a more or less broad recognition both at the international level and, as far as we are concerned, at the domestic level. The Italian discipline, which has been the result of a series of gradual (but not always orderly) stratifications over time,[7] has nonetheless reached the harsh result of denying the adoptee any authorisation to know his or her personal history – and to anyone interested in it, this cannot occur until a hundred years have elapsed since the certificate of assistance in childbirth or the medical records containing the identification data of the mother – without even contemplating a prior verification of the mother's persistent desire to remain anonymous.

The legal regulation was so stringent that it was foreseeable (even, inevitable) that the courts would intervene, in search of a more reasonable balance between the interests involved – "that of the person who wants to complete the construction of his identity through the search of his biological origins and that of the biological mother who has exercised, at the time of birth, the right not to be named and who may want to keep this secret precisely in order not to alter the identity, also relational, built over time".[8] Before looking dynamically at the constitutional issues involved, we first conducted an in-depth static analysis of the "right to know the truth about one's personal history" and "the right to preserve the pre-existing construction of one's own identity and that of any third parties involved".

Let us leave aside for a moment the purely synchronic profile of the two rights evoked (related, that is, to the need to guarantee the conceived and pregnant woman the best conditions for the birth

*all'indomani della sentenza costituzionale n. 162 del 2014. In particolare: il diritto a conoscere le proprie origini e l'"adozione per la nascita"*, in this *review*, no. 2/2014, 139.

[6] Obviously, it is not possible here to dwell at length on this main issue. It is only possible to point out that "during the discussion on Law 40/2004, 'adoption for birth' or 'prenatal adoption' was proposed as a limited and temporary remedy, on the assumption that when the new law came into force, the accumulation of spare embryos in freezers would stop": but it was harshly rejected, at the end, by those who "saw in the 'declaration of adoptability of the conceived' the equating of the unborn with the already born" (thus, once again, M. CASINI, C. CASINI, op. cit., 151). In the years that followed, this proposal made a comeback thanks to a series of interventions by the National Bioethics Committee, which on several occasions highlighted the validity of the arguments [see part. Adoption for birth of cryopreserved and residual embryos resulting from medically assisted procreation (P.M.A.) and fate of embryos resulting from medically assisted procreation that can no longer be implanted, both at http://bioetica.governo.it, 18 November 2005 and 26 October 2007 respectively].
On this subject, see for instance A. PALAZZO, *La filiazione*, Milan, 2007, part. 52 ss.; M. PICOZZI, F. NICOLI, V. VIGANÒ, *Il dono tra desiderio e ragione. Una riflessione sui principali nodi bioetici connessi alla fecondazione eterologa*, in AA.VV., *Cose o persone? Sull'esser figli al tempo dell'eterologa*, edited by L. Grion, Trieste, 2016, spec. 58 ss.; D. CASTELLANO, *Congelamento degli embrioni: un caso e molti problemi*, in www.filodiritto.com (15 December 2020).

[7] In this sense, see the original wording of Art. 28 of law no. 184/1983, *Right of the child to a family*, as well as the subsequent amendments introduced, respectively, by Art. 30(1) (*Declaration of birth*) of Presidential Decree no. 396/2000, *Regulations for the revision and simplification of the civil status system, pursuant to Article 2(12) of law no. 127 of 15 May 1997*, by Art. 24 of law no. 149/2001, *Amendments to law no. 184 of 4 May 1983, on the adoption and foster care of children, and to Title VIII of the first book of the Civil Code*, and by Art. 93 (2) (*Certificate of birth assistance*) of Legislative Decree no. 196/2003, *Personal Data Protection Code*.

[8] Here again Court of Cassation, sec. I civ., judgment 29 May 2017-20 March 2018, no. 6963 (p. 8.1, *cons. dir.*, respectively, second and first subparagraph) to which we refer also for the textual passage immediately following.

and, in this way, avoid her assumption of irreversible choices[9]), and let us now focus on the diachronic profile (relating to the time after the birth). It is natural, in fact, that "the commitment to the recognition of the right to know one's origins has been stimulated, in very recent times, precisely by the need to find a balanced composition between opposing rights".[10]

## 2. A comparison between the mother's right not to be found and the adoptee's right to seek: a static perspective

It is easy to understand how there is, *in fact,* a strong reciprocal conditioning between the fundamental constitutional requirements underlying the rights of mothers and children respectively, because they are not even artificially separable *in abstract.*[11]

If we think of the mother, in particular, the law is aimed at preventing her from retracing her steps many years later – answering to an unknown and perhaps already grown-up child – by establishing that her original choice of anonymous childbirth was irreversible.[12] The legislator of the time had, in short, staked everything on the inextricable interweaving between the maternal right to anonymity and the non-breakability of secrecy.[13] Indeed, this solution did not seem to be a real balancing of opposing constitutional interests (which, chronologically, would have occurred, *in limine*, only when the

[9] See ItCC no. 278 cit. (p. 4, *cons. dir.*, fourth subparagraph, first indent), which, in particular, refers to the same passage in its own precedent no. 425/2005 (p. 4, *cons. dir.*, third subparagraph) [with notes of, *ex multis*, S. MARZUCCHI, *Dei rapporti tra l'identità dell'adottato e la riservatezza del genitore naturale (in margine alla sent. n. 425 del 2005 della Corte costituzionale)*, in www.associazionedeicostituzionalisti.it (6 April 2006); S. FAVALLI, *Parto anonimo e diritto a conoscere le proprie origini: un dialogo decennale fra CEDU e Corte Costituzionale italiana*, in www.forumcostituzionale.it (9 December 2013); B. BARBISAN, *Apprendimento e resistenze nel dialogo fra Corte costituzionale e Corte di Strasburgo: il caso del diritto all'anonimato della madre naturale*, in www.dirittticomparati.it (9 May 2016)].

[10] Here again Court of Cassation, sec. I civ., judgment 29 May 2017-20 March 2018, no. 6963 (p. 8.1, *cons. dir.*, second subparagraph).

[11] As has been pointed out by ItCC no. 278, cited above (p. 4 *cons. dir*, first and second subparagraphs), "the issue of the mother's right to anonymity and the child's right to know his or her origins for the purpose of protecting his or her fundamental rights have already been the subject of rulings both by this Court and by the European Court of Human Rights": since they are "issues of particular delicacy, because they both involve constitutional values of primary importance and see their respective ways of realising them mutually implicated"; "to the point that - as is evident - the scope of the protection of the mother's right to anonymity cannot but condition, in practice, the fulfilment of the child's opposing aspiration to know his or her origins, and vice versa".

[12] "The irrevocability of the effects of this choice was", in other words, "explained according to a logic of reinforcing the corresponding objectives, excluding that the decision for anonymity could entail, for the mother, "the risk of being, in an unspecified future and at the request of the child never known and already an adult, called upon by the judicial authority to decide whether to confirm or revoke that distant declaration of will"": thus, ItCC no. 278 cit. (*ibid.*, fourth subparagraph, second indent).

[13] ... "the founding nucleus of that choice" being "in this way, as easily understandable, in the bi-univocal correspondence between the right to anonymity, considered in itself, and the lasting and binding protection of confidentiality or, if you like, of secrecy, which the exercise of that right inevitably involves": thus, again, ItCC no. 278, cit. (*ibid.*, fifth subparagraph) where, in particular, it goes on to consider this last protection "a founding nucleus which – it is worth pointing out – cannot but be reaffirmed, precisely in the light of the values of primary importance which it intends to preserve".

woman had decided to opt for anonymous childbirth), since the possibility of deciding whether to maintain or revoke that original choice would have been open only for the mother.[14]

The mother's constitutional right to anonymity, therefore, seemed to prevail over the other rights at stake, but the reasons for it prevailing did not seem conclusive in the end. The need to exercise a right to be forgotten without external interference did not seem decisive, nor did the need to prevent legal proceedings aimed at ascertaining whether the wish to remain anonymous was still in force, such a proceeding jeopardising the secrecy of her identity.[15] These two reasons were not decisive because the adoptee's right to access his or her past would have been irreparably compromised, and this right is no less fundamental than the mother's right to be forgotten. Secondly, the effective guarantee of the woman's privacy would have depended on the introduction of an abstract possibility and a concrete way of questioning her.[16] The real point was, in reality, a possible reconsideration of the assumption of a parental status that is no longer legal but natural: the fact that the mother initially denied her legal parental status cannot exclude the fact that she may later accept and desire her natural parental status. In the end, the mother could reconcile her original renunciation of her legal parental status with a later acceptance of her natural parental status.[17]

[14] "Only the mother therefore in this perspective can be the person entitled to decide whether to revoke her decision to remain anonymous in relation to the breaking of that need for protection that allowed her to make the choice allowed by the law": thus, Court of Cassation, sec. I civ, judgment of 21 July 2016, no. 15024 (p. 15 cons. dir.) [with notes of, *ex multis*, G. NALIS, Osservatorio di diritto civile, in www.ildirittoamministrativo.it (28 February 2017); A. GIURLANDA, *op. cit.*; I. LOMBARDINI, *Una questione problematica ancora aperta dopo le recenti pronunce della giurisprudenza: il diritto dell'adottato, non riconosciuto alla nascita, alla conoscenza delle proprie origini e il diritto della madre biologica all'anonimato*, in www.diritto.it (6 April 2020) and ID., *Il procedimento di "interpello" della madre biologica*, cit.], sharing the opinion that "according to which, in this case, the balancing of the fundamental rights at stake appears to be an ineffective and in some ways inappropriate category (...)": being, in other words, "properly to speak of a balancing between fundamental rights" only "with reference to the moment of the mother's choice to give birth anonymously" – "because at this moment her right to life and that of her child are at stake" – and not already "after the birth", when "it is no longer the right to life that is at stake and the right to anonymity becomes instrumental in protecting the choice made from the social consequences and in general from the negative consequences that would primarily affect the mother" (on this crucial point, however, we will return, *infra*, to par. 5, at the end of this article).

[15] The reference would be, thus, to that "system" which – "making the space of the "constraint" to anonymity temporally equivalent to a duration that could exceed that of an ideal human life" – "rests on the need to prevent any injury to the "right to be forgotten" of the mother and, at the same time, the need to safeguard *erga omnes* the confidentiality of her identity, which was obviously considered at risk every time contact is sought to ascertain whether or not she intends to maintain her anonymity": thus, ItCC no. 278 cit. (p. 5, fourth subparagraph).

[16] In other words, none of the above-mentioned requirements could be said to be truly "diriment": not the first one, since the danger of disturbance to the mother corresponds to an opposing danger for the child, deprived of the right to know its origins; not the second one, since the greater or lesser extent of the protection of confidentiality remains, in conclusion, entrusted to the different modalities provided for by the relevant rules, as well as to the practise of their application": thus, again, ItCC no. 278 cit. (*ibid.*, fifth subparagraph).

[17] ... "on a more general level, a choice for anonymity entailing an irreversible renunciation of 'legal parenthood'" could "reasonably not imply", in other words, "also a definitive and irreversible renunciation of 'natural parenthood'": thus, once again, ItCC no. 278 cit. (*ibid.*, sixth subparagraph) where, in particular, it is admitted that "if this were the case, on the other hand, a sort of prohibition would be introduced into the system which would preclude any possibility of a reciprocal relationship between mother and child, with outcomes that would be difficult to reconcile with Article 2 of the Constitution". (*ibid.*, seventh subparagraph).

Turning to the child's circumstances, it is useful and necessary to distinguish the profile of the effective enforceability of the right to learn about his or her previous parental history from the profile related to the constitutional parameters.

It should be noted that constitutional caselaw at first ruled out infringement of Article 3 of the Italian Constitution on the principle of equal treatment, due to differing regulations regarding the right for an adopted child to seek their own origins, whether they are the adopted child of a mother seeking anonymity or one whose parents never expressed any opinion on the matter (i.e., the search for one's origins was excluded in the first case and permitted in the second);[18] "only the first" of the above circumstances would be "characterised by the conflictual relationship between the adopted child's right to his or her own personal identity and the mother's right to respect for her wish to be anonymous", "and not also the second".[19] Thus, the difference in legal treatment of the two cases appears reasonable.[20]

With reference, then, to the possible limitation of the right in question – especially when the applicant is already an adult – it can be easily argued that "the vital interest of the individual to obtain the information necessary to discover the truth with regard to an important aspect of [his] personal identity, as an integral part of the right to private life", integrates "a subjective and ultra-personal right and, therefore, its enforceability has no temporal limitation".[21] Moreover, well-established case law confirmed recently[22] – has recognised that the full guarantee of the right to personal identity also depends on the recognition of the right "to a filial 'status' corresponding to the biological truth".[23]

[18] ... that is to say, "from the point of view of the unreasonable difference in treatment between the adopted child born of a woman who has declared that she does not wish to be named and the adopted child of parents who have not made any declaration and have, on the contrary, undergone the adoption". This legislative decision could have been considered unreasonable, "prohibiting the former from accessing information on his or her origins while allowing the latter to do so. The balance between the adoptee and his or her adoptive parents [could have been] exposed to greater dangers in the latter case than in the former, where years later the biological parent could have worked out his or her past conduct", ItCC no. 425, cit. (p. 6, *cons. dir.*, first subparagraph).

[19] In this sense, ItCC no. 425 cit. (*ibidem*, second subparagraph).

[20] The ItCC overruling of this decisive aspect will be discussed *infra* in section 4.

[21] In this way, European Court of Human Rights (ECtHR in the following), sec. II, *Godelli v. Italy*, 25 September 2012, § 54, with comments of, *ex plurimis*, D. BUTTURINI, *La pretesa a conoscere le proprie origini come espressione del diritto al rispetto della vita privata*, in www.forumcostituzionale.it (24 October 2012); R.G. CONTI, *La giurisprudenza civile sull'esecuzione delle decisioni della Corte Edu*, in www.questionegiustizia.it, no. 1/2019, 283 ss.; R. TREZZA, *Diritto all'anonimato e diritto a conoscere le proprie origini biologiche*, in www.giustiziainsieme.it (4 October 2019); I. LOMBARDINI, *Il procedimento di "interpello" della madre biologica*, cit.

[22] Here Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 with notes of, for example, S. OCCHIPINTI, *Accertamento della maternità, il diritto della madre all'anonimato cessa con la sua morte*, in www.altalex.com (2 October 2020); REDAZIONE, *Diritto a conoscere le proprie origini*, in www.diritto.it (8 October 2020); L. BONARINI, *Azione giudiziale di accertamento della maternità – parto cd. anonimo. Cass. Civ., sez. I, 22/09/2020, n. 19824*, in www.salvisjuribus.it (27 November 2020), and now please allow for reference to S. AGOSTA, *Anonimato della madre premorta e riespansione del diritto all'identità personale del figlio (a margine di Cassaz. sent. n. 19824/2020)*, in *Quad. cost.*, 2021.

[23] ... "the uncertainty on such a 'status'" could "determine distress and a 'vulnus' to the adequate development and formation of the personality in every stage of life": with the consequence that "the right to the recognition of a filial status corresponding to the truth belongs to the core of each person's inviolable rights (Art. 2 It. Cost.

The Italian legal system has given preeminent importance to this last right – "as an essential component of the right to personal identity, at every stage of a person's life and therefore also in adulthood".[24] This is, moreover, amply demonstrated by the lack of any temporal constraint on the legitimate activation by the interested person of the judge's verification of parenthood.[25]

### 3. (*continue*) The constitutional mosaic (between health, privacy and personal identity)

Let us now speak of constitutional parameters. There have been three main provisions that have traditionally underpinned the right in question: Article 32, Article 117(1), and Articles 2 and 3 of the Italian Constitution, depending on which one was invoked.

Let us start with the first provision, Article 32 of the Italian Constitution, concerning the right to psycho-physical health. This right has been put into play both in relation to the disclosure of the secret and in the diametrically opposed hypothesis of its maintenance. On the one hand, it has been argued, for example, that the judge (in this case, the European Court of Human Rights, also the Strasbourg Court or ECtHR in the following ) should have taken due account of the harm to the psycho-physical well-being of the person adopted at a tender age (and, at the time of the appeal, already elderly) that might have resulted from the judicial removal of the anonymity.[26] On the other hand, however, it was objected that the appellant herself had "demonstrated a genuine interest in knowing the identity of the mother, since she had attempted to acquire certainty in this regard": "such behaviour" demonstrated "a moral and psychological suffering, even if this is not ascertained from a medical point of view".[27] The same parameter is relevant considering the potential violation of Article 32

and Art. 8 ECHR), considered both in the individual and relational dimension" [thus, Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (p. 2, *cons. dir.*, sixth subparagraph) recalling among others, on this point, Court of Cassation, sec. I civ., judgment 13 April-9 June 2015, no. 11887; 29 November 2016, no. 24292; 15 February 2017, no. 4020]. "On the grounds of these articulated arguments", the Court of Cassation, moreover, held "the question about the constitutional legitimacy of Art. 270 of the Civil Code" to be manifestly unfounded. The question complained "that the action for the judicial ascertainment of paternity or maternity could not be time barred, [excluding] any possibility for the judge to assess the request for judicial declaration in cases where the action [had been] proposed with considerable delay (in this case about forty years), with the effect of sacrificing the right of the presumed father to the stability of family relationships matured over time, and imposing on him after a long time a compulsory ascertainment of the filiation relationship that the interested person could have requested earlier": so, again, Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (*ibid*.).

[24] Again, Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (*ibid.*, seventh subparagraph).

[25] ... "as well as the fact that evidence may be given by any means, pursuant to Art. 269, par. 2 of the Civil Code": Court of Cassation, *op. et loc. ult. cit*.

[26] "According to the Italian Government", in particular, "the Court" should precisely have "taken into account the fact that the applicant, now almost 70 years old, was adopted at the age of six and that the non-consensual lifting of the secrecy of her birth [could] have proved very difficult at this stage, given the possible non-negligible risks to her health and to her present family": see ECtHR, *Godelli v. Italia*, cit., § 58.

[27] If it was, therefore, realistic to think "that the applicant, [at the time] 69 years old, [had] managed to build up her personality even in the absence of information concerning the identity of her biological mother, it [had to be] accepted that the interest that [an] individual might have in knowing her ancestry did not [diminish] with age, indeed [the] opposite occurred": thus, again, ECtHR, *Godelli v. Italy*, cited above, § 69, on the point recalling - among its precedents on the matter – EctHR, third section, *Jäggi v. Switzerland*, 13 July 2006, spec. § 40, with comments, *ex multis*, of C. CAMPIGLIO, *Con la morte, l'uomo perde il diritto al rispetto della vita privata*

when the child found herself in the material impossibility of accessing any information relating to her parents' genetic makeup.[28]

As for the second relevant constitutional provision, Article 117(1) has often been invoked in connection with Article 8 of the European Convention on Human Rights (ECHR) and the corresponding interpretation offered by the Strasbourg judges, together with the New York and Hague Conventions.[29] In the case of *Godelli v. Italy* cited above, the Strasbourg Court sanctioned the Italian discipline for not having "sought to establish a fair balance and proportionality between the interests of the parties to the dispute" and, in so doing, for having consequently "exceeded the margin of discretion which [it] had been granted [by the ECHR]".[30] On the one hand, it was held that the need to know one's personal history could fall within the concept of both private and family life (both of which are protected by Article 8 ECHR).[31] On the other hand, however, the ECtHR clearly limited the case to private life only. Some of the Court's famous precedents on the matter have been quoted[32] to demonstrate that, in fact, the application was made only for access to the identity of one's biological ances-

and S. TONOLO, *Identità personale, maternità surrogata e superiore interesse del minore nella più recente giurisprudenza della Corte europea dei diritti dell'uomo*, both in *Diritti umani e diritto internazionale*, respectively no. 2/2007, 394 ss. and no. 1/2015, 202 ss.; L. POLI, *Il diritto a conoscere le proprie origini e le tecniche di fecondazione assistita: profili di diritto internazionale*, in *GenIUS*, no. 1/2016, 43 ss.

[28] ... "because of the impossibility", in other words, "for the child to obtain data on his family history, also in relation to the genetic risk": "inasmuch as preventing knowledge of data concerning the birth mother would deprive the adoptee of any possibility of obtaining an anamnesis of the family, which is essential for prophylactic interventions or diagnostic tests, since he of she already lacks information on the health history of the paternal branch of the family tree. This, moreover, in the light of the practice, widespread in Italian hospitals, of omitting the ordinary collection of anamnestic data that do not identify the mother" [ItCC no. 278 cited above (p. 1, *cons. dir.*, second subparagraph, and p.1 *rit. fatto*, eighth subparagraph)].

[29] ... for "violation" of, respectively, "Artt. 7 and 8 of the New York Convention on the Rights of the Child of 20 October 1989, made enforceable by law no. 176 of 1991, in so far as they require respect for the rights of the child, including those aimed at preserving his or her identity, name and family relationships" ("for the adopted child, identity" consisting "precisely in seeking his origins, his roots and information about his biological family") as well as "of Art. 30 of the Hague Convention of 29 May 1993, made enforceable by law no. 476 of 1998": thus, Court of Cassation, sec. I civ., judgment 29 May 2017-20 March 2018, no. 6963 (p. 4.1, *cons. dir.*)

[30] Here ECtHR, *Godelli v. Italia*, cit., § 71 [§ 58 English version, n.d.r.], quoted by ItCC no. 278, cit. (p. 1. cons. dir., second subparagraph).

[31] ... "the applicant" having in particular argued "that her request to obtain information on eminently personal aspects of her history and childhood [fell] within the scope of Article 8 of the Convention" since "the search for her identity [was] an integral part of her 'private life' but also of her 'family life'": thus, ECtHR, *Godelli v. Italia*, cit., § 43.

[32] Spec. *Mikulić v. Croatia*, 7 February 2002, § 53 [with comments of, *ex multis*, C. CAMPIGLIO, *Il divieto di fecondazione eterologa all'esame della Corte europea dei diritti umani*, in *Diritti umani e diritto internazionale*, no. 3/2010, spec. 4, D. BUTTURINI, *op. cit.*, part. 3, A. CIERVO, *Il diritto all'anonimato della madre biologica ovvero quando Strasburgo anticipa Roma*, in https://diritti-cedu.unipg.it/ (15 February 2014), par. 2] and *Odièvre c. Francia*, 13 February 2003, § 29 with notes of, *ex plurimis*, J. LONG, *Ammissibilità del parto anonimo e accesso alle informazioni sulle proprie origini: il caso Odièvre c. Francia (introduzione a Corte europea per i diritti dell'uomo, sentenza 13 febbraio 2003, Odièvre c. Francia)*, in *Minori e giustizia*, no. 3/2003, 172 ss.; A. RENDA, *La sentenza O c. Francia della Corte Europea dei diritti dell'uomo: un passo indietro rispetto all'interesse a conoscere le proprie origini biologiche*, in *Familia*, no. 4/2004, 1121 ss.; S. FAVALLI, *op. cit.*

tors (as an important component for the construction of one's personal identity) and not also for verification of one's adoptive status (which, on the contrary, falls within the notion of family life).[33]
Questioned on this point, the Strasbourg judges recalled "that Article 8 protects a right to personal identity and development and the right to establish and deepen relations with one's peers and the outside world": "to that development", contributes "the discovery of details relating to one's identity as a human being and the vital interest, protected by the Convention, in obtaining information necessary to discover the truth concerning an important aspect of personal identity, for example, the identity of one's parents".[34] From this last point of view, the Strasbourg Court has pointed out that, among the duties that Article 8 imposes on each national system, there is no clear demarcation between negative and positive obligations; on the contrary, the positive obligations – for instance, the need to adopt any measure aimed at ensuring the effectiveness of the protection of privacy – can overlap with the mere obligation of the State to abstain from any abusive public interference in the private sphere of the person.[35]

[33] "In the present case", in short, "the applicant was not seeking to question the existence of her adoptive filiation, but to know the circumstances of her birth and abandonment, which included knowledge of the identity of her biological parents": with the result that "the Court" was not "called upon to determine whether the proceedings concerning the filial link between the applicant and her mother fell within the scope of 'family life' within the meaning of Article 8, since in any event the right to know one's ancestry fell within the scope of the concept of 'private life', which included important aspects of personal identity of which the identity of the parents formed part" (thus, ECtHR, *Godelli v. Italia*, *ibid.*, § 45).
On this particular point, however, it is worth recalling that "the Government [had argued] that no family life within the meaning of Article 8 of the Convention [existed] between the applicant and her biological mother, as the former had never seen her mother, since the latter had never wanted to meet her and consider her as her child" ("in fact, she" having "expressly expressed her wish to abandon her" and "accepted that her daughter should be adopted"): "by guaranteeing the right to respect for family life, Article 8 presupposes", on the other hand, "the existence of a family (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31)"; "if the case-law did not [require] that there [be] cohabitation between the various members of the 'family', [there should] at least have been close personal relationships between them" which would have demonstrated "an affective relationship between two beings and their willingness to entertain that relationship would [have] been fundamental for the organs of the Convention" ("the latter" also considering "that the biological link alone [was] insufficient, in the absence of close personal ties between the persons concerned, to constitute a family life within the meaning of Article 8") (so, *ibid.*, § 44).
[34] With the consequence that "the birth, and in particular the its circumstances, is part of the private life of the child, and then of the adult, sanctioned by Article 8 of the Convention, which thus finds application in the present case": thus – also invoking the precedent set out in *Mikulic v. Croatia*, cited above, §§ 54 and 64 – ECtHR, *Godelli v. Italia*, cit., § 46, also referred to by Court of Cassation, sec. I civ., judgment of 21 July 2016, no. 15024 (p. 9, *cons. dir.*) where, in particular, it recalls how "the European Court of Human Rights (...) has given an interpretation of Article 8 ECHR, which places the right to knowledge of one's origins within the scope of the concept of private life and specifically within the sphere of protection of personal identity", "in this perspective", stating "that Article 8 protects the right to personal identity and fulfilment and the right to establish and develop relations with one's peers and the outside world".
[35] "[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91) ". Moreover, "[T]he boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonethe-

The Italian Constitutional Court, intervening on the matter, formally declared the violation of Article 117(1) be absorbed, without ruling on the merits.[36] However, there are no doubts that the Court has incorporated what was already observed at the conventional level. This was evident when it was noted that there were different outcomes between the French and the Italian legislation with respect to the common need to open a – albeit minimal – window to the right for the adoptee to access his or her past.[37]

Let us now deal with Articles 2 and 3 of the Italian Constitution. First of all, considering method,[38] it must be remembered that the interpretation of the Italian regulation on anonymity must comply both with the Italian Constitution (in particular Articles 2, 24, and 30) and with the ECHR [pursuant to Article 117(1) quoted above].[39] Knowledge of the circumstances surrounding one's birth and subsequent separation from the mother, as well as the emotional relationships established, contribute to the full realisation of one's parental story. It is for this reason that the right to search for one's origins can certainly take root within the borders of constitutional provisions as well as ECHR provisions protecting private and family life.[40]

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less similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests, and in both contexts the State enjoys a certain margin of appreciation (see *Mikulić*, cited above, § 58)" (ECtHR, *Godelli v. Italy*, cit., § 60 [§ 47 English version, n.d.r.], quoted by Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (p. 2, *cons. dir.*, sixteenth subparagraph) recalling that "Article 8 ECHR, as interpreted by the ECtHR (ECtHR, 22/09/2012, *Godelli v. Italy*, ECtHR, 13/02/2003, *Odievre v. France*), aims essentially at protecting the individual against arbitrary interference by the public authorities, not only ordering the State to refrain from such interference, but adding positive obligations inherent in effective respect for private life; these cannot but include the right to bring all the proceedings that the domestic legal system itself offers for the recognition of a person's status as a natural child".

[36] ItCC no. 278, cit. (p. 6, *cons. dir.*, seventh subparagraph).

[37] "This, in fact, is based on the same remarks, in substance, formulated by the ECtHR in the 'Godelli judgment'" when it "criticised the fact that the Italian legislation does not give "any possibility for an adopted child who is not recognised at birth to request access to non-identifying information on his origins or the reversibility of the secret", unlike what is provided for in the French system, which was examined in part in the judgment of 13 February 2003 in the 'Odièvre case'", judgment no. 278 cit. (*ibid*., second and third subparagraphs respectively).

[38] See, for example, *A. Rauti, La "cerchia dei custodi" delle "Carte" nelle sentenze costituzionali nn. 348-349 del 2007: considerazioni problematiche, in AA.VV., Riflessioni sulle sentenze 348-349/2007 della Corte costituzionale, edited by C. Salazar and A. Spadaro, Milan, 2009,* spec. 310; G. Rolla, *Il processo di ibridazione dei sistemi accentrati di giustizia costituzionale. Note di diritto comparato*, in AA.VV., *Estado constitucional, derechos humanos, justicia y vida universitariaEstudios en homenaje a Jorge Carpizo*, edited by M. Carbonell Sánchez, H. Fix Zamudio, L. Raúl Gonzálea Pérez, D.Valadés Ríos, Mexico, 2015, part. 529; P. Costanzo, L. Mezzetti, A. Ruggeri, *Lineamenti di diritto costituzionale dell'Unione europea*, Turin, 2019, spec. 287 ss.

[39] Here Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (p. 2, *cons. dir.*, sixteenth subparagraph).

[40] If "the constitutional and conventional framework of the right to know one's own origins, as a declination of primary importance of the right to personal identity, is given by Articles 2 and 3 of the Italian Constitution and Article 8 ECHR", there is no doubt that "the development of the individual personality and the harmonious conduct of one's private and family life require the construction of one's own individual identity, based not only on a recognisable affective-educational parental context, but also on information relating to one's own birth useful to reveal the secret and the reasons for the abandonment": Court of Cassation, sec. I civ., judgment 9 November 2016, no. 22838 (p. 4.1, *cons. dir*., first subparagraph).

## 4. (*continue*) The dynamic perspective

Moving on to the substantive level, it has been pointed out that the violation of Articles 2 and 3 of the Italian Constitution – with the subsequent constitutional obligation of removal – depends on the legislative imposition of absolute and unconditional maternal anonymity;[41] this being diametrically opposed to "the right to seek one's own origins and hence the right to personal identity of the adopted person", and also unreasonably discriminating "the adopted child born of a woman who has declared that she does not wish to be named and the adopted child of parents who have not made any declaration and have actually undergone the adoption".[42]

Within these premises, if we look again at the constitutional values at stake in a dynamic sense, there is no doubt that national legal systems have a wide margin of appreciation whenever they are called upon to "choose the means that they deem most suitable to ensure a fair balance between the protection of the mother and the legitimate request" to know one's personal history "having regard to the general interest"[43] (especially when there is not sufficient common ground between the European States on how to reconcile the opposing needs of two private individuals).[44] On the grounds of Article 8 ECHR, there are many factors conditioning the more or less extensive discretionary power of the State (including the specific circumstances of private life that are at stake in each concrete case).[45]

However, the domestic discretion does not preclude the judicial authority that is adopted by a subsequent control on legislative measures. Surely the ECtHR and the Constitutional Court differ in the methods of respective judgments. But in terms of substance, there are interesting argumentative overlaps between conventional and domestic rulings. Thus, for example, from a methodological point of view, the Strasbourg Court should not overlap with the local authorities in identifying the most appropriate instrument for regulating the anonymity of the mother, its review necessarily focusing on the specific case under examination without extending to the State regulation considered in the abstract and as a whole.[46]

[41] In this sense ItCC no. 278, cit. (p. 6, *cons. dir.*, sixth subparagraph).

[42] Again ItCC no. 278, cit. (p. 1, *cons. dir.*, second subparagraph).

[43] ECtHR, *Godelli v. Italia*, cit., § 67 [§ 52 English version, n.d.r.]

[44] The Government submitted that "the State enjoyed a margin of appreciation in the event of a conflict between two private interests. That margin of appreciation was enlarged in the instant case by the fact that no European consensus on the issue of a child's access to information about its origins existed", in ECtHR, *Godelli v. Italia*, *ibid.*, § 59 [§ 46 English version, n.d.r.]

[45] The Strasbourg Court itself "reiterates that the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation. In this connection, there are different ways of ensuring respect for private life, and the nature of the State's obligation will depend on the particular aspect of private life that is at issue (see *Odièvre*, cited above, § 46). The extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned", ECtHR, *Godelli v. Italia*, *ibid.*, § 65, second and third indent [§52 English version, n.d.r.]

[46] "In cases arising from individual applications the Court's task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it ... Consequently, the Court's task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters" (see *S.H. and Others v. Austria* [GC], no. 57813/00, § 92, ECHR 2011) of anonymous births. It is not for the Court to re-

However, an overlap of arguments emerges with regard to the substance of the decision, starting with the type of scrutiny required. The starting point is that the concept of private life cannot exist without the right to personal identity and this one, in turn, is connected to the right to access one's own experience, in a sort of Chinese box system. For this reason, the judicial review appears stricter in balancing the constitutional requirements at stake[47] and, ultimately, in determining whether the best balance has been struck between the mother's right to an anonymous birth and the child's right to information about his or her parental history, in the light of the given historical and contextual conditions;[48] "the right to identity, as an essential condition of the right to autonomy (*Pretty v. United Kingdom*) and development of the person (*Bensaid v. United Kingdom*)", in fact, "forms part of the hard core of the right to respect for private life and therefore a more rigorous examination is required in order to effectively balance the interests at stake".[49]

It is precisely this strict scrutiny that has led to quashing the maternal right to anonymous childbirth. Originally, the legislative solution seemed in compliance with Article 2 of the Italian Constitution as the expression of a correct balance between the requirements at stake.[50] But due to the unlimited and unconditional protection offered to the mother,[51] it ended up being unlawful, both by the ECtHR (2012) and the Italian Constitutional Court finding that followed shortly thereafter (2013). Both Courts, in fact, considered the rigidity of the law on anonymous childbirth to be entirely disproportionate, and therefore excessive.

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view the necessity of the absolute ban that was found constitutional by the Italian legislature, comparing the rights that are protected by the Convention, as long as this measure is not arbitrary and the balancing reasonably takes into consideration all the rights in question" [in this sense, dissenting opinion of Judge A. Sajó (*ibidem*), cit.].

[47] ECtHR, *Godelli v. Italia*, *ibid.* (forth subparagh) [§52 English version, n.d.r.].

[48] "In situations where the Convention rights of two right-holders come into conflict, the role of the Court is to satisfy itself that a proper balance has been struck in the case. This means that an appropriate margin of appreciation must be afforded to the domestic authorities to carry out the balancing exercise; the role of the Court is supervisory. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012)" (in this sense ECtHR, *Godelli v. Italy*, cit., § 66 [in the English version dissenting opinion of Judge A. Sajó (*ibidem*), n.d.r.]. "The choice of the most appropriate means of ensuring, in a fair manner, the reconciliation of the need for protection of the mother, who is in such a difficult position as to prevent her from assuming her parental role, with the legitimate demand of the child to have access to information about his or her origins is a matter for", in other words, "the States parties to the Convention": "however, the Court is in a position to review the choice and the actual exercise of those means of settling the conflict and, in particular, the search for and achievement of a balance between the competing interests and rights at stake": thus, Court of Cassation, sec. I civ., judgment 21 July 2016, no. 15024 (p. 11, *cons. dir.*).

[49] Again Court of Cassation, sec. I civ., judgment 21 July 2016, no. 15024 (p. 13 *cons. dir.*, eighth subparagraph).

[50] ItCC no. 425, cit. (*ibidem*, fifth subparagraph).

[51] This is because, as seen before, "the choice of the pregnant woman in difficulty that the law wishes to favour – in order to protect both her and the unborn child – would be rendered extremely difficult if the decision to give birth in an appropriate medical facility, remaining anonymous, could entail for the woman, on the basis of the same rule, the risk of being, in an unspecified future and at the request of a child she has never known and who is already an adult, questioned by the judicial authority to decide whether to confirm or revoke that distant declaration of will": thus, ItCC, judgment no. 425 cit. (p. 4, fourth subparagraph).

According to the Strasbourg judges, the violation of Article 8 ECHR comes immediately from the unlimited prevalence of the mother's need to preserve her anonymity over the competing interest of the child in the search for her origins, without the Italian legislature having made any effort to identify a minimum regulatory solution, so to speak, to redress the balance provided, as was done by the corresponding French legislation.[52] "… [W]here the birth mother has decided to remain anonymous, Italian law does not allow a child who was not formally recognised at birth and was subsequently adopted to request either access to non-identifying information concerning his or her origins or the disclosure of the mother's identity": and consequently, "the Italian authorities failed to strike a balance and achieve proportionality between the interests at stake and thus overstepped the margin of appreciation which it must be afforded".[53]

## 5. The centrality of the maternal veto and the residual ambiguities of a (disguised) balancing

The Italian Constitutional Court, on the other hand, quashed the Italian legislation for the absoluteness of its provisions, focusing on the existence of a real "crystallisation" or "immobilisation"[54] in the application of the right to maternal anonymity.[55] Since it was exercised by the mother, the right to anonymous childbirth ended up, on the one hand, becoming an irreversible legal obstacle for the child who wished to know his or her personal history but, on the other hand, turning into a sort of real "expropriation" to the detriment of the woman herself; from that moment on, she would, against her will, find herself deprived of any alternative option by the very system which, in theory, intended to protect her.[56]

The jurisprudential path that we have briefly tried to describe in these pages has been troubled, but in the end the ordinary courts, and their living interpretation, identified gaps in the narrow regulatory mesh of the right to maternal anonymity. It was, for example, accepted that a judicial action to es-

[52] Indeed, "The Court notes that, unlike the French system examined in *Odièvre*, Italian law [did] not attempt to strike any balance between the competing rights and interests at stake. In the absence of any machinery enabling the applicant's right to find out her origins to be balanced against the mother's interests in remaining anonymous, blind preference [was] inevitably given to the latter. Moreover, in *Odièvre* the Court observed that the new [French] law of 22 January 2002 improved the prospect of obtaining agreement to waive confidentiality and would facilitate searches for information about a person's biological origins as a National Council for Access to Information about Personal Origins had been set up. The law was of immediate application and now allowed the persons concerned to request disclosure of their mother's identity, subject to the latter's consent being obtained (see *Odièvre*, cited above, § 49), and to have access to non-identifying information", in ECtHR, *Godelli v. Italy*, cit., § 70 [§57 English version, n.d.r.].

[53] ECtHR, *Godelli v. Italy*, cit., § 71 [§58 English version, n.d.r.].

[54] In this sense ItCC no. 278 cit. (p. 5, *cons. dir.*, second subparagraph).

[55] In this sense ItCC no. 278 cit. (p. 6, *cons. dir.*, first subparagraph).

[56] "Once the choice for anonymity has been made, in fact, the relevant manifestation of will assumes connotations of irreversibility intended, substantially, to 'expropriate' the person holding the right from any further option; ultimately, the right is transformed into a sort of compulsory constraint, which ends up by having an expansive effect outside its holder and, therefore, by projecting the impediment to its eventual removal onto the child itself, to whose position it was originally intended to link the obligation of secrecy on the person who generated it": thus, ItCC no. 278, cit. (p. 5, second subparagraph).

tablish the link with the woman could be legitimately brought when she had in fact disavowed her original decision to abdicate her legal maternity. However, outside of such cases, the protection of maternal secrecy regarding childbirth remains maximal and lasting.[57]

In light of the above, in short, the undisputed prevalence of the right to anonymous childbirth – for the entire span of the woman's existence – seems to have been fully confirmed in recent times, every time it comes into the constitutional balance with the competing right of the child to have his or her own personal experience recognised; this is evidently still based on the future risk of disclosure of the mother's decision during the delicate moment of birth and which could push her to make irreversible decisions for the health and life of herself and the unborn child she is carrying.[58]

In the light of these considerations, the Italian attempt to make more flexible the original preclusion to learn information of one's own parental history appears to be crossed by lights and shadows, and it is considered alongside the French experience (where this result was achieved through legislation). Thus, for example, the perplexities already emerged in the Strasbourg case law on the French case, both in terms of method and merit, could be extended without too much difficulty to the Italian experience.[59]

Allowing a reconsideration of the initial choice for anonymity – the Italian ordinary courts have undoubtedly determined, on the one hand, a timid opening in favour of the adoptee's right to the search of his or her origins (as happened in parallel in France with the often cited law no. 93/2002, *relative à l'accès aux origines des personnes adoptées et pupilles de l'Etat).*[60] However, already on the merits, in Italy there is no doubt that "such reversibility [is] ultimately entrusted to and conditioned by the agreement" of the mother, the latter "[being] only invited and not [having] the obligation to

[57] … In other words, "this rule" could be "at the limit, derogated (thus allowing the exercise of the judicial ascertainment of maternity) only if it was the mother (...) with her own unequivocal conduct, to have shown the will to revoke in fact the choice, taken at the time, of renouncing legal parenthood, welcoming in her home the child as a son": "however, outside the borderline case set out above, the protection of the mother's right to anonymity, for the duration of her life, must be, as said, maximal" [thus, Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (p. 2, *cons. dir.*, respectively, tenth and eleventh indents)].

[58] "In the balancing of constitutional values that the interpreter must respect, facing the right to recognition of the status of parenthood, the mother's right to remain anonymous at the time of childbirth is in any case in a pre-eminent position": "This latter right, in fact, (...) is aimed at protecting the supreme goods of health and life, as well as that of the unborn child, of the mother, who could be induced to make choices of a different nature, a source of possible great risk for both, if, at the moment of extreme fragility that characterises childbirth, the woman who opts for anonymity has only the doubt of being exposed, subsequently, to an action of judicial ascertainment of maternity": so, again recently, Court of Cassation, sec. I civ., judgment 22 September 2020, no. 19824 (*ibid.*, respectively, eighth and nineth subparagraph).

[59] "The above-mentioned judgment of the European Court *Odièvre v. France*, of which the *Godelli v. Italy* judgment is the consistent reaffirmation" already represented, moreover, "a painful precedent because it was pronounced at the end of a difficult search for a balance between very different legal traditions and positions of principle, as is eloquently represented in the dissenting opinion of judges Wildhaber, Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää": see Court of Cassation, sec. I civ., judgment 21 July 2016, no. 15024 (p. 13, *cons. dir.*, first subparagraph).

[60] The French legislation submitted to the ECHR's scrutiny "clearly recognises the need to strike a balance between the conflicting rights": "although it does not call into question the institution of *accouchement sous x*, it certainly marks a step forward in terms of access to knowledge of one's origins in that it makes it possible to call for the reversal of the secrecy regarding the mother's identity" (Court of Cassation, *op. et loc. ult. cit.*, nineth and tenth subparagraphs).


ISSN 2284-4503

provide identifying information".[61] Legally, it is thus inevitable that this unilateral maternal decision can be opposed by the person concerned[62] (or removed by a third party).[63] Moreover, on a psychological level, there is little doubt that the woman ends up viewed as having "the purely discretionary right to bring a child into the world, placing it in a state of suffering and condemning it for life to ignorance of its origins".[64]

In addition to these considerations, one aspect of this method has attracted the most criticism from scholars. It has been critically observed – in the aforementioned *Odièvre* case (but the reflections are fully extendable, as we have seen, also to the current Italian experience) – that it is not possible to speak of a reasonable weighing up of all the constitutional requirements at stake, since the persistent validity of the discipline on maternal anonymity continues to maintain a basic inequality.[65] In conclusion, when it is accepted – irrespective of the reasons underlying it – that the mother's choice may constitute an insurmountable barrier for the adoptee on the road to knowledge of his or her personal history,[66] there is an inevitable risk that a blatant imbalance between all the needs involved will continue to be perpetrated (by law in France and by case law in Italy); "the pure and simple right of veto granted to the mother [imply] that the rights of the child recognised in the general system under the Convention (*Johansen v. Norvège*, *Kuzner v. Germany*), [are] entirely denied and forgotten".[67]

[61] ... as in the French legal system where, on the other hand, she "may always oppose her identity being revealed even after her death (Article L. 147-6 of the *'code de l'action sociale et des familles'* introduced by Article 1 of the law of 22 January 2002)": thus, Court of Cassation, *op. et loc. ult. cit.*, eleventh and twelfth indents.

[62] … "the mother's refusal" imposing itself, in fact, "on the child who has no legal means of opposing her unilateral will": thus, Court of Cassation. *op. et loc. ult. cit.*, forth indent.

[63] Such as, precisely, in France where it has not been "provided that the established National Council (nor any other independent body) can take a final decision on the removal of the secret, in view of the conflicting interests, when the mother confirms her refusal, definitively depriving the child's right to know his or her origin": with the consequence, "ultimately", that "the initial imbalance remains perpetuated to the extent that the right to access information on personal origins remains subject to the exclusive decision of the mother" (thus, Court of Cassation, *op. et loc. ult. cit.*, thirteenth and fourteenth indents).

[64] Here Court of Cassation, *op. et loc. ult. cit.*, fifth indent.

[65] ... highlighting, in short, "how to anonymous childbirth has been recognized in the judgment *Odièvre* legitimacy also in perpetuating a position of inequality between the conflicting interests, making in some ways improper the reference to the theory and technique of balancing fundamental rights habitually used by the case law of Strasbourg": so, Court of Cassation, sec. I civ., judgment 21 July 2016, no. 15024 (p. 14, *cons. dir.*).

[66] ... where, in other words, "the decision of the mother, whatever the reason and legitimacy of that decision, is recognised as an absolute obstacle to any search for information on the part of the person born anonymously": Court of Cassation, *op. et loc. ult. cit.*, third indent.

[67] In this way Court of Cassation, *op. et loc. ult. cit.*, seventh indent.