THE RIGHT TO KNOW ONE'S BIOLOGICAL IDENTITY

VERONICA DOBOZI*

Abstract

In the last decade, European Court of Human Right case-law evolution revealed a new component of the right to private life, protected by the Human Rights Convention, Article 8. Existence and limits of the right to know one's biological identity were set out in a long line of cases, starting with Mikulic c. Croatie (2002) until the very recent Godelli c. Italie (2012). The Court jurisprudence established that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention. Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality. This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Having regard to the margin of appreciation left to the member states, the Court sticks between taking priority over the third parties' right to privacy – for example, mothers in the cases of X births, donors sperm, unknown fathers – to recognition of the child' right to know his/her biological roots and identity. Following the bioethics and bio-law progress, case-law evolution had influence member states legislation and disseminated progressive ideas, as the recent official United Kingdom legislative modifications which remove anonymity for sperm, egg and embryo donors. In view of the above, future analysis of private life respect throughout Europe should include this new element, the right of any person to know his/her biological identity, not only for medical aims.

Keywords: *biological identity, human rights, filiation, paternity, maternity*

Introduction

In the last decade, the European Court of Human Rights (ECHR) case-law developed in appliance of art. 8 of the European Convention on human rights (the Convention) which consecrates the right to respect for one's private and family life, revealed a new component of private life concept. The European court's research report named "Bioethics and case law of the Court" describes the case law concerning this aspect under the title "The right to know one's biological identity?", keeping a question mark which seems to rise certain questions regarding the birth of a new human right.

This particular aspect of the right protected by art. 8 of the Convention is a concrete result of the intersection of concerns in Europe in the domain of the child's rights protection, on one side, and the prevalence of the legal biologic reality, on the other side.

In its law case, ECHR addressed the issue similarly both in the cases concerning descendants wishing to find the identity of genitors, and in the situations when the fathers contested or requested the establishment of paternity[1], consequence of the revealing of the biologic truth.

Even if they were placed in a common basket, which was called by the doctrine *freedom to develop one's own identity*[2], we find that the right to know the biologic identity should be treated separately.

First, the identity, both in the common meaning of the term, and in the one explained by the ECHR's case law, includes the biologic identity, but is not reduced to it. From this perspective, the

* Lawyer, Bucharest Bar; Ph.D. candidate, Faculty of Law, University of Bucharest (email:vdobozi@stoica-asociatii.ro).

[1] This is also the case in the ECHR report concerning the "Bioethics and the Court's case law".

[2] Jacobs, White, Ovey, The European Convention on Human Rights, ed. a 5-a, Oxford University Press, pp. 377-379.

plaintiffs who complained to the Court of the infringement of their rights in the context of the legal impossibility to establish the filiation according to the biologic truth revealed under various forms, even if they invoked the right to private or family life, were not searching their biologic identity. They only followed the legal recognition of a truth, they did not live in incertitude regarding their origin.

On the contrary, the plaintiffs who intend to obtain information on their origin, their genitors and their genetic inheritance, are motivated by the real will to answer to certain tormenting questions which weighted significantly on them during the childhood, teenage years and sometimes their adult period, considering that these answers are many times capable to sketch an important part of one's personality, helping to the identification to the cultural and moral values of their predecessors or of the population to which one belongs .

The Court recognized that there is a direct relationship between the establishment of the filiation and the private life of these plaintiffs[3], as it recognized, *de plano*, also the existence of certain long term moral and psychical sufferings in the case of the plaintiffs who wish to discover the identity of their genitors[4]. Moreover, the European Court exempts these plaintiffs from the charge of proving the interest of the request, presuming that it exists as component element of the constitution of an individual identity, socially integrated, notion protected by the Convention[5], art. 8.

Even if the interruption of the biologic relation between the parents and the children and its substitution with relations created artificially by the law – for example the adoption – is very old, the interest for the establishment of the biologic truth increased progressively during the last decades, enhanced by the progress of the biomedicine, which allows the accurate establishment of the blood relation, other times almost impossible to detect. ECHR vacillated during the case law to catalogue this aspect of the right guaranteed by art. 8, considering it either a component of the private life, either one of the family life[6].

I. The Court's case law in this topic

In the last case in which it used this aspect, Godelli c. Italie, ECHR clarified the issue, mentioning that the right to know one's own biologic identity enters in the domain of the private life notion, as long as between the child searching the truth of its blood relation and its genitor/s were not already established the specific relations of the family life, logical conclusion in the light of the current case law of the European court, which considers that art. 8 protect the continuity of the family life, only if its existence is previously demonstrated.

The DNA test allows now the establishment of the maternity and paternity relation with a 99.99% precision. As regards the need to find the truth on the biologic ascendance or lineage, ECHR gave priority to the reality. Simply, people wish to know where they come from, biologically speaking, and not knowing his aspect can cause psychological suffering, with important impact on the normal development of a child.

The first step in the recognition of the right to know one's biological identity was made in the case Mikulić c. Croatie. The case starts from a classical factual situation, the plaintiff being a child born outside the marriage, wishing the establishment of the paternity to the man she considers genitor. She complains, among others, of the infringement of her right to private life, in lack of a court decision in her file, which leaves her with an incertitude regarding the identity of the father. To establish if there was or not an infringement of the plaintiff's private life, ECHR considered her right to know her biological identity and the supposed father's right to refuse to be subject of the DNA

[3] Decision of July 3, 2003, case Jäggi v. Switzerland, request no. 58757/00, par. 26.
[4] Jäggi v. Switzerland, par. 40.
[5] Decision of February 7, 2002, case Mikulić c. Croatie, request no. 53176/99, par. 46.
[6] Jacobs, White, Ovey, op. cit., p. 377.

test[7], right which is also protected by the Convention, art. 8, which protects one's physical integrity against the state's arbitrary interferences. Establishing that the Croatian state infringed the plaintiff's right provided by art. 8 by not keeping a just equilibrium between the two rights analysed – implementing procedural measures which allow the settlement of the case and the surpassing of the impasse of the refusal of the DNA test – ECHR sketched the grounds of the plaintiff's right, re-used subsequently in all the decisions of the Court on the same aspect.

The court considered that the persons in the plaintiff's situation have a vital interest, protected by the Convention, to obtain the information needed to discover the truth concerning an important aspect of their personal identity, the one of knowing their genitors[8].

Subsequently, in case Odièvre v. France[9], the High Chamber decided[10] that art. 8 of the Convention were not infringed, in a similar case, but which opposed other interests. Thus, the plaintiff complained that she could not obtain the communication of the identity elements of her natural family and of the impossibility to know, as a consequence, her own personal history. Although in the grounds ECHR reminds elements of its prior case law which highlight the legitimacy of the right to know one's biologic identity, as the fact that art. 8 protects a right to identity and personal development, right which could not be effectively practiced without protecting the mental stability[11], as well as the vital interest to obtain information regarding the genitors[12], the plaintiff's request was rejected.

In the case, the issue being a birth on which the mother's anonymity was kept, at her request, the Court's analysis had in view, on one side, the child's interest to know the true identity of the mother, and, on the other side, the public interest to maintain this form of renouncing to the parental rights[13], which is at the same level as the mother's interest to do not divulge her identity[14]. The just equilibrium between the two interests was considered by most of the judges of the High Chamber as being complied with by the French state, since the plaintiff was allowed access to certain information on her family[15], even though it were not identification information.

The French state specified that starting with 2002[16], it has a new law regulating the issue, which institutes a National Council for access to personal origins, independent organism, formed of magistrates, representatives of the associations concerned by these aspects, as well as professionals with good practical knowledge of these aspects. It is difficult to believe that this legislative modification did not have importance when most of the judges decided the lack of infringement in the case of art. 8.

Few months later, on July 3, 2003, ECHR issued another decision in the case Jäggi v. Switzerland[17], noting an infringement of art. 8 by the defendant state, in a case similar to Mikulić case. The plaintiff complained to the Court that he could not perform a DNA analysis on a defunct

[7] Since the defendant refused to subject to the DNA test requested to the Croatian courts, and they did not have a legal mean to compel him to do so, the case could not be settled by elucidation of the blood relation between the daughter and the defendant.

[8] Mikulić c. Croatie, par. 64.

[9] Decision of 13.02.2003, case Odièvre v. France, request no. 42326/98.

[10] With a very tight vote, 10 votes against the infringement of art. 8 and 7 votes for the infringement of the article.

[11] Decision of February 6, 2001, case Bensaid c. Royaume-Uni, request no. 44599/98.

[12] Mikulić c. Croatie.

[13] The anonymity of birth, existing especially in the countries with catholic tradition, intends to stop the mothers who do not want to undertake the responsibility of motherhood from radical actions, as the killing of the new born.

[14] In France, as well as in Italy, the declaration signed by the mother at birth through which she requests to remain anonymous, constitutes a perpetual inability cause for the disclosure of her identity to the child thus born.

[15] The plaintiff found out in this manner only that she has three brothers.

[16] The new law entered into force on January 22, 2002.

[17] Decision of July 3, 2003, case Jäggi v. Switzerland, request no. 58757/00.

person, his assumed father, to establish the biologic truth. The Court reminded that is in the charge of the state, by virtue of the appreciation margin they enjoy, to establish the adequate measures for the guarantee of the compliance with the provisions of art. 8 of the Convention in the individual relationships, there are various manners to insure the respect one's private life, and the nature of the state's obligation depends on the aspect of private life implicated in the case.

Consequence of the Mikulić, the Court re-stated the existence in the analysis of two interests protected by art.8, respectively the vital interest of any person to know its biologic identity, as opposed to the interest to preserve the intangibility of the defunct person's body and the respect for the dead persons, both menaced by the idea of certain forced DNA tests. The Court took in consideration also the public interest of the legal security, menaced by the possibility of change of the filiation.

Removing the government's arguments, ECHR noted that, although the plaintiff has 67 years and is obviously to have constructed a personality even in lack of certitude regarding his biologic father, his long term steps to find out the blood relation reveal that he has a real interest in this regard, and the lack of certitude caused him moral and physical suffering, even if they cannot be medically ascertained.

As regards the interest regarding the intangibility of the defunct person's body and the untroubled rest of the dead, the Court notes the lack of any religious or philosophical interest of the family members of the defunct person who opposed to the obtaining of the sample needed for the DNA test, as well as that the exhumation of the defunct will be compelling in 2016 when expires the free use of the grave, thus, the peace of the defunct, invoked by the family is anyway a temporary issue.

Analysing the obtaining of this sample also from the perspective of the private life protection – the defunct person's one – ECHR also notes that this aspect would have been complied with by taking the sample in order to find the truth in the case, making reference to its case law, respectively the decision in the case Succession Kresten Filtenborg Mortensen c. Denmark[18], in which it decided that the defunct person whose DNA should have been taken could not have been affected in his right to private life by such operation.

A new case Odievre, this time from Italy, gave ECHR the possibility to rephrase discreetly its prior case law, keeping differentiation arguments between the situations of the two plaintiffs. Thus, in the case Godelli c. Italie[19], ECHR noted an infringement by the defendant state of the provisions of art. 8. The plaintiff, who was subject to an anonymity birth and was subsequently adopted, complained to the Court that the Italian authorities refuse her access to information regarding the identity of her mother, giving priority, without respecting an equilibrium, to her mother's right to conceal her identity.

ECHR starts its analysis by explaining that the protection offered by art. 8 of the Convention regards both the child and the mother, on one side existing the child's right to know his biologic identity, on the other side, the interest of the women who gave birth in anonymity to protect her health thus giving birth under adequate medical conditions[20]. On the same part of the barricade, ECHR notes that there is also a public interest, if the Italian law governing these aspects is in line with the state's obligation to protect the mothers and the children during the pregnancy and birth, in order to avoid clandestine abortions or "savage" abandonment".

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[18] Decision of May 15, 2006, case Succession Kresten Filtenborg Mortensen c. Danemark, request no. 1338/03.

[19] Decision of September 25, 2012, case Godelli c. Italie, request no. 33783/09.

[20] In a dissident opinion, the Hungarian judge expressed a different opinion on the interests under discussion. According to his grounding, the anonymity of the mother is related to the right to life, which is an absolute right. Even if its protection is indirect by the guarantee of the anonymity of births, it should prevail, therefore in the case would not exist an infringement of art. 8 of the convention.

The facts which leaded to favouring the plaintiff were determined by the lack of any possibility in the Italian legislation to annul the mother's decision regarding the keeping of the anonymity, which infringed the rule of keeping a just equilibrium between the interference of the measure and the interest protected by the Convention, which is over the margin of consideration of the states, in ECHR's opinion.

II.A modern vision in favour of children's rights

People donating sperm and eggs will no longer have the right to remain anonymous, under the law which came into force on March 2005. Children conceived in this way will now be able to identify their genetic parents once they reach 18. The new rules will not be retrospective, so people who have already donated will not be affected[21].

Some experts in genetics and human fertilization are concerned that the removal of anonymity will deter donors from coming forward in the future and the British Fertility Society has warned that couples who do want eggs or sperm from anonymous donors may choose to go to unlicensed "backstreet" clinics, or travel abroad to countries with less strict regulations. The change in the rules means that children conceived using donor eggs or sperm will be able to trace their biological parent in the same way as children who are adopted[22]. So forth, the UK legislation seems to be a national image of the general principles setting out in the above mentioned case-law evolution.

While children will be able to access more information about the donor's genetic origins, they will have no financial or legal claim. The first time children born in this way will have the option to ask for the identity of their donor will be when they turn 18 in 2023.

Following the Odièvre case instructions from European Court of Human Rights, an official authority - the Human Fertilisation and Embryology Authority – is entitled to release the specific information.

The donor will not be able to trace a child, a "natural" option in the context of ECHR jurisprudence. Recognizing the priority of child interest is a natural choice to let in a secondary plan the rights of the biological parents.

The situation is similar in other European countries: Sweden, Switzerland, Norway, Netherlands and Germany.

UK legislative evolution in the area of third party reproduction is a very good example of ECHR case law influence and efficacy, integrating the right of any person to know his/her biological identity into the previous legal context.

Basically, positive obligations of member states, described in Odièvre and Mikulić cases, i.e. maintaining a fair balance between confidentiality of third party and applicant interests, in the first place, than assuring an official and independent view of the request for information regarding the biological origins, in the second place, determined a new political and legal approach of genetic and biomedical cases regarding third party reproduction. The legal anonymity for sperm and eggs donors' era ends, and a new era of everyone right to know his/her biological origins begins.

Conclusions

As a conclusion, from the analysis of all these aspects, we can determine the limits, influence and importance of this right.

Outlined in ECHR jurisprudence as a new aspect of the right to privacy protected by Article 8 of the Convention and strengthened over the last decade by the European judges, the right to know his/her biological identity imposed changes in the laws of European countries, causing even changes in state policies regarding genetics and biomedicine. Future approach of private life violation in the

[21] Information available on the website www.genethique.org.
[22] Ibidem.

frame of national law throughout Europe should include this new element, the right of any person to know his/her biological identity.

One of the notable and sinuous effects of ECHR jurisprudence at the national level of implementation was the end of anonymity for biological material donors in the reproductive process with third donor.

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